



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Fiscal Note & Local Impact Statement

**Bill:** H.B. 258 of the 132nd G.A.

**Status:** As Passed by the House

**Sponsor:** Reps. Hagan and Hood

**Local Impact Statement Procedure Required:** No

**Subject:** Generally prohibits abortion of an unborn human individual with a detectable heartbeat and creates the Joint Legislative Committee on Adoption Promotion and Support

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### State Fiscal Highlights

- **Ohio Department of Health (ODH).** ODH will realize an increase in costs to inspect the medical records from any facility that performs abortions to ensure that individuals who perform abortions are in compliance with the reporting requirements of the bill.
- **State Medical Board.** The State Medical Board could experience an increase in administrative and possible investigative costs related to the bill. However, it is assumed that the number of violators would be small. Thus, any increase in costs would likely be minimal.
- **Ohio Department of Medicaid (ODM).** The Medicaid Program currently pays abortion costs for enrollees in cases involving life endangerment, incest, and rape. The bill could result in fewer abortions. According to ODM, the Medicaid Program paid for four abortions in FY 2016 and six abortions in FY 2017.

### Local Fiscal Highlights

- **Local courts.** As a result of any violations, additional felony criminal cases may be generated for county criminal justice systems to process, potentially increasing the costs to investigate, prosecute, adjudicate, and sanction violators. However, the court could impose court costs and fines to be paid by violators to help offset some of these costs.
- **Local courts.** It is also possible that additional civil cases may be generated for county municipal or common pleas courts. However, the courts could impose court costs to help offset some of these costs.
- **Public hospitals.** It is possible that public hospitals may realize an increase in costs relating to the bill's reporting requirements. However, only a small percentage of abortions are performed in hospitals and the majority of those are due to medical emergencies, so any increase should be minimal.

## Detailed Fiscal Analysis

### Abortion prohibition and fetal heart examination

The bill generally prohibits a person from knowingly and purposefully performing or inducing an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected. Whoever violates this is guilty of performing or inducing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree. Under the bill, there are two circumstances in which a person is not in violation of this prohibition. A physician who performs a medical procedure that, in the physician's reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman, is not in violation. If the procedure is done under these circumstances, the physician performing the procedure is required to declare in writing, that the procedure is necessary, to the best of that physician's reasonable medical judgment to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman. The physician must also provide, in the written document, the medical condition that the procedure will assertedly address, and the medical rationale for the conclusion that the procedure is necessary. The written document must be placed in the pregnant woman's medical records and a copy must be maintained in the physician's files for at least seven years. Additionally, a person who has performed an examination for the presence of a fetal heartbeat, in accordance with the person's good-faith understanding of standard medical practice, that does not reveal a fetal heartbeat, is not in violation of the prohibition.

After a fetal heartbeat has been detected, any person performing or inducing an abortion for the purpose of preserving the health of the pregnant woman is required to set forth in a written document the medical condition that the abortion will address and the medical rationale for the conclusion that the abortion is necessary to address the condition. If the abortion is not to preserve the health of the pregnant woman, the person performing or inducing the abortion must specify in a written document that the purpose was not maternal health. The person must place either written document in the pregnant woman's medical records and a copy must be maintained in the person's own records for seven years.

If the person who intends to perform or induce an abortion on a pregnant woman detects a fetal heartbeat, the bill requires the pregnant woman to sign a form acknowledging that she has received information, from the person intending to perform or induce the abortion, that the unborn human individual she is carrying has a fetal heartbeat and that she is aware of the statistical probability of bringing the unborn human individual she is carrying to term. The acknowledgement form must be signed at least 24 hours prior to performance or inducement of the intended abortion.

Continuing law requires the person to notify the pregnant woman of the existence of a fetal heartbeat and the statistical probability of the unborn human individual being brought to term.

The bill provides that, except when prevented by a medical emergency in certain cases, whoever knowingly and purposefully performs or induces an abortion without determining whether there is a detectable fetal heartbeat is guilty of a felony of the fifth degree. Continuing law prohibits this already, but only provides for a civil action for compensatory and exemplary damages or disciplinary action by the State Medical Board for a violation. The bill provides that a physician does not commit this offense if the physician believes that a medical emergency exists. The bill also provides that a person does not commit the offense if that person has performed an examination for the presence of a fetal heartbeat and the method used does not reveal a fetal heartbeat.

The bill states that provisions in existing law and the bill prohibiting abortion before and after detection of a fetal heartbeat apply only to intrauterine pregnancies.

#### **Medical record inspection and disciplinary action**

The Ohio Department of Health (ODH) is required under the bill to inspect the medical records from any facility that performs abortions to ensure that physicians or other persons who perform abortions are in compliance with the reporting requirements of the bill. The facility is required to make those records available to ODH, but shall not release any personal medical information that is prohibited by law.

The bill requires a physician who performs or induces abortions to provide all of the information the physician is required to certify in writing or determine with respect to detection. The bill also provides that if a person other than the physician makes or maintains records relating to abortions and fetal heartbeat detection on the physician's behalf or at the physician's direction, that person must comply with the reporting requirements.

The bill permits the State Medical Board to take disciplinary action for failure to comply with the requirements to make or maintain certain medical records or documents for a pregnant woman regarding an abortion procedure.

#### **Wrongful death action, recovery of costs, and liability**

The bill makes changes to existing law permitting a woman who received an abortion to bring a wrongful death action for her unborn child. The bill permits an action to be brought if the abortion was knowingly and purposely performed or induced (1) with the specific intent of causing or abetting the termination of the unborn human individual whose fetal heartbeat has been detected, or (2) without the woman's signature on an acknowledgement that the woman received the information that there was a fetal heartbeat and about the statistical probability of the unborn human individual with a fetal heartbeat being brought to term. These circumstances for supporting the wrongful death action are in addition to those under continuing law regarding abortions. The bill requires the court to award the woman court costs and

reasonable attorney's fees if she prevails in the action. The bill also specifies that if a defendant prevails, the court is to award reasonable attorney's fees to the defendant under certain conditions. The bill provides that a court finding of unconstitutionality of the law under which the wrongful death action is brought is to be a defense to the action.

The bill provides that a pregnant woman on whom an abortion is performed in violation of any of the crimes specified by the bill is not guilty of the crimes or of attempting to commit, conspiring to commit, or complicity in committing the crimes. Further, the pregnant woman is not subject to a civil penalty based on the violations.

### **Declaratory judgments, court orders, and severability**

The bill allows the Attorney General to take certain legal action if the Supreme Court of the United States overrules *Roe v. Wade*; any other court issues an order or judgment restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part; or the federal Constitution is amended to restore, expand, or clarify the authority of states to prohibit or regulate abortion entirely or in part. The bill permits the Attorney General to seek either or both from a federal or state court: (1) a declaration that any of the provisions of the bill are constitutional, or (2) a judgment or order lifting an injunction if one has been placed on provisions of the bill. Any county prosecutor may apply to a state or federal court for such relief if the Attorney General fails to apply for the relief within a 30-day period after one of the above-mentioned events.

Additionally, the bill provides that if any provision of R.C. sections 2919.171 or 2919.19 to 2919.1910 or their application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the bill that can be given effect without the invalid provision or application, and to this end the provisions of the bill are severable. Moreover, the bill expresses that the General Assembly's intent is to continue the immediate and continuing enforcement of the remainder of the provisions in those sections, should any individual provision of those sections be held invalid or if any provision is potentially invalid. The General Assembly also intends a court judgment or order suspending any provision of those sections not be regarded as tantamount to repeal of that provision. Nothing in R.C. sections 2919.171 or 2919.19 to 2919.1910 is intended to repeal or limit any other Ohio laws, except as provided in those sections. The bill also provides that if any provisions of a section that are amended or enacted by the bill, or their application to a person or circumstance is held invalid, that invalidity does not affect other provisions or applications of the section or related sections that can be given effect without the invalid provision or application, and to that end they are severable.

### **Joint Legislative Committee on Adoption Promotion and Support**

The bill creates the Joint Legislative Committee on Adoption Promotion and Support, which may review or study any matter that it considers relevant to the adoption process in Ohio, with priority given to the study or review of mechanisms

intended to increase awareness of the process, increase its effectiveness, or both. The Committee will consist of three members of the House of Representatives and three members of the Senate. The bill specifies that the Committee has the same powers as other standing or select committees of the General Assembly.

### **Background information**

According to ODH's 2016 report on "Induced Abortions in Ohio," 20,672 abortions were performed in Ohio in 2016. Of these abortions, 19,543 (94.5%) were performed on Ohio residents. The majority of abortions, 11,230 (54.3%), were performed at less than nine weeks gestation. Between nine and 12 weeks, 6,250 (30.2%) abortions were performed, 2,684 (13.0%) abortions were performed between 13 and 18 weeks, and 368 (1.8%) were performed between 19 and 20 weeks of gestation. A total of 140 abortions (0.7%) were performed at 21 weeks of gestation or over. Currently, induced abortions must be reported to ODH by the physician who performed the abortion.

### **Fiscal impact**

ODH will realize an increase in costs to inspect the medical records from any facility that performs abortions to ensure that individuals who perform abortions are in compliance with the reporting requirements of the bill.

The State Medical Board could experience an increase in administrative and possible investigative costs related to the bill. However, it is assumed that the number of violators would be small. Thus, any increase in costs would likely be minimal.

The Medicaid Program currently pays abortion costs for enrollees in cases involving life endangerment, incest, and rape. The bill could result in fewer abortions. If this occurs, abortion costs for the Medicaid Program would decrease. However, there could be an increase in birth-related costs. According to the Department of Medicaid, the Medicaid Program paid for four abortions in FY 2016 and six abortions in FY 2017. It is unknown how many of these were conducted due to life endangerment versus incest or rape. As a result of any violations, additional felony criminal cases may be generated for county criminal justice systems to process, potentially increasing the costs to investigate, prosecute, adjudicate, and sanction violators. However, the court could impose court costs and fines to be paid by violators to help offset some of these costs. The number of cases that could be generated annually would likely be small. Therefore, any related fiscal effect on local criminal justice systems would likely be minimal. Dependent upon the number of successful prosecutions, the state could realize a gain in court cost revenues generated annually to the credit of the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020).

It is also possible that additional civil cases may be generated for county municipal or common pleas courts. However, the courts could impose court costs to help offset some of these costs. The number of cases that could be generated annually would likely be small. Therefore, any related fiscal effect on local civil justice systems would likely be minimal.

A small percentage of abortions are performed in hospitals and the majority of those are medical emergencies, so it appears that there will be little fiscal impact to public hospitals. There are currently 17 such hospitals in Ohio. Any increases in administrative costs to public hospitals relating to the reporting requirements of the bill would likely be minimal.