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Bill Analysis

Version: As Introduced

Primary Sponsors: Reps. Koehler and Fowler Arthur

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SUMMARY

- Requires the Department of Health to publish on its website both of the following:
 - Materials designed to inform a pregnant woman of the possibility of reversing the effects of an abortion that utilizes mifepristone if she changes her mind;
 - Materials regarding information on and assistance with the resources that may be available to help reverse the effects of an abortion that utilizes mifepristone.
- Requires a physician who is to perform or induce a mifepristone abortion, at least 24 hours prior to the performance or inducement of the abortion, to give the pregnant woman copies of the materials required to be published by the Department, and subjects the physician to civil or disciplinary action for failure to do this.
- Creates the crime of failure to disclose the reversibility of a mifepristone abortion, a first degree misdemeanor on a first offense and a fourth degree felony on each subsequent offense.
- If the crime is committed, permits the pregnant woman to file a civil action for the wrongful death of the woman's unborn child.

DETAILED ANALYSIS

Overview

The bill enacts both civil and criminal provisions that require physicians to inform pregnant women, before inducing or performing a mifepristone abortion, of the possibility of reversing the effects of a mifepristone abortion. The bill also requires the physician to provide the pregnant woman with information on and assistance with resources that may help reverse the effects of a mifepristone abortion. Mifepristone, also known as RU-486, is a drug used during the early part of a pregnancy to cause an abortion.

Mifepristone abortion defined

The bill defines a mifepristone abortion as an abortion that involves a regimen of taking mifepristone first, then one or more subsequent “dangerous drugs.” A “dangerous drug” is defined in continuing law to include prescription drugs.¹

Civil provisions

Department of Health to publish materials on its website

The bill requires the Department of Health to publish on its website both of the following:

1. Materials designed to inform a pregnant woman of the possibility of reversing the effects of an abortion that utilizes mifepristone if she changes her mind;
2. Information on and assistance with the resources that may be available to help reverse the effects of an abortion that utilizes mifepristone.

The materials must be published in English and in Spanish, in a typeface large enough to be clearly legible, and in an easily comprehensible format. The bill also requires the materials to be developed in accordance with rules that the bill requires the Department to adopt in accordance with R.C. 111.15, which does not require public hearings.²

Requirement of physician to give the materials to a pregnant woman

The bill requires a physician who is to perform or induce a mifepristone abortion, at least 24 hours prior to the performance or inducement of the abortion, to give the pregnant woman copies of the materials required to be published by the Department. The bill permits the materials to be provided in person, by telephone, by certified mail, return receipt requested, or by regular mail evidenced by a certificate of mailing.³

Civil and disciplinary consequences

A physician’s failure to give the pregnant woman the materials could be the basis for a civil action or disciplinary action. In the case of a civil action, a physician who performs or induces the mifepristone abortion with actual knowledge that the conditions specified in the bill have not been satisfied or with a heedless indifference as to whether they have been satisfied is liable in compensatory and exemplary damages to any person, or the representative of the estate of any person who sustains injury, death, or loss to person or property as a result of the failure to satisfy the bill’s conditions. The court may also enter any injunctive or other equitable relief that it considers appropriate. Both of the following are affirmative defenses in a civil action:

¹ R.C. 2919.125(A) and (C) and 2317.56(A)(3); R.C. 4729.01, not in the bill.

² R.C. 2317.56(C); R.C. 111.15, not in the bill.

³ R.C. 2317.56(B).

1. The mifepristone abortion was compelled by a medical emergency or medical necessity;
2. The physician made a good faith effort to satisfy the bill's conditions.

The employer or other principal of the physician is not liable in damages for a civil action unless the employer or principal had actual knowledge of, or, by the exercise of reasonable diligence, should have known that an employee or agent performed or induced the mifepristone abortion with actual knowledge that the bill's conditions had not been satisfied or with a heedless indifference as to whether the conditions had been satisfied. Or, the employer or principal may be liable if the employer or principal negligently failed to secure the compliance of an employee or agent.⁴

“Medical emergency” defined

The bill defines a “medical emergency” the same as its existing law definition under the criminal provisions regarding post-viability abortions. Under that section, the term means a condition that in the physician's good faith medical judgment, based upon the facts known to the physician at that time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.⁵

Criminal provisions

Creation of crime

The bill also creates the crime of failure to disclose the reversibility of a mifepristone abortion, a first degree misdemeanor on a first offense (up to 180 days of jail time and a maximum \$1,000 fine)⁶ and a fourth degree felony on each subsequent offense (definite prison term ranging from 6 to 18 months and a maximum \$5,000 fine).⁷ A physician is guilty of the crime if the physician knowingly performs or induces a mifepristone abortion without the physician or the physician's agent doing both of the following:

1. At least 24 hours prior to providing the pregnant woman with mifepristone, informing her that: (a) it may be possible to reverse the intended effects of a mifepristone abortion if she changes her mind, but time is of the essence, and (b) information and assistance with reversing the effects of the mifepristone abortion is available on the Department of Health's website;

⁴ R.C. 2317.56(E), (G), and (H)

⁵ R.C. 2919.125(B); R.C. 2919.16(F), not in the bill.

⁶ R.C. 2929.24 and 2929.28, not in the bill.

⁷ R.C. 2929.14 and 2929.18, not in the bill.

2. Immediately prior to providing the pregnant woman with mifepristone, providing her with printed materials that include the following statement: “Recent developing research has indicated that mifepristone alone is not always effective in ending a pregnancy. It may be possible to avoid, cease, or even to reverse the intended effects of an abortion utilizing mifepristone if the second pill has not been taken. Please consult with a health care professional immediately.”

The crime does not apply if the physician believes that a medical emergency exists that prevents compliance with the bill.

The bill states that it must not be construed to permit a physician to delegate the performance or inducement of an abortion.⁸

Department of Health to adopt rules

The bill requires the Department of Health to adopt rules in accordance with R.C. 111.15 (which does not require public hearings) governing the information, assistance, and materials that are required to be provided under the bill’s criminal provisions.⁹ The bill states that the criminal prohibition does not apply until the Department of Health has placed on its website information on reversing a mifepristone abortion, as required under the bill’s civil provisions.¹⁰

Pregnant woman may file a civil action if the crime is committed

The bill permits a woman on whom a mifepristone abortion is performed or induced in violation of the bill’s criminal prohibition to file a civil action for the wrongful death of the woman’s unborn child. She may receive, at her election and at any time prior to final judgment, \$10,000 in damages or an amount determined by the trier of fact after consideration of the evidence. The bill specifies that in this situation, the evidence must be considered subject to the same defenses and requirements of proof, except any requirements of live birth, as would apply to a suit for the wrongful death of a child who had been born alive.¹¹

Pregnant woman is not guilty or subject to civil penalties

The bill states that a pregnant woman on whom a mifepristone abortion is performed or induced in violation of the bill’s criminal prohibition is not guilty of that crime, is not guilty of attempting to commit, conspiring to commit, or complicity in committing that crime, and is not subject to civil penalty based on the mifepristone abortion being performed or induced in violation of the bill’s criminal prohibition.¹²

⁸ R.C. 2919.126(A), (B), (D), and (E). A corrective amendment may be necessary to R.C. 2919.126(A) to change “No physician shall knowingly perform or induce a mifepristone abortion *in* a pregnant woman [. . .]” to “[. . .] *on* a pregnant woman [. . .]” (emphasis added).

⁹ R.C. 2919.126(C).

¹⁰ Section 3.

¹¹ R.C. 2919.128.

¹² R.C. 2919.127.

HISTORY

Action	Date
Introduced	07-15-21
