



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Fiscal Note & Local Impact Statement

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**Bill:** S.B. 127 of the 131st G.A.

**Date:** December 8, 2016

**Status:** As Enacted

**Sponsor:** Sens. Lehner and Hottinger

**Local Impact Statement Procedure Required:** No

**Contents:** Prohibits the performance of an abortion on a pregnant woman when the probable post-fertilization age of the unborn child is 20 weeks or greater

### State Fiscal Highlights

- **Ohio Department of Health (ODH).** ODH will likely realize a minimal increase in costs related to compiling abortion information and promulgating rules.
- **State Medical Board of Ohio.** The Board may experience an increase in administrative and possible investigative costs relating to certain provisions. It is expected that the costs would be minimal since the number of violations is anticipated to be small.
- **Ohio Pain-Capable Unborn Child Protection Act Litigation Fund.** The bill creates the Ohio Pain-Capable Unborn Child Protection Act Litigation Fund in the state treasury, which will consist of any donations, gifts, grants, or appropriations. The fund is to be used for any costs and expenses incurred by the Attorney General in relation to actions surrounding the defense of the bill's provisions.

### Local Fiscal Highlights

- **Government-owned hospitals.** Administrative costs for government-owned hospitals could increase as a result of the bill. However, costs should be minimal since a small percentage of abortions are performed in hospitals and it is assumed that a majority of those performed are medical emergencies.
- **Local courts.** As a result of any violations, additional misdemeanor and felony criminal cases may be generated for county and municipal criminal justice systems to process, potentially increasing the costs to investigate, prosecute, adjudicate, and sanction violators. However, the court would generally impose court costs and fines to be paid by violators to help offset some of these costs.

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## Detailed Fiscal Analysis

The bill prohibits purposely performing or inducing or purposely attempting to perform or induce an abortion on a pregnant woman when the probable post-fertilization age of the unborn child is 20 weeks or greater.

### **Affirmative defense to abortion prohibition**

The bill establishes an affirmative defense to its prohibition against purposely performing or inducing or attempting to perform or induce an abortion on a woman when the probable post-fertilization age of the unborn child is 20 weeks or greater. The defense would require the physician to show that, in the physician's reasonable medical judgment and based on the facts known to the physician at that time, that either: (1) the probable post-fertilization age of the unborn child was less than 20 weeks or (2) the abortion was necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the woman.

Unless a medical emergency exists, the physician must either determine the probable post-fertilization age or rely upon another physician's determination in order to use the affirmative defense. The bill requires a physician who performs or induces an abortion, unless prevented by a medical emergency, to comply with several conditions to use the defense. The conditions are specified in the bill, and include things such as: requiring certification in writing that in reasonable medical judgment and based on the results of tests performed, the probable post-fertilization age is less than 20 weeks, requiring certification in writing stating that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function, requiring the abortion to be performed where there is an appropriate neonatal service, and requiring the attendance of at least one other physician who is to provide, among other things, medical care for the unborn child.

### **Probable post-fertilization age testing**

The bill prohibits a physician, except in the case of a medical emergency that prevents compliance, from performing or inducing or attempting to perform or induce an abortion on a pregnant woman after the unborn child reaches the probable post-fertilization age of 20 weeks unless the physician determines prior to the abortion, in the physician's reasonable medical judgment, the unborn child's probable post-fertilization age. The physician must make the determination after making inquiries with the pregnant woman and performing medical examinations or tests of the pregnant woman the physician considers necessary as a reasonably prudent physician would consider necessary to determine the unborn child's probable post-fertilization age. These determination results must be entered into the woman's medical record.

## **Fiscal impact**

Costs for public hospitals could increase as a result of the probable post-fertilization age testing requirements and the requirements concerning the conditions that must be followed for an affirmative defense. However, costs should be minimal since a small percentage of abortions are performed in hospitals and it is assumed that a majority of those performed are medical emergencies.<sup>1</sup>

## **Report to the Ohio Department of Health**

The bill requires a physician who performs or induces or attempts to perform or induce an abortion to submit a report to the Ohio Department of Health (ODH) containing the information the physician is required to certify in writing or determine. Under the bill, a physician is required to submit the report within 15 days of a woman being discharged. If a report is not filed for 30 days after the 15-day deadline, the physician is subject to a late fee of \$500 for each additional 30-day period or portion of a period the report is overdue. ODH is required to issue a report detailing the information compiled during the previous calendar year and to provide statistics for each previous calendar year in which a report was filed by September 30 of each year. ODH is also required to adopt rules relating to the above requirements within 90 days of the effective date of the bill.

## **Fiscal impact**

ODH currently produces an annual report about induced abortions in Ohio. Physicians who perform abortions must fill out a "Confidential Abortion Report" form and return the form to ODH. The form includes questions about the woman, her medical history, and the medical procedure performed. In addition, physicians who provide care for post abortion complications must fill out a "Post Abortion Care Report for Complications" form. This information is currently compiled by ODH for the annual report. As a result of the bill, ODH may have to modify the form that is currently used. Thus, costs could minimally increase relating to this and for any other duties such as follow-up with physicians regarding form answers, etc., as well as for promulgating rules.

## **Penalties**

The bill has a number of criminal and civil penalties associated with violations. A violation of the prohibition against purposely performing or inducing or attempting to perform or induce an abortion on a pregnant woman when the probable post-fertilization age of the unborn child is 20 weeks or greater would be a felony of the fourth degree. In addition, a violation of this prohibition would be cause for the State Medical Board of Ohio to revoke a physician's license to practice. Lastly, if a physician performs or attempts to perform or induce an abortion with actual knowledge that the

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<sup>1</sup> According to the Ohio Department of Health's report entitled "Induced Abortions in Ohio," in 2013, hospitals performed 89 of the 23,216 induced abortions.

bill's affirmative defenses are inapplicable or with heedless indifference to the applicability of affirmative defenses, he or she would be civilly liable for compensatory, punitive and exemplary damages, and reasonable attorney's fees and court costs. The court would be permitted to award any injunctive or other equitable relief it considers appropriate.

If a physician fails to perform probable post-fertilization age testing, the State Medical Board would be required to suspend a physician's license for a period of not less than six months. Additionally, a violation would be a misdemeanor of the fourth degree.

Under the bill, if a physician fails to comply with the reporting requirements or fails to submit a complete report more than one year after the 15-day deadline, the physician may be directed by a court of competent jurisdiction to submit a complete report or be subject to contempt of court. Additionally, a physician may be subject to disciplinary action by the State Medical Board.

Under the bill, if a person falsifies a report, he or she could be charged with a misdemeanor of the first degree.

### **Fiscal impact**

As a result of any violations, additional misdemeanor and felony criminal cases may be generated for county and municipal criminal justice systems to process, potentially increasing the costs to investigate, prosecute, adjudicate, and sanction violators. However, the court would generally impose court costs and fines to be paid by violators to help offset some of these costs. The number of possible cases that could be generated annually would likely be small. Therefore, any related fiscal effect on local criminal justice systems would be minimal at most. 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).

The State Medical Board would likely 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 be minimal.

### **Litigation fund**

The bill creates the Ohio Pain-Capable Unborn Child Protection Act Litigation Fund in the state treasury to pay for any costs and expenses incurred by the Attorney General in relation to actions surrounding the defense of the bill's provisions. The bill specifies that the fund is to consist of appropriations and any donations, gifts, or grants.

## **Relationship to other abortion laws and severability**

The bill specifies that the bill's provisions do not repeal or limit any other provision of law that restricts or regulates the performance or inducement of abortion by a particular method or during a particular stage of pregnancy, nor do other provisions satisfy or limit the bill's requirements or prohibitions. The bill also specifies that the bill's provisions are severable, should any of them be subject to a restraining order or injunction regarding their application.

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