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Final Analysis

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Sens. Lehner and Hottinger, Uecker, Hite, Eklund, Jones, Burke, Gardner, Oelslager, Obhof, Faber, Jordan

Reps. Antani, Amstutz, Blessing, Boose, Brinkman, Buchy, Burkley, Butler, Conditt, Cupp, DeVitis, Dovilla, Ginter, Goodman, Green, Hagan, Hall, Hambley, Hayes, Henne, Hill, Hood, Keller, Koehler, LaTourette, Maag, McColley, Merrin, Perales, Retherford, Roegner, Romanchuk, Schaffer, Sprague, Terhar, Thompson, Young, Rosenberger

Effective date: March 14, 2017

ACT SUMMARY

Abortion prohibited at 20 weeks

- 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.
- Provides that whoever violates the prohibition is guilty of terminating or attempting to terminate a human pregnancy of a pain-capable unborn child, a fourth degree felony.
- Defines a "pain-capable unborn child" as an unborn child of probable post-fertilization age of 20 weeks or more.
- Provides affirmative defenses to the new prohibition based on (1) the probable post-fertilization age of the unborn child being less than 20 weeks and (2) protecting the life and health of the pregnant woman.
- Conditions (except when there is a medical emergency) the affirmative defense based on the probable post-fertilization age of the unborn child being less than

* This version updates the effective date.

20 weeks on the treating physician, or another physician on which the treating physician relies, making a determination regarding the unborn child's probable post-fertilization age.

- Requires the physician to certify in writing, based on the results of tests performed, that in reasonable medical judgment the unborn child's probable post-fertilization age is less than 20 weeks.
- Conditions (except when there is a medical emergency) the affirmative defense based on protecting the life or health of the pregnant woman on all of the following:
 - The treating physician and a different physician, not professionally related to the treating physician, certifies in writing that in reasonable medical judgment the abortion is necessary for the life or health of the pregnant woman.
 - The treating physician terminates or attempts to terminate the pregnancy in a manner that provides the best opportunity for the child to survive unless the physician determines in reasonable medical judgment that termination in that manner poses a greater health risk or risk of death to the pregnant woman than another method.
 - The treating physician certifies in writing the available methods or techniques considered and the reasons for choosing the method or technique employed.
 - The abortion is performed or induced or attempted in a facility with appropriate neonatal services for premature infants.
 - The treating physician arranges for another physician to be present to provide immediate medical care and take other reasonable steps to preserve the unborn child's life and health upon expulsion or extraction.
- Requires the State Medical Board to revoke a physician's license to practice medicine if the physician violates the provisions governing abortions of pain-capable children.
- Imposes civil liability on a physician who performs or induces or attempts to perform or induce an abortion of a pain-capable unborn child, conditioned on the physician having actual knowledge that the affirmative defenses do not apply or with heedless indifference as to whether they apply.

- Permits courts in such civil actions to award injunctive or other appropriate equitable relief, as well as compensatory damages, punitive and exemplary damages, and reasonable attorney's fees and court costs.

Abortion prohibited without testing

- Prohibits, except in a medical emergency, an abortion 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.
- Requires the physician to make the determination after making inquiries with the pregnant woman and performing medical examinations or tests the physician considers necessary as a reasonably prudent physician, knowledgeable about the case and medical conditions involved, would consider necessary to make the determination.
- Requires the physician to enter the determination and associated findings of the medical examination and tests in the pregnant woman's medical record.
- Requires the State Medical Board to suspend for a period of not less than six months a physician's license to practice medicine if the physician violates the provisions governing probable post-fertilization age testing.

Abortion reporting requirements

- Requires a physician who performs or induces or attempts to perform or induce an abortion to submit a report with specified information to the Department of Health within 15 days after the woman is discharged and provides for court enforcement, including punishment for contempt of court, if the physician fails to submit a timely report.
- Provides that if a physician fails to comply with the reporting requirements, the physician is subject to disciplinary action by the State Medical Board.
- Prohibits a person from falsifying any required report and provides that whoever does so is guilty of pain-capable unborn child abortion report falsification, a misdemeanor of the first degree.
- Requires the Department of Health to annually issue a public report that provides statistics from compiled reports for the previous calendar year that include the information physicians must certify in writing or determine under the act's requirements.

- Requires that the Department's annual report provide the statistics for each previous calendar year in which a report was filed, adjusted to reflect any additional information that a physician provides to the Department.
- Requires the Department to ensure that none of the information included in the annual report could reasonably lead to the identification of any pregnant woman upon whom an abortion is performed.
- Requires the Department to adopt rules to assist in compliance with the act's reporting requirements by June 12, 2017.

Litigation fund

- 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 act's provisions.
- Provides that the fund is to consist of appropriations, donations, gifts, or grants.

Savings provisions

- Provides that the act's provisions do not repeal or limit any other provision of law restricting or regulating abortion by a particular method or during a particular stage of pregnancy, nor do other provisions satisfy or limit the act's requirements or prohibitions.
- Provides that the act's provisions are severable, should any of them be subject of a restraining order or injunction regarding their application.

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CONTENT AND OPERATION

Abortion prohibited at 20 weeks

The act generally prohibits a person from 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. Whoever violates this prohibition is guilty of terminating or attempting to terminate a human pregnancy of a pain-capable unborn child, a felony of the fourth degree.¹ Additionally, the State Medical Board must revoke the medical license of a physician who violates this prohibition.²

"Probable post-fertilization age" means, in reasonable medical judgment and with reasonable probability, the age of the unborn child, as calculated from fertilization, at the time the abortion is performed or induced or attempted to be performed or induced. "Post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum. "Unborn child" means an individual organism of the species homo sapiens from fertilization to live birth. "Pain-capable unborn child" means an unborn child of a probable post-fertilization age of 20 weeks or more. "Reasonable medical judgment" means medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.³

Affirmative defenses to criminal charge

Conditions

The act establishes affirmative defenses to the above prohibition. The defenses will require the physician to show that, in his or her reasonable medical judgment and based on the facts known at the time, the physician determined either:

- The unborn child's probable post-fertilization age was less than 20 weeks;
or

¹ R.C. 2919.201(A) and (E).

² R.C. 2919.201(F).

³ R.C. 2919.20.



- The abortion was *necessary* to prevent the death or serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.⁴

The act defines "serious risk of the substantial and irreversible impairment of a major bodily function" as any medically diagnosed condition that so complicates the pregnancy as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function. The conditions include pre-eclampsia, inevitable abortion, and premature rupture of the membranes. It excludes a condition related to her mental health.⁵

No abortion is considered necessary, if based on (1) a claim or diagnosis that the pregnant woman will engage in conduct that would result in her death or a substantial and irreversible impairment of a major bodily function or (2) any reason related to her mental health.⁶

Application of probable post-fertilization age less than 20 weeks defense

Except when prevented by a medical emergency, the physician must either determine the unborn child's probable post-fertilization age, or rely on another physician's determination of the age, in order to use the affirmative defense that the probable post-fertilization age of the unborn child was less than 20 weeks. The physician must certify in writing, based on test results, that in the physician's reasonable medical judgment the post-fertilization age is less than 20 weeks.⁷

Application of impairment of major bodily function defense

Additionally, the act requires the physician, unless prevented by a medical emergency, to do all of the following in order to use this defense:

(1) Certify in writing that, in the physician's reasonable medical judgment, based on the facts known to the physician at that time, the abortion is necessary to prevent the pregnant woman's death or a serious risk of substantial and irreversible impairment of a major bodily function;

(2) Have a different, not professionally related physician certify in writing that, in that different physician's reasonable medical judgment, based on the facts known to

⁴ R.C. 2919.201(B)(1).

⁵ R.C. 2919.20(H).

⁶ R.C. 2919.201(B)(2).

⁷ R.C. 2919.201(C).

that different physician at that time, the abortion was necessary to prevent the pregnant woman's death or a serious risk of substantial and irreversible impairment of a major bodily function;

(3) Purposely perform or induce or purposely attempt to perform or induce the abortion in a hospital or other health care facility that has appropriate neonatal services for premature infants;

(4) Terminate or attempt to terminate the pregnancy in the manner that provides the best opportunity for the unborn child to survive, unless the physician determines, in the physician's reasonable medical judgment, based on the facts known to that physician at that time, that the termination of the pregnancy in that manner poses a greater risk of the death or the substantial and irreversible impairment of a major bodily function than would other available methods of abortion;

(5) Certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed; and

(6) Arrange for the attendance in the same room in which the abortion is to be performed or induced or attempted to be performed or induced at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn child immediately upon the child's complete expulsion or extraction from the pregnant woman.⁸

Medical emergency defined

"Medical emergency" means a condition that in the physician's reasonable medical judgment, based on 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.⁹

Pregnant woman not guilty

The act provides that a pregnant woman on whom an abortion is purposely performed or induced or purposely attempted to be performed or induced in violation

⁸ R.C. 2919.201(D).

⁹ R.C. 2919.20(B).



of the prohibition described above in "**Abortion prohibited at 20 weeks**" is not guilty of violating that prohibition or of attempting to commit, conspiring to commit, or complicity in committing that prohibition.¹⁰

Civil liability

The act provides that any physician who purposely performs or induces, or purposely attempts to perform or induce an abortion with actual knowledge that the act's affirmative defenses (see "**Affirmative defenses to criminal charge**," above) do not apply, or with heedless indifference to whether the affirmative defenses apply, is liable in a civil action for compensatory and exemplary damages and reasonable attorney's fees 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 physician's actions. In the civil action, the court also may award any injunctive or other equitable relief that the court considers appropriate.¹¹ The act imposes a one-year limitation on these actions, commencing from the performance or inducement of the abortion or attempted performance or inducement of the abortion.¹²

Additionally, a woman upon whom an abortion is purposely performed or induced or purposely attempted to be performed or induced, or the father of the unborn child who was the subject of the abortion, may sue for compensatory damages, punitive or exemplary damages (if authorized under Ohio law governing a request for such damages in a tort action), and court costs and reasonable attorney's fees against the physician who is civilly liable as described above. If the court renders judgment for the defendant and finds the action to be frivolous conduct, and that the defendant was adversely affected by the frivolous conduct, it must award the defendant reasonable attorney's fees. "Frivolous conduct" includes, for example, conduct in a civil action that serves to merely harass or maliciously injure another party to the action or consists of allegations or other factual contention that have no evidentiary support.¹³

Abortion prohibited without testing

The act also creates the crime of failure to perform probable post-fertilization age testing. Unless prevented by a medical emergency, no physician may purposely perform or induce or purposely attempt to perform or induce an abortion on a pregnant woman after the unborn child reaches the probable post-fertilization age of 20 weeks

¹⁰ R.C. 2919.201(H).

¹¹ R.C. 2919.201(G).

¹² R.C. 2305.11(B).

¹³ R.C. 2307.54; R.C. 2315.21 and 2323.51, not in the act.

without determining, in the physician's reasonable medical judgment, the unborn child's probable post-fertilization age. The physician's determination must be based on inquiries of the pregnant woman and any medical examinations or tests that the physician considers necessary as a reasonably prudent physician, knowledgeable about the case and medical conditions involved, would consider necessary to determine the probable post-fertilization age.¹⁴

A violation is a misdemeanor of the fourth degree.¹⁵ The act also requires the State Medical Board to suspend a physician's license to practice medicine for a period of not less than six months for violating this prohibition.¹⁶

Unless a medical emergency prevented the testing, the physician must enter the determination made and the associated findings of the medical examination and tests in the medical record of the pregnant woman before the abortion.¹⁷

Report to Department of Health

The act requires a physician who performs or induces or attempts to perform or induce an abortion on a pregnant woman to submit a report to the Department of Health in accordance with the forms, rules, and regulations adopted by the Department that includes all of the information the physician is required to certify in writing or determine under the act (see "**Abortion prohibited at 20 weeks**" and "**Abortion prohibited without testing**," above).¹⁸

The physician must submit the report to the Department within 15 days after the woman is discharged. If the physician fails to submit the report more than 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 30-day period the report is overdue. A physician who is required to submit a report but fails or submits an incomplete report more than one year following the 15-day deadline may, in an action brought by the Department, be directed by a court of competent jurisdiction to submit a complete report to the Department within a period of time stated in a court order or be subject to contempt of court.¹⁹ If a physician fails to comply with these requirements, other than filing a late

¹⁴ R.C. 2919.203(A) and (C).

¹⁵ R.C. 2919.203(C).

¹⁶ R.C. 2919.203(D).

¹⁷ R.C. 2919.203(B).

¹⁸ R.C. 2919.202(A).

¹⁹ R.C. 2919.202(C)(1).



report with the Department, or fails to submit a complete report to the Department in accordance with a court order, the physician is subject to disciplinary action by the State Medical Board.²⁰

Further, the act prohibits a person from falsifying any required report. Whoever violates this prohibition is guilty of pain-capable unborn child abortion report falsification, a misdemeanor of the first degree.²¹

Professional discipline

Continuing law requires the State Medical Board to limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for certain specified reasons. The act adds to these reasons the individual's failure to comply with the requirements included in the new criminal prohibition against abortion without testing for post-fertilization age or failure to submit to the Department in accordance with a court order a complete report.²²

Public report issued by the Department of Health

The act requires the Department of Health to issue an annual public report that provides statistics for the previous calendar year compiled from all reports covering that calendar year that include the information physicians must certify in writing or determine, as described above. The report must also provide the statistics for each previous calendar year in which a report was filed with the Department, adjusted to reflect any additional information that a physician provides to the Department in a late or corrected report. The Department must ensure that none of the information in the report could reasonably lead to the identification of any pregnant woman upon whom an abortion is performed. The reports must be issued by September 30 each year.²³

²⁰ R.C. 2919.202(C)(2).

²¹ R.C. 2919.202(C)(3).

²² R.C. 4731.22(B)(44).

²³ R.C. 2919.202(B).



Adoption of rules by the Department of Health

The act requires the Department of Health to adopt rules pursuant to R.C. 111.15 to assist in compliance with the reporting requirements described above. The rules must be adopted by June 12, 2017 (90 days after the act's effective date).²⁴

Litigation fund

The act creates the Ohio Pain-capable Unborn Child Protection Act Litigation Fund in the state treasury. The fund is to be used by the Attorney General to pay for any costs and expenses the Attorney General may incur in relation to actions surrounding defense of the act's provisions. The fund will consist of appropriations, and any donations, gifts, or grants. Any interest earned must be credited to the fund.²⁵

Relationship to other abortion laws and severability

The act provides that if any of its provisions are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of state law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted. If an injunction is entered against one of its provisions, but that injunction later is stayed or dissolved, or otherwise ceases to have effect, the provision shall have full force and effect. The act also states that its provisions do not repeal, by implication or otherwise, any law regulating or restricting abortion (such as, for example, the prohibition against post-viability abortion). It further provides that compliance with the act's procedures is irrelevant to compliance with other provisions that would be applicable, and vice versa.²⁶

HISTORY

ACTION	DATE
Introduced	03-16-15
Reported, S. Health & Human Services	06-24-15
Passed Senate (23-9)	06-24-15
Reported, H. Community & Family Advancement	12-08-16
Passed House (64-29)	12-08-16
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²⁴ R.C. 2919.202(D).

²⁵ R.C. 2919.204.

²⁶ R.C. 2919.205; R.C. 2919.16 to 2919.18, not in the act.

