

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: SB 1748

INTRODUCER: Senator Flores

SUBJECT: Abortions

DATE: March 25, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	Pre-meeting
2.	_____	_____	CJ	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill prohibits abortions from being performed while a woman is in her third trimester of pregnancy or after a fetus has attained viability unless a medical emergency exists.

The bill provides that any abortion clinic that advertises its services must also advertise that the clinic is prohibited from performing abortions in the third trimester or after viability and requires the Agency for Health Care Administration (AHCA) to adopt rules to regulate such advertisements.

The bill requires any physician who performs abortions in an abortion clinic to annually complete at least 3 hours of continuing education that relate to ethics. The bill also provides for restrictions as to where an abortion may be performed.

This bill also provides that it is a misdemeanor of the second-degree if:

- A person establishes, conducts, manages, or operates an abortion clinic without a valid current license.
- A person performs or assists in performing an abortion on a person in the third trimester or after viability in a place other than in a hospital.
- After October 1, 2011, an abortion clinic is not wholly owned and operated by a physician who has received certain training during residency.

This bill increases the penalty for failure to properly dispose of fetal remains from a second-degree to a first-degree misdemeanor. It is also a misdemeanor of the first-degree for a person to advertise or facilitate an advertisement of services or drugs for the purpose of performing an

abortion in violation of ch. 390, F.S. A licensed health care practitioner who is guilty of a felony for providing unlawful abortion services is subject to licensure revocation.

This bill also requires a director of a medical facility or physician's office where abortions are performed to report to the AHCA specific information, which the AHCA must then submit to the Centers for Disease Control and Prevention (CDC) and make available on the AHCA website prior to each general legislative session. Additionally, the AHCA must provide an annual report to the Governor and Legislature, which contains such information. None of the reported or published information is to contain any personal identifying information.

The bill transfers provisions concerning abortion from the Florida Criminal Code, under ch. 797, F.S., into ch. 390, F.S., and the bill contains a severability clause.

The effective date of the act is October 1, 2011.

This bill substantially amends the following sections of the Florida Statutes: 390.0111, 390.0112, 390.012, and 456.013.

This bill repeals the following sections of the Florida Statutes: 797.02 and 797.03.

This bill also creates an undesignated section of the Florida Statutes.

II. Present Situation:

Background

Under Florida law the term "abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.¹ "Viability" means that stage of fetal development when the life of the unborn child may, with a reasonable degree of medical probability, be continued indefinitely outside the womb.² Induced abortion can be elective (performed for nonmedical indications) or therapeutic (performed for medical indications). An abortion can be performed by surgical or medical means (medicines that induce a miscarriage).³

An abortion in Florida must be performed by a physician licensed to practice medicine or osteopathic medicine who is licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.⁴ No person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital or physician in which, or by whom, the termination of a pregnancy has been authorized or performed, who states an objection to the procedure on moral or religious grounds is required to

¹ Section 390.011, F.S.

² Section 390.0111(4), F.S.

³ Suzanne R. Trupin, M.D., *Elective Abortion*, December 21, 2010, available at <http://www.emedicine.com/med/TOPIC3312.HTM> (last visited Mar. 23, 2011).

⁴ Section 390.0111(2) and s. 390.011(7), F.S.

participate in the procedure. The refusal to participate may not form the basis for any disciplinary or other recriminatory action.⁵

According to the AHCA, for the calendar year 2009, a total of 81,916 abortions were performed by licensed physicians. During calendar year 2010, a total of 79,908 abortions were performed by licensed physicians.⁶

Abortion Clinics

Abortion clinics are licensed and regulated by the AHCA under ch. 390, F.S., and part II of ch. 408, F.S. The AHCA has adopted rules in Chapter 59A-9, Florida Administrative Code, related to abortion clinics. Section 390.012, F.S., requires these rules to address the physical facility, supplies and equipment standards, personnel, medical screening and evaluation of patients, abortion procedures, recovery room standards, and follow-up care. The rules relating to the medical screening and evaluation of each abortion clinic patient, at a minimum, shall require:

- A medical history, including reported allergies to medications, antiseptic solutions, or latex; past surgeries; and an obstetric and gynecological history;
- A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa;
- The appropriate laboratory tests, including:
 - For an abortion in which an ultrasound examination is not performed before the abortion procedure, urine or blood tests for pregnancy performed before the abortion procedure,
 - A test for anemia,
 - Rh typing, unless reliable written documentation of blood type is available, and
 - Other tests as indicated from the physical examination;
- An ultrasound evaluation for patients who elect to have an abortion after the first trimester. If a person who is not a physician performs the ultrasound examination, that person must have documented evidence that he or she has completed a course in the operation of ultrasound equipment. If a patient requests, the physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant must review the ultrasound evaluation results and the estimate of the probable gestational age of the fetus with the patient before the abortion procedure is performed; and
- The physician to estimate the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age and write the estimate in the patient's medical history. The physician must keep original prints of each ultrasound examination in the patient's medical history file.

Section 390.0111(4), F.S., provides for the standard of medical care to be used during viability. If a termination of pregnancy is performed during viability, a person who performs or induces the termination of pregnancy may not fail to use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which the person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted.

⁵ Section 390.0111(8), F.S.

⁶ Agency for Health Care Administration, *2011 Bill Analysis & Economic Impact Statement for SB 1748*, on file with the Senate Health Regulation Committee.

The biennial license fee for an abortion clinic is \$514. The administrator responsible for the day to day operations of the abortion clinic and the chief financial officer are required to submit to a level 2 (statewide and nationwide) background screening.⁷

Relevant Case Law

In 1973, the landmark case of *Roe v. Wade* established that restrictions on a woman's access to secure an abortion are subject to a strict scrutiny standard of review.⁸ In *Roe*, the U.S. Supreme Court determined that a woman's right to have an abortion is part of the fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, justifying the highest level of review.⁹ Specifically, the Court concluded that: (1) during the first trimester, the state may not regulate the right to an abortion; (2) after the first trimester, the state may impose regulations to protect the health of the mother; and (3) after viability, the state may regulate and proscribe abortions, except when it is necessary to preserve the life or health of the mother.¹⁰ Therefore, a state regulation limiting these rights may be justified only by a compelling state interest, and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake.¹¹

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court relaxed the standard of review in abortion cases involving adult women from strict scrutiny to unduly burdensome, while still recognizing that the right to an abortion emanates from the constitutional penumbra of privacy rights.¹² In *Planned Parenthood*, the Court determined that, prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference.¹³ The Court concluded that the state may regulate the abortion as long as the regulation does not impose an undue burden on a woman's decision to choose an abortion.¹⁴ If the purpose of a provision of law is to place substantial obstacles in the path of a woman seeking an abortion before viability, it is invalid; however, after viability the state may restrict abortions if the law contains exceptions for pregnancies endangering a woman's life or health.¹⁵

The unduly burdensome standard as applied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which is generally considered to be a hybrid between strict scrutiny and intermediate level scrutiny, shifted the Court's focus to whether a restriction creates a substantial obstacle to access. This is the prevailing standard today applied in cases in which abortion access is statutorily restricted.

⁷ Agency for Health Care Administration, *Abortion Clinic*, available at http://www.fdhc.state.fl.us/mchq/health_facility_regulation/hospital_outpatient/abortion.shtml (Last visited on March 23, 2011).

⁸ 410 U.S. 113 (1973).

⁹ 410 U.S. 113, 154 (1973).

¹⁰ 410 U.S. 113, 162-65 (1973).

¹¹ 410 U.S. 113, 152-56 (1973).

¹² 505 U.S. 833, 876-79 (1992).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

However, the undue burden standard was held not to apply in Florida. The 1999 Legislature passed a parental notification law, the Parental Notice of Abortion Act, requiring a physician to give at least 48 hours of actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor. Although a judicial waiver procedure was included, the act was never enforced.¹⁶ In 2003, the Florida Supreme Court¹⁷ ruled this legislation unconstitutional on the grounds that it violated a minor's right to privacy, as expressly protected under Article I, s. 23 of the Florida Constitution.¹⁸ Citing the principle holding of *In re T.W.*,¹⁹ the Court reiterated that, as the privacy right is a fundamental right in Florida, any restrictions on privacy warrant a strict scrutiny review, rather than that of an undue burden. Here, the Court held that the state failed to show a compelling state interest and therefore, the Court permanently enjoined the enforcement of the Parental Notice of Abortion Act.²⁰

Centers for Disease Control and Prevention (CDC)

The CDC began collecting abortion data (abortion surveillance) in 1969 to document the number and characteristics of women obtaining "legal induced" abortions. The CDC's surveillance system counts legal induced abortions only. For the CDC's surveillance purposes, legal abortion is defined as a procedure performed by a licensed physician, or a licensed advanced practice clinician acting under the supervision of a licensed physician, to induce the termination of a pregnancy.²¹

States and other territories voluntarily report data to the CDC for inclusion in its annual Abortion Surveillance Report.²² The CDC's Division of Reproductive Health prepares surveillance reports as data becomes available. There is no national requirement for data submission or reporting.²³

Those states requiring the reporting of information on induced abortions use various methods to collect the data. Some states include induced abortion reporting as a part of their fetal death reporting system, while a majority of states use a separate form, usually called Report of Induced Termination of Pregnancy, for the reporting of induced abortions. Regardless of the reporting system used, all states with reporting systems require the reporting of all induced abortions regardless of length of gestation.²⁴

¹⁶ See s. 390.01115, F.S. (repealed by s. 1, ch. 2005-52, Laws of Florida). Ch. 2005-52, Laws of Florida created s. 390.01114, F.S., the revised Parental Notice of Abortion Act.

¹⁷ *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So. 2d 612, 619-20 (Fla. 2003)

¹⁸ The constitutional right of privacy provision reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, s. 23.

¹⁹ 551 So. 2d 1186, 1192 (Fla. 1989).

²⁰ *North Florida Women's Health and Counseling Services, supra* note 16, at 622 and 639-40.

²¹ Centers for Disease Control and Prevention, *CDC's Abortion Surveillance System FAQs*, available at: http://www.cdc.gov/reproductivehealth/Data_Stats/Abortion.htm (Last visited on March 23, 2011).

²² Florida does not report abortion data to the CDC. *Supra* fn. 6.

²³ *Supra* fn. 21.

²⁴ Centers for Disease Control and Prevention, *Handbook on the Reporting of Induced Termination of Pregnancy*, April 1998, available at: http://www.cdc.gov/nchs/data/misc/hb_itop.pdf (Last visited on March 23, 2011).

The CDC has developed a Standard Report of Induced Termination of Pregnancy to serve as a model for use by states. The model report suggests that the state's report should include the:²⁵

- Facility name where the induced termination of pregnancy occurred.
- City, town, or location where the pregnancy termination occurred.
- County where the pregnancy termination occurred.
- Hospital, clinic, or other patient identification number, which would enable the facility or physician to access the medical file of the patient.
- Age of the patient in years at her last birthday.
- Marital status of the patient.
- Date of the pregnancy termination.
- Place the patient actually and physically lives or resides, which is not necessarily a patient's home state, voting residence, mailing address, or legal residence.
- Name of the state, county, and city where the patient lives.
- Number of the ZIP code where the patient lives.
- Origin of the patient, if Hispanic.
- Ancestry of the patient.
- Race of the patient.
- Highest level of education completed by the patient.
- Date the patient's last normal menstrual period began.
- Length of gestation as estimated by the attending physician.
- Number of previous pregnancies, including live births and other terminations.
- Type of termination procedure used.
- Name of the attending physician.
- Name of the person completing the report.

The CDC reports that its surveillance data is used to:²⁶

- Identify characteristics of women who are at high risk of unintended pregnancy.
- Evaluate the effectiveness of programs for reducing teen pregnancies and unintended pregnancy among women of all ages.
- Calculate pregnancy rates based on the number of pregnancies ending in abortion in conjunction with birth data and fetal loss estimates.
- Monitor changes in clinical practice patterns related to abortion, such as changes in the types of procedures used, and weeks of gestation at the time of abortion.

Additionally, demographers use information in the report to calculate pregnancy rates, which are combined estimates of births and fetal loss and managers of public health programs use this data to evaluate the programs' effectiveness to prevent unintended pregnancy. There have historically been other data uses; such as, the calculation of the mortality rate of specific abortion procedures.

The CDC reports that in 2007,²⁷ there were 827,609 legal induced abortions reported to the CDC from 49 reporting areas. This is a 2 percent decrease from the 846,181 abortions in 2006. The

²⁵ *Id.*

²⁶ *Supra* fn. 21.

abortion rate for 2007 was 16.0 abortions per 1,000 women aged 15 through 44 years. This also is a 2 percent decrease from 2006. The abortion ratio was 231 abortions per 1,000 live births in 2007. This is a 3 percent decrease from 2006. During 1998 through 2007, the reported abortion numbers, rates, and ratios decreased 6 percent, 7 percent, and 14 percent, respectively. During 1997 through 2006, women aged 20 to 29 years accounted for the majority of abortions. The majority (62.3 percent) of abortions in 2007 were performed at 8 weeks' gestation or less and 92 percent were performed at 13 weeks' gestation or less; 13.1 percent of all abortions were medical abortions.²⁸

III. Effect of Proposed Changes:

Section 1 amends s. 390.0111, F.S., to prohibit abortions from being performed after the period at which, in the physician's best medical judgment, the fetus has attained viability or during the third trimester of pregnancy. However, an abortion may be performed after viability or during the third trimester of pregnancy if two physicians certify in writing as to the existence of a medical emergency²⁹ or one physician certifies in writing to the existence of a medical emergency and another physician is not available for consultation.

This section also requires:

- An abortion clinic that advertises its services to provide conspicuous notice on its advertisements that it is prohibited from performing abortions in the third trimester or after viability.
- Physicians who offer to perform or perform abortions in abortion clinics to annually complete at least 3 hours of continuing education that relate to ethics.
- Abortions to be performed in a validly licensed hospital, abortion clinic, or physician's office, unless the law specifically requires the abortion to be performed in a hospital or an emergency care situation exists.

This section provides that it is a misdemeanor of the second-degree punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., (maximum imprisonment of 60 days or maximum fine of \$500) if a person willfully:

- Establishes, conducts, manages, or operates an abortion clinic without a valid current license.
- Performs or assists in performing an abortion on a person in the third trimester or after viability in a place other than in a hospital.
- After October 1, 2011, operates or owns an abortion clinic and is not a physician who has received training during residency in performing a dilation-and-curettage procedure³⁰ or a dilation-and-evacuation procedure.³¹

²⁷ This is the most recent data available on the CDC website, which is available at: http://www.cdc.gov/reproductivehealth/Data_Stats/Abortion.htm (Last visited on March 23, 2011).

²⁸ *Supra* fn. 21.

²⁹ Section 390.01114(2)(d), F.S., defines a "medical emergency" as a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.

³⁰ Dilation-and-curettage is a medical procedure in which the uterine cervix is dilated and a curette is inserted into the uterus to scrape away the endometrium, also known as a D&C. Merriam-Webster, *MedlinePlus Medical Dictionary*, available at: <http://www.merriam-webster.com/medlineplus/dilation-and-curettage> (Last visited on March 23, 2011).

This section also increases the penalty for a person who fails to dispose of fetal remains in an appropriate manner. The penalty is increased from a misdemeanor of a second-degree to a misdemeanor of a first-degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S. (maximum imprisonment of 1 year or maximum fine of \$1,000). In addition, it is a misdemeanor of the first-degree for a person to advertise or facilitate an advertisement of services or drugs for the purpose of performing an abortion in violation of ch. 390, F.S.

The Department of Health is required to permanently revoke the license of a licensed health care practitioner who has been convicted or found guilty of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, a felony criminal act for willfully performing an unlawful abortion.

The AHCA is required to report, prior to each general legislative session, aggregate statistical data that relates to abortions and does not contain any personal identifying information, which has been reported to the Division of Reproductive Health within the CDC, on its website. In addition, the AHCA must submit such information in an annual report the Governor, the President of the Senate, and the Speaker of the House of Representatives.

Section 2 amends s. 390.0112, F.S., to require the director of any medical facility or physician's office in which an abortion is performed to submit a report to AHCA following each abortion. The report must be on a form developed by the AHCA which is consistent with the U.S. Standard Report of Induced Termination of Pregnancy from the CDC. The AHCA is required to submit this reported information to the Division of Reproductive Health within the CDC.

Section 3 amends s. 390.012, F.S., to require the AHCA to adopt rules to prescribe standards for advertisements used by an abortion clinic by requiring the clinic to provide conspicuous notice on its advertisement that it is prohibited from performing abortions in the third trimester or after viability.

Section 4 amends s. 456.013, F.S., to require physicians who offer to perform or perform abortions in an abortion clinic to annually complete a 3-hour course related to ethics as part of the licensure and renewal process as required in section 1 of the bill. This section clarifies that the 3-hour course must count toward the total number of continuing education hours required for the profession and the applicable board, or department if there is no board, must approve of the course.

Section 5 repeals s. 797.02, F.S., the provisions of which are transferred to ch. 390, F.S., in section 1 of the bill.

Section 6 repeals s. 797.03, F.S., the provisions of which are transferred to ch. 390, F.S., in section 1 of the bill.

³¹ Dilation-and-evacuation is a surgical abortion that is typically performed midway during the second trimester of pregnancy and in which the uterine cervix is dilated and fetal tissue is removed using surgical instruments and suction, also called a D&E. Merriam-Webster, MedlinePlus Medical Dictionary, available at: <http://www.merriam-webster.com/medlineplus/dilation-and-evacuation%20> (Last visited on March 23, 2011).

Section 7 is an undesignated section that provides for the severability of any provision in the bill that is held invalid.

Section 8 provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

If the bill, should it become law, is challenged as an invasion of privacy, it will be subject to a strict scrutiny review, rather than that of an undue burden test pursuant to *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*,³² as discussed above under the subheading, "Relevant Case Law." Otherwise, any challenge that does not impinge on a constitutional fundamental right, will be subject to the "undue burden" standard announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³³

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Abortion clinics may incur an indeterminate amount of costs associated with complying with the advertisement requirements, ownership requirements, and report requirements provided for in the bill.

³² 866 So. 2d 612 (Fla. 2003).

³³ 505 U.S. 833 (1992).

C. Government Sector Impact:

Because the bill requires the director of any medical facility or physician's office to submit a report after each abortion, instead of monthly, the AHCA has estimated that it will receive approximately 80,000 reports annually. The AHCA estimates that it will incur costs of approximately \$50,000 in order to contract for services to develop a database to collect the additional data elements required by the bill.³⁴

VI. Technical Deficiencies:

The term "viability" is defined in s. 390.0111(4), F.S. Lines 78, 82, 98, 114 and 217 of the bill use the term viability. However, the definition is not provided in a manner so that it applies to the whole chapter. In order for the definition of the term to apply to the whole chapter, including the use of the term in the aforementioned lines, the definition of viability should be moved to s. 390.011, F.S.

Line 131 of the bill should read "Except as provided in paragraph (f) of subsection (2) and subsections (3) and (7)" because paragraph (f) of subsection (2) contains misdemeanor penalties that should also be excluded from the felony provisions of subsection (10).

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³⁴ *Supra* fn. 6.