

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 Committee on Health Policy

BILL: SB 1722
 INTRODUCER: Senator Stargel
 SUBJECT: Termination of Pregnancies
 DATE: January 20, 2016 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Looke | Stovall | HP | Favorable |
| 2. | | | AHS | |
| 3. | | | FP | |

I. Summary:

SB 1722 amends various statutes related to the termination of pregnancies. The bill:

- Defines the terms “gestation,” “first trimester,” “second trimester,” and “third trimester”;
- Prohibits the sale and donation of fetal remains from an abortion and increases penalties for the improper disposal of fetal remains;
- Restricts state agencies, local governmental entities, and Medicaid managed care plans from contracting with, or expending funds for the benefit of, an organization that owns, operates, or is affiliated with one or more clinics that perform abortions with some exceptions;
- Requires the Agency for Health Care Administration (AHCA) to collect certain data from medical facilities in which abortions are performed and to submit data to the federal Centers for Disease Control and Prevention (CDC);
- Requires the AHCA to:
 - Perform annual licensure inspections of abortion clinics;
 - Inspect at least 50 percent of abortion clinic records during a license inspection; and
 - Promptly investigate all credible allegations of unlicensed abortions being performed;
- Requires, in clinics that only perform first trimester abortions, that either:
 - The clinic have a written patient transfer agreement with a hospital within reasonable proximity; or
 - All physicians who perform abortions in the clinic have admitting privileges at a hospital within reasonable proximity of the clinic;
- Requires, in clinics that perform second trimester abortions, that:
 - The clinic have a written patient transfer agreement with a hospital within reasonable proximity; and
 - All physicians who perform abortions in the clinic have admitting privileges at a hospital within reasonable proximity of the clinic;
- Requires the AHCA to submit an annual report to the Legislature summarizing regulatory actions taken by the AHCA pursuant to its authority under ch. 390, F.S.; and

- Requires abortion referral and counseling agencies to register with the AHCA and pay a registration fee with some exceptions.

II. Present Situation:

Abortion in Florida

Under Florida law, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or remove a dead fetus.¹ The termination of a pregnancy must be performed by a physician² 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.³

The termination of a pregnancy may not be performed in the third trimester or if a physician determines that the fetus has achieved viability unless there is a medical necessity. Florida law defines the third trimester to mean the weeks of pregnancy after the 24th week and defines viability to mean the state of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures.⁴ Specifically, an abortion may not be performed after viability or within the third trimester unless two physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition. If a second physician is not available, one physician may certify in writing to the medical necessity for legitimate emergency medical procedures for the termination of the pregnancy.⁵

Sections 390.0111(4) and 390.01112(3), F.S., provide that if a termination of pregnancy is performed during the third trimester or during viability, the physician who performs or induces the termination of pregnancy must use that degree of professional skill, care, and diligence to preserve the life and health of the fetus, which the physician would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. However, the woman's life and health constitute an overriding and superior consideration to the concern for the life and health of the fetus when the concerns are in conflict. This termination of a pregnancy must be performed in a hospital.⁶

Case Law on Abortion

Federal Case Law

In 1973, the U.S. Supreme Court issued the landmark *Roe v. Wade* decision.⁷ Using the strict scrutiny standard, the Court determined that a woman's right to terminate a pregnancy is protected by a fundamental right to privacy guaranteed under the Due Process Clause of the

¹ Section 390.011(1), F.S.

² Section 390.0111(2), F.S.

³ Section 390.011(8), F.S.

⁴ Sections 390.011(11) and (12), F.S.

⁵ Sections 390.0111(1) and 390.01112(1), F.S.

⁶ Sections 797.03(3), F.S.

⁷ 410 U.S. 113 (1973).

Fourteenth Amendment of the U.S. Constitution.⁸ Further, the Court reasoned that state regulations limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.⁹

In 1992, the U.S. Supreme Court ruled on the constitutionality of a Pennsylvania statute involving a 24-hour waiting period between the provision of information to a woman and the performance of an abortion. In that decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰ the Court upheld the statute and relaxed the standard of review in abortion cases involving adult women from “strict scrutiny” to “unduly burdensome.” An undue burden exists and makes a statute invalid if the statute’s purpose or effect is to place a substantial obstacle in the way of a woman seeking an abortion before the fetus is viable.¹¹ The Court held that the undue burden standard is an appropriate means of reconciling a state’s interest in human life with the woman’s constitutionally protected liberty to decide whether to terminate a pregnancy. The Court determined that, prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference. Before viability, a state’s interests are not strong enough to support prohibiting an abortion or the imposition of a substantial obstacle to the woman’s right to elect the procedure.¹² However, once viability occurs, a state has the power to restrict abortions if the law contains exceptions for pregnancies that endanger a woman’s life or health.

Florida Law on Abortion

Florida law embraces more privacy interests and expressly extends more privacy protection to its citizens than the U.S. Constitution does. Article I, s. 23 of the State Constitution provides an express right to privacy. The Florida Supreme Court has recognized that this constitutional right to privacy “is clearly implicated in a woman’s decision whether or not to continue her pregnancy.”¹³ The Florida Supreme Court ruled in *In re T. W.*¹⁴

Under Florida law, prior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests... Under our Florida Constitution, the state’s interest becomes compelling upon viability Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures.¹⁵

⁸ *Id.*

⁹ *Id.*

¹⁰ 505 U.S. 833 (1992).

¹¹ *Id.* at 878.

¹² *Id.* at 846.

¹³ *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

¹⁴ 551 So. 2d 1186, 1192 (Fla. 1989) (holding that a parental consent statute was unconstitutional because it intrudes on a minor’s right to privacy).

¹⁵ *Id.* at 1193-94.

The Court concluded that, “Following viability, the state may protect its interest in the potentiality of life by regulating abortion, provided that the mother’s health is not jeopardized.”¹⁶

Unlike the U.S. Supreme Court, however, the Florida Supreme Court reached a different standard of review for privacy laws involving abortion. The Florida Supreme Court held that, when determining the constitutionality of a statute that impinges upon a right of privacy under the Florida Constitution, the strict scrutiny standard of review applies.¹⁷

Abortion and Related Services Funding

Currently, neither the federal government nor the state of Florida funds abortion procedures except in limited situations.¹⁸ Federal funding for abortions, including Medicaid funding, has been restricted since 1977 with the passage of the Hyde amendment.¹⁹ The Hyde amendment restricts the federal government from spending funds or administrative expenses in connection with abortions unless the pregnancy was the result of rape or incest or if the life of the mother would be in danger if the fetus were carried to term. However, the Hyde amendment and state law do not restrict federal or state funds from being expended for other services offered by abortion providers, such as family planning services, and Medicaid under fee-for-service arrangements may not exclude qualified health care providers because they separately provide abortion services.²⁰ This provision is often referred to as the “any willing provider” provision. However, the Florida Medicaid managed care program is exempt from the any willing provider provision.²¹

Regulation of Clinics Providing Only First Trimester Abortions vs. Regulation of Clinics Providing Second Trimester Abortions

As detailed above, the constitutionality of regulations on abortion differs for abortions performed in the first trimester and the second trimester. The effect of this difference can be seen in Florida statute and rule. Section 390.012, F.S., details numerous requirements for clinics providing second trimester abortions, but only requires that AHCA rules “be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care” for first trimester abortions.²² The AHCA currently has no rules specific to first trimester clinics, but has

¹⁶ *Id.* at 1194.

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

¹⁸ See ss. 627.64995, 627.66996, and 641.31099, F.S.

¹⁹ For an example of Hyde amendment language passed in a Federal appropriations act, see Pub. Law 111-8, ss. 613 and 614, March 11, 2009.

²⁰ CMCS Informational Bulletin, Cindy Mann director of the Center for Medicaid, CHIP and Survey and Certification, June 1, 2011, available at <https://www.medicaid.gov/Federal-Policy-Guidance/downloads/6-1-11-Info-Bulletin.pdf> (last visited on January 22, 2016).

²¹ See s. 409.975, F.S., and Centers for Medicare and Medicaid Services Special Terms and Conditions Number 11-w-00206/4 Florida Medicaid Medical Assistance Program, Number 37 Freedom of Choice, p. 22, October 15, 2015.

²² The Department of Health’s rules on office surgery (Rule 64B15-14.007, F.A.C.) regulate procedures that may be comparable to first trimester abortions. Specifically, a comparison can most closely be drawn between first trimester abortions and either level I or level II office surgery. Criteria for level I and level II office surgery are detailed in Rule 64B15-14.007(3) and (4), F.A.C., respectively. Rules for level I office surgery have no requirements for patient transfer agreements or admitting privileges. Rules for level II office surgery require either that the physician’s office have a transfer agreement with a hospital within reasonable proximity or that the physician performing the surgery have privileges at hospital within reasonable proximity.

issued guidelines for clinics as to which requirements must be met by clinics providing first and second trimester abortions and those providing only first trimester abortions.²³ In general, clinics providing only first trimester abortions must be licensed, inspected annually,²⁴ and must adhere to the restrictions on abortions in general²⁵ but are not required to meet specific regulations regarding clinic staffing, physical plant, equipment, medical screening, the abortion procedure, and recovery room standards.

Confusion Over the Timing of the First and Second Trimester

In recent months there has been some widely publicized confusion over the definitions of first and second trimester. Currently, AHCA rule defines the “first trimester” as “the first 12 weeks of pregnancy (the first 14 completed weeks from the last normal menstrual period)” and “second trimester” as “the portion of a pregnancy following the 12th week and extending through the 24th week of gestation.”²⁶ These definitions are important due to the much more stringent regulation of clinics providing second trimester abortions.

In August of 2015, the AHCA cited several clinics associated with Planned Parenthood of Southwest and Central Florida for performing unlicensed second trimester abortions. The clinics were licensed only to provide first trimester abortions but the citation reports that several patient reports from the clinics indicated that abortions had been performed after 13 weeks of gestation.²⁷ The AHCA cited the clinics for performing abortions beyond their license. Planned Parenthood challenged the citations alleging that the clinics had not violated the law and that the AHCA redefined first trimester to mean 12 weeks from the last normal menstrual cycle, rather than 12 weeks from point of gestation.²⁸ The lawsuit is currently ongoing, however, it is interesting to note that as a part of the requirement to file a corrective action plan with the AHCA, the citation given to Planned Parenthood of Collier County requires that the corrective action plan must “educate staff to ensure that...the field titled ‘WEEKS OF GESTATION’ is correctly completed using ‘weeks of gestation’...and not erroneously using last normal menstrual period.”²⁹

Centers for Disease Control Abortion Surveillance

In 1969, the CDC began abortion surveillance in order to document the number and characteristics of women obtaining legal induced abortions. States voluntarily report abortion data to the CDC and the CDC’s Division of Reproductive Health prepares surveillance reports as

²³ AHCA ASPEN: Regulation Set (RS), Aug. 11, 2015, available at http://ahca.myflorida.com/mchq/Current_Reg_Files/Abortion_Clinic_ST_A.pdf, (last visited Jan. 21, 2016).

²⁴ Rule 59A-9.021, F.A.C.

²⁵ General restrictions include, but are not limited to: the requirement that all abortions must be performed by a physician, the requirement to obtain informed consent before performing an abortion, requirements regarding the disposal of fetal remains, and the requirement that the physician performing the abortion notify the parent or guardian of a minor before performing such abortion. See ss. 390.0111 and 390.01114, F.S.

²⁶ Rule 59A-9.019, F.S.

²⁷ For an example see: AHCA statement of deficiencies for Planned Parenthood of Collier County, available at http://apps.ahca.myflorida.com/dm_web/DMWeb_Docs/6359763.pdf, (last visited Jan. 21, 2016).

²⁸ See <http://www.capitalnewyork.com/article/florida/2015/08/8574447/planned-parenthood-sues-says-state-trying-redefine-1st-trimester> (last visited on January 21, 2016).

²⁹ Id. n. 22

data becomes available.³⁰ Information reported to the CDC includes maternal age, gestational age of the fetus in weeks at the time of the abortion, race, ethnicity, method of abortion, marital status, maternal residence, the number of previous live births, and the number of previous abortions. Currently, Florida is one of six states and the District of Columbia that does not report data to the CDC.³¹

Disposal of Fetal Remains

Currently, Florida statute and rule require that fetal remains be disposed of in a sanitary and appropriate manner in accordance with standard health practices and the laws and rules covering the disposal of biomedical waste.³² As such an abortion clinic must obtain a biomedical waste generator permit from the Department of Health (DOH), unless the clinic generates less than 25 pounds of biomedical waste per month. Also, s. 873.05, F.S., prohibits any knowing advertisement or offer to purchase or sell a human embryo for valuable consideration.³³ This violation is classified as a second degree felony.

If an abortion clinic fails to dispose of fetal remains properly, the clinic could be liable for penalties under both s. 381.0098, F.S., and ch. 390, F.S. Section 381.0098, F.S., states that any person or public body that violates that section or applicable rules is subject to DOH sanction as well as an administrative fine of up to \$2,500 for each day of a continuing violation. Additionally, any failure by an abortion clinic to dispose of fetal remains in accordance with DOH rule and standard health practices is a second degree misdemeanor³⁴ and any failure by an owner, operator, or employee of an abortion clinic to dispose of fetal remains and tissue consistent with the disposal of other human tissue is a first degree misdemeanor and allows the AHCA to suspend, revoke, or deny the clinic's license.³⁵

Abortion Referral and Counseling Agencies

Section 390.025, F.S., defines an abortion referral and counseling agency as “any person, group, or organization, whether funded publicly or privately, that provides advice or help to persons in obtaining abortions.” The section requires that such an agency provide a full and detailed explanation of abortion, including the effects and alternatives to abortion, to a person seeking an abortion before making a referral or aiding the person in obtaining an abortion. If the person seeking a referral is a minor, the agency must make a good faith effort to furnish the required information to his or her parents or guardian. Additionally, the section prohibits an agency from accepting fees, kickbacks, or other compensation in return for referring a person for an abortion. Any violation of the provisions of the section is a misdemeanor of the first degree.

³⁰ CDCs Abortion Surveillance System FAQ, available at http://www.cdc.gov/reproductivehealth/Data_Stats/Abortion.htm, (last visited on January 21, 2016).

³¹ Abortion Surveillance Report for 2012, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6410a1.htm?s_cid=ss6410a1_e#tab2, (last visited on January 21, 2016).

³² s. 390.0111(7), F.S., and rule 59A-9.030, F.A.C. (laws and rules governing the disposal of biomedical waste are contained in s. 381.0098, F.S., and rule ch. 64E-16, F.A.C.)

³³ “Valuable consideration” does not include the reasonable costs associate with the removal, storage, and transportation of human embryos.

³⁴ s. 390.0111(7), F.S.

³⁵ s. 390.012(7), F.S.

III. Effect of Proposed Changes:

SB 1722 amends various sections of law related to the termination of pregnancies. In addition to the substantive changes detailed below, the bill also makes various technical and conforming changes.

Section 1 amends s. 390.011, F.S., to define the terms:

- “Gestation” to mean the development of a human embryo or fetus between fertilization and birth;
- “First trimester” to mean the period of time from fertilization through the end of the 11th week of gestation;
- “Second trimester” to mean the period of time from the beginning of the 12th week of gestation through the end of the 23rd week of gestation; and
- “Third trimester” to mean the period of time from the beginning of the 24th week of gestation to birth.

Section 2 amends s. 390.0111, F.S., to:

- Clarify that the disposal of fetal remains must be in accordance with s. 381.0098, F.S., and DOH rules;
- To increase the penalty for improperly disposing of fetal remains from a second degree misdemeanor to a first degree misdemeanor; and
- To restrict state agencies, local governmental entities, and Medicaid managed care plans from expending funds for the benefit of, paying funds to, or initiating or renewing a contract with any organization that owns, operates, or is affiliated with one or more clinics that are licensed under ch. 390, F.S., and perform abortions. The bill exempts:
 - Clinics that only perform abortions on fetuses that are the result of rape or incest or abortions that are necessary to preserve the life of the pregnant woman or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition;
 - Funds that must be expended to fulfill the terms of a contract entered into before July 1, 2016; and
 - Funds that must be expended as reimbursement for Medicaid services provided on a fee-for-service basis.

Section 3 amends s. 390.0112, F.S., to update the reporting requirements for abortion clinics to, beginning no later than January 1, 2017, include information consistent with the United States Standard Report of Induced Termination of Pregnancy adopted by the CDC. Additionally, the bill requires that the AHCA submit all such reported data to the CDC as requested by the CDC.

Section 4 of the bill amends s. 390.012, F.S., to:

- Require that the AHCA:
 - Perform annual license inspections of all abortion clinics;³⁶
 - When performing a licensure inspection of an abortion clinic, review at least 50 percent of patient records generated since the clinic’s last license inspection;

³⁶ Note: the AHCA currently performs annual inspections of abortion clinics; however, this requirement is not established in statute.

- Promptly investigate all credible allegations of abortions being performed at a clinic that is not licensed to perform such abortions; and
- Beginning February 1, 2017, annually report to the Legislature on all regulatory actions taken during the prior year by the AHCA under ch. 390, F.S.
- Require, in clinics that only perform first trimester abortions, that either:
 - The clinic have a written patient transfer agreement with a hospital within reasonable proximity that includes the transfer of the patient's medical records; or
 - All physicians who perform abortions in the clinic must have admitting privileges at a hospital within reasonable proximity of the clinic;
- Require, in clinics that perform second trimester abortions, that:
 - The clinic have a written patient transfer agreement with a hospital within reasonable proximity that includes the transfer of the patient's medical records; and
 - All physicians who perform abortions in the clinic must have admitting privileges at a hospital within reasonable proximity of the clinic;

Section 5 amends s. 390.014, F.S., to allow the AHCA to establish in rule a license fee that may not be more than required to pay for the costs incurred by the AHCA in administering ch. 390, F.S. Current law caps the license fee at \$500.

Section 6 amends s. 390.025, F.S., to require that abortion referral and counseling agencies registered with the AHCA and pay a registration fee. The amount of the initial and renewal fees are to be established in rule in an amount not to exceed the costs incurred by the AHCA in administering this section of law. The AHCA is granted rulemaking authority to implement this section and registrants are required to include the registration number issued by the AHCA in any advertising materials disseminated by the registrant. The AHCA may also assess costs related to investigations that result in a successful prosecution under the provisions in the section. The following are exempt from the requirement to register:

- Facilities licensed under chs. 390, 395, 400, and 408, F.S.;
- Facilities that are exempt from the requirement to be licensed as a clinic and that refer five or fewer patients for abortions per month; and
- Health care practitioners who do not, in the course of their practice outside of a licensed facility, refer more than five patients for abortions each month.

Section 7 amends s. 873.05, F.S., to prohibit any advertisement for or offer to sell, purchase, donate, or transfer fetal remains obtained from an abortion other than the transportation or transfer of fetal remains for disposal pursuant to s. 381.0098, F.S., and applicable rules. A violation of this prohibition is a first degree felony.

Section 8 establishes, unless otherwise expressly provided, an effective date for the act of July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It is unclear, given stricter constitutional prohibition against regulations of abortions in the first trimester, whether or not the changes in the bill relating to clinics providing only first trimester abortions may be successfully challenged under Florida's constitution.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

SB 1722 may have a negative fiscal impact on clinics providing abortions due to the additional requirements established in the bill. Additionally, the bill may have a negative fiscal impact on organizations affiliated with clinics providing abortions if such organizations currently receive funds which would be restricted by the bill.

The bill will likely have a negative fiscal impact on abortion referral and counseling agencies due to the requirement to register with the AHCA and pay a registration fee.

C. Government Sector Impact:

The AHCA will incur additional costs due to the increased time required for inspections at licensed abortion clinics and for the registration and oversight functions of abortion referral and counseling agencies. The AHCA is required to set fees at a level to cover these costs. The estimated fiscal impact is not available at this time..

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 390.011, 390.0111, 390.0112, 390.012, 390.014, 390.025, and 873.05.

IX. Additional Information:

- A. **Committee Substitute – Statement of 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.
