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DATE: February 20, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH REGULATION
ANALYSIS**

BILL #: HB 1223
RELATING TO: Termination of Pregnancies
SPONSOR(S): Representatives Bean, Kilmer, Murman, and others
TIED BILL(S): None.

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) HEALTH REGULATION
 - (2) COUNCIL FOR HEALTHY COMMUNITIES
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

HB 1223 amends s. 390.0112, F.S., requiring a physician or a facility medical director to report terminations of pregnancies. The bill requires reports to be filed on each patient after each procedure. Currently these reports must be filed monthly. The bill clarifies that the reports must be filed with the Agency for Health Care Administration (agency) within 30 days following the procedure, and states that the licensee shall be subject to disciplinary action by the licensing authority upon successive failures to file the report. Currently, those that violate the reporting requirement are subject to a \$200 fine for each violation.

The bill requires the agency to develop a reporting form that is uniform in nature to the categories reported in the Centers for Disease Control and Prevention Surveillance Summary on Abortion. Currently, the form must only contain the number of procedures performed, the reason for same, and the period of gestation at the time such procedures were performed.

The bill amends s. 390.012, F.S., stating that the rules developed by the agency for clinics that perform first trimester abortions only shall be comparable to the rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of abortions during the first trimester. For clinics that perform abortions after the first trimester, the rules should be comparable to the rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of abortions during the second trimester. Currently, the clinical standard for regulation of all abortions is that it be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions.

The bill specifies that the rules developed by the agency relating to abortions performed in abortion clinics must be in accordance with current statutes that stipulate prohibited acts relating to abortions. The bill provides that the rules must not impose an "unconstitutional", instead of the current language of "legally significant," burden on the woman's freedom to decide whether to have an abortion. Finally, the bill requires abortion clinics to develop policies to protect the health, care, and treatment of patients.

Based on information provided by the DOH, there is a fiscal impact.

The bill's effective date is July 1, 2002.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|-----------------------------------------|----------------------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

Less Government: The bill requires the Agency for Health Care Administration to develop a form to be used by medical directors in reporting pregnancy terminations. The bill requires a pregnancy termination report to be filed by medical directors after every termination, rather than on a monthly basis, thereby requiring the agency to process more of these reports. These additional requirements increase responsibility to the state, regarding developing and processing of reporting forms for pregnancy terminations.

Additionally, the bill directs the Agency for Health Care Administration, in its development of rules relating to the safe operation of abortion clinics, to distinguish between clinics that perform only first trimester abortions and those clinics that perform second trimester abortions. This increases responsibility to the state, regarding regulation of abortion clinics.

Individual Freedom: This principle is both achieved and not achieved by the bill. The bill requires directors of medical facilities to fill out a pregnancy termination report after every termination, rather than on a monthly basis. The bill requires abortion clinics to develop, promulgate, and enforce policies to protect the health, care, and treatment of patients. These requirements increase responsibilities of private clinics.

The bill states that the policies to be developed by the clinics should relate to protecting health, care, and treatment of patients. These policies may both increase and limit options of individuals, depending on the nature of the policy.

B. PRESENT SITUATION:

Collecting data on abortions in Florida:

Currently all statistical data and analysis on termination of pregnancies is collected by the Department of Health (DOH), Office of Vital Statistics. Section 390.0112(1), F.S., requires the report to be filed with the Agency for Health Care Administration; however, it is the practice of the agencies (DOH & AHCA) to direct the medical directors and physicians to file the report with the DOH. Chapter 59A-9.034, F.A.C., requires that an abortion clinic must submit a cumulative report each month to the Office of Vital Statistics. The Agency for Health Care Administration licenses and inspects abortion clinics, but all reporting from physicians or medical directors regarding termination of pregnancies is sent directly to the DOH, Office of Vital Statistics where the data is entered and reports are prepared.

Reports are confidential and will not be revealed except under the order of a court. Statutorily, such reports include the following information:

- Number of procedures performed;
- Reason for pregnancy termination (personal choice, physical condition, mental condition, abnormal fetus, or other reason) which must be specified; and
- Period of gestation (specified by trimester) at the time such procedure was performed.

Currently, the form used by the Department of Health also includes the following data fields:

- Facility name;
- Facility address (Street Address);
- City of Facility;
- County;
- Zip Code;
- Telephone number and Area Code;
- Director, Physician or authorized Representative;
- Title;
- Signature;
- Date Signed

If the termination of pregnancy was not performed in a medical facility (physician's office), the physician performing the procedure is also responsible for reporting such information to the DOH.

A \$200 fine is assessed against any person who willfully fails to file the monthly report.

Regulation of abortion clinics:

Currently, the agency and the DOH have promulgated detailed rules regulating the licensure of and setting clinical standards for surgical facilities, including physicians' offices (Chapter 64B8-9.009, F.A.C.) and ambulatory surgical centers (Chapter 59A-5, F.A.C.).

The agency has also promulgated rules regulating abortion clinics (Chapter 59A-9, F.A.C.). Under the current statute, s.390.012(1), F.S., the agency's rulemaking authority for abortion clinics is limited to the promulgation of rules that are "comparable to rules which apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions." According to the Department of Health and the Agency for Health Care Administration, since this statute was originally passed, abortions performed after the first trimester have become commonplace. The agency's authority to protect patient health is limited by the statutory rule authority language, which sets the clinical standard for such rules at a level lower than that necessary to benefit patients receiving post-first trimester abortions. The rule governing abortion clinics is less clinically significant than the rules governing office surgery and ambulatory surgical centers.

Currently, there is no requirement in law or rule that abortion clinics develop any policy, in contrast to the rules on office surgery and ambulatory surgical clinics.

Collecting data on abortion, nationally – The Centers for Disease Control and Prevention (CDC) Surveillance Summary on Abortion:

In 1969, CDC began abortion surveillance to document the number and characteristics of women obtaining legal induced abortions, to monitor unintended pregnancy, and to assist efforts to identify and reduce preventable causes of morbidity and mortality associated with abortions.

For each year since 1969, CDC has compiled abortion data by state where the abortion occurred. The data are received from 52 reporting areas in the United States: 50 states, the District of Columbia, and New York City.

According to the CDC, the number and characteristics of women who obtain abortions in the United States should continue to be monitored so that trends in induced abortion can be assessed and efforts to prevent unintended pregnancy can be evaluated.

In its December 2000 report entitled, "Abortion Surveillance – United States, 1997", the CDC indicated that the availability of information about characteristics of women who obtained an abortion in 1997 varied by state. Most reporting areas (44 states, the District of Columbia, and New York City) collected and reported adequate abortion data (i.e., data with <15% unknown values and categorized in accordance with the study variables) by age of the woman, whereas only 26 states, the District of Columbia, and New York City collected and reported adequate abortion data by Hispanic ethnicity. Therefore, the findings of the CDC report only reflect characteristics among women from reporting areas that submitted adequate data.

The CDC indicated in its report the following categories of information about women who obtained legal abortions in the United States:

- Reported number of legal abortions
- Residence (in-state or out-of-state)
- Age (Three categories: ≤19, 20-24, ≥25)
- Race (White, Black, Other)
- Hispanic origin (Hispanic, Non-Hispanic)
- Marital status (Married, Unmarried)
- Number of previous live births
- Type of procedure
- Weeks of gestation

The results of the report were based on known values in data from all areas reporting a given characteristic with no more than 15% unknowns. The number of areas reporting a given characteristic varied. For 1997, the number of areas included for residence was 45; age, 46; race 39; ethnicity, 28; marital status, 38; number of live births, 39; type of procedure, 43; and weeks of gestation, 42.

Data on abortions performed in Florida was not included in the report for the following categories: reported abortions by age group, reported abortions by weeks of gestation, reported abortions obtained by adolescents, reported abortions by type of procedure, reported abortions by race, reported abortions by Hispanic ethnicity, reported abortions by marital status, and reported abortions by number of previous live births.

C. EFFECT OF PROPOSED CHANGES:

The bill requires the director of any medical facility in which a pregnancy is terminated to submit a report to the Agency for Health Care Administration (agency) following each termination, rather than monthly. The agency is required to develop a reporting form that contains information regarding each category reported in the Centers for Disease Control and Prevention Surveillance Summary on Abortion.

The bill clarifies that the reports must be filed with the agency within 30 days following the procedure. Presently, if these reports are not timely received, the licensee shall be subject to a \$200 fine for willful failure to file, for each violation. Because the bill requires a report to be filed

after each procedure, rather than monthly, this increases the potential number of violations for failure to file a report. Additionally, the bill states that upon successive failure to file, the licensee shall be subject to disciplinary action by the licensing authority.

As it relates to the power of the agency to regulate abortion clinics, the bill distinguishes between clinics that perform only first trimester abortions and those that perform second trimester abortions. The bill states that for clinics that perform first trimester abortions only, the rules developed by the agency should be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions. The bill states that rules for clinics that perform second trimester abortions shall be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of second trimester abortions. For clinics that perform both first and second trimester abortions, it is unclear whether the second trimester standard would apply to all abortions performed at those clinics, or whether the standard would change depending on the particular trimester.

The bill states that agency rules shall be in accordance with s. 797.03, F.S., which describes prohibited acts relating to abortion and provides penalties. The bill clarifies that the rules should not impose an "unconstitutional", instead of the current language of "legally significant", burden on a woman's freedom to decide to terminate her pregnancy. An "unconstitutional" burden, as it pertains to the fundamental liberty interest in terminating one's pregnancy, has been defined by the U.S. Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992) as an "undue burden." The Court further defines undue burden as a "state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Casey at 878.

The bill requires all abortion clinics that perform termination of pregnancies to develop, promulgate, and enforce policies to protect the health, care, and treatment of patients.

The bill's effective date is July 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 390.0112, F.S., requiring the director of any medical facility in which any pregnancy is terminated to submit a report to the agency following each termination, on a form developed by the agency. The report shall contain information regarding each category reported in the Centers for Disease Control and Prevention Surveillance Summary on Abortion.

Clarifies that the reports must be filed with the agency within 30 days following the procedure, and states that the licensee shall be subject to disciplinary action by the licensing authority upon successive failures to file the report.

Section 2. Amends s. 390.012, F.S., regarding enforcement of rules for the health, care, and treatment of persons in abortions clinics and for the safe operation of such clinics. Distinguishes, as to the power of the agency to regulate abortion clinics, between clinics that perform only first trimester abortions and those that perform second trimester abortions. States that for clinics that perform first trimester abortions only, the rules developed by the agency should be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions. States that rules for clinics that perform second trimester abortions shall be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of second trimester abortions.

States that agency rules shall be in accordance with s. 797.03, F.S. Clarifies that the rules should not impose an unconstitutional, rather than a legally significant, burden on a woman's freedom to decide to terminate her pregnancy.

Requires abortion clinics to develop, promulgate, and enforce policies to protect the health, care, and treatment of patients, which include obtaining the informed consent of the patient and the postoperative care of patients suffering from complications from an abortion.

Section 3. Provides that the bill shall take effect July 1, 2002.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

The Department of Health estimates the following non-recurring expenditures:

<u>Expense</u>	<u>Amount Year 1</u>	<u>Amount Year 2</u>
Upgrade Software for individual reporting	\$2,000	
Total Non-Recurring Expenditures	\$2,000	

The department estimates the following recurring expenditures:

<u>Expense</u>	<u>Amount Year 1</u>	<u>Amount Year 2</u>
Form design and printing	\$4,000	\$3,500
Contract data entry	\$18,900	\$18,900
Total Recurring Expenditures	\$22,900	\$22,400
Sub-Total Non-Recurring Expenditures	\$2,000	
Sub-Total Recurring Expenditures	\$22,900	\$22,400
Total Expenditures	\$24,900	\$22,400

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Agency for Health Care Administration estimates that there will be no fiscal impact relative to abortion clinics. The agency recognizes that the bill requires medical directors of all facilities that perform abortions to increase the number of reports they file with the DOH, and also requires

licensed clinics, which have not already done so, to develop, promulgate and enforce new policies, and to comply with additional rules as developed by the agency to implement the bill.

D. FISCAL COMMENTS:

Physicians and medical directors are now required to report terminations of pregnancies on a monthly basis to the Department of Health, Office of Vital Statistics. If this bill passes, the physicians and medical directors will be required to report each termination of pregnancy separately within 30 days from the date of termination. The Office of Vital Statistics reported to the Agency for Health Care Administration in 1998 that a total of 82,335 abortions were reported. According to the agency, although the exact fiscal impact cannot be determined, the impact of processing this number of individual reports may require additional staff.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Right of Privacy under the Federal Constitution:

The United States Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) sets forth the limits that the 14th Amendment Due Process Clause of the United States Constitution imposes on the states' ability to interfere with abortion procedures. 505 U.S. at 874. In Casey, the Court held that a state has legitimate interests in protecting the life of the fetus, however, the Court held that the following two principles are paramount:

1. A woman has a right to an abortion before viability and to obtain it without undue interference from the state. Id. at 846.
2. Subsequent to viability, the state in promoting its interest in the potentiality of human life may ... proscribe abortion, except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother. Id. at 879, quoting Roe v. Wade, 410 U.S. at 164-165.

Under Casey, state legislation that does not comply with these two principles may raise constitutional concerns.

Right of Privacy under the Florida Constitution:

The Florida Supreme Court has held that the express right of privacy in section 23 of article I of the Florida Constitution provides broader protection than that afforded by the U.S. Constitution. See Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985). Therefore, any state regulation of a fundamental right is subject to the higher standard of review, i.e., strict scrutiny. The Florida Supreme Court has held that the right of privacy is “clearly implicated in a woman’s decision of whether or not to continue her pregnancy.” In re T.W., 551 So.2d 1186, 1192 (1989) (statute for parental consent for a minor’s abortion declared unconstitutional). Therefore, any regulation regarding termination of pregnancy must be analyzed against whether the state has a compelling state interest and whether the state has satisfied its burden to justify its regulatory goal through the use of the least intrusive means. Id., citing to Winfield, 447 So.2d at 547.

Constitutional Implications:

The bill may possibly implicate a woman’s right of privacy, if the regulations and policies required are construed by the courts to constitute an undue burden on the woman’s right to choose to have an abortion before viability. However, according to the Court in Casey, “not all burdens on the right to decide whether to terminate a pregnancy will be undue.” Casey at 876. The Court recognized the following requirements as constitutional: informed consent; 24-hour waiting period; parental consent; and record keeping. Also, “regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.” Id. at 878.

Section 1 of the bill deals with reporting requirements for abortions. In Planned Parenthood v. Danforth, 428 U.S. 52, 80, (1976), the Supreme Court held that “recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient’s confidentiality and privacy are permissible.” However, the Court held that record-keeping requirements may not be “utilized in such a way as to accomplish, through the sheer burden of record keeping detail, what we have held to be an otherwise unconstitutional restriction.” Danforth at 81. Therefore, the requirement of filing a report after each individual procedure rather than monthly, could possibly be challenged as having the effect of placing a substantial obstacle in the way of a woman’s right to choose to terminate her pregnancy. The Court in Casey noted that the effect of slightly increasing cost of abortion is not an undue burden, but stated that “at some point, increased cost could become a substantial obstacle.” Casey at 901.

Section 2 of the bill, in directing the Agency for Health Care Administration to regulate the treatment of persons in abortion clinics and the safe operation of such clinics, requires the resulting rules to provide for the following:

- A distinction between abortion clinics that provide only first trimester abortions and those that perform second trimester abortions, and enforcement of a comparable standard of care as that for all surgical procedures requiring approximately the same degree of skill and care as abortions performed during the particular trimester;
- Compliance with s. 797.03, F.S.; and
- Requirement that abortion clinics develop, promulgate, and enforce policies to protect the health, care, and treatment of patients, including policies relating to obtaining the informed consent of the patient and to postoperative care of patients suffering complications from an abortion.

Informed consent requirements are already provided for in statute in s. 390.0111(3), F.S. No current requirement for postoperative care exists. In Florida Women’s Medical Clinic v. Smith, 536 F. Supp. 1048, 1059 (1982), major provisions of the Florida’s abortion law in chapter 390, F.S. (1980), were declared unconstitutional. The court ordered a permanent injunction against

enforcement of a statutory requirement that agency rules provide for the “availability of aftercare services.” Id. The same court rejected reconsideration of the injunction in 1990. See Florida Women’s Medical Clinic v. Smith, 746 F. Supp. 89 (1990). Therefore, the postoperative care requirement of the bill could possibly be subject to challenge for violation of the injunction.

Furthermore, the injunction provided that the agency could not enforce rules pertaining to: the establishment of minimum standards for the care and treatment of clients of an abortion clinic; the availability of emergency medical services to be administered by a hospital; the transportation of patients requiring emergency care from an abortion clinic to a licensed hospital; the cleanliness of an abortion clinic; or license suspension or revocation, or criminal penalties for failure to dispose of fetal remains and tissue. The injunction may therefore affect the agency’s ability to develop and enforce rules that apply comparable standards as that of surgical procedures requiring approximately the same degree of skill and care to abortion procedures.

The bill does retain the current statutory requirement found in s. 390.012(1), F.S., that the rules be reasonably related to the preservation of maternal health, and that they not be an unconstitutional burden on choice. This will require the agency to consider the current federal and state case law on what type of regulations do or do not violate the right to privacy.

B. RULE-MAKING AUTHORITY:

The bill will require revisions to rules. The reporting rule would be amended to incorporate the new reporting form required by the bill. The clinic-licensing rule would be amended to delineate rules applicable to clinics that perform abortions after the first trimester in contrast to those applicable to clinics that perform abortions in the first trimester. The clinic-licensing rule would be amended to specify the types of policies clinics must develop, promulgate, and enforce to comply with the statute.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON HEALTH REGULATION:

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