

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1397 Abortions

**SPONSOR(S):** Burgin and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1748

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee		Prater	Calamas
2) Health & Human Services Committee			

### SUMMARY ANALYSIS

This bill amends chapter 309, F.S., relating to termination of pregnancies. The bill:

- Expands the category of prohibited abortions in Florida to include those when the fetus has attained viability.
- Modifies the medical emergency exception to the prohibition on third trimester or post-viability abortions.
- Requires all abortion clinics to provide conspicuous notice on any advertisements 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 implement a rule to enforce this provision.
- Transfers the criminal statutory prohibitions found in s. 797.03, F.S., to a newly created s. 390.0111(2), F.S., and conforms them to other changes in the bill.
- Transfers the criminal statutory prohibitions found in s. 797.02, F.S., to a newly created s. 390.0111(10)3., F.S.
- Adds new statutory requirements for all abortion clinics and physicians by requiring 3 hours annual continuing education relating to ethics, requiring a physician to own and operate an abortion clinic, and requiring any abortion performed after viability to be performed in a hospital.
- Amends s. 390.0111(10), F.S., by requiring the Department of Health to permanently revoke the license of any health care practitioner who has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, violating s. 390.0111, F.S.
- Amends current reporting requirements for facilities that perform abortions to conform to standards set by the U.S. Centers for Disease Control.
- Requires AHCA to submit an annual report, using collected information from abortion clinics or physician's offices performing abortions, to the U.S. Centers for Disease Control.
- Provides a severability clause.

The bill appears to have no fiscal impact.

The effective date of the bill is July 1, 2011.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

###### Background

In 2008, there were 1.21 million abortions nationwide.<sup>1</sup> This same year, 22 percent of all pregnancies (excluding miscarriages) resulted in abortion.<sup>2</sup> According to the most recent statistics available, in 2008, there were 94,360 abortions in Florida<sup>3</sup>, while there were 231,657 live births.<sup>4</sup> This amounts to approximately 2 abortions for every 5 births

Florida law prohibits abortions in the third trimester of pregnancy unless the abortion is performed out of medical necessity.<sup>5</sup> The third trimester is defined as the weeks of pregnancy after the 24<sup>th</sup> week (weeks 25-birth).<sup>6</sup> However, AHCA data indicates that of the 125 abortions performed in the 25<sup>th</sup> week or after in 2009, 121 of them were elective, i.e., not for a medical emergency. Although Florida defines the third trimester as any week after the 24<sup>th</sup> week of pregnancy, the American Congress of Obstetricians and Gynecologists list the third trimester as weeks 29-40; the second trimester as weeks 14-28; and the first trimester as weeks 0-13.<sup>7</sup> First and Second trimester abortions are currently permitted in the state of Florida without limitations.

According to data collected by the Agency for Health Care Administration (AHCA), there were 6,641 abortions performed at a gestational age of 13 weeks or greater in Florida in 2009.<sup>8</sup> That same year, 2,986 premature babies aged 29 weeks gestation and younger survived birth<sup>9</sup>.

###### *Abortion Clinic Regulations*

Under current law, abortion clinics in Florida can be owned by individuals or entities. There are 68 abortion clinics currently licensed by the State of Florida.<sup>10</sup> Six of these 68 clinics are owned by an individual, while the others are owned by companies or corporations. Only one of the six individual clinic owners in the state is listed as a medical doctor.<sup>11</sup>

Abortion clinics and physicians that perform abortions are subject to various laws and regulations. Some violations of these laws and regulations may result in criminal penalties, while others may result in licensure actions or administrative fines. Additionally, some laws and regulations that apply to clinics that perform abortions for one or more patients in their second trimester of pregnancy do not apply to clinics that only provide abortions to patients in their first trimester.

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<sup>1</sup> The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.

<sup>2</sup> *Id.*

<sup>3</sup> The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.

<sup>4</sup> Florida Department of Health, Department of Vital Statistics, 2008

<sup>5</sup> S. 390.0111 (1), F.S.

<sup>6</sup> S. 390.011, F.S.

<sup>7</sup> American Congress of Obstetricians and Gynecologists, Patient Education Pamphlet: *You and Your Baby* (last viewed on March 17, 2011).

<sup>8</sup> The Agency for Health Care Administration, *Reported Induced Terminations of Pregnancy by reason, Jan-Dec 2009*, on file with the committee.

<sup>9</sup> The Department of Health, Births by Year of Birth by Calculated Gestation 2009, on file with the committee.

<sup>10</sup> The Agency For Health Care Administration, Florida Health Finder Report, All Abortion Clinics as of March 17, 2011 (on file with the committee).

<sup>11</sup> *Id.*

All abortion clinics and physicians performing abortions are subject to the following requirements:

- An abortion can only be performed in a validly licensed hospital, abortion clinic, or in a physician's office.<sup>12</sup>
- An abortion clinic must be operated by a person with a valid and current license.<sup>13</sup>
- Any third trimester abortion procedure must only be performed in a hospital.<sup>14</sup>
- No abortion shall be performed in the third trimester of pregnancy, unless medically necessary.<sup>15</sup>
- An abortion must be performed by a physician as defined in s. 390.011, F.S.<sup>16</sup>
- Proper medical care must be given and used for a fetus for abortions performed during viability.<sup>17</sup>
- Experimentation on a fetus is prohibited.<sup>18</sup>
- No hospital or person can be forced to participate in an abortion procedure.<sup>19</sup>
- Except when there is a medical emergency, an abortion may only be performed after a patient has given voluntary and written informed consent.<sup>20</sup>
- Fetal remains shall be disposed of in a sanitary and appropriate manner.<sup>21</sup>
- Parental notice must be given 48 hours before performing an abortion on a minor,<sup>22</sup> unless waived by a parent or otherwise ordered by a judge.

Abortion clinics that perform abortions after the first trimester are subject to additional laws and regulations which are enforced by AHCA. AHCA can impose fines for violations. For example, pursuant to s. 390.0112, F.S., such clinics are required to have proper dressing rooms, hand-washing areas, and proper exam tables; proper clinical supplies and equipment such as sterilized instruments, medication and ultrasound equipment; meet certain personnel requirements, such as having a designated medical director who has hospital privileges, surgical staff trained in counseling, and trained volunteers; provide for medical screening such as checking medical history, certain blood tests, performing an ultrasound, and performing physical examinations; have certain protocols in place, such as the use of anesthesia, intravenous access, and monitoring vital signs; and post certain protocols for patients to see, such as the required length of stay, post abortion medical instructions, and follow up visits.

### *Abortion Reporting*

Currently facilities that perform abortions are required to submit a monthly report that contains the number of abortions performed, the reason for the abortion, and the gestational age of the fetus.<sup>23</sup> AHCA is required to keep this information in a central location from which statistical data can be drawn.<sup>24</sup> If the abortion is performed in a location other than an abortion clinic, the physician who performed the abortion is responsible for reporting the information.<sup>25</sup> The reports are confidential and exempt from public records requirements.<sup>26</sup> Fines may be imposed for violations of the reporting requirements.<sup>27</sup> Currently the agency collects and maintains the data but is not required to report it.

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<sup>12</sup> s. 797.03 (1), F.S.

<sup>13</sup> s. 797.03 (2), F.S.

<sup>14</sup> s. 797.03(3), F.S. The violation of any of these provisions results in a second degree misdemeanor.

<sup>15</sup> s. 390.0111(1), F.S.

<sup>16</sup> s. 390.0111(2), F.S.

<sup>17</sup> s. 390.0111(4), F.S.

<sup>18</sup> s. 390.0111(6), F.S.

<sup>19</sup> s. 390.0111(8), F.S. Any person that performs or participates in an abortion that violates any of these provisions commits a third degree felony. Any person that performs or participates in an abortion that violates any of these provisions and results in the death of a woman commits a second degree felony.

<sup>20</sup> s. 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.

<sup>21</sup> s. 390.0111(8), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.

<sup>22</sup> s. 390.01114(3), F.S. A physician who violates this provision is subject to disciplinary action.

<sup>23</sup> s. 390.0112 (1)

<sup>24</sup> *Id.*

<sup>25</sup> s. 390.0112(2)

<sup>26</sup> s. 390.0112(3)

The U.S. Centers for Disease Control (CDC) requests data each year from the 50 states, the District of Columbia, and New York City to document abortion statistics nationwide.<sup>28</sup> While there is no national requirement for states to report this data, almost all states do.<sup>29</sup> The CDC uses this data to produce an annual Abortion Surveillance Report, which contains statistical data from each reporting state. The data includes the total number of abortions, the gestational age of the fetus, as well as the age, race, ethnicity, and marital status of the woman obtaining the abortion.<sup>30</sup> Currently, Florida only provides the CDC with the annual number of reported abortions and is therefore absent on most of the statistical charts that the Abortion Surveillance Report provides.<sup>31</sup> Florida is only included on 3 of the 35 total charts contained in the Abortion Surveillance Report.<sup>32</sup>

For example, the following chart illustrates abortion occurrences among minors and their ages.<sup>33</sup> No information is presented for Florida because Florida neither collects nor reports this data.

TABLE 5. Reported abortions among adolescents, by known age and reporting area of occurrence --- selected states,* United States, 2007													
State/Area	Age (yrs)												Total
	<15		15		16		17		18		19		
	No.	(%)†	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)	
Alabama	104	(5.2)	144	(7.1)	223	(11.1)	324	(16.1)	557	(27.6)	666	(33.0)	2,018
Alaska	8	(2.5)	9	(2.8)	40	(12.3)	78	(24.1)	103	(31.8)	86	(26.5)	324
Arizona	146	(7.3)	97	(4.8)	189	(9.4)	295	(14.7)	575	(28.7)	700	(35.0)	2,002
Arkansas	39	(4.5)	52	(6.0)	104	(12.0)	147	(16.9)	254	(29.2)	274	(31.5)	870
Colorado	44	(2.1)	120	(5.7)	249	(11.8)	361	(17.1)	608	(28.8)	732	(34.6)	2,114
Connecticut	87	(3.1)	170	(6.1)	311	(11.2)	600	(21.7)	744	(26.9)	858	(31.0)	2,770
Delaware§	20	(3.0)	46	(6.8)	93	(13.8)	113	(16.7)	194	(28.7)	210	(31.1)	676
D.C.	12	(3.2)	29	(7.7)	50	(13.2)	99	(26.1)	85	(22.4)	104	(27.4)	379
Georgia	230	(4.7)	310	(6.3)	570	(11.6)	789	(16.0)	1,397	(28.4)	1,626	(33.0)	4,922
Hawaii	29	(3.8)	62	(8.1)	110	(14.3)	153	(19.9)	195	(25.4)	218	(28.4)	767
Idaho	5	(1.7)	14	(4.7)	33	(11.2)	52	(17.6)	96	(32.5)	95	(32.2)	295
Indiana	52	(2.8)	98	(5.3)	195	(10.6)	275	(15.0)	555	(30.2)	664	(36.1)	1,839
Iowa	25	(2.1)	79	(6.6)	156	(13.1)	197	(16.6)	328	(27.6)	404	(34.0)	1,189
Kansas	55	(3.1)	121	(6.7)	205	(11.4)	287	(16.0)	504	(28.1)	622	(34.7)	1,794
Kentucky	51	(6.4)	62	(7.7)	100	(12.5)	130	(16.2)	221	(27.5)	239	(29.8)	803
Louisiana	67	(5.7)	79	(6.7)	121	(10.3)	171	(14.6)	315	(26.9)	420	(35.8)	1,173
Maine	10	(2.0)	26	(5.3)	57	(11.6)	96	(19.5)	135	(27.4)	169	(34.3)	493
Massachusetts	83	(2.0)	223	(5.4)	362	(8.7)	663	(16.0)	1,204	(29.0)	1,613	(38.9)	4,148
Michigan	124	(2.7)	282	(6.2)	536	(11.8)	739	(16.3)	1,301	(28.7)	1,549	(34.2)	4,531
Minnesota	55	(2.6)	97	(4.5)	241	(11.3)	331	(15.5)	634	(29.7)	779	(36.5)	2,137
Mississippi	23	(5.0)	38	(8.2)	59	(12.8)	57	(12.3)	132	(28.6)	153	(33.1)	462
Missouri	40	(3.2)	87	(6.9)	125	(9.9)	185	(14.7)	364	(28.9)	459	(36.4)	1,260

<sup>27</sup> S. 390.0112(4).

<sup>28</sup> Centers for Disease Control and Prevention, Abortion Surveillance-United States, 2007 see: [http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm?s\\_cid=ss6001a1\\_x](http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm?s_cid=ss6001a1_x) (last viewed March 19, 2011).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Montana	8	(1.9)	26	(6.1)	52	(12.2)	71	(16.7)	111	(26.1)	158	(37.1)	<b>426</b>
Nebraska	15	(3.7)	33	(8.2)	43	(10.7)	62	(15.4)	104	(25.8)	146	(36.2)	<b>403</b>
Nevada	47	(2.8)	84	(4.9)	186	(10.9)	326	(19.1)	489	(28.6)	575	(33.7)	<b>1,707</b>
New Jersey**	104	(2.5)	222	(5.4)	480	(11.7)	809	(19.7)	1,151	(28.1)	1,333	(32.5)	<b>4,099</b>
New Mexico	39	(3.3)	69	(5.8)	162	(13.6)	219	(18.4)	328	(27.6)	373	(31.3)	<b>1,190</b>
New York	690	(3.0)	1,388	(6.0)	2,887	(12.5)	4,612	(19.9)	6,391	(27.6)	7,203	(31.1)	<b>23,171</b>
New York City	470	(3.1)	954	(6.2)	1,959	(12.8)	3,031	(19.8)	4,196	(27.4)	4,704	(30.7)	<b>15,314</b>
New York State	220	(2.8)	434	(5.5)	928	(11.8)	1,581	(20.1)	2,195	(27.9)	2,499	(31.8)	<b>7,857</b>
North Carolina	182	(3.4)	317	(5.9)	540	(10.1)	786	(14.7)	1,574	(29.5)	1,930	(36.2)	<b>5,329</b>
North Dakota	5	(2.2)	12	(5.4)	36	(16.1)	34	(15.2)	72	(32.3)	64	(28.7)	<b>223</b>
Ohio	207	(3.7)	399	(7.1)	715	(12.8)	945	(16.9)	1,513	(27.1)	1,804	(32.3)	<b>5,583</b>
Oklahoma	37	(3.3)	63	(5.6)	141	(12.6)	186	(16.6)	294	(26.2)	400	(35.7)	<b>1,121</b>
Oregon	49	(2.4)	122	(5.9)	215	(10.5)	397	(19.3)	567	(27.6)	705	(34.3)	<b>2,055</b>
Pennsylvania	211	(3.2)	401	(6.1)	707	(10.8)	977	(14.9)	1,981	(30.2)	2,280	(34.8)	<b>6,557</b>
South Carolina	51	(3.6)	91	(6.5)	150	(10.7)	354	(25.2)	365	(26.0)	395	(28.1)	<b>1,406</b>
South Dakota	0	(0.0)	11	(8.1)	11	(8.1)	24	(17.8)	34	(25.2)	55	(40.7)	<b>135</b>
Tennessee	120	(4.1)	206	(7.0)	319	(10.8)	436	(14.8)	831	(28.2)	1,040	(35.2)	<b>2,952</b>
Texas	197	(1.9)	546	(5.2)	1,030	(9.7)	1,697	(16.1)	2,825	(26.7)	4,272	(40.4)	<b>10,567</b>
Utah	17	(2.6)	33	(5.0)	54	(8.1)	87	(13.1)	220	(33.2)	252	(38.0)	<b>663</b>
Vermont	6	(2.1)	15	(5.3)	28	(9.9)	53	(18.7)	73	(25.8)	108	(38.2)	<b>283</b>
Virginia	120	(3.0)	207	(5.2)	373	(9.3)	559	(14.0)	1,200	(30.1)	1,533	(38.4)	<b>3,992</b>
Washington	109	(2.3)	248	(5.3)	557	(11.9)	937	(20.0)	1,286	(27.5)	1,542	(33.0)	<b>4,679</b>
West Virginia	12	(3.8)	28	(8.9)	28	(8.9)	54	(17.3)	98	(31.3)	93	(29.7)	<b>313</b>
Wisconsin§	45	(3.2)	85	(6.1)	173	(12.5)	248	(17.9)	379	(27.3)	459	(33.0)	<b>1,389</b>
Wyoming	0	(0.0)	0	(0.0)	0	(0.0)	0	(0.0)	0	(0.0)	0	(0.0)	<b>0</b>
<b>Total</b>	<b>3,580</b>	<b>(3.1)</b>	<b>6,851</b>	<b>(5.9)</b>	<b>13,016</b>	<b>(11.3)</b>	<b>20,015</b>	<b>(17.4)</b>	<b>32,387</b>	<b>(28.1)</b>	<b>39,360</b>	<b>(34.2)</b>	<b>115,209</b>
<b>Abortion rate††</b>	<b>1.2</b>		<b>4.4</b>		<b>8.3</b>		<b>12.5</b>		<b>21.2</b>		<b>25.8</b>		<b>10.7</b>
<b>Abortion ratio§§</b>	<b>753</b>		<b>495</b>		<b>404</b>		<b>337</b>		<b>337</b>		<b>291</b>		<b>337</b>

\* Data from 46 reporting areas; excludes six states (California, Florida, Illinois, Maryland, New Hampshire, and Rhode Island) that did not report, did not report age among adolescents by individual year, or did not meet reporting standards for age.

† Percentages for the individual component categories might not add up to 100.0 because of rounding.

§ Includes residents only.

¶ Because reporting is not mandatory, information could not be obtained for all abortions performed in the District of Columbia.

\*\* Data from hospitals and licensed ambulatory care facilities only; because reporting is not mandatory for private physicians and women's centers, information could not be obtained for all abortions performed in New Jersey.

†† Number of abortions obtained by adolescents in a given age group per 1,000 adolescents in that same age group. Adolescents aged 13--14 years were used as the denominator for adolescents aged <15 years.

§§ Number of abortions obtained by adolescents in a given age group per 1,000 live births to adolescents in that same age group.

According to the CDC, "abortion surveillance in the United States continues to provide the data needed to examine trends in the number and characteristics of women obtaining abortions. Policymakers and program planners can use these data to guide and evaluate efforts to prevent unintended pregnancies."<sup>34</sup>

### Caselaw Related to Abortion

#### *The Viability Standard*

<sup>34</sup> *Id.*

In the seminal case regarding abortion, *Roe v. Wade*, the United States Supreme Court established a rigid trimester framework for determining how, if at all, states can regulate abortion.<sup>35</sup> One of the primary holdings in the case was that, in the third trimester, when the fetus is considered viable, states can prohibit abortions as long as the life or health of the mother is not at risk.<sup>36</sup>

Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than that of the third trimester, in *Planned Parenthood v. Casey*<sup>37</sup> the United States Supreme Court rejected the trimester framework in favor of limiting the states' ability to regulate abortion pre-viability.<sup>38</sup>

Thus, while upholding the underlying holding in *Roe* that states can "[r]egulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother[.]"<sup>39</sup> the Court determined that the line for this authority should be drawn at "viability," because "[T]o be sure, as we have said, there may be some medical developments that affect the precise point of viability...but this is an imprecision with tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter."<sup>40</sup> Furthermore, the Court recognized that "In some broad sense, it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."<sup>41</sup>

### *The Medical Emergency Exception*

One question before the *Casey* Court was whether the medical emergency exception to a 24-hour waiting period for an abortion was too narrow in that there were some potentially significant health risks that would not be considered "immediate."<sup>42</sup> The exception in question provided that a medical emergency is:

[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert death or for which delay will create serious risk of substantial and irreversible impairment of a major bodily function<sup>43</sup>

The Court determined that the exception would not significantly threaten the life and health of a woman and imposed no undue burden on the woman's right to choose.<sup>44</sup>

### *Florida Caselaw*

Article I, Section 23 of the Florida Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."<sup>45</sup>

In *In re T.W.* the Florida Supreme Court, determined that

[p]rior 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

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<sup>35</sup> 410 U.S. 113 (1973).

<sup>36</sup> *Id.* at 164-165.

<sup>37</sup> 505 U.S. 833 (1992).

<sup>38</sup> The standard developed in the *Casey* case was the "undue burden" standard, which provides that a state regulation cannot impose an undue burden on, meaning it cannot place a substantial obstacle in the path of, the woman's right to choose. *Id.* at 876-79.

<sup>39</sup> See *Roe*, 410 U.S. at 164-65.

<sup>40</sup> See *Casey*, 505 U.S. at 870.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 880.

<sup>43</sup> *Id.* at 879.

<sup>44</sup> *Id.* at 880.

<sup>45</sup> See *In re T.W.*, 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).

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 procedures.<sup>46</sup>

The court recognized that after viability, the state can regulate abortion in the interest of the unborn child so long as the mother's health is not in jeopardy.<sup>47</sup>

In *WomanCare of Orlando v. Agwunobi*,<sup>48</sup> an almost identical medical emergency exception to that in the *Casey* case was upheld when Florida's parental notification statute was challenged.<sup>49</sup> Florida's parental notification statute, s. 390.01114, F.S., defines 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."

### Abortion-Related Crimes

Sections 797.02 and 797.03, F.S., delineate several crimes related to abortion. Section 797.02, F.S., makes it a first degree misdemeanor to advertise, in various ways, any means of "procuring the miscarriage" of a pregnant woman, or any entity or location where such might be obtained.<sup>50</sup>

Section 797.03, F.S., provides that abortions must be performed only in a validly licensed hospital, abortion clinic or physician's office, except in an emergency care situation. It also provides that a person cannot establish, conduct, manage or operate an abortion clinic without a valid, current license. That section prohibits performing or assisting in an abortion in the third trimester other than in a hospital. Violations of these requirements are second degree misdemeanors.<sup>51</sup>

### **Effect of Proposed Changes**

With certain limited exceptions explained below, the bill expands the category of prohibited abortions in Florida to include the stage at which the fetus attains viability, as determined by the best medical judgment of the physician. Viability is defined in current law as the 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.<sup>52</sup> This change takes into account the lives of those that are capable of survival outside of the womb at a stage earlier than current statute allows for. Medical advances in neonatal care have the potential to sustain life at earlier and earlier stages of birth. It is unclear if the expansion of prohibited abortion procedures to include the age of viability will result in fewer allowable abortions since the viability standard would be based on the medical judgment of the physician.

The bill modifies the medical emergency exception to the prohibition on third trimester or post-viability abortions currently in statute. In the bill, "medical emergency" is defined as a condition that, on the

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<sup>46</sup> *Id.* at 1193-94.

<sup>47</sup> *Id.* at 1194.

<sup>48</sup> 448 F.Supp. 2d 1293, 1301 N.D. Fla. (2005).

<sup>49</sup> One of the underlying issues in the case was whether the parenting notice statute was unconstitutionally vague in that it allegedly failed to give physicians adequate guidance about when the medical emergency provision applies. It was this question for which the court determined that the medical emergency definition was sufficient. The medical emergency provision applies as an exception to obtaining parental notice.

<sup>50</sup> A first degree misdemeanor is punishable by a fine not exceeding \$1,000 or imprisonment not exceeding one year. Ss. 775.082, 775.083, F.S.

<sup>51</sup> A second degree misdemeanor is punishable by a fine not exceeding \$500 or imprisonment not exceeding 60 days. Ss. 775.082, 775.083, F.S.

<sup>52</sup> S. 390.0111(4), F.S.

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.

Current law provides that a medical emergency exists when the termination is necessary to "save the life or preserve the health of the woman."<sup>53</sup> Consistent with current law, the bill requires that two physicians certify in writing to the existence of the medical emergency or, one physician certifies in writing to the existence of a medical emergency and another physician is not available for consultation.

The bill requires all abortion clinics to provide conspicuous notice on any advertisements that the clinic is prohibited from performing abortions in the third trimester or after viability. Such procedures must be done in a hospital consistent with current law on third trimester procedures.

The bill transfers the criminal statutory prohibitions found in s. 797.03, F.S., to a newly created s. 390.0111(2), F.S., and conforms them to other changes in the bill. Similarly, the bill transfers the criminal statutory prohibitions found in s. 797.02, F.S. to a newly created s. 390.0111(10)3., F.S. The bill removes the criminal nature of, and penalties for, performing an abortion in any location other than a licensed hospital, abortion clinic, or physician's office.

Consistent with the transfer of these provisions to s. 390.0111, F.S., ss. 797.02 and 797.03, F.S., are repealed in the bill.

The bill adds the following new statutory requirements for all abortion clinics and physicians:

- Physicians who perform abortions must complete a minimum of 3 hours of continuing education relating to ethics each year.<sup>54</sup>
- A person may not perform or assist in performing an abortion on a person after viability, other than in a hospital. A person who violates this requirement commits a second degree misdemeanor.<sup>55</sup>
- Other than abortion clinics licensed before October 1, 2011, an abortion clinic must be wholly owned and operated by a physician who has received training during residency in performing a dilation-and-curettage procedure or a dilation-and-evacuation procedure. A person who violates this requirement commits a second degree misdemeanor.<sup>56</sup>

The bill also amends s. 390.0111(10) by requiring the Department of Health to permanently revoke the license of any health care practitioner who has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, violating s. 390.0111.

The bill amends current reporting requirements for abortion clinics and physician's offices that perform abortions by requiring abortion providers to report all of the information contained within the U.S. Standard Report of Induced Termination of Pregnancy from the Centers of Disease Control and Prevention.<sup>57</sup> The CDC requests the following information:

- Facility name (clinic or hospital)
- City, town or location
- County

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<sup>53</sup> s. 390.0111(1)(a)-(b), F.S.

<sup>54</sup> S. 456.013, F.S., is also amended to incorporate this new requirement. The bill clarifies in s. 456.013, F.S., that the 3-hour course shall count towards the total number of continuing education hours required for the profession. The course must be approved by the applicable board, or department when there is no board, as appropriate.

<sup>55</sup> A second degree misdemeanor is punishable by a fine not exceeding \$500 or imprisonment not exceeding 60 days. Ss. 775.082, 775.083, F.S.

<sup>56</sup> A second degree misdemeanor is punishable by a fine not exceeding \$500 or imprisonment not exceeding 60 days. Ss. 775.082, 775.083, F.S.

<sup>57</sup> Centers for Disease Control, Handbook on the Reporting of Induced Termination of Pregnancy, [www.cdc.gov/nchs/data/misc/hb\\_itop.pdf](http://www.cdc.gov/nchs/data/misc/hb_itop.pdf) (last viewed March 18, 2011).



- Hospital or clinic's patient identification number (used for querying for missing information without identifying the patient)
- Age
- Marital status
- Date of abortion
- Residence of patient
- Ethnicity
- Race
- Education attainment
- Date of last menses
- Clinical estimate of gestation
- Previous pregnancy history
- Previous abortion history
- Type of abortion procedure
- Name of attending physician & name of person completing report<sup>58</sup>

The bill requires the abortion clinics to report this information following each abortion.

The bill requires AHCA to submit an annual report, using the collected information from abortion clinics or physician's offices performing abortions, to the Centers for Disease Control. AHCA must also provide this report to the Governor, President of the Senate, and Speaker of the House before each general legislative session. AHCA must also include the report on its website. The bill provides that any information required to be reported may not include any personal identifying information.

The bill requires AHCA to implement an additional rule for abortion clinics performing abortions after the first trimester to ensure that conspicuous notice is provided on any of the clinic's advertisements that the clinic is prohibited from performing abortions in the third trimester or after viability.

Finally, the bill contains a severability clause providing that if any of the provisions of this bill are held invalid, it does not affect the validity of the other provisions of this bill.

## B. SECTION DIRECTORY:

- Section 1:** Amends s. 390.0111, F.S., relating to termination of pregnancies.
- Section 2:** Amends s. 390.0112, F.S., relating to termination of pregnancies; reporting.
- Section 3:** Amends s. 390.012, F.S., relating to powers of agency; rules; disposal of fetal remains.
- Section 4:** Amends s. 456.013, F.S., relating to Department; general licensing provisions.
- Section 5:** Repeals s. 797.02, F.S., relating to advertising drugs, etc., for abortion.
- Section 6:** Repeals s. 797.03, F.S., relating to prohibited acts; penalties.
- Section 7:** Provides a severability clause.
- Section 8:** Provides and effective date of October 1, 2011.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

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<sup>58</sup> *Id.*

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

It is possible that certain provisions in this bill, including provisions relating to the modification of the medical emergency exception, may be challenged under Art. I, Section 23, of the Florida Constitution, which provides for an express right to privacy. While the Florida Supreme Court recognized the State's compelling interest in regulating abortion post-viability in *In re T.W.*, 551 So.2d 1186 (1989), the definition of medical emergency applied to third trimester and post-viability abortions in this bill does not appear to have been before the court in this context. Other court decisions that have construed the medical health exception to include the "mental health" of the woman may be persuasive.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The bill at lines 99-103 provides that abortions must be performed in validly licensed hospitals, abortion clinics, or physician's offices, except for procedures that must be performed in hospitals or in "emergency –care situations." The term "emergency-care situations" is not defined in the bill and there is no cross reference to a definition elsewhere in Florida Statutes.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**