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## Memo on Revisions to HB 125

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Memo on revisions to HB 125

David F. Forte

Below are suggested revisions to HB 125 designed to strengthen and clarify the bill's obligations. These revisions derived from suggestions and concerns of interested senators.

1: Section A (5) delete "viability and" .

Explanation: The point of the heartbeat is a predictor of live birth, not viability

2: Section A (7) add "The State of Ohio has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."

Explanation: this principle comes from the Supreme Court decision in *Casey v. Planned Parenthood*.

3: Section A (8) add "In order to make an informed choice about whether to continue her pregnancy, the pregnant woman has a legitimate interest in knowing the likelihood of the fetus surviving to full term birth based upon the presence of cardiac activity."

Explanation: This justifies requiring the physician to provide such information.

4: Section B (6) insert "poses a serious risk of the substantial and irreversible impairment of".

Explanation: Makes the medical emergency exception parallel to that in the post-viability ban bill.

5: Section B (7) add "'Serious risk of the substantial and irreversible impairment of a major bodily function' has the same meaning as in Section 2919.16 of the Revised Code."

Explanation: Brings into harmony with the post-viability ban bill.

6: Section B (9) add "'Standard medical practice' means the degree of skill, care, and diligence that a physician of the same medical specialty would employ in like circumstances. As applied to the method utilized to determine the presence of a fetal heartbeat, it includes employing the appropriate means of detection depending upon the estimated gestational age of the fetus and the condition of the woman and her pregnancy."

Explanation: The first sentence is the classic definition in Ohio law of standard medical practice used in tort liability. The second is its application to the requirements of the bill, while allowing for appropriate discretion by the physician.

7: Section C (1) deletion of first phrase, and inserting, "unless believing that a medical emergency exists that prevents compliance with this division"

Explanation: Includes the requirement of scienter for any penalty placed on the physician.

8: Section C (1) insertion of "knowingly and purposefully" and "induce."

Explanation: Includes requirement of scienter and parallels other abortion laws.

9: Section C (1) insert at end: "and shall also note the medical condition of that pregnant woman which assertedly prevented compliance with this division. That person shall maintain a copy of the written documentation in the person's own records for at least seven years."

Explanation: Refines reporting requirements

10: Section C (2) Revise and insert: "The method of determining the presence of a detectable fetal heartbeat shall be in accord with the physician's good faith understanding of standard medical practice, or according to rules that may be promulgated by the director of health under division (C)(3) of this section. The person who determines the presence or absence of a fetal heartbeat shall record in the pregnant woman's medical record the method used to test for a heartbeat, the date and time of the test, and the results thereof."

Explanation: Clarifies physician's responsibility and adds reporting requirement.

11: Section C (4): add "(4) A person is not in violation of division (C)(1) of this section if that person has performed an examination for the presence of a fetal heartbeat in the fetus utilizing standard medical practice and that examination does not reveal a fetal heartbeat."

Explanation: Clarifies the standards for non-culpability.

12: Section C (new 5): revised to read "Whoever performs or induces an abortion on a pregnant woman in violation of Division (C)(1) of this section by knowingly and purposefully performing or inducing an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat, unless believing a medical emergency exists, is guilty of a felony of the fifth degree."

Explanation: Makes felony definition parallel to E (5)

13: Section C (6): "Knowing failure to make or maintain any record required by Divisions (C)(1) or (C)(2) of this section shall subject the physician to disciplinary action under Divisions (B)(41) of section 4731.22 of the Revised Code."

Explanation: Completes the disciplinary sanctions found elsewhere in the bill in Section G and Section 4731.22 B 41

14: Section D (1): Revised language: "Division (D) of this section applies to all abortions that are not prohibited under sections 2919.12, 2919.121, and 2919.151 of the Revised Code; provided that Division D(2) does not apply when a medical emergency exists that prevents compliance with this division."

Explanation: Revised for clarity.

15: Section D (2) (a): Revised and insert: "The person intending to perform or induce the abortion shall also" and "or shall provide to the pregnant woman information promulgated by the department of health under division (D)(3) of this section."

Explanation: Clarifies informed consent obligations.

16: Section E (2) (b) delete: "under penalty of perjury."

Explanation: Unnecessary with an administrative sanction for failure to keep records.

17: Section E (3): delete: "Or the physician has been informed by a physician who has performed the examination for fetal heartbeat that the examination did not reveal a fetal heartbeat."

Explanation: It is better that the physician intending to perform the abortion have the responsibility of determining the existence of a heartbeat.

18: Section F: Revised to read: "(F) (1) The following subsection will be operational only during any period in which division (E)(1) is not in effect.(2)Any person performing or inducing an abortion on a pregnant woman purportedly to preserve the health of the pregnant woman who is carrying an unborn human individual whose heartbeat has been detected pursuant to the requirements of division (C) of

this section shall set forth in a separate document the medical condition that the abortion will assertedly address and the medical rationale for the conclusion that the abortion is necessary to address that condition. If the abortion is not being done for reasons of maternal health, this shall be noted instead. The person shall place this written documentation in the pregnant woman's medical records and shall maintain a copy in the person's own records for at least seven years. This documentation requirement is independent of the provisions in divisions (E) of this section."

Explanation: Clarifies the reporting requirement in case of the operation sections of the bill are enjoined.

19: Section I (2) deleted and substituted with: "It is the intent of the Legislature that a court judgment or order suspending enforcement of any portion of this bill not be regarded as tantamount to repeal of that provision. At such time as the Attorney General deems appropriate, the Attorney General may apply to the pertinent state or federal court to obtain relief from the judgment or order prospectively."

Explanation: Make clear the intent of legislature to revive bill upon appropriate action by the attorney general

20: Seriatim: The following insertions for clarification:

- a) Section C (3) insert "describing" for "for"
- b) Sections D (2) and D (2) b: Insert "or induce"
- c) Section D (3): insert "information regarding"
- d) Section E (1) insert: "knowingly and purposefully" perform "or induce"
- e) Section E (5) insert: "or inducing"
- f) Section H: insert: "or induced"