DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3438/P1dn
DAK:jld:jf

September 4, 2001

To Representative Pocan:

I have drafted this bill in preliminary form because I need to ascertain your intent with respect to some issues, because it differs from the proposed language in several respects, and because it intersects with current law in some intricate ways that require explanation.

Changes from the proposed language

1. I did not draft the proposed title and legislative findings; the policy of the Legislative Reference Bureau is not to draft titles and only to draft legislative findings to assist in sustaining the constitutionality of a potentially unconstitutional bill, or in a recodification bill, neither of which is present in this bill.

2. Instead of using the proposed definition of "emergency contraception," I used a modified definition for "contraceptive article" that was in 2001 Assembly Bill 296 and that is more specific.

3. I referred to s. 940.225 (1), (2), and (3), stats., in a definition of "sexual assault"; please also look at ss. 948.02, 948.025, and 948.09, stats., to see if you would like reference to these crimes to be included in the definition.

4. I placed the provisions in chapter 50 (the licensing chapter), because the violations ultimately jeopardize a hospital's certificate of authority.

5. I changed the wording of s. 50.375 (2) (c), because some medications now and as developed in the future might not require an additional dose.

6. The forfeiture specified in s. 50.38 (1) (b) specifies a maximum ($5,000), but not a minimum; do you want a minimum? In addition, in conformity with the language proposed, the forfeiture specifies that 30 days of additional violation constitutes an additional offense; I can find no precedent in the statutes for this kind of a structure––the usual mode is "Each day of continued violation constitutes an additional offense." However, since two violations may result in suspensions or revocations of a certificate of authority, that may be the reason behind the more lenient second offense language.

Current law

This redraft does not include reference to s. 20.927 (2) (a), 20.9275, 48.375 (4) (b) 1g., 253.09 (1) and (2), 253.10 (3m) (a), 441.06 (6), or 448.03 (5) (a), stats., because the definition of "emergency contraception" specifically does not include a drug, medicine, oral hormonal compound, mixture preparation, instrument, article, or device for use in terminating a pregnancy of a woman who is known by the prescribing licensed health care provider to be pregnant. However, please note the following:

1. Section 253.09 (1), stats., prohibits requiring a hospital to admit a patient or allow the use of hospital facilities to remove a human embryo or fetus. Section 253.09 (2), stats., precludes civil liability for a hospital or hospital employee resulting from a refusal to remove a human embryo or fetus from a person, if the refusal is based on religious or moral precepts; similarly, s. 441.06 (6), stats., precludes this liability for a registered nurse, and s. 448.03 (5) (a), stats., precludes this liability for physicians and physician assistants. Whether a fertilized ovum that is not implanted in the womb is an embryo is not completely clear; *Webster's Third New International Dictionary (Unabridged)* defines "embryo" as: 1.a. *archaic*: a human or other animal offspring at any stage of development prior to birth or hatching as a young individual fundamentally similar to the adult. b.: an animal organism in the early stages of growth and differentiation that are characterized by cleavage, the laying down of fundamental tissues, and the formation of primitive organs and organ systems and that in higher forms (as mammals) merge insensibly into fetal stages but in lower forms are terminated by commencement of larval life, often with a form markedly different from that of the adult—compare fetus, zygote. c.: the developing human individual *from the time of implantation* to the end of the eighth week after conception—compare fetus, ovum." (Emphasis mine.) Given the fact that definitions 1.a. and b. appear to be in conflict with definition 1.c. and in the absence of an explicit statutory clarification, the outcome of a court that is faced with such an issue is unpredictable. You might wish to amend ss. 253.09, 441.06 and 448.03, stats., to define "embryo" using definition 1.c. from *Webster's* or to notwithstand them in s. 50.375.

2. The standard "known by the prescribing licensed health care provider to be pregnant" that is used in the definition of "emergency contraception" is somewhat different from the standard used in definition "abortion" under s. 20.9275, stats. (which prohibits receipt of various funds, including family planning funds, if a hospital provides abortion services) and under s. 253.10, stats. (the 24–hour requirement for consent prior to performance of an abortion; for these statutes, the definition refers to " ... the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant or for whom there is reason to believe that she may be pregnant...." This difference may make these statutes applicable; to achieve complete clarity, you might want to notwithstand them.

If you would like to discuss the bill or if I can otherwise provide assistance, please let me know.

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