



Abortion Laws in Wisconsin

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ABORTION LAWS IN WISCONSIN

Abortion is among the nation's most contentious public policy issues, centered on whether and under what circumstances abortion is legally permitted. The debate on abortion involves beliefs between "pro-choice" supporters of a woman's right to a legal, safe abortion at the discretion of a woman and her physician; and "pro-life" proponents who support completely banning, or severely restricting, the practice of abortion, particularly in the later stages of gestation.

Since at least 1849, performing an abortion is criminally prohibited in Wisconsin. Chapter 133, Section 11, Laws of 1849, provided that:

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be hereby produced, be deemed guilty of manslaughter in the second degree.

Section 253.10 (2) (a), Wisconsin Statutes, defines the term "abortion," as:

...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 and with intent other than to increase the probability of a live birth, to preserve the life or health of the infant after live birth or to remove a dead fetus.

In *Roe v. Wade*, 410 U.S. 113 (1973), the US Supreme Court ruled, in a landmark decision, that abortion is legal throughout the nation in many instances, particularly in the early stages of pregnancy, despite laws in many states, including Wisconsin, prohibiting the procedure. It held that blanket restrictions violated the due process clause of the Fourteenth Amendment to the US Constitution, which protects against state action the right of privacy, including a woman's qualified right to terminate her pregnancy. The high court, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), upheld the essential holding of *Roe v. Wade* allowing abortion, but also held that certain state restrictions on abortion are permissible.

Laws prohibiting all abortions remain on the statute books, but are unenforceable due to the US Supreme Court decisions. However, there are a number of laws in force, and legislation under consideration, restricting the practice of abortion in the state. This report examines the laws relating to abortion in Wisconsin.

Law Prohibiting All Abortions Ruled Unconstitutional. The *Roe v. Wade* decision rendered unenforceable the criminal penalties in Section 940.04 (1), Wisconsin Statutes, which provides that "Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony." The penalty prescribed for a Class H felony is a fine not to exceed \$10,000 or imprisonment not to exceed six years, or both. The law defines an "unborn child" as "a human being from the time of conception until it is born alive" (§ 940.04 (6), Wis. Stats.). It exempts an abortion performed by a physician if necessary, or advised by two other physicians as necessary, to save the life of the mother, but does not provide an exception for cases in which the pregnancy is the result of "rape" (sexual assault), incest, or other reasons relating to the physical or mental health of the mother.

Prohibition of "Partial-Birth" Abortions Ruled Unconstitutional. Two other related laws, Sections 895.038 and 940.16, Wisconsin Statutes, are enjoined from enforcement by federal court decisions. The purpose of these laws was to criminalize as a Class A felony, punishable by life imprisonment, the

performance of an abortion procedure commonly known as “partial-birth abortion,” except in certain cases in which the procedure is necessary to save the life of the mother, and to impose civil liability on persons who perform the procedure. Under the law, “partial-birth abortion” is defined as “an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child.” These laws were created by 1997 Wisconsin Act 219 and were invalidated by the US Supreme Court in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and by the US Court of Appeals, Seventh Circuit, in *Hope Clinic v. Ryan*, 249 F.3d 603 (2001).

Abortion Prohibited After “Viability.” Section 940.15, Wisconsin Statutes, makes it a Class I felony to intentionally perform an abortion after a fetus reaches viability, except if the physician determines the abortion is necessary to preserve the life or health of the mother. A Class I felony is punishable by a fine of not to exceed \$10,000 or imprisonment not to exceed three years and six months, or both. “Viability” is defined as “that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.” In the United States, viability presently occurs at approximately 24 weeks of gestational age. A physician who performs an abortion is required to use the available method of abortion that, in the physician’s medical judgment, is most likely to preserve the life and health of the fetus or unborn child, but without increasing the risk to the woman. Section 940.15, Wisconsin Statutes, was created by 1985 Wisconsin Act 56.

Protection of Unborn Child Capable of Feeling Pain From Abortion. Under Section 253.107, Wisconsin Statutes, a physician may not or attempt to perform or induce an abortion, except in a medical emergency, when an unborn child is considered to be capable of experiencing pain. Under the law, the unborn child is considered to be capable of experiencing pain if the probable postfertilization age of the unborn child is 20 or more weeks. When the unborn child is considered capable of experiencing pain and the pregnant woman is undergoing a medical emergency, the physician is required to terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity for the unborn child to survive. An abortion provider who violates this prohibition is guilty of a Class I felony. In addition, the physician may be liable for civil damages. Section 253.107, Wisconsin Statutes, was created by 2015 Wisconsin Act 56.

Abortion Exception for Women. Section 940.13, Wisconsin Statutes, which was created by 1985 Wisconsin Act 56, provides that no fine or imprisonment may be imposed or enforced against, and no prosecution may be brought against, a woman who obtains an abortion or otherwise violates any provision of any abortion statute with respect to her unborn child or fetus. In addition, Section 253.107 (3) (b), Wisconsin Statutes, exempts a woman from any penalty if an abortion is performed or induced upon her in cases in which an unborn child is considered to be capable of feeling pain from an abortion.

Parental Consent for Minors. Sections 48.257, 48.375, and 895.037, Wisconsin Statutes, generally require an unemancipated pregnant child, before having an abortion, to obtain the consent of a parent, guardian, legal custodian, adult family member (a grandparent, aunt, uncle, brother, or sister) who is 25 years of age or over, or an eligible foster parent. In addition, a member of the clergy on behalf of the child may file a petition to seek to obtain a waiver of the consent requirement from a court. Consent is not required in cases of medical emergency; of likely suicide attempt; or of a pregnancy that is the result of sexual intercourse with a relative, guardian, legal custodian, or person residing with the child; sexual assault other than consensual sexual contact with a person under 16 years of age; or a parent, guardian, legal custodian, adult family member, or foster parent abusing the child. A court must waive the consent requirement if the court finds that the child is mature and well-informed enough to make the abortion decision on her own or that having the abortion is in the child’s best interests. These laws were created by 1991 Wisconsin Act 263.

Informed Consent and 24-Hour Waiting Period. Under Section 253.10, Wisconsin Statutes, an abortion may generally not be performed or induced unless consent is given in writing by the woman or, in the case of a minor, by a parent or other eligible person. The physician who is to perform the abortion must determine that the woman's decision to have an abortion is voluntary and free from coercion by speaking privately with the woman.

In general, an abortion may not be performed unless, at least 24 hours prior to the procedure, a physician has orally provided the woman with certain information, including: the probable gestational and postfertilization age of the unborn child and the numerical odds of its survival if delivered at that time (this information must also be supplied in writing); any medical risks associated with the woman's pregnancy; the probable anatomical and physical characteristics of the unborn child; details and risk of the medical or surgical procedure to be used; that the pregnant woman is required to receive an ultrasound if she has not already; if, in the reasonable medical judgment of the physician, the woman's unborn child has reached viability, and the physician who is to perform the abortion is required to take all steps necessary to preserve and maintain the life and health of the unborn child, that the woman has a right to refuse to consent to an abortion, that it is unlawful to perform the abortion without her voluntary consent, and that she may change her mind at any time; that benefits under the Medical Assistance program may be available for prenatal care, childbirth, and neonatal care; that the father of the unborn child is liable for assistance in the support of the woman's child, if born, even if the father has offered to pay for the abortion; that the woman has a legal right to continue her pregnancy and to keep the child; and that the woman has the right to receive and review various related printed materials. The woman seeking an abortion may waive the 24-hour period in the case of a pregnancy resulting from sexual assault that is reported to law enforcement authorities and verified. The period is reduced to at least two hours if the pregnancy is the result of incest that is reported to law enforcement authorities.

Ultrasound Required. Generally, under Section 253.10, Wisconsin Statutes, before an abortion is performed or induced, a pregnant woman must have an ultrasound and the woman is not required to review the results. Section 253.10 (3) (c) 1. gm., Wisconsin Statutes, was created and s. 253.10 (3) (c) 5., Wisconsin Statutes, was amended by 2013 Wisconsin Act 37.

Performing or inducing an abortion without adhering to the informed consent or ultrasound requirements may subject a physician to a civil forfeiture of not less than \$1,000 nor more than \$10,000, and the physician may be liable to the woman in a lawsuit seeking civil remedies, including damage awards for personal injury and emotional and psychological distress. Section 253.10, Wisconsin Statutes, was originally created by 1985 Wisconsin Act 56 as Section 146.78, 1985 Wisconsin Statutes, and has since been affected by a number of acts, including 1993 Wisconsin Act 27, 1995 Wisconsin Act 309, 2011 Wisconsin Act 217, and 2015 Wisconsin Act 56.

Criminal Trespass to Medical Facilities. Under Section 943.145, Wisconsin Statutes, a person may not unlawfully enter a medical facility without the consent of a responsible party under circumstances tending to create or provoke a breach of the peace. A violation of this prohibition is a Class B misdemeanor, punishable by a fine not to exceed \$1,000 or imprisonment not to exceed 90 days, or both. While this law is generally applicable to all hospitals, medical clinics, or physicians' offices, it was prompted by incidents of interference with the activities at clinics that provide abortion services. Section 943.145, Wisconsin Statutes, which was created by 1985 Wisconsin Act 56, was upheld as constitutional by the Wisconsin Supreme Court in *State v. Migliorino*, 150 Wis. 2d 513 (1989).

Requirement for a Physician's Hospital Admitting Privileges Ruled Unconstitutional. 2013 Wisconsin Act 37 generally provided that a physician performing or inducing an abortion is required to have admitting privileges in a hospital within 30 miles of the location where the abortion is performed. In

Planned Parenthood of Wisconsin, Inc., et al. v. Van Hollen, et al., Case No. 13-cv-465-wmc (2013), this law was held to be unconstitutional under the Fourteenth Amendment to the US Constitution by the US District Court for the Western District of Wisconsin. On December 20, 2013, the court granted a permanent injunction against enforcement of this law under Section 253.095, Wisconsin Statutes.

Prohibiting Coverage of Abortion by Health Plans Sold Through Federal Exchanges. Under Section 632.8985, Wisconsin Statutes, generally a health plan offered in Wisconsin through a health benefit exchange established by the federal government under the Patient Protection and Affordable Care Act of 2010 may not provide coverage of abortions. Section 632.8985, Wisconsin Statutes, was created by 2011 Wisconsin Act 218.

Hospitals and Medical Providers Not Required to Participate in Abortions Based on Religious or Moral Precepts. Under Section 253.09, Wisconsin Statutes, a hospital, or a physician or hospital staff member, is not required to admit a patient for the purposes of, or to participate in the performance of, an abortion if the refusal is based on religious or moral precepts. The institution or individual is not liable for any civil damages resulting from the refusal to remove a human embryo or fetus, and a person may not be discriminated against regarding their employment status on this basis. Related disciplinary or recriminatory action is prohibited. The receipt of a grant, contract, loan, or loan guarantee does not authorize a court or public official or authority to require the performance of or participation in an abortion procedure. Section 253.09, Wisconsin Statutes, was originally created by Chapter 159, Laws of 1973.

Abortion Reporting for State Statistics. Each hospital, clinic, or other facility that performs an induced abortion must file with the Department of Health Services (DHS) by each January 15 a summary report from the previous calendar year. Information in the report includes: the month and year the abortion was induced; the type of procedure (chemically induced or surgical); any resulting complications; whether the patient was a minor and information relating to consent; and information about whether the aborted unborn child was capable of experiencing pain and related matters. The reporting, required by Section 69.186, Wisconsin Statutes, must ensure the anonymity of the patient, health care provider, and medical facility.

According to the 2014 report prepared by the Office of Health Informatics in the DHS Division of Public Health, a total of 5,800 abortions were reported occurring in Wisconsin in 2014, an approximate 10 percent decrease from the 6,462 reported abortions in Wisconsin in 2013. Of those, 196 abortions were performed on Wisconsin residents who were minors. In those cases, written consent (usually a parent) was provided in 161 cases, the patient was an emancipated minor in 20 cases, and a court granted a petition to waive the parental consent requirement in 15 cases. There were no waivers of a minor's abortion due to the pregnancy resulting from sexual assault, medical emergency, or sexual intercourse with a caregiver.

Public Funds For Abortions Prohibited. Moneys appropriated by, or federal funds passing through, the state or a county, city, village, town, or other governmental body may generally not be used to pay for or subsidize the performance of an abortion, except in certain situations such as medical emergencies, danger to the long-term health of the pregnant woman, or in cases of sexual assault or incest. The substance of Sections 20.927, 20.9275, and 59.53 (13) (a), Wisconsin Statutes, were originally created by Chapter 245, Laws of 1977, and 1997 Wisconsin Act 27, and have been affected by other session laws.

CURRENT 2015–16 LEGISLATION

Sale and Use of Fetal Body Parts. 2015 Assembly Bill 305 (AB–305) was introduced on August 7, 2015, by Representatives Jacque, Kleefisch, Brandtjen, and others, and cosponsored by Senators Stroebel,

Lazich, and others. Current federal law prohibits a person from knowingly acquiring, receiving, or otherwise transferring, in interstate commerce, any fetal tissue for “valuable consideration,” which is defined as not including “reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.” In general, organs or tissue resulting from an abortion may be donated for research purposes.

AB–305, as amended by Assembly Substitute Amendment 1 (ASA 1), generally prohibits a person from knowingly acquiring, providing, receiving, or using a fetal body part in Wisconsin, regardless of whether the acquisition, provision, receipt, or use is for valuable consideration. “Fetal body part” is defined as “a cell, tissue, organ, or other part of an unborn child ... who is aborted by an induced abortion...” A violation of this prohibition is a Class H felony, subject to a fine or a penalty of imprisonment not to exceed six years, or both. The fine applicable to a Class H felony usually does not exceed \$10,000, but a maximum fine of not more than \$50,000 may be imposed for such a violation.

A public hearing on the bill was held on August 11, 2015, by the Assembly Committee on Criminal Justice and Public Safety. On September 10, 2015, the committee recommended passage of AB–305, as amended by ASA 1, by a vote of 7 to 4. A companion bill on the same subject matter, 2015 Senate Bill 260, was introduced on September 18, 2015, and referred to the Senate Committee on Health and Human Services.

Prohibition of Funding of Abortion Services. 2015 Assembly Bill 310 (AB–310) was introduced on August 7, 2015, by Representatives Jacque, Kleefisch, Allen, and others, and cosponsored by Senators Kapenga, Lazich, and others. The bill requires DHS to annually apply for grant funds under Title X of the federal Public Health Service Act and to distribute funds received first to the Wisconsin Well-Woman Program and public entities, including state, county, and local health departments and clinics and, if there are remaining funds, to certain nonpublic entities. AB–310 proposes that a public entity that receives family planning and preventive health services grant funds may provide some or all of the funds to other public or private entities provided that the recipient of the funds does not provide abortion services, or have an affiliate that provides abortion services or makes referrals for abortion services.

A public hearing on the bill was held on September 2, 2015, by the Assembly Committee on Health. On September 18, 2015, the committee recommended passage by a vote of 7 to 4. A companion bill on the same subject matter, 2015 Senate Bill 237, was introduced on September 18, 2015, and referred to the Senate Committee on Health and Human Services.

SOURCES

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The Patient Protection and Affordable Care Act of 2010. Pub. L. No. 111–148, 124 Stat. 119, 2010. <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

Wisconsin Department of Health Services, Division of Public Health, Office of Health Informatics. *Reported Induced Abortions in Wisconsin*. Madison, WI: Wisconsin Department of Health Services, August 2015. <https://www.dhs.wisconsin.gov/publications/p45360-14.pdf>.