

SESSION OF 2023

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2439

As Recommended by House Committee on
Health and Human Services

Brief*

HB 2439 would amend the Woman's Right-to-Know Act to add provisions to require certain notifications be posted in facilities where medication abortions that use mifepristone are provided and be given by physicians providing such abortions. The bill would provide relevant definitions and create civil and criminal penalties for violating the notification requirements.

Definitions

The bill would define the following terms:

- "Abortion" would mean the same as defined in KSA 65-6701: "the use or prescription of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes *in utero*, accidental trauma, or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy";

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- “Medication abortion” would mean the use or prescription of any drug for the purpose of inducing an abortion; and
- “Medical emergency” would mean the same as defined in KSA 65-6701: “a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the woman for which a delay necessary to comply with the applicable statutory requirements will create serious risk of substantial or irreversible physical impairment of a major bodily function. No condition would be deemed a medical emergency if based on a claim or diagnosis that the woman would engage in conduct which would result in her death or substantial and irreversible physical impairment of a major bodily function.”

Notification Requirements

The bill would require any private office, freestanding surgical outpatient clinic, hospital, or other facility or clinic where medication abortions that use mifepristone are provided to post a conspicuous sign that is clearly visible to patients, that is printed with lettering that is legible and at least 3/4 of an inch boldfaced type, and that would read as follows:

NOTICE TO PATIENTS HAVING
MEDICATION ABORTIONS THAT USE
MIFEPRISTONE: Mifepristone, also known as
RU-486 or Mifeprex, alone is not always
effective in ending a pregnancy. It may be
possible to reverse its intended effect if the
second pill or tablet has not been taken or
administered. If you change your mind and
wish to try to continue the pregnancy, you can

get immediate help by accessing available resources.

The bill would require the notice to include information about the Kansas Department of Health and Environment (KDHE) website required by continuing law and other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion.

Facilities

The bill would require any private office or freestanding surgical outpatient clinic where medication abortions that use mifepristone are provided to post the sign in each patient waiting room and patient consultation room used by patients for whom medication abortions are provided.

A hospital or other facility where medication abortions that use mifepristone are provided that is not a private office or freestanding surgical outpatient clinic would be required to post the sign in each patient admission area used by patients for whom medication abortions that use mifepristone are provided.

A pharmacy where mifepristone is prescribed, dispensed, or administered for the purpose of inducing a medication abortion would be required to post the sign in each area inside the premises where customers are provided prescription medications and on the exterior of the premises in the area where customers are provided prescription medications via a drive-through window.

Physician

Except in the case of a medical emergency, the bill would prohibit a physician from providing, inducing, or attempting to provide or induce a medication abortion that uses mifepristone without informing the woman, in writing as

prescribed in the Woman's Right-to-Know Act and by telephone or in person, at least 24 hours prior to the medication abortion, of the following:

- It may be possible to reverse the intended effects of a medication abortion that uses mifepristone, if the woman changes her mind, but that time is of the essence;
- Information on reversing the effects of a medication abortion that uses mifepristone would be available on the KDHE website, as required by law, and other relevant telephone and internet resources containing information on where the patient could obtain timely assistance to attempt to reverse the medication abortion.

The bill would require, after a physician dispenses or provides an initial administration of mifepristone to a patient for the purposes of performing a medication abortion, the physician or an agent of the physician to provide a legible, written notice to the patient that includes the same information stated above.

The bill would require, when a medical emergency compels the performance of a medication abortion that uses mifepristone, the physician to inform the woman, prior to the medication abortion, if possible, of the medical indications supporting the physician's judgment an abortion would be necessary to avert the woman's death or a 24-hour delay would create serious risk of substantial and irreversible impairment of a major bodily function, excluding psychological or emotional conditions.

KDHE Website

The bill would require, within 90 days after the effective date of the bill, KDHE to cause to be published comprehensible materials designed to inform women of the possibility of reversing the effects of a medication abortion

that uses mifepristone and information on resources available to reverse the effects of a medication abortion that uses mifepristone. The bill would require publication in English and in each language that is the primary language of 2.0 percent or more of the state's population, in print and on the website required by law. The bill also would require the website to include other relevant telephone and internet resources containing information on where the patient could obtain timely assistance to attempt to reverse the medication abortion.

Criminal Penalties

The bill would provide that upon a first conviction of a violation of failing to provide notification as outlined in the bill, a person would be guilty of a class A person misdemeanor and upon second or subsequent conviction of such violation, a person would be guilty of a severity level 10, person felony.

Civil Penalties

The bill would require KDHE to assess a fine of \$10,000 to any private office, freestanding surgical outpatient clinic, hospital, or other clinic or facility that fails to post the sign. Each day the required sign is not posted would be a separate violation. KDHE would be required to remit all moneys received from fines to the State Treasurer for deposit to the credit of the State General Fund.

Civil Action

The bill would allow the following individuals to bring a civil action against a physician who provided a medication abortion using mifepristone in violation of the provisions in the bill for actual damages, exemplary and punitive damages, and any other appropriate relief:

- A woman to whom such medication abortion has been provided;
- The father of the unborn child who was subject to such medication abortion; or
- Any grandparent of the unborn child who was subject to such medication abortion, if the woman was not 18 years of age or older at the time the medication abortion was performed or if the woman died as a result of the medication abortion.

The bill would require such civil action be commenced within two years after the later of:

- The date of the discovery of the violation; or
- The conclusion of a related criminal case.

A court would be required to award reasonable attorney fees and costs to a prevailing plaintiff or a prevailing defendant upon a finding that the action was frivolous and brought in bad faith.

Anonymity

In any civil or criminal proceeding or action brought under the provisions of bill, the bill would require the court to rule whether the anonymity of any woman to whom a medication abortion has been provided, induced, or attempted to be provided or induced would be preserved from public disclosure, if she does not give her consent to such disclosure.

The bill would require the court, upon motion of a party or on its own accord, to make such a ruling and, upon determining the woman's anonymity should be preserved, to issue orders to the parties, witnesses, and counsel and to direct the sealing of the record and exclusion of individuals

from courtrooms or hearing rooms to the extent necessary to safeguard the woman's identity from public disclosure. The bill would require each such order to be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman to whom a medication abortion has been provided, induced, or attempted to be provided or induced, any person, other than a public official, who brings an action under this section would be required to do so under a pseudonym. The bill would state these provisions are not to be construed to conceal the identity of the plaintiff or witnesses from the defendant.

Severability Clause

The bill would declare its provisions to be severable, to provide that if any provision of the bill, or any application of it to any person or circumstance, is held to be invalid by court order, the invalidity would not affect the remainder of the provisions and any application thereof.

Woman's Right-to-Know Act

The bill's provisions would be included in the Woman's Right-to-Know Act.

Background

The bill was introduced by the House Committee on Federal and State Affairs at the request of Representative Humphries.

House Committee on Health and Human Services

In the House Committee hearing, **proponent** testimony was provided by a private citizen physician and representatives of Kansans for Life and Kansas Family Voice, who generally stated the bill would ensure women who begin a medication abortion are provided information about protocols for abortion pill reversal.

Written-only proponent testimony was provided by two private citizen physicians and a representative of the Kansas Catholic Conference.

Written-only **opponent** testimony was provided by two private citizen physicians and representatives of Planned Parenthood Great Plains Votes and Trust Women Foundation.

No other testimony was provided.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, KDHE indicates its enactment would result in additional expenditures of \$21,250 in FY 2023 and \$85,000 in FY 2024, all from the State General Fund, as well as 1.00 new FTE position. The agency would be required to update and print Woman's Right-to-Know materials and no funds are currently allocated for this purpose. The agency also notes it does not have a program to issue the civil penalty and is without a way to investigate or verify facility compliance with the provisions of the bill. KDHE would require 1.00 FTE position to monitor the facilities and fulfill the requirements of the bill. The agency estimates \$85,000 for salaries and wages, as well as administrative and printing costs. The FY 2023 amount is estimated for three months of expenditures and would be needed to ensure compliance when the bill becomes effective in FY 2024. The revenue generated by fines for violations of provisions of the bill would

be deposited to the State General Fund and the total revenue could not be estimated.

The Office of Judicial Administration states enactment of the bill could increase the number of cases filed in district court because it would create a new crime and also allows for civil suits to be filed, which could result in more time spent by district court judicial and non-judicial personnel processing, researching, and hearing these cases. The bill could also require more supervision of offenders to be performed by court services officers. The Office estimates enactment of the bill could result in the collection of docket fees and fines assessed in those cases filed under the bill's provisions. According to the Office, a fiscal effect cannot be estimated.

The Office of the Attorney General states that the measure could be challenged in state or federal court, but a fiscal effect could not be estimated.

The Kansas State Board of Healing Arts reports that the bill could result in some actionable complaints, but these would be handled within existing resources. The Kansas Board of Pharmacy states the bill would not result in a fiscal effect on agency operations.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

Abortion; medication abortion; mifepristone; informed consent; Woman's Right-to-Know Act; Kansas Department of Health and Environment