As Introduced

136th General Assembly
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H. B. No. 237

Representatives Somani, Piccolantonio
Cosponsors: Representatives Upchurch, Brennan, Brownlee, Russo, McNally

A BILL

To enact sections 2305.2312, 3732.01, 3732.02, 3732.03, 3732.04, 3732.05, 3732.06, 3732.08, 3732.09, 3732.11, 3732.13, and 3732.14 of the Revised Code to protect assisted reproduction care.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 2305.2312, 3732.01, 3732.02, 3732.03, 3732.04, 3732.05, 3732.06, 3732.08, 3732.09, 3732.11, 3732.13, and 3732.14 of the Revised Code be enacted to read as follows:

Sec. 2305.2312. (A) As used in this section:

(1) "Assisted reproduction," "donor," and "human reproductive material" have the same meanings as in section 2907.13 of the Revised Code;

(2) "Assisted reproduction care" means all medical, surgical, counseling, or referral services that are lawful in Ohio or the receipt of products relating to assisted reproduction that is lawful in Ohio, including services, procedures, or medicines relating to assisted reproduction and

the provision of human reproductive material by a donor.

(3) "Assisted reproduction care helper" means a person who facilitates or otherwise has supported or is supporting an individual in seeking or receiving assisted reproduction care in Ohio, including a person who provides funding, lodging, transportation, doula services, information, data sharing services such as electronic medical records programs, or other financial or practical support to an individual seeking or receiving assisted reproduction care.

(4) "Health care provider" has the same meaning as in section 2305.2311 of the Revised Code.

(B) Except as provided in sections 2907.13, 2907.14, 4731.861, and 4731.864 of the Revised Code, a health care provider providing assisted reproduction care, a health care facility where assisted reproduction care is provided, an individual seeking or accessing assisted reproduction care, including a donor, or an assisted reproduction care helper is not liable for or subject to damages in a civil action, prosecution in a criminal proceeding, or professional disciplinary action for any of the following:

(1) A claim of injury to or death of any human reproductive material as an unborn human individual;

(2) Providing, accessing, or utilizing assisted reproduction care.

(C)(1) This section does not apply if the act or omission associated with providing assisted reproduction care constitutes negligence, willful or wanton misconduct, or reckless disregard for loss to person or property or the consequences so as to affect the life or health of the patient.

(2) Nothing in this section shall be construed to permit a wrongful death action related to a loss of human reproductive material.

Sec. 3732.01. As used in sections 3732.01 to 3732.14 of the Revised Code:

(A) "Assisted reproduction," "donor," and "human reproductive material" have the same meanings as in section 2907.13 of the Revised Code.

(B) "Collect" means for a regulated entity to obtain personal assisted reproduction or donor information in any manner.

(C) "Commerce" has the same meaning as in the "Federal Trade Commission Act," 15 U.S.C. 44.

(D) "Disclose" means for a regulated entity to release, transfer, sell, provide access to, license, or divulge personal assisted reproduction or donor information in any manner to a third party, including the federal government, the state, any political subdivision, or a law enforcement agency.

(E)(1) "Express consent" means informed, opt-in, voluntary, specific, and unambiguous written consent, including by electronic means, to collecting, retaining, using, or disclosing personal assisted reproduction or donor information.

(2) "Express consent" does not include any of the following:

(a) Consent secured without first providing to the individual a clear and conspicuous disclosure, apart from any privacy policy, terms of service, terms of use, general release, user agreement, or other similar document, of all information

material to the provision of consent;

(b) Hovering over, muting, pausing, or closing a given piece of content;

(c) Agreement obtained through the use of a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.

(F) "Personal information" means information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly to, a particular individual.

(G) "Personal assisted reproduction or donor information" means personal information relating to the past, present, or future use of assisted reproduction by an individual or the past, present, or future provision of human reproductive material by a donor, including any of the following:

(1) Efforts to research or obtain assisted reproduction-related or donor-related information, services, or supplies, including location information that might indicate an attempt to acquire or receive such information, services, or supplies;

(2) The provision of human reproductive material by a donor or the use of human reproductive material for assisted reproduction;

(3) Fertility-related conditions, status, diseases, or diagnoses, including pregnancy, menstruation, ovulation, the use of assisted reproduction procedures, and the ability to conceive a pregnancy, regardless of whether such individual is sexually active, and whether such individual is engaging in unprotected sex;

(4) Fertility-related or assisted reproduction-related surgeries or procedures;

(5) Use or purchase of any medication related to fertility, including medicine for assisted reproduction;

(6) Bodily functions, vital signs, measurements, or symptoms related to menstruation or pregnancy, such as basal temperature, cramps, bodily discharge, or hormone levels;

(7) Any information about diagnoses or diagnostic testing, treatment, medications, or the use of any product or service relating to the matters described in divisions (G)(1) to (6) of this section;

(8) Any information described in divisions (G)(1) to (7) of this section that is derived or extrapolated from non-health information, including proxy, derivative, inferred, emergent, or algorithmic data.

(H)(1) "Regulated entity" means any entity, to the extent the entity is engaged in activities in or affecting commerce, that is either:

(a) A person, partnership, or corporation subject to the jurisdiction of the federal trade commission under section 5(a)(2) of the "Federal Trade Commission Act," 15 U.S.C. 45(a)(2);

(b) Notwithstanding section 4, 5(a)(2), or 6 of the "Federal Trade Commission Act," 15 U.S.C. 44; 45(a)(2); 46, or any jurisdictional limitation of the commission, either of the following:

(i) A common carrier subject to the "Communications Act of 1934,"47 U.S.C. 151 et seq.;

(ii) An organization not organized to carry on business

for its own profit or that of its members.

(2) "Regulated entity" does not include any of the following:

(a) An entity that is a covered entity, as defined in 45 C.F.R. 160.103, to the extent the entity is acting as a covered entity under the HIPAA privacy regulations, as defined in section 1180(b)(3) of the "Social Security Act," 42 U.S.C. 1320d-9(b)(3);

(b) An entity that is a business associate, as defined in 45 C.F.R. 160.103, to the extent the entity is acting as a business associate under the HIPAA privacy regulations, as defined in section 1180(b)(3) of the "Social Security Act," 42 U.S.C. 1320d-9(b)(3);

(c) An entity that is subject to restrictions on disclosure of records under section 543 of the "Public Health Service Act," 42 U.S.C. 290dd-2, to the extent the entity is acting in a capacity subject to the restrictions.

(I)(1) "Service provider" means a person to whom both of the following apply:

(a) Collects, retains, uses, or discloses personal assisted reproduction or donor information for the sole purpose of, and only to the extent that the person is, conducting business activities on behalf of, for the benefit of, under instruction of, and under contractual agreement with a regulated entity and not any other individual or entity;

(b) Does not divulge personal assisted reproduction or donor information to any individual or entity other than such regulated entity or a contractor to such service provider bound to information processing terms not less restrictive than terms

to which the service provider is bound.

(2) A person shall only be considered a service provider in the course of activities described in division (I)(1)(a) of this section.

(J) "Third party" means any person who is not any of the following:

(1) The regulated entity that is disclosing or collecting personal assisted reproduction or donor information;

(2) The individual to whom the personal assisted reproduction or donor information relates;

(3) A service provider.

Sec. 3732.02. (A) A regulated entity shall not collect, retain, use, or disclose personal assisted reproduction or donor information, except under either of the following circumstances:

(1) With the express consent of the individual to whom such information relates;

(2) As is strictly necessary to provide a product or service that the individual to whom the information relates has requested from the regulated entity.

(B) A regulated entity shall restrict access to personal assisted reproduction or donor information to the employees or service providers of the regulated entity for which access is necessary to provide a product or service that the individual to whom the information relates has requested from the regulated entity.

(C) For purposes of compliance with this section by a service provider of a regulated entity, a request from an

individual to the regulated entity for a product or service, and an express consent from the individual to the regulated entity, shall be treated as having also been provided to the service provider.

Sec. 3732.03. (A)(1) A regulated entity shall make available a reasonable mechanism by which an individual, upon a verified request, may access both of the following:

(a) Any personal assisted reproduction or donor information relating to the individual that is retained by the regulated entity, including both of the following:

(i) In the case of the information that the regulated entity collected from third parties, how and from which specific third parties the regulated entity collected the information;

(ii) The information that the regulated entity inferred about the individual.

(b) A list of the specific third parties to which the regulated entity has disclosed any personal assisted reproduction or donor information relating to such individual.

(2) A regulated entity shall make the information described in division (A)(1) of this section available in both a human-readable format and a structured, interoperable, and machine-readable format.

(B)(1) A regulated entity shall make available a reasonable mechanism by which an individual, upon a verified request, may request the deletion of any personal assisted reproduction or donor information relating to the individual that is retained by the regulated entity, including any information that the regulated entity collected from a third party or inferred from other information retained by the

regulated entity.

(2) A regulated entity shall comply with a verified request received under this section without undue delay but not later than fifteen days after the date on which such regulated entity receives the verified request.

(3) A regulated entity shall not charge a fee to an individual for a request made under this section.

(C) Nothing in this section shall be construed to require a regulated entity to do any of the following:

(1) Take an action that would convert information that is not personal information into personal information;

(2) Collect or retain personal information that the regulated entity would otherwise not collect or retain;

(3) Retain personal information longer than the regulated entity would otherwise retain the information.

(D) For purposes of this section, "reasonable mechanism" means, with respect to a regulated entity and a right under division (B) of this section, a mechanism to which both of the following apply:

(1) It is equivalent in availability and ease of use to that of other mechanisms for communicating or interacting with the regulated entity.

(2) It includes an online means of exercising the right described under division (B) of this section.

Sec. 3732.04. (A) A regulated entity shall maintain a privacy policy relating to the practices of the regulated entity regarding the collecting, retaining, using, and disclosing of

personal assisted reproduction or donor information.

(B) If a regulated entity has a web site, it shall prominently publish the privacy policy on the web site.

(C) The privacy policy shall be clear and conspicuous and shall include all of the following:

(1) A description of the practices of the regulated entity regarding the collecting, retaining, using, and disclosing of personal assisted reproduction and donor information;

(2) A clear and concise statement of the categories of the information collected, retained, used, or disclosed by the regulated entity;

(3) A clear and concise statement of the purposes of the regulated entity for the collecting, retaining, using, or disclosing of the information;

(4) A list of the specific third parties to which the regulated entity discloses the information, and a clear and concise statement of the purposes for which the regulated entity discloses the information, including how the information may be used by each such third party;

(5) A list of the specific third parties from which the regulated entity has collected the information, and a clear and concise statement of the purposes for which the regulated entity collects the information;

(6) A clear and concise statement describing the extent to which individuals may exercise control over the collecting, retaining, using, and disclosing of personal assisted reproduction or donor information by the regulated entity, and the steps an individual must take to implement such controls;

(7) A clear and concise statement describing the efforts of the regulated entity to protect personal assisted reproduction or donor information from unauthorized disclosure.

Sec. 3732.05. (A) Any individual alleging a violation of sections 3732.02 to 3732.04 of the Revised Code may bring a civil action in any court of competent jurisdiction.

(B) In a civil action brought under this section in which the plaintiff prevails, the court may award the following:

(1) An amount not less than one hundred dollars and not greater than one thousand dollars per violation per day, or actual damages, whichever is greater;

(2) Punitive damages;

(3) Reasonable attorneys' fees and litigation costs;

(4) Any other relief, including equitable or declaratory relief, that the court determines appropriate.

(C) A violation of sections 3732.02 to 3732.04 of the Revised Code constitutes a concrete and particularized injury in fact to the individual to whom such information relates.

(D)(1) Notwithstanding any other provision of law, no pre-dispute arbitration agreement or pre-dispute joint-action waiver is valid or enforceable with respect to a dispute arising under sections 3732.02 to 3732.04 of the Revised Code.

(2) Any determination as to whether or how division (D) of this section applies to any dispute shall be made by a court, rather than an arbitrator, without regard to whether the agreement purports to delegate the determination to an arbitrator.

(E) For purposes of this section:

(1) "Pre-dispute arbitration agreement" means any agreement to arbitrate a dispute that has not arisen at the time of the making of the agreement.

(2) "Pre-dispute joint-action waiver" means an agreement that would prohibit a party from participating in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

Sec. 3732.06. (A) A violation of sections 3732.02 to 3732.04 of the Revised Code is an unfair or deceptive act or practice in violation of section 1345.02 of the Revised Code. A person injured by a violation of those sections has a cause of action and is entitled to the same relief available to a consumer under section 1345.09 of the Revised Code.

(B) The attorney general shall enforce sections 3732.02 to 3732.04 of the Revised Code in the same manner, by the same means, and with the same jurisdiction, powers, and duties as applicable for violations of sections 1345.01 to 1345.13 of the Revised Code. Any regulated entity that violates those sections is subject to the provisions, including penalties, of Chapter 1345. of the Revised Code.

(C) The attorney general may adopt rules as necessary to implement and enforce sections 3732.02 to 3732.04 of the Revised Code. Any rules shall be adopted in accordance with Chapter 119. of the Revised Code.

Sec. 3732.08. (A) As used in sections 3732.08 to 3732.14 of the Revised Code, "assisted reproduction health care provider" means any entity or individual, including any

physician, nurse practitioner, physician assistant, or pharmacist, who is engaged or seeks to engage in assisted reproduction care, such as through the provision of evidence-based information, counseling, or items and services related to fertility treatment.

(B) No political subdivision of this state, or official or employee of this state, shall prohibit or unreasonably limit, for reasons other than to enforce health and safety regulations, any of the following:

(1) Any individual from doing any of the following:

(a) Accessing assisted reproduction;

(b) Continuing or completing an ongoing assisted reproduction treatment or procedure pursuant to a written plan or agreement with an assisted reproduction health care provider;

(c) Using or controlling the use of the individual's human reproductive material.

(2) Any assisted reproduction health care provider from doing either of the following:

(a) Performing assisted reproduction treatments or procedures;

(b) Providing evidence-based information related to assisted reproduction.

(3) Any insurance provider from covering assisted reproduction treatments or procedures.

(C) Nothing in this section shall be construed as preempting any written agreement or contract regarding an individual's human reproductive material.

Sec. 3732.09. (A) All of the following may bring a civil action against any political subdivision of this state, or any official or employee of this state, for the violation of, or the enactment, implementation, or enforcement of a limitation or requirement that violates, section 3732.08 of the Revised Code:

(1) The attorney general;

(2) Any individual or entity adversely affected by the violation;

(3) An assisted reproduction health care provider on the provider's own behalf, on behalf of the provider's staff, and on behalf of the provider's patients who are or may be adversely affected by the violation.

(B) The court may award appropriate equitable relief, including temporary, preliminary, or permanent injunctive relief.

(C)(1) The court shall award costs of litigation and reasonable attorney's fees to any prevailing plaintiff.

(2) A plaintiff is not liable to a defendant for costs or attorney's fees in any non-frivolous action filed under this section.

(D) Notwithstanding any other provision of law, no political subdivision of this state, or official or employee of this state, is immune from an action brought under this section in a court of competent jurisdiction.

(E) Nothing in section 3732.08 of the Revised Code or this section shall be construed to do either of the following:

(1) Prohibit the enforcement of health and safety regulations that apply to assisted reproduction health care

providers or health care facilities that provide assisted reproduction care, if the regulations do both of the following:

(a) Advance the safety of health care services or the health of patients;

(b) Cannot be advanced by a less restrictive alternative measure or action.

(2) Modify, supersede, or otherwise affect any law regarding insurance coverage of assisted reproduction.

Sec. 3732.11. (A) No assisted reproduction health care provider or health care facility that provides assisted reproduction care shall be required or compelled to provide patient records to any out-of-state third party, including the federal government, another state, any political subdivision, or a law enforcement agency.

(B) For purposes of this section, "health care facility" has the same meaning as in section 2925.11 of the Revised Code.

Sec. 3732.13. For the purposes of the Revised Code and notwithstanding any other provision of law, no human reproductive material that exists outside of a human uterus shall be considered an unborn human individual, an unborn child, a fetus, a natural person, or any other term that connotes or designates personhood.

Sec. 3732.14. (A) Assisted reproduction health care shall be performed or provided only if the assisted reproduction health care provider has obtained the informed consent of each patient. The health care provider shall provide written copies to each patient of the provider's and health care facility's assisted reproduction-related policies and services applicable to the patient.

(B) Each patient shall sign a form acknowledging that the patient has received the information and consents to the policies and applicable services described in division (A) of this section.