

House Bill 3400

Sponsored by Representatives MORGAN, LEVY B, MCINTIRE, BOICE, DIEHL, HIEB, OWENS; Representatives GOODWIN, MANNIX, SCHARF

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Prohibits abortion unless health care provider first determines probable gestational age of unborn child, except in case of medical emergency. Defines "abortion" and "health care provider." Prohibits abortion of unborn child with probable gestational age of 15 or more weeks, except in case of medical emergency. Allows specified persons to bring action against health care provider for violations. Requires health care provider who performs or induces, or attempts to perform or induce, abortion to file report with Oregon Health Authority. Requires authority to publish annually statistics relating to abortion. Allows specified persons to bring cause of action for actual and punitive damages and injunctive relief against health care provider for violation.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to abortion restrictions; creating new provisions; amending ORS 435.496, 677.190 and
3 678.111; and prescribing an effective date.

4 Whereas medical and other authorities know more about human prenatal development now than
5 ever before; and

6 Whereas the assertion by some medical experts that an unborn child is incapable of experienc-
7 ing pain until later than 24 weeks gestational age predominantly rests on the assumption that the
8 ability to experience pain depends on the cerebral cortex and requires nerve connections between
9 the thalamus and the cortex; and

10 Whereas medical research and analysis since 2007 provides strong evidence for the conclusion
11 that a functioning cortex is not necessary to experience pain; and

12 Whereas substantial evidence indicates that children born missing the bulk of the cerebral
13 cortex, such as those with hydraencephaly, nevertheless experience pain; and

14 Whereas substantial evidence indicates that neural elements, such as the thalamus and
15 subcortical plate, serve as pain processing centers for an unborn child and show signs of sufficient
16 maturation beginning at 15 weeks gestational age; and

17 Whereas in adult humans and in animals stimulation or ablation of the cerebral cortex does not
18 alter pain perception, while stimulation or ablation of the thalamus does alter pain perception; and

19 Whereas pain receptors begin forming at seven weeks gestational age, and nerve fibers linking
20 pain receptors to the brain's thalamus and subcortical plate form between 12 and 20 weeks
21 gestational age; and

22 Whereas the first contact between the subcortical plate and the forming nerve fibers occurs no
23 later than 16 weeks gestational age; and

24 Whereas the application of painful stimuli to an unborn child is associated with significant in-
25 creases in stress hormones known as the stress response; and

26 Whereas subjection to painful stimuli is associated with long-term harmful neurodevelopmental
effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 later in life; and

2 Whereas fetal anesthesia is routinely administered to unborn children for purposes of surgery
3 and is associated with a decrease in the level of stress hormones compared to the level of stress
4 hormones without the administration of anesthesia; and

5 Whereas fetal surgeons have found it necessary to sedate an unborn child with anesthesia to
6 prevent the unborn child from engaging in vigorous movement in reaction to invasive surgery; and

7 Whereas doctors have concluded that an unborn child is extremely sensitive to painful stimuli
8 by 15 weeks, and as early as 12 weeks, gestational age, making adequate analgesia and anesthesia
9 necessary for invasive medical procedures performed on an unborn child to prevent fetal suffering;
10 now, therefore,

11 **Be It Enacted by the People of the State of Oregon:**

12 **SECTION 1. As used in sections 1 to 9 of this 2023 Act:**

13 (1) **“Abortion” means the use or prescription of any instrument, medicine, drug or any
14 other substance or device to terminate the pregnancy of a person known to be pregnant, if
15 the intention is other than to increase the probability of a live birth, to preserve the life or
16 health of the child after live birth or to remove a dead unborn child who died as the result
17 of natural causes in utero, accidental trauma or a criminal assault on the pregnant person
18 or their unborn child, and that use or prescription causes the premature termination of the
19 pregnancy.**

20 (2) **“Attempt to perform or induce an abortion” means an act, or an omission of a
21 statutorily required act, that, under the circumstances as the actor believes them to be,
22 constitutes a substantial step in a course of conduct planned to culminate in the perform-
23 ance or induction of an abortion.**

24 (3) **“Fertilization” means the fusion of a human spermatozoon with a human ovum.**

25 (4) **“Health care provider” means:**

26 (a) **A physician licensed under ORS chapter 677;**

27 (b) **A physician assistant licensed under ORS 677.505 to 677.525; and**

28 (c) **A nurse practitioner licensed under ORS 678.375 to 678.390.**

29 (5) **“Probable gestational age” means the duration of the pregnancy at the time the
30 abortion is to be performed or induced.**

31 (6) **“Reasonable medical judgment” means a medical judgment that would be made by a
32 reasonably prudent health care provider who is knowledgeable about the case and the treat-
33 ment possibilities with respect to the medical conditions involved.**

34 (7) **“Unborn child” means an individual organism of the species Homo sapiens from
35 fertilization until live birth.**

36 **SECTION 2. (1) A pregnant person’s condition is a medical emergency for purposes of
37 sections 3 and 4 of this 2023 Act if, in the professional judgment of the health care provider:**

38 (a) **Failure to immediately terminate the pregnancy is reasonably likely to result in the
39 pregnant person’s death; or**

40 (b) **The delay necessary to determine the probable gestational age as required under
41 sections 3 and 4 of this 2023 Act is reasonably likely to create a serious risk of substantial
42 and irreversible physical impairment of one or more of the pregnant person’s major bodily
43 functions, not including psychological or emotional functions.**

44 (2) **A pregnant person’s likelihood to engage in conduct that will result in the pregnant
45 person’s death or in substantial and irreversible physical impairment of a major bodily**

1 function is not a medical emergency for purposes of sections 3 and 4 of this 2023 Act.

2 **SECTION 3.** (1) Except in the case of a medical emergency that prevents compliance with
 3 this section, a person may not perform or induce, or attempt to perform or induce, an
 4 abortion unless a health care provider has first made a determination of the probable
 5 gestational age of the unborn child.

6 (2) In making the determination required by subsection (1) of this section, the health
 7 care provider shall make the inquiries of the person who is pregnant and perform or cause
 8 to be performed the medical examinations and tests that a reasonably prudent health care
 9 provider who is knowledgeable about the case and the medical conditions involved would
 10 make and perform to make an accurate diagnosis with respect to the probable gestational
 11 age.

12 **SECTION 4.** (1) Except in the event of a medical emergency, a person may not perform
 13 or induce, or attempt to perform or induce, an abortion when a health care provider has
 14 determined that the probable gestational age of the unborn child is 15 or more weeks.

15 (2) When a health care provider terminates a pregnancy that is not prohibited under this
 16 section because of a medical emergency, the health care provider shall terminate the preg-
 17 nancy in the manner that, in reasonable medical judgment, provides the best opportunity for
 18 the unborn child to survive, unless, in reasonable medical judgment, termination of the
 19 pregnancy in that manner would pose a greater risk of the death of the pregnant person or
 20 of the substantial and irreversible physical impairment of a major bodily function of the
 21 person, other than psychological or emotional functions, than other available methods. The
 22 likelihood that the person who is pregnant will engage in conduct that would result in the
 23 person's death or in substantial and irreversible physical impairment of a major bodily
 24 function does not constitute a greater risk under this subsection.

25 **SECTION 5.** (1) In addition to the reporting requirements under ORS 432.075 and 435.496,
 26 a health care provider who performs or induces, or attempts to perform or induce, an
 27 abortion, shall report to the Oregon Health Authority in accordance with rules adopted by
 28 the authority. The report must include:

29 (a) If a determination of probable gestational age was made, the probable gestational age
 30 determined and the method and basis of the determination;

31 (b) If a determination of probable gestational age was not made or the probable
 32 gestational age was determined to be 15 or more weeks, the basis of the determination that
 33 a medical emergency existed;

34 (c) The method used for the abortion and, in the case of a termination performed when
 35 the probable gestational age was determined to be 15 or more weeks:

36 (A) Whether the method used was one that, in reasonable medical judgment, provided the
 37 best opportunity for the unborn child to survive; or

38 (B) If the method used did not provide the best opportunity for the unborn child to sur-
 39 vive, the basis of the determination that termination of the pregnancy in that manner would
 40 pose a greater risk of the death of the pregnant person or of the substantial and irreversible
 41 physical impairment of a major bodily function of the person, other than psychological or
 42 emotional functions, than other available methods;

43 (d) Whether an intra-fetal injection was used in an attempt to induce fetal demise; and

44 (e) The age and race of the person whose pregnancy was terminated or attempted to be
 45 terminated.

1 (2) The reports required by this section:

2 (a) May not include the name, address or other information that individually identifies
3 the person whose pregnancy was terminated or attempted to be terminated.

4 (b) Must include a unique medical record identifying number that correlates to the
5 person's medical record.

6 (3)(a) Except as provided in paragraph (b) of this subsection, the reports submitted under
7 this section are confidential and exempt from disclosure under ORS 192.311 to 192.478.

8 (b) The reports submitted under this section may be released:

9 (A) To the Attorney General or a district attorney with appropriate jurisdiction pursuant
10 to a civil or criminal investigation; or

11 (B) Pursuant to a court order in an action brought under section 6 of this 2023 Act.

12 (4) The authority may adopt rules to carry out this section, including rules regarding the
13 schedule on which a health care provider described in this section is required to submit the
14 report described in this section.

15 **SECTION 6.** Intentional or reckless failure by a health care provider to meet the re-
16 quirements of section 5 of this 2023 Act:

17 (1) Constitutes unprofessional conduct for purposes of ORS 677.190.

18 (2) May be the basis for disciplinary action under ORS 678.111.

19 **SECTION 7.** (1) On or before June 30 of each year, the Oregon Health Authority shall
20 issue a public report of statistics relating to abortion. The public report must include:

21 (a) Statistics for the previous calendar year compiled from the reports submitted under
22 section 5 of this 2023 Act.

23 (b) Statistics for all previous calendar years in which reports were submitted under sec-
24 tion 5 of this 2023 Act, adjusted to reflect any additional information from late or corrected
25 reports.

26 (2) The authority may not include individually identifiable information in the public re-
27 port.

28 **SECTION 8.** (1)(a) Except as provided in paragraph (b) of this subsection, a person whose
29 pregnancy was terminated or attempted to be terminated in violation of section 3 or 4 of this
30 2023 Act, or the person responsible for the fertilization that resulted in the pregnancy that
31 is the subject of the abortion, may maintain an action against the health care provider who
32 performed or induced, or attempted to perform or induce, the abortion for actual and puni-
33 tive damages.

34 (b) Damages may not be awarded under this subsection if the pregnancy described in
35 paragraph (a) of this subsection was the result of criminal conduct by the person responsible
36 for fertilization that resulted in the pregnancy described in this subsection.

37 (2) A cause of action for injunctive relief against a health care provider who intentionally
38 or recklessly violates section 3 or 4 of this 2023 Act may be brought against the health care
39 provider by:

40 (a) A person whose pregnancy was terminated or attempted to be terminated, if the
41 person was not at least 18 years of age at the time of the abortion;

42 (b) The representative of a person whose pregnancy was terminated or attempted to be
43 terminated if the person died as a result of the abortion;

44 (c) The person responsible for the fertilization that resulted in the pregnancy of the
45 person whose pregnancy was terminated or attempted to be terminated;

1 (d) A prosecuting attorney with competent jurisdiction; or

2 (e) The Attorney General.

3 (3) Injunctive relief may not be granted to the person responsible for fertilization that
 4 resulted in the pregnancy that is the subject of the abortion described in subsection (1)(a)
 5 of this section if the pregnancy is the result of criminal conduct by the person described in
 6 this subsection.

7 (4) If the plaintiff prevails in the action described in this section, the court shall also
 8 award reasonable attorney fees to the plaintiff.

9 (5) If the defendant prevails in the action described in this section, and the court finds
 10 that the action was frivolous and brought in bad faith, the court shall award attorney fees
 11 to the defendant.

12 **SECTION 9.** (1) In any action or proceeding brought under section 8 of this 2023 Act, the
 13 court shall determine whether the anonymity of a person whose pregnancy was terminated
 14 or attempted to be terminated must be exempt from public disclosure under ORS 192.311 to
 15 192.478 if the person does not consent to disclosure.

16 (2) If the court determines that the person’s anonymity must be preserved, the court
 17 shall issue orders to the parties, witnesses and counsel, direct the sealing of the record and
 18 order exclusion from the courtroom or hearing room all persons who are not parties, wit-
 19 nesses or counsel. The orders described in this subsection must be accompanied by written
 20 findings that explain why the person’s anonymity must be preserved, why the order is es-
 21 sential to that end, how the order is narrowly tailored to serve that interest and why no
 22 reasonable less-restrictive alternative exists.

23 (3) If the person described in subsection (1) of this section does not consent to disclose
 24 the person’s identity, any person other than a public official who brings an action under
 25 section 8 of this 2023 Act that is related to the person’s pregnancy shall bring the action
 26 under a pseudonym.

27 (4) This section may not be construed to conceal the identity of the plaintiff or witnesses
 28 from the defendant or defendant’s counsel.

29 **SECTION 10.** ORS 435.496 is amended to read:

30 435.496. (1) Each induced termination of pregnancy which occurs in this state, regardless of the
 31 length of gestation, shall be reported to the Center for Health Statistics within 30 days by the per-
 32 son in charge of the institution in which the induced termination of pregnancy was performed. If the
 33 induced termination of pregnancy was performed outside an institution, the attending physician [*or*
 34 *the naturopathic physician*] shall prepare and file the report.

35 (2) If the person who is required to file the report under subsection (1) of this section has
 36 knowledge that the person [*who underwent the induced termination of pregnancy*] **whose pregnancy**
 37 **was terminated** also underwent a follow-up visit or had follow-up contact with a health care pro-
 38 vider, the person shall include the fact of the follow-up visit or contact, and whether any compli-
 39 cations were noted, in the report. If the person filing the report is not personally aware of the
 40 follow-up visit or contact but was informed of the visit or contact, the person shall include the
 41 source of that information in the report.

42 (3) Reports submitted under this section [*shall*] **may** not disclose the [*names or identities of the*
 43 *parents*] **name or identity of the person whose pregnancy was terminated.**

44 **SECTION 11.** ORS 677.190 is amended to read:

45 677.190. The Oregon Medical Board may refuse to grant, or may suspend or revoke a license to

1 practice for any of the following reasons:

2 (1)(a) Unprofessional or dishonorable conduct.

3 (b) For purposes of this subsection, the use of an alternative medical treatment shall not by it-
4 self constitute unprofessional conduct. For purposes of this paragraph:

5 (A) "Alternative medical treatment" means:

6 (i) A treatment that the treating physician, based on the physician's professional experience, has
7 an objective basis to believe has a reasonable probability for effectiveness in its intended use even
8 if the treatment is outside recognized scientific guidelines, is unproven, is no longer used as a gen-
9 erally recognized or standard treatment or lacks the approval of the United States Food and Drug
10 Administration;

11 (ii) A treatment that is supported for specific usages or outcomes by at least one other physician
12 licensed by the Oregon Medical Board; and

13 (iii) A treatment that poses no greater risk to a patient than the generally recognized or
14 standard treatment.

15 (B) "Alternative medical treatment" does not include use by a physician of controlled substances
16 in the treatment of a person for chemical dependency resulting from the use of controlled sub-
17 stances.

18 (2) Employing any person to solicit patients for the licensee. However, a managed care organ-
19 ization, independent practice association, preferred provider organization or other medical service
20 provider organization may contract for patients on behalf of physicians.

21 (3) Representing to a patient that a manifestly incurable condition of sickness, disease or injury
22 can be cured.

23 (4) Obtaining any fee by fraud or misrepresentation.

24 (5) Willfully or negligently divulging a professional secret without the written consent of the
25 patient.

26 (6) Conviction of any offense punishable by incarceration in a Department of Corrections insti-
27 tution or in a federal prison, subject to ORS 670.280. A copy of the record of conviction, certified
28 to by the clerk of the court entering the conviction, shall be conclusive evidence of the conviction.

29 (7) Impairment as defined in ORS 676.303.

30 (8) Fraud or misrepresentation in applying for or procuring a license to practice in this state,
31 or in connection with applying for or procuring registration.

32 (9) Making statements that the licensee knows, or with the exercise of reasonable care should
33 know, are false or misleading, regarding skill or the efficacy or value of the medicine, treatment or
34 remedy prescribed or administered by the licensee or at the direction of the licensee in the treat-
35 ment of any disease or other condition of the human body or mind.

36 (10) Impersonating another licensee licensed under this chapter or permitting or allowing any
37 person to use the license.

38 (11) Aiding or abetting the practice of medicine or podiatry by a person not licensed by the
39 board, when the licensee knows, or with the exercise of reasonable care should know, that the per-
40 son is not licensed.

41 (12) Using the name of the licensee under the designation "doctor," "Dr.," "D.O." or "M.D.,"
42 "D.P.M.," "Acupuncturist," "P.A." or any similar designation in any form of advertising that is
43 untruthful or is intended to deceive or mislead the public.

44 (13) Gross negligence or repeated negligence in the practice of medicine or podiatry.

45 (14) Incapacity to practice medicine or podiatry. If the board has evidence indicating incapacity,

1 the board may order a licensee to submit to a standardized competency examination. The licensee
 2 shall have access to the result of the examination and to the criteria used for grading and evaluat-
 3 ing the examination. If the examination is given orally, the licensee shall have the right to have the
 4 examination recorded.

5 (15) Disciplinary action by another state of a license to practice, based upon acts by the licensee
 6 similar to acts described in this section. A certified copy of the record of the disciplinary action of
 7 the state is conclusive evidence thereof.

8 (16) Failing to designate the degree appearing on the license under circumstances described in
 9 ORS 677.184 (3).

10 (17) Willfully violating any provision of this chapter or any rule adopted by the board, board
 11 order, or failing to comply with a board request pursuant to ORS 677.320.

12 (18) Failing to report the change of the location of practice of the licensee as required by ORS
 13 677.172.

14 (19) Imprisonment as provided in ORS 677.225.

15 (20) Making a fraudulent claim.

16 (21)(a) Performing psychosurgery.

17 (b) For purposes of this subsection and ORS 426.385, “psychosurgery” means any operation de-
 18 signed to produce an irreversible lesion or destroy brain tissue for the primary purpose of altering
 19 the thoughts, emotions or behavior of a human being. “Psychosurgery” does not include procedures
 20 which may produce an irreversible lesion or destroy brain tissues when undertaken to cure well-
 21 defined disease states such as brain tumor, epileptic foci and certain chronic pain syndromes.

22 (22) Refusing an invitation for an informal interview with the board requested under ORS
 23 677.415.

24 (23) Violation of the federal Controlled Substances Act.

25 (24) Prescribing controlled substances without a legitimate medical purpose, or prescribing
 26 controlled substances without following accepted procedures for examination of patients, or pre-
 27 scribing controlled substances without following accepted procedures for record keeping.

28 (25) Providing written documentation for purposes of ORS 475C.783 without having legitimately
 29 diagnosed a debilitating medical condition, as defined in ORS 475C.777, or without having followed
 30 accepted procedures for the examination of patients or for keeping records.

31 (26) Failure by the licensee to report to the board any adverse action taken against the licensee
 32 by another licensing jurisdiction or any peer review body, health care institution, professional or
 33 medical society or association, governmental agency, law enforcement agency or court for acts or
 34 conduct similar to acts or conduct that would constitute grounds for disciplinary action as described
 35 in this section.

36 (27) Failure by the licensee to notify the board of the licensee’s voluntary resignation from the
 37 staff of a health care institution or voluntary limitation of a licensee’s staff privileges at the insti-
 38 tution if that action occurs while the licensee is under investigation by the institution or a com-
 39 mittee thereof for any reason related to medical incompetence, unprofessional conduct, physical
 40 incapacity or impairment.

41 **(28) Violation of section 3 or 4 of this 2023 Act.**

42 **SECTION 12.** ORS 678.111, as amended by section 9, chapter 38, Oregon Laws 2022, is amended
 43 to read:

44 678.111. In the manner prescribed in ORS chapter 183 for a contested case:

45 (1) The Oregon State Board of Nursing may refuse to issue a license to practice nursing by ex-

1 amination or indorsement or a nurse internship license or may revoke or suspend a license, issue
2 a limited license, censure or reprimand or place on probation, subject to any conditions imposed by
3 the board, a person issued a license, for any of the following causes:

4 (a) Conviction of the licensee of crime where the crime bears demonstrable relationship to the
5 practice of nursing. A copy of the record of the conviction, certified to by the clerk of the court
6 entering the conviction, shall be conclusive evidence of the conviction.

7 (b) Gross incompetence or gross negligence of the licensee in the practice of nursing at the level
8 for which the licensee is licensed.

9 (c) Any willful fraud or misrepresentation in applying for or procuring a license or renewal of
10 a license.

11 (d) Fraud or deceit of the licensee in the practice of nursing or in admission to the practice of
12 nursing.

13 (e) Impairment as defined in ORS 676.303.

14 (f) Conduct derogatory to the standards of nursing.

15 (g) Violation of any provision of ORS 678.010 to 678.448 or rules adopted under ORS 678.010 to
16 678.448.

17 (h) Revocation or suspension of a license to practice nursing by any state or territory of the
18 United States, or any foreign jurisdiction authorized to issue nursing credentials whether or not that
19 license or credential was relied upon in issuing that license in this state. A certified copy of the
20 order of revocation or suspension shall be conclusive evidence of the revocation or suspension.

21 (i) Physical condition that makes the licensee unable to conduct safely the practice for which
22 the licensee is licensed.

23 (j) Violation of any condition imposed by the board when issuing a limited license.

24 **(k) Violation of section 3 or 4 of this 2023 Act.**

25 (2) A license may be denied, suspended or revoked for the reasons stated in subsection (1) of this
26 section.

27 (3) A license in inactive status may be denied, suspended or revoked for the reasons stated in
28 subsection (1) of this section.

29 (4) A license in retired status may be denied, suspended or revoked for any cause stated in
30 subsection (1) of this section.

31 **SECTION 13. Sections 1 to 9 of this 2023 Act and the amendments to ORS 435.496, 677.190**
32 **and 678.111 by sections 10 to 12 of this 2023 Act apply to abortions that are performed or**
33 **induced, or attempted to be performed or induced, on or after the operative date of this 2023**
34 **Act.**

35 **SECTION 14. (1) Sections 1 to 9 of this 2023 Act and the amendments to ORS 435.496,**
36 **677.190 and 678.111 by sections 10 to 12 of this 2023 Act become operative on January 1, 2024.**

37 **(2) The Oregon Health Authority, the Oregon Medical Board and the Oregon State Board**
38 **of Nursing may take any action before the operative date specified in subsection (1) of this**
39 **section that is necessary to enable the authority and the boards to exercise, on and after the**
40 **operative date specified in subsection (1) of this section, all of the duties, functions and**
41 **powers conferred on the authority and the boards by sections 1 to 9 of this 2023 Act and the**
42 **amendments to ORS 435.496, 677.190 and 678.111 by sections 10 to 12 of this 2023 Act.**

43 **SECTION 15. This 2023 Act takes effect on the 91st day after the date on which the 2023**
44 **regular session of the Eighty-second Legislative Assembly adjourns sine die.**