
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: SENATOR MARY FELZKOWSKI

FROM: Margit Kelley, Principal Attorney

RE: Summary of LRB-2151/1, Relating to Clarification of Medical Necessity for Abortion and Exceptions in Cases of Rape or Incest

DATE: March 14, 2023

This memorandum summarizes Wisconsin’s primary statute that criminalizes abortion and summarizes LRB-2151/1, a bill draft that proposes to clarify the exception from those criminal penalties in cases of medical necessity, and to add an exception during the first trimester of pregnancy for cases of rape or incest.

CURRENT STATE LAW ABORTION PROHIBITION

Wisconsin law includes various criminal prohibitions against the performance of abortions. Of particular relevance, s. [940.04](#), Stats., prohibits any person, other than the mother, from intentionally destroying the life of an unborn child or unborn “quick child.” The provision is commonly referred to as the state’s abortion prohibition or abortion ban. Under the provision, a person who destroys the life of an unborn child at any stage of its development is subject to a Class H felony. A person who destroys the life of an unborn “quick child” is subject to a Class E felony.¹ [s. 940.04 (1) and (2), Stats.]

The law contains an exception only for a therapeutic abortion that meets all of the following three criteria: (1) is performed by a physician; (2) is necessary, or is advised by two other physicians as necessary, to save the life of the mother; and (3) unless an emergency prevents, is performed in a licensed maternity hospital. [s. 940.04 (5), Stats.]

BILL DRAFT

LRB-2151/1 amends three aspects of the abortion prohibition by: resolving certain questions relating to the exception in current law for a therapeutic abortion; explicitly excluding removal of fetal remains; and adding a new exception during the first trimester of pregnancy for cases of rape or incest.

¹ For purposes of the statute, an “unborn child” is defined as a human being from the time of conception until it is born alive. [s. 940.04 (6), Stats.] Although not defined in the statute, a “quick child” is commonly understood to mean the stage of development when the motion of the fetus is felt by the mother. This may commonly be between 16 and 20 weeks of pregnancy. [See, for example, Cleveland Clinic, [Quickening in Pregnancy](#) (April 22, 2022).]

First, the bill draft specifies the circumstances in which a therapeutic abortion may be necessary to save the life of the mother. Under the draft, a therapeutic abortion may occur in either of the following circumstances:

- When pregnancy is contraindicated due to a serious risk of death of the pregnant woman or of substantial and irreversible physical impairment of a major bodily function of the woman.
- When the fetus has no chance of survival, including a physical condition of the fetus that makes survival of the fetus outside of the uterus not possible, an anembryonic pregnancy, an ectopic pregnancy, or a molar pregnancy.

Similarly, although removal of fetal remains is not a criminal act under the abortion prohibition in current law, the bill draft explicitly states that “destroying a life,” as prohibited under the law, does not include removal of a fetus that no longer has a heartbeat.

Lastly, the bill draft adds a new exception related to rape and incest. Under the new exception, the abortion prohibition does not apply to a pregnancy in the first trimester if the pregnancy is the result of sexual assault or incest.²

Please let me know if I can provide any further assistance.

MSK:jal

² Although not defined in the bill draft, the “first trimester” time period is commonly understood to mean the first phase of a pregnancy. The first trimester lasts until the end of the 13th week of a pregnancy. [See, for example, Cleveland Clinic, [First Trimester](#) (August 22, 2022).]