



2023 ASSEMBLY BILL 366

July 27, 2023 - Introduced by Representatives SUBECK, DRAKE, C. ANDERSON, J. ANDERSON, ANDRACA, BALDEH, BARE, BILLINGS, CABRERA, CLANCY, CONLEY, CONSIDINE, DOYLE, EMERSON, GOYKE, HAYWOOD, HONG, JACOBSON, JOERS, MADISON, MCGUIRE, MOORE OMOKUNDE, MYERS, NEUBAUER, OHNSTAD, ORTIZ-VELEZ, PALMERI, RATCLIFF, RIEMER, SHANKLAND, SHELTON, SINICKI, SNODGRASS, STUBBS and VINING, cosponsored by Senators HESSELBEIN, ROYS, PFAFF, AGARD, CARPENTER, L. JOHNSON, LARSON, SMITH, SPREITZER, TAYLOR and WIRCH. Referred to Committee on State Affairs.

AUTHORS SUBJECT TO CHANGE

1 **AN ACT** *to create* 253.078 of the statutes; **relating to:** statutory right to
2 contraception.

Analysis by the Legislative Reference Bureau

This bill establishes that a person has a statutory right to obtain contraceptives and to engage in contraception and, further, that a health care provider has a corresponding right to provide contraceptives, contraception, and contraception-related information. Under the bill, these rights may not be limited or otherwise infringed through any limitation or requirement that 1) expressly, effectively, implicitly, or as implemented singles out the provision of contraceptives, contraception, or contraception-related information; health care providers who provide contraceptives, contraception, or contraception-related information; or facilities in which contraceptives, contraception, or contraception-related information is provided; and 2) impedes access to contraceptives, contraception, or contraception-related information. The bill provides that a party may defend against a claim that a limitation or requirement violates the rights established under the bill by establishing, by clear and convincing evidence, both that the limitation or requirement significantly advances the safety of contraceptives, contraception, and contraception-related information and that the safety of contraceptives, contraception, and contraception-related information or the health of patients cannot be advanced by a less restrictive alternative measure or action.

The bill specifically provides that neither the state nor any political subdivision of the state may administer, implement, or enforce any law, rule, regulation, standard, or other provision having the force and effect of law in a manner that 1)

ASSEMBLY BILL 366

prohibits or restricts the sale, provision, or use of any contraceptives that have been approved by the federal Food and Drug Administration (FDA) for contraceptive purposes; 2) prohibits or restricts any person from aiding another person in obtaining any contraceptives approved by the FDA or contraceptive methods; or 3) exempts any contraceptives approved by the FDA from any other generally applicable law in a way that would make it more difficult to sell, provide, obtain, or use those contraceptives or contraceptive methods. The bill allows the attorney general on behalf of the state or any individual or entity, including any health care provider or patient, to bring a cause of action for a violation of the provisions of the bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 253.078 of the statutes is created to read:

2 **253.078 Right to contraception.** (1) SHORT TITLE. This section shall be
3 known as the “Right to Contraception Act.”

4 (2) DEFINITIONS. In this section:

5 (a) “Contraception” means an action taken to prevent pregnancy, including the
6 use of contraceptives or fertility-awareness-based methods and sterilization
7 procedures.

8 (b) “Contraceptive” means any drug, device, or biological product intended for
9 use in the prevention of pregnancy, whether specifically intended to prevent
10 pregnancy or for other health needs, that is legally marketed under the federal Food,
11 Drug, and Cosmetic Act, such as oral contraceptives, long-acting reversible
12 contraceptives, emergency contraceptives, internal and external condoms,
13 injectables, vaginal barrier methods, transdermal patches, and vaginal rings, or
14 other contraceptives.

15 (c) “Health care provider” has the meaning given in s. 146.81 (1).

16 (d) “Political subdivision” means a city, village, town, or county.

ASSEMBLY BILL 366

1 **(3) PERMITTED SERVICES.** (a) A person has a statutory right under this section
2 to obtain contraceptives and to engage in contraception, and a health care provider
3 has a corresponding right to provide contraceptives, contraception, and
4 contraception-related information.

5 (b) The statutory rights specified in par. (a) may not be limited or otherwise
6 infringed through any limitation or requirement that does all of the following:

7 1. Expressly, effectively, implicitly, or as implemented singles out the provision
8 of contraceptives, contraception, or contraception-related information; health care
9 providers who provide contraceptives, contraception, or contraception-related
10 information; or facilities in which contraceptives, contraception, or
11 contraception-related information is provided.

12 2. Impedes access to contraceptives, contraception, or contraception-related
13 information.

14 (c) To defend against a claim that a limitation or requirement violates a health
15 care provider's or patient's statutory rights under par. (b), a party must establish, by
16 clear and convincing evidence, all of the following:

17 1. The limitation or requirement significantly advances the safety of
18 contraceptives, contraception, and contraception-related information.

19 2. The safety of contraceptives, contraception, and contraception-related
20 information or the health of patients cannot be advanced by a less restrictive
21 alternative measure or action.

22 **(4) APPLICABILITY.** (a) Neither the state nor any political subdivision of the state
23 may administer, implement, or enforce any law, rule, regulation, standard, or other
24 provision having the force and effect of law in a manner that does any of the following:

ASSEMBLY BILL 366

1 1. Prohibits or restricts the sale, provision, or use of any contraceptives that
2 have been approved by the federal food and drug administration for contraceptive
3 purposes.

4 2. Prohibits or restricts any person from aiding another person in obtaining any
5 contraceptives approved by the federal food and drug administration or
6 contraceptive methods.

7 3. Exempts any contraceptives approved by the federal food and drug
8 administration from any other generally applicable law in a way that would make
9 it more difficult to sell, provide, obtain, or use those contraceptives or contraceptive
10 methods.

11 (b) This section does not supersede or otherwise affect any provision relating
12 to coverage under group health plans or group or individual health insurance
13 coverage and may not be construed as requiring the provision of specific benefits
14 under these plans or coverage.

15 (c) An individual or entity who is subject to a limitation or requirement that
16 violates this section may raise this section as a defense to any cause of action against
17 the individual or entity.

18 **(5) CONSTRUCTION.** (a) This section shall be liberally construed to effectuate
19 its purposes.

20 (b) Nothing in this section may be construed to do any of the following:

21 1. Authorize any government to interfere with a health care provider's ability
22 to provide contraceptives or contraception-related information or a person's ability
23 to obtain contraceptives or to engage in contraception.

24 2. Permit or sanction the conduct of any sterilization procedure without the
25 patient's voluntary and informed consent.

ASSEMBLY BILL 366

1 **(6) ENFORCEMENT.** (a) The attorney general may commence a civil action on
2 behalf of the state against any person that violates or enforces a limitation or
3 requirement that violates this section. Notwithstanding s. 165.08 (1), in any civil
4 action brought under this paragraph, the attorney general may compromise and
5 settle the action as the attorney general determines to be in the best interest of the
6 state.

7 (b) Any individual or entity, including any health care provider or patient,
8 adversely affected by an alleged violation of this section may commence a civil action
9 against any person that violates or implements or enforces a limitation or
10 requirement that violates this section.

11 (c) A health care provider may commence an action for relief on its own behalf,
12 on behalf of the provider's staff, and on behalf of the provider's patients who are or
13 may be adversely affected by an alleged violation of this section.

14 (d) If a court finds that there has been a violation of this section, the court shall
15 hold unlawful and set aside the limitation or requirement. In any action under this
16 section, the court may award appropriate equitable relief, including temporary,
17 preliminary, or permanent injunctive relief.

18 (e) Notwithstanding the limitation under s. 814.04, in any action under this
19 section, the court shall award to any prevailing plaintiff costs and reasonable
20 attorney fees. Unless a court determines an action is frivolous, the court may not
21 hold a plaintiff liable to a defendant for costs and attorney fees in an action under
22 this section.

SECTION 2. Nonstatutory provisions.

23 **(1) LEGISLATIVE FINDINGS.** The legislature finds all of the following:
24

ASSEMBLY BILL 366

1 (a) The right to contraception is a fundamental right, central to a person's
2 privacy, health, well-being, dignity, liberty, equality, and ability to participate in the
3 social and economic life of the state.

4 (b) The U.S. Supreme Court has repeatedly recognized the constitutional right
5 to contraception.

6 (c) In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the U.S. Supreme Court
7 first recognized the constitutional right for married people to use contraceptives.

8 (d) In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the U.S. Supreme Court
9 confirmed the constitutional right of all people to legally access contraceptives
10 regardless of marital status.

11 (e) In *Carey v. Population Services International*, 431 U.S. 678 (1977), the U.S.
12 Supreme Court affirmed the constitutional right to contraceptives for minors.

13 (f) The right to contraceptives is protected by the Wisconsin Constitution. See
14 article I, section 1, of the Wisconsin Constitution; *Haase v. Sawicki*, 20 Wis. 2d 308,
15 310 n.2 (1963) (finding that article I, section 1, of the Wisconsin Constitution is
16 substantially the equivalent of the Due Process Clause and the Equal Protection
17 Clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479,
18 484-86 (1965) (finding that a prohibition on the use of contraceptives violates the
19 right to privacy created by several fundamental constitutional guarantees under the
20 U.S. Constitution); and *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003) (finding that
21 the Due Process Clause of the Fourteenth Amendment protects personal decisions
22 relating to marriage, procreation, contraception, family relationships, child rearing,
23 and education).

24 (g) The right to contraception has been repeatedly recognized internationally
25 as a human right. The United Nations Population Fund has published several

ASSEMBLY BILL 366

1 reports outlining family planning as a basic human right that advances women's
2 health, economic empowerment, and equality.

3 (h) Access to contraceptives is internationally recognized by the World Health
4 Organization as advancing other human rights such as the right to life, liberty,
5 expression, health, work, and education.

6 (i) Contraception is safe, essential health care, and access to contraceptive
7 products and services is central to people's ability to participate equally in economic
8 and social life. Contraception allows people to make decisions about their families
9 and their lives.

10 (j) Contraception is key to sexual and reproductive health. Contraception is
11 critical to preventing unintended pregnancy, and many contraceptives are highly
12 effective in preventing and treating a wide array of often severe medical conditions
13 and decrease the risk of certain cancers.

14 (k) Family planning improves health outcomes for women, their families, and
15 their communities and reduces rates of maternal and infant mortality and morbidity.

16 (L) The United States has a long history of reproductive coercion, including the
17 childbearing forced upon enslaved women, as well as the forced sterilization of Black
18 women, Puerto Rican women, indigenous women, immigrant women, and disabled
19 women, and reproductive coercion continues to occur.

20 (m) The right to make personal decisions about contraceptive use is important
21 for all people, and is especially critical for historically marginalized groups,
22 including Black, indigenous, and other people of color; immigrants; lesbian, gay,
23 bisexual, transgender, and queer people; people with disabilities; people with low
24 incomes; and people living in rural and underserved areas. Many people who are
25 part of these marginalized groups already face barriers, exacerbated by social,

ASSEMBLY BILL 366

1 political, economic, and environmental inequities, to comprehensive health care,
2 including reproductive health care, that reduce their ability to make decisions about
3 their health, families, and lives.

4 (n) Policies governing pharmaceutical and insurance policies affect the
5 accessibility of contraceptives and the settings in which contraception services are
6 delivered.

7 (o) Despite the clearly established constitutional right to contraception, access
8 to contraceptives, including emergency contraceptives and long-acting reversible
9 contraceptives, has been obstructed in various ways.

10 (p) As of June 2023, at least 4 states tried to ban access to some or all
11 contraceptives by restricting access to public funding for these products and services.

12 (q) Providers' refusals to offer contraceptives and contraception-related
13 information on the basis of their own personal beliefs impede patients from obtaining
14 their preferred method.

15 (r) States have attempted to define abortion expansively so as to include
16 contraceptives in state bans on abortion and have also restricted access to emergency
17 contraception.

18 (s) In June 2022, Justice Thomas, in his concurring opinion in *Dobbs v. Jackson*
19 *Women's Health Organization*, 142 S. Ct. 2228 (2022), stated that the U.S. Supreme
20 Court "should reconsider all of this Court's substantive due process precedents,
21 including *Griswold*, *Lawrence*, and *Obergefell*" and that the court has "a duty to
22 correct the error established in those precedents" by overruling them.

23 (t) In order to further public health and to combat efforts to restrict access to
24 reproductive health care, action is necessary to protect access to contraceptives,
25 contraception, and contraception-related information for everyone, regardless of

ASSEMBLY BILL 366

1 actual or perceived race, ethnicity, sex, including gender identity and sexual
2 orientation, income, disability, national origin, immigration status, or geography.

3 (END)