



## 2023 SENATE BILL 365

July 13, 2023 - Introduced by Senators HESSELBEIN, ROYS, PFAFF, AGARD, CARPENTER, L. JOHNSON, LARSON, SMITH, SPREITZER, TAYLOR and WIRCH, cosponsored 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. Referred to Committee on Health.

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

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### *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)

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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.

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*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.

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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:

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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.

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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:  
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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

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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,

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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



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

3 (END)