

TITLE 18
CRIMES AND PUNISHMENTS

CHAPTER 5
PAIN-CAPABLE UNBORN CHILD PROTECTION ACT

18-501. SHORT TITLE. This act shall be known and may be cited as the "Pain-Capable Unborn Child Protection Act."

[18-501, added 2011, ch. 324, sec. 1, p. 945.]

18-502. DEFINITIONS. For purposes of this chapter:

(1) "Abortion" means the use or prescription of any instrument, medicine, drug or other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma, or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy;

(2) "Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of the provisions of this chapter;

(3) "Fertilization" means the fusion of a human spermatozoon with a human ovum;

(4) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function;

(5) "Physician" means any person licensed to practice medicine and surgery or osteopathic medicine under [chapter 18, title 54](#), Idaho Code;

(6) "Postfertilization age" means the age of the unborn child as calculated from the fertilization of the human ovum;

(7) "Probable postfertilization age of the unborn child" means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed;

(8) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved;

(9) "Unborn child" or "fetus" means an individual organism of the species homo sapiens from fertilization until live birth; and

(10) "Woman" means a female human being whether or not she has reached the age of majority.

[18-502, added 2011, ch. 324, sec. 1, p. 945.]

18-503. LEGISLATIVE FINDINGS. The legislature makes the following findings:

(1) Pain receptors (nociceptors) are present throughout the unborn child's entire body by no later than sixteen (16) weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty (20) weeks.

(2) By eight (8) weeks after fertilization, the unborn child reacts to touch. After twenty (20) weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example by recoiling.

(3) In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response.

(4) Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life.

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia.

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty (20) weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

(7) Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain.

(8) In adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does.

(9) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing.

(10) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty (20) weeks after fertilization.

(11) It is the purpose of the state of Idaho to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

(12) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which, in the context of determining the severability of a state statute regulating abortion, the United States supreme court noted that an explicit statement of legislative intent is of greater weight than inclusion of a severability clause standing alone, the legislature declares that it would have passed this act, and each provision, section, subsection, sentence, clause, phrases, phrase or word thereof, irrespective of the fact that any one (1)

or more provisions, sections, subsections, sentences, clauses or words of this act or the application thereof to any person or circumstance, were to be declared unconstitutional.

[18-503, added 2011, ch. 324, sec. 1, p. 946.]

18-504. DETERMINATION OF POSTFERTILIZATION AGE. (1) Except in the case of a medical emergency, no abortion shall be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, a physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.

(2) Intentional or reckless failure by any physician to conform to any requirement of this section makes the physician subject to medical discipline pursuant to section [54-1814](#) (6), Idaho Code.

[18-504, added 2011, ch. 324, sec. 1, p. 947.]

18-505. ABORTION OF UNBORN CHILD OF TWENTY OR MORE WEEKS POSTFERTILIZATION AGE PROHIBITED. No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks unless, in reasonable medical judgment: (1) she has a condition that so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions; or (2) it is necessary to preserve the life of an unborn child. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

[18-505, added 2011, ch. 324, sec. 1, p. 947.]

18-506. REPORTING. (1) Any physician who performs or induces or attempts to perform or induce an abortion shall report to the department of health and welfare, on a schedule and in accordance with forms and rules adopted and promulgated by the department:

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

(b) If a determination of probable postfertilization age was not made, the basis of the determination that a medical emergency existed;

(c) If the probable postfertilization age was determined to be twenty (20) or more weeks, the basis of the determination that the pregnant woman had a condition that so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment

of a major bodily function, not including psychological or emotional conditions, or the basis of the determination that it was necessary to preserve the life of an unborn child; and

(d) The method used for the abortion.

(2) By June 30 of each year, the department shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (1) of this section. Each such report shall also provide the statistics for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The department shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed.

(3) Any physician who fails to submit a report by the end of thirty (30) days following the due date shall be subject to a late fee of five hundred dollars (\$500) for each additional thirty (30) day period or portion of a thirty (30) day period the report is overdue. Any physician required to report in accordance with this chapter who has not submitted a report, or has submitted only an incomplete report, more than one (1) year following the due date, may, in an action brought by the department, be directed by a court of competent jurisdiction to submit a complete report within a time period stated by court order or be subject to civil contempt. Intentional or reckless failure by any physician to conform to any requirement of this section, other than late filing of a report, makes the physician subject to medical discipline under section [54-1814\(6\)](#), Idaho Code. Intentional or reckless failure by any physician to submit a complete report in accordance with a court order renders the physician subject to civil contempt and makes the physician subject to medical discipline pursuant to section [54-1814\(6\)](#), Idaho Code. Intentional or reckless falsification of any report required under this section is a misdemeanor.

(4) Within ninety (90) days after the effective date of this act, the department shall adopt and promulgate rules to assist in compliance with this section. Subsection (1) of this section shall take effect so as to require reports regarding all abortions performed or induced on and after the first day of the first calendar month following the effective date of such rules.

[18-506, added 2011, ch. 324, sec. 1, p. 947.]

18-507. CRIMINAL PENALTIES. Any person who intentionally or recklessly performs or attempts to perform an abortion in violation of the provisions of section [18-505](#), Idaho Code, is guilty of a felony. No penalty shall be assessed against the woman upon whom the abortion is performed or attempted to be performed.

[18-507, added 2011, ch. 324, sec. 1, p. 948.]

18-508. CIVIL REMEDIES. (1) Any woman upon whom an abortion has been performed in violation of the pain-capable unborn child protection act or the father of the unborn child who was the subject of such an abortion may maintain an action against the person who performed the abortion in an intentional or a reckless violation of the provisions of this chapter for actual damages. Any woman upon whom an abortion has been attempted in violation of

the provisions of this chapter may maintain an action against the person who attempted to perform the abortion in an intentional or a reckless violation of the provisions of this chapter for actual damages.

(2) A cause of action for injunctive relief against any person who has intentionally or recklessly violated the provisions of this chapter may be maintained by the woman upon whom an abortion was performed or attempted to be performed in violation of the provisions of this chapter, by any person who is the spouse, parent, sibling, or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or attempted to be performed in violation of the provisions of this chapter, by a prosecuting attorney with appropriate jurisdiction, or by the attorney general. The injunction shall prevent the abortion provider from performing or attempting to perform further abortions in violation of the provisions of this chapter in this state.

(3) No damages may be assessed against the woman upon whom an abortion was performed or attempted to be performed.

[18-508, added 2011, ch. 324, sec. 1, p. 948.]

18-509. PROTECTION OF PRIVACY IN COURT PROCEEDINGS. In every civil or criminal proceeding or action brought under the pain-capable unborn child protection act, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under the provisions of section [18-508](#), Idaho Code, shall do so under a pseudonym. This section shall not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

[18-509, added 2011, ch. 324, sec. 1, p. 949.]

18-510. LITIGATION DEFENSE FUND. There is hereby created in the state treasury the pain-capable unborn child protection act litigation fund for the purpose of providing funds to pay for any costs and expenses incurred by the state attorney general in relation to actions surrounding defense of this chapter. This fund may include appropriations, donations, gifts or grants made to the fund. Interest earned on the investment of idle moneys in the fund shall be returned to the fund. Moneys in the fund may be expended pursuant to appropriation.

[18-510, added 2011, ch. 324, sec. 1, p. 949.]