

# NEBRASKA'S INFORMED CONSENT FOR ABORTION

*This web page provides information and resources as directed in Neb. Rev. Stat. 28-327.01. Find Nebraska's Informed Consent for Abortion Statutes here:*

## Nebraska Revised Statute 28-327

*Revised Statutes » Chapter 28 » 28-327*

### **28-327. Abortion; voluntary and informed consent required; exception.**

No abortion shall be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed. Except in the case of an emergency situation, consent to an abortion is voluntary and informed only if:

(1) The woman is told the following by the physician who is to perform the abortion, by the referring physician, or by a physician assistant or registered nurse licensed under the Uniform Credentialing Act who is an agent of either physician, at least twenty-four hours before the abortion:

- (a) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, perforated uterus, danger to subsequent pregnancies, and infertility;
- (b) The probable gestational age of the unborn child at the time the abortion is to be performed;
- (c) The medical risks associated with carrying her child to term; and
- (d) That she cannot be forced or required by anyone to have an abortion and is free to withhold or withdraw her consent for an abortion.

The person providing the information specified in this subdivision to the person upon whom the abortion is to be performed shall be deemed qualified to so advise and provide such information only if, at a minimum, he or she has had training in each of the following subjects: Sexual and reproductive health; abortion technology; contraceptive technology; short-term counseling skills; community resources and referral; and informed consent. The physician or the physician's agent may provide this information by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied by the patient and whatever other relevant information is reasonably available to the physician or the physician's agent;

(2) The woman is informed by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either physician, at least twenty-four hours before the abortion:

(a) The name of the physician who will perform the abortion;

(b) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(c) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion;

(d) That she has the right to review the printed materials described in section 28-327.01. The physician or his or her agent shall orally inform the woman that the materials have been provided by the Department of Health and Human Services and that they describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to review the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee. The physician and his or her agent may disassociate themselves from the materials and may comment or refrain from commenting on them as they choose; and

(e) That she has the right to request a comprehensive list, compiled by the Department of Health and Human Services, of health care providers, facilities, and clinics that offer to have ultrasounds performed by a person at least as qualified as a registered nurse licensed under the Uniform Credentialing Act, including and specifying those that offer to perform such ultrasounds free of charge. The list shall be arranged geographically and shall include the name, address, hours of operation, and telephone number of each entity. If requested by the woman, the physician who is to perform the abortion, the referring physician, or his or her agent shall provide such a list as compiled by the department;

(3) If an ultrasound is used prior to the performance of an abortion, the physician who is to perform the abortion, the referring physician, or a physician assistant or registered nurse licensed under the Uniform Credentialing Act who is an agent of either physician, or any qualified agent of either physician, shall:

(a) Perform an ultrasound of the woman's unborn child of a quality consistent with standard medical practice in the community at least one hour prior to the performance of the abortion;

(b) Simultaneously display the ultrasound images so that the woman may choose to view the ultrasound images or not view the ultrasound images. The woman shall be informed that the ultrasound images will be displayed so that she is able to view them. Nothing in this subdivision shall be construed to require the woman to view the displayed ultrasound images; and

(c) If the woman requests information about the displayed ultrasound image, her questions shall be answered. If she requests a detailed, simultaneous, medical description of the ultrasound image, one shall be provided that includes the dimensions of the unborn child, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable;

(4) At least one hour prior to the performance of an abortion, a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker licensed under the Uniform Credentialing Act has:

(a) Evaluated the pregnant woman to identify if the pregnant woman had the perception of feeling pressured or coerced into seeking or consenting to an abortion;

(b) Evaluated the pregnant woman to identify the presence of any risk factors associated with abortion;

(c) Informed the pregnant woman and the physician who is to perform the abortion of the results of the evaluation in writing. The written evaluation shall include, at a minimum, a checklist identifying both the positive and negative results of the evaluation for each risk factor associated with abortion and both the licensed person's written certification and the woman's written certification that the pregnant woman was informed of the risk factors associated with abortion as discussed; and

(d) Retained a copy of the written evaluation results in the pregnant woman's permanent record;

(5) If any risk factors associated with abortion were identified, the pregnant woman was informed of the following in such manner and detail that a reasonable person would consider material to a decision of undergoing an elective medical procedure:

(a) Each complication associated with each identified risk factor; and

(b) Any quantifiable risk rates whenever such relevant data exists;

(6) The physician performing the abortion has formed a reasonable medical judgment, documented in the permanent record, that:

(a) The preponderance of statistically validated medical studies demonstrates that the physical, psychological, and familial risks associated with abortion for patients with risk factors similar to the patient's risk factors are negligible risks;

(b) Continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman greater than if the pregnancy were terminated by induced abortion; or

(c) Continuance of the pregnancy would involve less risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated by an induced abortion;

(7) The woman certifies in writing, prior to the abortion, that:

(a) The information described in subdivisions (1) and (2)(a), (b), and (c) of this section has been furnished her;

(b) She has been informed of her right to review the information referred to in subdivision (2)(d) of this section; and

(c) The requirements of subdivision (3) of this section have been performed if an ultrasound is performed prior to the performance of the abortion; and

(8) Prior to the performance of the abortion, the physician who is to perform the abortion or his or her agent receives a copy of the written certification prescribed by subdivision (7) of this section. The physician or his or her agent shall retain a copy of the signed certification form in the woman's medical record.

#### **Source**

*Laws 1977, LB 38, § 42;*

*Laws 1979, LB 316, § 2;*

*Laws 1984, LB 695, § 2;*

*Laws 1993, LB 110, § 2;*

*Laws 1996, LB 1044, § 60;*

*Laws 2009, LB675, § 2;*

*Laws 2010, LB594, § 4.*

#### **Cross References**

Uniform Credentialing Act, see section 38-101.

#### **Annotations**

*This section does not create an independent cause of action under section 25-206. The right of action for violation of this section is "against the person who performed the abortion or attempted to perform the abortion". Hill v. Women's Med. Ctr. of Neb., 254 Neb. 827, 580 N.W.2d 102 (1998).*

**Sections 28-326(8), 28-327, 28-333, and 28-343 (1979) regulating abortion were unconstitutional. Womens Services, P.C. v. Thone, 690 F.2d 667 (8th Cir. 1982).**

*The interest of the state in having women who seek abortions make a thoughtful decision after receiving certain information, while legitimate, is not sufficiently compelling to justify the substantial burden imposed by the requirement of a forty-eight hour wait between the expression of informed consent and the performance of the abortion. Therefore, sections 28-327 and 28-328*

*(1979) imposing the waiting period are unconstitutional and their implementation is permanently enjoined. Womens Services, P.C. v. Thone, 483 F.Supp. 1022 (D. Neb. 1979).*

## **Nebraska Revised Statute 28-327.01**

### **Revised Statutes » Chapter 28 » 28-327.01**

*28-327.01. Department of Health and Human Services; printed materials; duties; availability; Internet web site information.*

(1) The Department of Health and Human Services shall cause to be published the following easily comprehensible printed materials:

(a) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth, and while the child is dependent, including adoption agencies and agencies and services for prevention of unintended pregnancies, which materials shall include a comprehensive list of the agencies available, a description of the services they offer, and a description of the manner, including telephone numbers and addresses in which such agencies may be contacted or printed materials including a toll-free, twenty-four-hour-a-day telephone number which may be called to orally obtain such a list and description of agencies in the locality of the caller and of the services they offer;

(b) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a woman can be known to be pregnant to full term, including pictures or drawings representing the development of unborn children at the two-week gestational increments, and any relevant information on the possibility of the unborn child's survival. Any such pictures or drawings shall contain the dimensions of the unborn child and shall be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The materials shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion, the medical risks commonly associated with abortion, and the medical risks commonly associated with carrying a child to term; and

(c) A comprehensive list of health care providers, facilities, and clinics that offer to have ultrasounds performed by a person at least as qualified as a registered nurse licensed under the Uniform Credentialing Act, including and specifying those that offer to perform such ultrasounds free of charge. The list shall be arranged geographically and shall include the name, address, hours of operation, and telephone number of each entity.

(2) The printed materials shall be printed in a typeface large enough to be clearly legible.

(3) The printed materials required under this section shall be available from the department upon the request by any person, facility, or hospital for an amount equal to the cost incurred by the department to publish the materials.

(4) The Department of Health and Human Services shall make available on its Internet web site a printable publication of geographically indexed materials designed to inform the woman of public and private agencies with services available to assist a woman with mental health concerns, following a risk factor evaluation. Such services shall include, but not be limited to, outpatient and crisis intervention services and crisis hotlines. The materials shall include a comprehensive list of the agencies available, a description of the services offered, and a description of the manner in which such agencies may be contacted, including addresses and telephone numbers of such agencies, as well as a toll-free, twenty-four-hour-a-day telephone number to be provided by the department which may be called to orally obtain the names of the agencies and the services they provide in the locality of the woman. The department shall update the publication as necessary.

#### **Source**

*Laws 1993, LB 110, § 3;*

*Laws 1996, LB 1044, § 61;*

*Laws 2009, LB675, § 3;*

*Laws 2010, LB594, § 12.*

#### **Cross References**

*Uniform Credentialing Act, see section 38-101.*

## **Nebraska Revised Statute 28-327.02**

*Revised Statutes » Chapter 28 » 28-327.02*

### **28-327.02. Abortion; emergency situation; physician; duties.**

When an emergency situation compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his or her judgment that an abortion is necessary to avert her death or to avert substantial impairment of a major bodily function.

#### **Source**

*Laws 1993, LB 110, § 4.*

## **Nebraska Revised Statute 28-327.03**

*Revised Statutes » Chapter 28 » 28-327.03*

### **28-327.03. Civil liability; limitation.**

No civil liability for failure to comply with subdivision (2)(d) of section 28-327 or that portion of subdivision (7) of such section requiring a written certification that the woman has been informed of her right to review the information referred to in subdivision (2)(d) of such section may be imposed unless the Department of Health and Human Services has published and made available the printed materials at the time the physician or his or her agent is required to inform the woman of her right to review them.

#### **Source**

*Laws 1993, LB 110, § 5;*

*Laws 1996, LB 1044, § 62;*

*Laws 2009, LB675, § 4;*

*Laws 2010, LB594, § 13*

## **Nebraska Revised Statute 28-327.04**

*Revised Statutes » Chapter 28 » 28-327.04*

**28-327.04. Civil cause of action; authorized; evidence of professional negligence; attorney's fee.**

*Any person upon whom an abortion has been performed or attempted in violation of section 28-327 or the parent or guardian of a minor upon whom an abortion has been performed or attempted in violation of such section shall have a right to maintain a civil cause of action against the person who performed the abortion or attempted to perform the abortion. A violation of subdivision (1), (2), (3), (7), or (8) of section 28-327 shall be prima facie evidence of professional negligence. The written certifications prescribed by subdivisions (4) and (7) of section 28-327 signed by the person upon whom an abortion has been performed or attempted shall constitute and create a rebuttable presumption of full compliance with all provisions of section 28-327 in favor of the physician who performed or attempted to perform the abortion, the referring physician, or the agent of either physician. The written certification shall be admissible as evidence in the cause of action for professional negligence or in any criminal action. If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.*

#### **Source**

*Laws 1993, LB 110, § 6;*

*Laws 2009, LB675, § 5;*

*Laws 2010, LB594, § 14*

## **Nebraska Revised Statute 28-327.05**

*Revised Statutes » Chapter 28 » 28-327.05*

**28-327.05. Civil action; anonymity of woman; procedures.**

*In every civil action brought pursuant to section 28-327.04, the court shall rule whether the anonymity of any woman upon whom an abortion is performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion by a party or on its own motion, 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 given standing under section 28-327.04 who brings a civil action under such section shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.*

**Source**

*Laws 1993, LB 110, § 7.*

## **Nebraska Revised Statute 28-327.06**

*Revised Statutes » Chapter 28 » 28-327.06*

### **28-327.06. Waiver of evaluations and notices; void and unenforceable.**

*Any waiver of the evaluations and notices provided for in subdivision (4) of section 28-327 is void and unenforceable.*

**Source**

*Laws 2010, LB594, § 5.*

## **Nebraska Revised Statute 28-327.07**

*Revised Statutes » Chapter 28 » 28-327.07*

### **28-327.07. Damages.**

*In addition to whatever remedies are available under the common or statutory laws of this state, the intentional, knowing, or negligent failure to comply with the requirements of section 28-327 shall provide a basis for the following damages:*

- (1) The award of reasonable costs and attorney's fees; and
- (2) A recovery for the pregnant woman for the wrongful death of her unborn child under section 30-809 upon proving by a preponderance of evidence that the physician knew or should have

known that the pregnant woman's consent was either not fully informed or not fully voluntary pursuant to section 28-327.

**Source**

*Laws 2010, LB594, § 6.*

## **Nebraska Revised Statute 28-327.08**

*Revised Statutes » Chapter 28 » 28-327.08*

**28-327.08. Action for civil remedies.**

*Any action for civil remedies based on a failure to comply with the requirements of section 28-327 shall be commenced in accordance with section 25-222 or 44-2828.*

**Source**

*Laws 2010, LB594, § 7*

## **Nebraska Revised Statute 28-327.09**

*Revised Statutes » Chapter 28 » 28-327.09*

**28-327.09. Minor; burden of proof.**

*If a physician performed an abortion on a pregnant woman who is a minor without providing the information required in section 28-327 to the pregnant woman's parent or legal guardian, then the physician bears the burden of proving that the pregnant woman was capable of independently evaluating the information given to her.*

**Source**

*Laws 2010, LB594, § 8.*

## **Nebraska Revised Statute 28-327.10**

*Revised Statutes » Chapter 28 » 28-327.10*

**28-327.10. Time requirement.**

*Except in the case of an emergency situation, if a pregnant woman is provided with the information required by section 28-327 less than twenty-four hours before her scheduled abortion, the physician shall bear the burden of proving that the pregnant woman had sufficient reflection time, given her age, maturity, emotional state, and mental capacity, to comprehend and consider such information.*

## Source

*Laws 2010, LB594, § 9.*

## Nebraska Revised Statute 28-327.11

*Revised Statutes » Chapter 28 » 28-327.11*

**28-327.11. Civil action; rebuttable presumption; noneconomic damages; expert witness; physician deemed transacting business; affirmative defense; additional remedies.**

*In a civil action involving section 28-327, the following shall apply:*

- (1) In determining the liability of the physician and the validity of the consent of a pregnant woman, the failure to comply with the requirements of section 28-327 shall create a rebuttable presumption that the pregnant woman would not have undergone the recommended abortion had section 28-327 been complied with by the physician;
- (2) The absence of physical injury shall not preclude an award of noneconomic damages including pain, suffering, inconvenience, mental suffering, emotional distress, psychological trauma, loss of society or companionship, loss of consortium, injury to reputation, or humiliation associated with the abortion;
- (3) The fact that a physician does not perform elective abortions or has not performed elective abortions in the past shall not automatically disqualify such physician from being an expert witness. A licensed obstetrician or family practitioner who regularly assists pregnant women in resolving medical matters related to pregnancy may be qualified to testify as an expert on the screening, counseling, management, and treatment of pregnancies;
- (4) Any physician advertising services in this state shall be deemed to be transacting business in this state pursuant to section 25-536 and shall be subject to the provisions of section 28-327;
- (5) It shall be an affirmative defense to an allegation of inadequate disclosure under the requirements of section 28-327 that the defendant omitted the contested information because statistically validated surveys of the general population of women of reproductive age, conducted within the three years before or after the contested abortion, demonstrate that less than five percent of women would consider the contested information to be relevant to an abortion decision; and
- (6) In addition to the other remedies available under the common or statutory law of this state, a woman or her survivors shall have a cause of action for reckless endangerment against any person, other than a physician or pharmacist licensed under the Uniform Credentialing Act, who attempts or completes an abortion on the pregnant woman or aids or abets the commission of a self-induced abortion. Proof of injury shall not be required to recover an award, including reasonable costs and attorney's fees, for wrongful death under this subdivision.

**Source**

*Laws 2010, LB594, § 10.*

**Cross References**

*Uniform Credentialing Act, see section 38-101.*

**Nebraska Revised Statute 28-327.12**

*Revised Statutes » Chapter 28 » 28-327.12*

*28-327.12. Statute of limitations; tolled; section, how construed; violations; how treated.*

(1) In the event that any portion of section 28-327 is enjoined and subsequently upheld, the statute of limitations for filing a civil suit under section 28-327 shall be tolled during the period for which the injunction is pending and for two years thereafter.

(2) Nothing in section 28-327 shall be construed as defining a standard of care for any medical procedure other than an induced abortion.

(3) A violation of subdivision (4), (5), or (6) of section 28-327 shall not provide grounds for any criminal action or disciplinary action against or revocation of a license to practice medicine and surgery pursuant to the Uniform Credentialing Act.

**Source**

*Laws 2010, LB594, § 11.*

**Cross References**

*Uniform Credentialing Act, see section 38-101.*