

118TH CONGRESS
1ST SESSION

S. 323

To ensure the privacy of pregnancy termination or loss information under the HIPAA privacy regulations and the HITECH Act.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 9, 2023

Ms. HIRONO (for herself, Mr. BENNET, Mrs. GILLIBRAND, Ms. WARREN, Mr. WYDEN, Mr. BROWN, Mrs. FEINSTEIN, Ms. CORTEZ MASTO, Ms. DUCKWORTH, Mrs. MURRAY, and Mr. BOOKER) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To ensure the privacy of pregnancy termination or loss information under the HIPAA privacy regulations and the HITECH Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Secure Access for Es-
5 sential Reproductive Health Act of 2023” or the “SAFER
6 Health Act of 2023”.

1 **SEC. 2. ENSURING THE PRIVACY OF PREGNANCY TERMI-**
2 **NATION OR LOSS INFORMATION UNDER THE**
3 **HIPAA PRIVACY REGULATIONS AND THE**
4 **HITECH ACT.**

5 (a) IN GENERAL.—

6 (1) PROHIBITION ON DISCLOSURE.—Subject to
7 paragraph (2) and notwithstanding any regulations
8 promulgated pursuant to section 264(e) of the
9 Health Insurance Portability and Accountability Act
10 of 1996 (42 U.S.C. 1320d–2 note; Public Law 104–
11 191), a covered entity or a business associate of a
12 covered entity may not disclose pregnancy termi-
13 nation or loss information of an individual in Fed-
14 eral, State, local, or Tribal proceedings, including
15 civil, criminal, administrative, legislative, or other
16 proceedings, without the valid authorization of the
17 individual made in accordance with section 164.508
18 of title 45, Code of Federal Regulations (or a suc-
19 cessor regulation).

20 (2) EXCEPTIONS.—Paragraph (1) shall not
21 apply in the case of a disclosure of pregnancy termi-
22 nation or loss information of an individual by a cov-
23 ered entity or a business associate of a covered enti-
24 ty if—

25 (A) the pregnancy termination or loss in-
26 formation is necessary for use in defense of a

1 professional liability action or proceeding
2 against the covered entity or business associate
3 and the pregnancy termination or loss informa-
4 tion is disclosed by—

5 (i) the covered entity or business asso-
6 ciate to the covered entity's or business as-
7 sociate's attorney or professional liability
8 insurer or insurer's agent; or

9 (ii) the authorized attorney of the cov-
10 ered entity or business associate to a court
11 or body hearing the action or proceeding;
12 or

13 (B)(i) the pregnancy termination or loss
14 information is necessary to investigate physical
15 harm to the individual by another person di-
16 rectly relating to the loss or termination of the
17 pregnancy; and

18 (ii) the individual is unable to provide con-
19 sent due to death or incapacity.

20 (b) HITECH.—

21 (1) PRIVACY EXCEPTION.—The Secretary shall
22 revise section 171.202 of title 45, Code of Federal
23 Regulations, to clarify that an entity's practice of
24 not fulfilling a request to access, exchange, or use
25 electronic health information in order to comply with

1 subsection (a) shall not be considered information
2 blocking (as defined in section 171.103 of title 45,
3 Code of Federal Regulations (or a successor regula-
4 tion)) if the information is pregnancy termination or
5 loss information.

6 (2) GREATER SECURITY.—The Secretary shall
7 revise section 170.401 of title 45, Code of Federal
8 Regulations, to require that as a condition of certifi-
9 cation (as described in that section), a health IT de-
10 veloper (as so described) shall implement practices
11 that allow for the segregation of data relating to
12 pregnancy termination or loss information to ensure
13 compliance with subsection (a).

14 (c) PREEMPTION; MODIFICATION OF STATE PRE-
15 EMPTION EXCEPTIONS.—

16 (1) PREEMPTION.—

17 (A) IN GENERAL.—This section shall pre-
18 empt any State law to the extent that the State
19 law conflicts with or prevents application of this
20 section.

21 (B) EFFECT.—Nothing in subparagraph
22 (A) shall be construed to preempt a State law
23 to the extent that the State law provides great-
24 er privacy protections for pregnancy termi-

1 nation or loss information than provided under
2 this section.

3 (2) MODIFICATION.—The Secretary shall revise
4 section 160.203 of title 45, Code of Federal Regula-
5 tions, to ensure that no exception to the general pre-
6 emption rule stated in that section applies with re-
7 spect to pregnancy termination or loss information
8 other than the exception described in paragraph
9 (1)(B).

10 (d) OUTREACH.—The Secretary shall conduct an out-
11 reach campaign to ensure that covered entities, business
12 associates of covered entities, the public, and affected indi-
13 viduals are aware of the requirements of this section and
14 any revisions to regulations made pursuant to this section.

15 (e) PROCEDURE.—

16 (1) INTERIM FINAL RULE.—Not later than 90
17 days after the date of enactment of this Act, the
18 Secretary shall revise each regulation as required by
19 this section through publication of an interim final
20 rule in the Federal Register.

21 (2) FINAL RULE.—Not later than 270 days
22 after the date on which an interim final rule is pub-
23 lished under paragraph (1), the Secretary, after pro-
24 viding opportunity for public comment, shall publish

1 in the Federal Register a final rule with such modi-
2 fications as the Secretary determines appropriate.

3 (f) DEFINITIONS.—In this section:

4 (1) HIPAA TERMS.—The terms “business asso-
5 ciate”, “covered entity”, and “protected health infor-
6 mation” have the meanings given those terms in sec-
7 tion 160.103 of title 45, Code of Federal Regula-
8 tions (or a successor regulation).

9 (2) PREGNANCY TERMINATION OR LOSS INFOR-
10 MATION.—The term “pregnancy termination or loss
11 information” means protected health information of
12 an individual that relates to information that could
13 reveal having or seeking an abortion or care for
14 pregnancy loss, including, without limitation, any re-
15 quest for, or receipt of, items, services, education,
16 counseling, or referrals relating to the termination
17 or loss of a pregnancy of the individual, including
18 abortion, miscarriage, stillbirth, and ectopic preg-
19 nancy.

20 (3) SECRETARY.—The term “Secretary” means
21 the Secretary of Health and Human Services.

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