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Proposed State Legislation in Michigan

Bill to Prohibit State Contracts with Abortion Providers

House Bill 5242 is a recent attempt by the Michigan legislature to defund health care providers that offer abortion services. Currently, Section 2 of the Allocation of Funds to Family Planning Services Act of 2002 requires that the department of community health give priority in contracting to entities that engage in the fewest abortion-related activities, including performing elective abortions, referring a pregnant woman to an abortion provider, or maintaining a policy in writing that elective abortion is considered part of the continuum of family planning or reproductive health services. This bill seeks to make the funding restrictions absolute by eliminating all grants or contracts to entities that engage in any such activities.

If the measure passes, Michigan will join the ranks of Indiana, North Carolina, and Kansas—all of which passed similar legislation to defund abortion-related family planning services in 2011. Courts in those states have ordered temporary injunctions that reinstate funds because state governments may not punish a particular health provider for offering a legal, constitutionally protected medical service.

Bill to Ban Abortions Past 20 Weeks

State Representative Eileen Kowall introduced legislation in the Michigan House that would prohibit physicians from performing abortions after 20 weeks of pregnancy. HB 5343 and 5344, the Pain-Capable Unborn Child Protection Act, would make a violation of the Act a felony punishable by up to 15 years in prison. The bills do provide an exception for when the mother's life is at risk, but do not provide a health exception.

Proponents of the legislation base their support on the premise that a fetus can feel pain at 20 weeks. Opponents not only dispute such claims, but also contend that the bills depart from Roe v. Wade and its progeny, which generally allow states to limit abortions upon the fetus reaching viability. No medical research currently states that viability begins at 20 weeks.

Please consult UMHS' Medical-Legal Handbook for ObGyn Health Care Professionals for more information about medical-legal issues: http://www.obgyn.med.umich.edu/research/programs-units/ssrj

Individual Highlights

Bill to Require Excessive Medical Malpractice Insurance Would Increase Barriers to Abortion Services

Senate Bill 876 would require certain physicians who perform abortions to carry medical malpractice insurance of at least $1 million, or to provide equivalent security to compensate women experiencing abortion complications caused by gross negligence. The bill would apply to any physician performing five or more abortions who either: (1) has been the subject of two or more civil lawsuits related to abortion in the last seven years; (2) has sanctions against his or her license in the last seven years; or (3) operates or supervises a facility where abortions are performed that was previously deemed noncompliant with health and safety requirements.

Physicians meeting the criteria, but failing to carry the excessive coverage, would be prohibited from performing abortions until in full compliance with the requirements. Since performing a procedure more frequently tends to increase a providers ability to do so safely—and since induced abortion has a very low risk rate—this bill may have more to do with increasing barriers to abortion services than with patient safety.

For more information on abortion-related mortality rates, see The Guttmacher Institute, Facts on Induced Abortion Worldwide (Jan. 2012), explaining that in the United States, legal induced abortion results in 0.6 deaths per 100,000 abortions.

UPDATE: House Panel Approved Ban on Coerced Abortion

A legislative package seeking to criminalize coercing a woman into aborting a pregnancy has passed out of the House Families, Children, and Seniors Committee. In addition to criminal penalties, the bills—HB 4798, HB 4799, HB 5134, HB 5181, HB 5182—would allow civil actions by or on behalf of the woman against the person who coerced or attempted to coerce the abortion. The bills would also require facilities that provide abortions to implement protocols to screen for coercion to terminate the pregnancy, and if coercion is disclosed, the patient would then have to wait at least 24-hours before obtaining an abortion.

Opponents of the package see it as a deceptive measure that would impinge on the doctor-patient relationship, run contrary to informed consent standards, and discount women's ability to make reproductive decisions. In spite of such criticism, the package was approved by a vote of 6-2 and will now go to the House for full discussion.

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Individual Highlights

Bill to Allow Residents to Purchase "Choose Life" License Plate

Michigan began issuing specialty license plates in April, 2001. Currently, two-dozen fundraising license plates are available for purchase—15 support the state's public universities, and nine support a variety of causes like the Michigan Vietnam Veterans Memorial and Agricultural Heritage.

State Senator Patrick Colbeck seeks to add another plate to that list. Senate Bill 600 would allow Michigan residents to purchase a "Choose Life" license plate, the proceeds of which would go to abortion prevention projects sponsored by the Right to Life Michigan Fund. The legislation was approved unanimously by the Senate Transportation Committee on January 17, 2012, and now goes to the Senate.

According to the Guttmacher Institute, 25 states currently offer "Choose Life" license plates, and legal groups have mounted First Amendment challenges in response. Most recently, the ACLU of North Carolina challenged approval of the state's "Choose Life" plates on the basis that they constitute viewpoint discrimination because there are no corresponding pro-choice plates available to North Carolina drivers. On November 28, 2011, a federal district judge issued a preliminary injunction that blocked the production and issuance of the plates until the lawsuit is resolved.

For more information on similar legislation and funding, see The Guttmacher Institute, State Policies in Brief, "Choose Life" License Plates, (Feb. 1, 2012).

DID YOU KNOW... The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons without penalty?

The FMLA requires that large employers—those who employ 50 or more employees in 20 or more workweeks—provide unpaid leave for up to 12 weeks in a 12 months period to employees who need to: 1) care for a new child, 2) care for a family member who has a serious health condition, or 3) recover from the employee's own serious health condition. The Act also provides leave for covered service members and leave for caregivers who are tending to a covered service member with a serious illness or injury. When an employee returns from FMLA leave, s/he is entitled to the same position or an equivalent position with the same benefits, pay, and other terms of conditions of employment.

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Individual Highlights

Conscience Clause Bill Proposed in Michigan Senate

Senate Bill 975 would allow providers of health care services and medical and scientific researchers to refuse to provide certain medical services for reasons of conscience. The Religious Liberty and Conscience Protection Act defines "conscience" as religious beliefs, moral convictions, or ethical principles, and "health care service" as any phase of patient medical care, treatment, or procedure, including referral. If passed, any health care provider who objected to providing or participating in a health care service would be provided absolute immunity from civil, criminal, and administrative liability.

Proponents believe conscience clauses protect religious liberty, while opponents maintain that health care providers have a professional duty to fulfill patients' medical needs within legal bounds, regardless of personal ethical stances. None of these bills would allow for an affirmative conscience act such as provision of a service in a facility where the service is not favored.

UPDATE: Litigation to Watch

Availability of Emergency Contraception: *Tummino v. Torti*

On December 7, 2011, the Food and Drug Administration (FDA) issued a complicated ruling in accordance with Judge Korman's 2009 decision ordering the FDA to reconsider whether Plan B should be available over-the-counter (OTC) to women of all ages. The FDA Center for Drug Evaluation and Research (CDER) concluded that Plan B "met the regulatory standard for a nonprescription drug." CDER also determined that "the product was safe and effective in adolescent females, that adolescent females understood the product was not for routine use," and that adolescent females could use the drug properly without the supervision of a health care provider.

That very same day, U.S. Department of Health and Human Services Secretary, Kathleen Sebelius, issued a statement contrary to the FDA's recommended approval. Secretary Sebelius, invoking her authority to execute the provisions of the Federal Food, Drug, and Cosmetic Act, disagreed with the Agency's decision and concluded that the data do not sufficiently establish that Plan B should be made available OTC for all girls of reproductive age. She then directed the FDA to issue a complete response letter to the drug's manufacturer denying its supplemental new drug application. As a result of this ruling, a prescription for Plan B will continue to be required for females under seventeen.

Judge Korman noted that the FDA's current decision bore striking similarities to its bad-faith decision-making in 2009. The Center for Reproductive Rights noticed the similarities as well and, in response, sought immediate relief on February 8, 2012. The Center requested that Judge Korman reopen its 2005 lawsuit against the FDA, *Tummino v. Hamburg*, for imposing arbitrary and capricious age restrictions on Plan B, while adding Secretary Sebelius as a defendant for her role in overruling the FDA's decision to approve Plan B OTC status.

For background information on the litigation, see the Summer 2011 edition of this newsletter (Volume 1, Issue 1).