WEST VIRGINIA CODE CHAPTER 16 ARTICLE 2I

WV Legislature

§16-2I-1. Definitions.

For the purposes of this article, the words or phrases defined in this section have these meanings ascribed to them.

“Abortion” means the same as that term is defined in §16-2F-2 of this code.

“Attempt to perform an abortion” means the same as that term is defined in §16-2M-2 of this code.

“Chemical abortion” means the use or prescription of an abortion-inducing drug dispensed with the intent to cause an abortion.

“Licensed medical professional” means the same as that term is defined in §16-2P-1 of this code.

“Medical emergency” means any condition which, in the reasonable medical judgment of the patient’s physician, so complicates the medical condition of a pregnant female as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create 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 female will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

“Physician” means the same as that term is defined in §16-2M-2 of this code.

“Probable gestational age of the embryo or fetus” means what, in the judgment of the physician, will with reasonable probability be the gestational age of the embryo or fetus at the time the abortion is planned to be performed.

“Reasonable medical judgement” means the same as that term is defined in §16-2M-2 of this code.

“Stable Internet website” means a website that, to the extent reasonably practicable, is safeguarded from having its content altered by another other than the Department of Health and Human Resources.

WV Legislature

§16-2I-2. Informed consent.

An abortion may not be performed in this state except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if, and only if:

(a) The female is told the following, by telephone or in person, by the physician or the licensed medical professional to whom the responsibility has been delegated by the physician who is to perform the abortion at least 24 hours before the abortion:

(1) The particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies, and infertility;

(2) The probable gestational age of the embryo or fetus at the time the abortion is to be performed;

(3) The medical risks associated with carrying her child to term; and

(4) If a chemical abortion involving the two-drug process of mifepristone is initiated and then a prostaglandin such as misoprostol is planned to be used at a later time, the female shall be informed that:

(A) Some suggest that it may be possible to counteract the intended effects of a mifepristone chemical abortion by taking progesterone if the female changes her mind, before taking the second drug, but this process has not been approved by the Food and Drug Administration.

(B) After the first drug involved in the two-drug process is dispensed in a mifepristone chemical abortion, the physician or agent of the physician shall provide written medical discharge instructions to the pregnant female which shall include the statement:

“If you change your mind and decide to try to counteract the intended effects of a mifepristone chemical abortion, if the second pill has not been taken, please consult with your physician.

(i) You might experience a complete abortion without ever taking misoprostol;

(ii) You might experience a missed abortion, which means the fetus is no longer viable, but the fetus did not leave your body; or

(iii) It is possible that your pregnancy may continue; and

(iv)You should consult with your physician.”

(C) The female shall certify, as part of the informed consent process for any medical procedure, that she has been informed about the above possibilities regarding a chemical

WV Legislature

abortion.

(D) Notwithstanding any law to the contrary, a physician acting in conformity with the informed consent provisions of this section relating to the possibility of counteracting the intended effects of a chemical abortion, or a physician prescribing a non-Food and Drug Administration approved drug therapy to counteract a chemical abortion is not liable for any loss, damage, physical injury, or death arising from any information provided by the physician related to counteracting the intended effects of a chemical abortion or arising from prescribing a non-Food and Drug Administration approved drug therapy to counteract a chemical abortion.

The information required by this subsection may be provided by telephone without conducting a physical examination or tests of the patient, in which case the information required to be provided may be based on facts supplied by the female to the physician or other licensed health care professional to whom the responsibility has been delegated by the physician and whatever other relevant information is reasonably available to the physician or other licensed health care professional to whom the responsibility has been delegated by the physician. It may not be provided by a tape recording, but must be provided during a consultation in which the physician or licensed health care professional to whom the responsibility has been delegated by the physician is able to ask questions of the female and the female is able to ask questions of the physician or the licensed health care professional to whom the responsibility has been delegated by the physician.

If a physical examination, tests or the availability of other information to the physician or other licensed health care professional to whom the responsibility has been delegated by the physician subsequently indicate, in the medical judgment of the physician or the licensed health care professional to whom the responsibility has been delegated by the physician, a revision of the information previously supplied to the patient, that revised information may be communicated to the patient at any time before the performance of the abortion procedure.

Nothing in this section may be construed to preclude provision of required information in a language understood by the patient through a translator.

(b) The female is informed, by telephone or in person, by the physician who is to perform the abortion, or by an agent of the physician, at least 24 hours before the abortion procedure:

(1) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care through governmental or private entities;

(2) That the father, if his identity can be determined, is liable to assist in the support of her child based upon his ability to pay even in instances in which the father has offered to pay for the abortion;

(3) That she has the right to review the printed materials described in §16-2I-3 of this code,

that these materials are available on a state-sponsored website and the website address; and

(4) That the female will be presented with a form which she will be required to execute prior to the abortion procedure that is available pursuant to §16-2I-3 of this code, and that the form to be presented will inform her of the opportunity to view the ultrasound image and her right to view or decline to view the ultrasound image, if an ultrasound is performed.

The physician or an agent of the physician shall orally inform the female that the materials have been provided by the State of West Virginia and that they describe the embryo or fetus and list agencies and entities which offer alternatives to abortion.

If the female chooses to view the materials other than on the website, then they shall either be provided to her at least 24 hours before the abortion or mailed to her at least 72 hours before the abortion by first class mail in an unmarked envelope.

The information required by this subsection may be provided by a tape recording if provision is made to record or otherwise register specifically whether the female does or does not choose to have the printed materials given or mailed to her.

(c) The form required pursuant to subdivision (b)(4) of this section shall include the following information:

(1) It is a female's decision whether or not to undergo any ultrasound imaging procedure in consultation with her health care provider;

(2) If an ultrasound is performed in conjunction with the performance of an abortion procedure, the female has the right to view or to decline to view the image; and

(3) That the female has been previously informed of her opportunity to view the ultrasound image and her right to view or decline to view the ultrasound image. The female shall certify her choice on this form prior to the abortion procedure being performed.

The female shall certify in writing, before the abortion, that the information described in subsections (a) and (b) of this section has been provided to her and that she has been informed of her opportunity to review the information referred to in subdivision (b)(3) of this section.

Before performing the abortion procedure, the physician who is to perform the abortion or the physician's agent shall obtain a copy of the executed certification required by the provisions of subsections (b) and (c) of this section.

WV Legislature

§16-2I-3. Printed information.

(a) Within 90 days of the effective date of this article, the Secretary of the Department of Health and Human Resources shall cause to be published, in English and in each language which is the primary language of two percent or more of the state's population, as determined by the most recent decennial census performed by the U.S. census bureau, and shall cause to be available on the website provided in §16-2I-4 of this code the following printed materials in such a way as to ensure that the information is easily comprehensible:

(1) Geographically indexed materials designed to inform the reader of public and private agencies and services available to assist a female through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which 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. At the option of the Secretary of Health and Human Resources, a 24-hour-a-day telephone number may be established with the number being published in such a way as to maximize public awareness of its existence which may be called to obtain a list and description of agencies in the locality of the caller and of the services they offer;

(2) Materials designed to inform the female of the probable anatomical and physiological characteristics of the embryo or fetus at two-week gestational increments from the time when a female can be known to be pregnant to full term, including any relevant information on the possibility of the embryo or fetus's survival and pictures or drawings representing the development of an embryo or fetus at two-week gestational increments: *Provided*, That any such pictures or drawings must contain the dimensions of the embryo or fetus and must 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 embryo or fetus at the various gestational ages. The material shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each procedure, the possible detrimental psychological effects of abortion, and the medical risks commonly associated with carrying a child to term; and

(3) Materials designed to inform the female of the range of possibilities regarding the effects and risks of a mifepristone chemical abortion or an attempt to counteract it and information on and assistance with the resources that may be available.

(b) The materials referred to in subsection (a) of this section shall be printed in a typeface large enough to be clearly legible. The website provided for in section four of this article shall be maintained at a minimum resolution of seventy dots per inch. All pictures appearing on the website shall be a minimum of 200 x 300 pixels. All letters on the website shall be a minimum of 11-point font. All information and pictures shall be accessible with an industry standard browser requiring no additional plug-ins.

(c) The materials required under this section shall be available at no cost from the

WV Legislature

Department of Health and Human Resources upon request and in appropriate numbers to any person, facility, or hospital.

WV Legislature

§16-2I-4. Internet website.

Within ninety days of the effective date of this article, the secretary of the Department of Health and Human Resources shall develop and maintain a stable Internet website to provide the information required to be provided pursuant to the provisions of section three of this article. No information regarding persons visiting the website may be collected or maintained. The secretary of the Department of Health and Human Resources shall monitor the website on a daily basis to prevent and correct tampering.

WV Legislature

§16-2I-5. Procedure in case of medical emergency.

When a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or that a twenty-four-hour delay will create serious risk of substantial and irreversible impairment of a major bodily function.

WV Legislature

§16-2I-6. Protection of privacy in court proceedings.

In every civil or criminal proceeding or action brought under this article, the court shall rule whether the anonymity of any female 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 female 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 female upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under section nine of this article 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.

WV Legislature

§16-2I-7. Reporting requirements.

(a) Within ninety days of the effective date of this article, the secretary of the Department of Health and Human Resources shall prepare a reporting form for physicians containing a reprint of this article and listing:

(1) The number of females to whom the information described in subsection (a), section two of this article was provided;

(2) The number of females to whom the physician or an agent of the physician provided the information described in subsection (b), section two of this article;

(3) The number of females who availed themselves of the opportunity to obtain a copy of the printed information described in section three of this article other than on the website;

(4) The number of abortions performed in cases involving medical emergency; and

(5) The number of abortions performed in cases not involving a medical emergency.

(b) The secretary of the Department of Health and Human Resources shall ensure that copies of the reporting forms described in subsection (a) of this section are provided:

(1) Within one hundred twenty days after the effective date of this article to all physicians licensed to practice in this state;

(2) To each physician who subsequently becomes newly licensed to practice in this state, at the same time as official notification to that physician that the physician is so licensed; and

(3) By December 1, of each year, other than the calendar year in which forms are distributed in accordance with subdivision (1) of this subsection, to all physicians licensed to practice in this state.

(c) By the twenty-eighth day of February of each year following a calendar year in any part of which this act was in effect, each physician who provided, or whose agent provided, information to one or more females in accordance with section two of this article during the previous calendar year shall submit to the secretary of the Department of Health and Human Resources a copy of the form described in subsection (a) of this section with the requested data entered accurately and completely.

(d) Reports that are not submitted by the end of a grace period of thirty days following the due date are subject to a late fee of $500 for each additional thirty-day period or portion of a thirty-day period they are overdue. Any physician required to report in accordance with this section who has not submitted a report, or has submitted only an incomplete report, more than one year following the due date may, in an action brought by the secretary of the Department of Health and Human Resources, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject

WV Legislature

to sanctions for civil contempt.

(e) By August 1, of each year, the secretary of the Department of Health and Human Resources 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 (a) of this section. Each report shall also provide the statistics for all previous calendar years, adjusted to reflect any additional information from late or corrected reports. The secretary of the Department of Health and Human Resources shall prevent any of the information from being included in the public reports that could reasonably lead to the identification of any physician who performed or treated an abortion, or any female who has had an abortion, in accordance with subsection (a), (b) or (c) of this section. Any information that could reasonably lead to the identification of any physician who performed or treated an abortion, or any female who has had an abortion, in accordance with subsection (a), (b) or (c) of this section is exempt from disclosure under the freedom of information act, article one, chapter twenty-nine-b of this code.

(f) The secretary of the Department of Health and Human Resources may propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code which alter the dates established by subdivision (3), subsection (b) of this section or subsection (c) or (e) of this section or consolidate the forms or reports described in this section with other forms or reports to achieve administrative convenience or fiscal savings or to reduce the burden of reporting requirements, so long as reporting forms are sent to all licensed physicians in the state at least once every year and the report described in subsection (e) of this section is issued at least once every year.

WV Legislature

§16-2I-8. Administrative remedies.

Any physician or agent thereof who willfully violates the provisions of this article may be subject to sanctions as levied by the licensing board governing his or her profession.

WV Legislature

§16-2I-9. Severability.

Effective from the reenactment of this section during the third extraordinary session of the Legislature, 2022, this article is of no force or effect unless any provision of §16-2R-1 *et seq*. of this code is judicially determined to be unconstitutional.

WV Legislature

§16-2I-10.

Repealed.

Acts, 2010 Reg. Sess., Ch. 94.

WV Legislature