WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 3472

By Delegates Walker and Hansen

[Introduced February 14, 2023; Referred to the Committee on Health and Human Resources then the Judiciary]

A BILL to repeal §9-2-11 of the Code of West Virginia, 1931, as amended; to repeal §16-2I-1, §16-2I-2, §16-2I-3, §16-2I-4, §16-2I-5, §16-2I-6, §16-2I-7, §16-2I-8, and §16-2I-9 of said code; to repeal §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, and, §16-2M-7 of said code; to repeal §16-2O-1 of said code; to repeal §16-2P-1 of said code; to repeal §16-2Q-1 of said code; to repeal §16-2R-1, §16-2R-2, §16-2R-3, §16-2R-4, §16-2R-5, §16-2R-6, §16-2R-7, §16-2R-8, and §16-2R-9 of said code; to amend and reenact §30-1-26; to amend and reenact §30-14-12d of said code; to repeal §33-42-8 of said code; to repeal §61-2-8 of said code; all relating to returning a woman’s right to choose.

Be it enacted by the Legislature of West Virginia:

CHAPTER 9. HUMAN SERVICES.

ARTICLE 2. COMMISSIONER OF HUMAN SERVICES; POWERS, DUTIES AND RESPONSIBILITIES GENERALLY.

§9-2-11. Limitation on use of funds.

[Repealed.]

CHAPTER 16. PUBLIC HEALTH

ARTICLE 2I. WOMENS RIGHT TO KNOW ACT.

§16-2I-1. Definitions.

[Repealed.]

§16-2I-2. **Informed** consent.

[Repealed.]

§16-2I-3. Printed information.

[Repealed.]

§16-2I-4. Internet website.

[Repealed.]

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

[Repealed.]

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

[Repealed.]

§16-2I-7. Reporting requirements.

[Repealed.]

§16-2I-8. Administrative remedies.

[Repealed.]

§16-2I-9. Severability.

[Repealed.]

ARTICLE 2M. THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT.

§16-2M-1. Legislative findings.

[Repealed.]

§16-2M-2. Definitions.

[Repealed.]

§16-2M-3. Determination of gestational age.

[Repealed.]

§16-2M-4. Abortion of fetus of pain capable gestational age prohibited.

[Repealed.]

§16-2M-5. Reporting.

[Repealed.]

§16-2M-6. Penalties.

[Repealed.]

§16-2M-7. Severability.

[Repealed.]

ARTICLE 2O. Unborn Child Protection from Dismemberment Abortion Act.

§16-2O-1. Unborn Child Protection from Dismemberment Abortion Act.

[Repealed.]

ARTICLE 2P. BORN-ALIVE ABORTION SURVIVORS PROTECTION ACT.

§16-2P-1. Born-Alive Abortion Survivors Protection Act.

[Repealed.]

ARTICLE 2Q. UNBORN CHILD WITH A DISABILITY PROTECTION AND EDUCATION ACT.

§16-2Q-1. Abortion may not be performed because of a disability, except in a medical emergency.

[Repealed.]

ARTICLE 2R. UNBORN CHILD PROTECTION ACT.

§16-2R-1. Legislative findings.

[Repealed.]

§16-2R-2. Definitions.

[Repealed.]

§16-2R-3. Prohibition to perform an abortion.

[Repealed.]

§16-2R-4. Not considered an abortion.

[Repealed.]

§16-2R-5. Requirements when an abortion is performed on an unemancipated minor.

[Repealed.]

§16-2R-6. Reporting by licensed medical professionals regarding abortion.

[Repealed.]

§16-2R-7. Licensure action.

[Repealed.]

§16-2R-8. Protection of aborted fetuses born alive.

[Repealed.]

§16-2R-9. Severability.

[Repealed.]

CHAPTER 30. PROFESSIONS AND OCCUPATIONS.

ARTICLE 1. GENERAL PROVISIONS APPLICABLE TO ALL STATE BOARDS OF EXAMINATION OR REGISTRATION REFERRED TO IN CHAPTER.

§30-1-26. Telehealth practice.

(a) For the purposes of this section:

~~"Abortifacient" means mifepristone, misoprostol or any other chemical or drug dispensed with the intent of causing an abortion~~

"Established patient" means a patient who has received professional services, face-to-face, from the physician, qualified health care professional, or another physician or qualified health care professional of the exact same specialty and subspecialty who belongs to the same group practice, within the past three years.

"Health care practitioner" means a person authorized to practice under §30-3-1 *et seq.*, §30-3E-1 *et seq.*, §30-4-1 *et seq.*, §30-5-1 *et seq.*, §30-7-1 *et seq.*, §30-7A-1 *et seq.*, §30-8-1 *et seq.*, §30-10-1 *et seq.*, §30-14-1 *et seq.*, §30-16-1 *et seq.*, §30-20-1 *et seq.*, §30-20A-1 *et seq.*, §30-21-1 *et seq.*, §30-23-1 *et seq.*, §30-26-1 *et seq.*, §30-28-1 *et seq.*, §30-30-1 *et seq.*, §30-31-1 *et seq.*, §30-32-1 *et seq.*, §30-34-1 *et seq.*, §30-35-1 *et seq.*, §30-36-1 *et seq.*, §30-37-1 *et seq.* and any other person licensed under this chapter that provides health care services.

"Interstate telehealth services" means the provision of telehealth services to a patient located in West Virginia by a health care practitioner located in any other state or commonwealth of the United States.

"Registration" means an authorization to practice a health profession regulated by §30-1-1 *et seq.* of this code for the limited purpose of providing interstate telehealth services within the registrant’s scope of practice.

"Telehealth services" means the use of synchronous or asynchronous telecommunications technology or audio only telephone calls by a health care practitioner to provide health care services, including, but not limited to, assessment, diagnosis, consultation, treatment, and monitoring of a patient; transfer of medical data; patient and professional health-related education; public health services; and health administration. The term does not include internet questionnaires, e-mail messages, or facsimile transmissions.

(b) Unless provided for by statute or legislative rule, a health care board, referred to in §30-1-1 *et seq.* of this code, shall propose an emergency rule for legislative approval in accordance with the provisions of §29A-3-15 *et seq.* of this code to regulate telehealth practice by a telehealth practitioner. The proposed rule shall consist of the following:

(1) The practice of the health care service occurs where the patient is located at the time the telehealth services are provided;

(2) The health care practitioner who practices telehealth shall be:

(A) Licensed in good standing in all states in which he or she is licensed and not currently under investigation or subject to an administrative complaint; and

(B) Registered as an interstate telehealth practitioner with the appropriate board in West Virginia;

(3) When the health care practitioner-patient relationship is established;

(4) The standard of care for the provision of telehealth services. The standard of care shall require that with respect to the established patient, the patient shall visit an in-person health care practitioner within 12 months of using the initial telemedicine service or the telemedicine service shall no longer be available to the patient until an in-person visit is obtained. This requirement may be suspended, in the discretion of the health care practitioner, on a case-by-case basis, and it does not to the following services: acute inpatient care, post-operative follow-up checks, behavioral medicine, addiction medicine, or palliative care;

(5) A prohibition of prescribing any controlled substance listed in Schedule II of the Uniform Controlled Substance Act, unless authorized by another section: *Provided*, That the prescribing limitations contained in this section do not apply to a physician or a member of the same group practice with an established patient;

(6) Establish the conduct of a registrant for which discipline may be imposed by the board of registration;

(7) Establish a fee, not to exceed the amount to be paid by a licensee, to be paid by the interstate telehealth practitioner registered in the state;

(8) A reference to the Board’s discipline process~~; and~~

~~(9) A prohibition of prescribing or dispensing an abortifacient.~~

(c) A registration issued pursuant to the provisions of or the requirements of this section does not authorize a health care professional to practice from a physical location within this state without first obtaining appropriate licensure.

(d) By registering to provide interstate telehealth services to patients in this state, a health care practitioner is subject to:

(1) The laws regarding the profession in this state, including the state judicial system and all professional conduct rules and standards incorporated into the health care practitioner’s practice act and the legislative rules of registering board; and

(2) The jurisdiction of the board with which he or she registers to provide interstate telehealth services, including such board’s complaint, investigation, and hearing process.

(e) A health care professional who registers to provide interstate telehealth services pursuant to the provisions of or the requirements of this section shall immediately notify the board where he or she is registered in West Virginia and of any restrictions placed on the individual’s license to practice in any state or jurisdiction.

(f) A person currently licensed in this state is not subject to registration but shall practice telehealth in accordance with the provisions of this section and the rules promulgated thereunder.

ARTICLE 14. OSTEOPATHIC PHYSICIANS AND SURGEONS.

§30-14-12d. Telemedicine practice; requirements; exceptions; definitions; rulemaking.

(a) *Definitions*. – For the purposes of this section:

(1) "Chronic nonmalignant pain" means pain that has persisted after reasonable medical efforts have been made to relieve the pain or cure its cause and that has continued, either continuously or episodically, for longer than three continuous months. "Chronic nonmalignant pain" does not include pain associated with a terminal condition or illness or with a progressive disease that, in the normal course of progression, may reasonably be expected to result in a terminal condition or illness.

(2) "Physician" means a person licensed or registered by the West Virginia Board of Osteopathic Medicine to practice osteopathic medicine in West Virginia.

(3) "Store and forward telemedicine" means the asynchronous computer-based communication of medical data or images from an originating location to a physician at another site for the purpose of diagnostic or therapeutic assistance.

(4) "Telemedicine" means the practice of medicine using tools such as electronic communication, information technology, store and forward telecommunication, audio only telephone calls, or other means of interaction between a physician in one location and a patient in another location, with or without an intervening health care provider.

(5) "Telemedicine technologies" means technologies and devices which enable secure communications and information exchange in the practice of telemedicine, and typically involve the application of secure real-time audio/video conferencing or similar secure video services, remote monitoring or store and forward digital image technology, or audio only telephone calls, to provide or support health care delivery by replicating the interaction of a traditional in-person encounter between a physician and a patient.

(b) *Licensure or registration*. –

(1) The practice of medicine occurs where the patient is located at the time the telemedicine technologies are used.

(2) A physician who practices telemedicine must be licensed as provided in this article or registered as provided in §30-1-1 *et seq.* of this code.

(3) This section does not apply to:

(A) An informal consultation or second opinion, at the request of a physician who is licensed to practice medicine in this state: *Provided*, That the physician requesting the opinion retains authority and responsibility for the patient’s care; and

(B) Furnishing of medical assistance by a physician in case of an emergency or disaster if no charge is made for the medical assistance.

(c) Physician-patient relationship through telemedicine encounter. –

(1) A physician-patient relationship may not be established through:

Text-based communications such as e-mail, Internet questionnaires, text-based messaging, or other written forms of communication.

(2) If an existing physician-patient relationship is not present prior to the utilization to telemedicine technologies, or if services are rendered solely through telemedicine technologies, a physician-patient relationship may only be established:

(A) Through the use of telemedicine technologies which incorporate interactive audio using store and forward technology, real-time videoconferencing, or similar secure video services during the initial physician-patient encounter;

(B) For the practice of pathology and radiology, a physician-patient relationship may be established through store and forward telemedicine or other similar technologies; or

(C) Through the use of audio-only calls or conversations that occur in real time. Patient communication though audio-visual communication is preferable, if available or possible. Audio-only calls or conversations that occur in real time may be used to establish the physician-patient relationship.

(3) Once a physician-patient relationship has been established, either through an in-person encounter or in accordance with subdivision (2) of this subsection, the physician may utilize any telemedicine technology that meets the standard of care and is appropriate for the patient presentation.

(d) *Telemedicine practice*. – A physician using telemedicine technologies to practice medicine shall:

(1) Verify the identity and location of the patient;

(2) Provide the patient with confirmation of the identity and qualifications of the physician;

(3) Provide the patient with the physical location and contact information of the physician;

(4) Establish or maintain a physician-patient relationship which conforms to the standard of care;

(5) Determine whether telemedicine technologies are appropriate for the patient presentation for which the practice of medicine is to be rendered;

(6) Obtain from the patient appropriate consent for the use of telemedicine technologies;

(7) Conduct all appropriate evaluations and history of the patient consistent with traditional standards of care for the patient presentation;

(8) Create and maintain health care records for the patient which justify the course of treatment and which verify compliance with the requirements of this section; and

(9) The requirements of §30-3-13(a)(1) through §30-3-13(a)(8) of this code do not apply to the practice of pathology or radiology medicine through store and forward telemedicine.

(e) *Standard of care*. –

The practice of medicine provided via telemedicine technologies, including the establishment of a physician-patient relationship and issuing a prescription via electronic means as part of a telemedicine encounter, are subject to the same standard of care, professional practice requirements, and scope of practice limitations as traditional in-person physician-patient encounters. Treatment, including issuing a prescription, based solely on an online questionnaire does not constitute an acceptable standard of care.

(f) *Patient records*. –

The patient record established during the use of telemedicine technologies shall be accessible and documented for both the physician and the patient, consistent with the laws and legislative rules governing patient health care records. All laws governing the confidentiality of health care information and governing patient access to medical records shall apply to records of practice of medicine provided through telemedicine technologies. A physician solely providing services using telemedicine technologies shall make documentation of the encounter easily available to the patient, and subject to the patient’s consent, to any identified care provider of the patient.

(g) *Prescribing limitations*. –

(1) A physician or podiatrist who practices medicine to a patient solely through the utilization of telemedicine technologies may not prescribe to that patient any controlled substances listed in Schedule II of the Uniform Controlled Substances Act: *Provided*, That the prescribing limitations contained in this section do not apply to a physician or a member of the same group practice with an established patient.

(2) The prescribing limitations in this subsection do not apply when a physician is providing treatment to patients who are minors, or if 18 years of age or older, who are enrolled in a primary or secondary education program and are diagnosed with intellectual or developmental disabilities, neurological disease, Attention Deficit Disorder, Autism, or a traumatic brain injury in accordance with guidelines as set forth by organizations such as the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, or the American Academy of Pediatrics. The physician must maintain records supporting the diagnosis and the continued need of treatment.

(3) The prescribing limitations in this subsection do not apply to a hospital, excluding the emergency department, when a physician submits an order to dispense a controlled substance, listed in Schedule II of the Uniform Controlled Substances Act, to a hospital patient for immediate administration in a hospital.

(4) A physician or podiatrist may not prescribe any pain-relieving controlled substance listed in Schedule II of the Uniform Controlled Substance Act as part of a course of treatment for chronic nonmalignant pain solely based upon a telemedicine encounter: *Provided*, That the prescribing limitations contained in this section do not apply to a physician or a member of the same group practice with an established patient.

~~(5) A physician or health care provider may not prescribe any drug with the intent of causing an abortion. The term "abortion" has the same meaning ascribed to it in §16-2F-2 of this code~~

(h) *Exceptions*. –

This section does not prohibit the use of audio-only or text-based communications by a physician who is:

(1) Responding to a call for patients with whom a physician-patient relationship has been established through an in-person encounter by the physician;

(2) Providing cross coverage for a physician who has established a physician-patient or relationship with the patient through an in-person encounter; or

(3) Providing medical assistance in the event of an emergency.

(i) *Rulemaking*. –

The West Virginia Board of Medicine and West Virginia Board of Osteopathic Medicine may propose joint rules for legislative approval in accordance with §29A-3-1, of this code to implement standards for and limitations upon the utilization of telemedicine technologies in the practice of medicine in this state. The West Virginia Board of Medicine and the West Virginia Board of Osteopathic Medicine may promulgate emergency rules pursuant to the provisions of §29A-3-15 of this code to implement the provisions of the bill passed during the 2021 session of the Legislature.

(j) *Preservation of the traditional physician-patient relationship*. –

Nothing in this section changes the rights, duties, privileges, responsibilities, and liabilities incident to the physician-patient relationship, nor is it meant or intended to change in any way the personal character of the physician-patient relationship. This section does not alter the scope of practice of any health care provider or authorize the delivery of health care services in a setting, or in a manner, not otherwise authorized by law.

chapter 33. insurance.

ARTICLE 42. WOMENS ACCESS TO HEALTH CARE ACT.

§33-42-8. Partial-birth abortions prohibited; criminal penalties; exceptions; hearings by state Board of Medicine.

[Repealed.]

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 2. CRIMES AGAINST THE PERSON.

§61-2-8. Abortion; penalty.

[Repealed].

NOTE: The purpose of this bill is to return a woman’s right to choose.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.