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Federal and State Laws Regarding Pharmacists Who Refuse to Distribute Contraceptives

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Summary

This report provides an analysis of federal and state laws that govern whether pharmacists may refuse to fill valid prescriptions for birth control and emergency contraception or to sell the emergency contraceptive Plan B now that the Food and Drug Administration (FDA) has approved Plan B for over-the-counter sale to women aged 18 or older. Such laws are sometimes referred to as "conscience clause" laws because they allow medical providers to refuse to provide services to which they have religious or moral objections. During the 109th Congress, legislators have introduced several bills that address this issue, including H.R. 1539, H.R. 1652, S. 778, and S. 809.

This report provides an analysis of federal and state laws regarding pharmacists who refuse to distribute birth control and emergency contraceptives. In response to reports of such incidents, multiple jurisdictions have enacted or are considering laws that would govern whether or not pharmacists may, for moral or religious reasons, refuse to fill valid prescriptions or sell contraception. Such laws are sometimes referred to as "conscience clause" laws because they allow medical providers to refuse to provide services to which they have religious or moral objections. Supporters of such laws argue that pharmacists should not be forced to engage in activity that violates their personal beliefs, while opponents contend that women have the right to receive the medical treatment that is prescribed by their doctors or that is otherwise legally available. This report describes trends in federal and state law regarding pharmacy conscience clause legislation.[1]

[1] Because this report is intended to provide examples of the various types of pharmacy conscience clause laws, it does not contain an exhaustive list of all state laws on the topic. Furthermore, because there are currently no reported cases in federal or state court databases regarding pharmacists who refuse to fill prescriptions for contraceptives, this report focuses on statutes and regulations rather than court decisions.

Until recently, most conscience clause laws were designed to allow medical practitioners to opt out of providing abortion-related services.[2] Over the past several years, however, several newspapers have begun to report incidents in which pharmacists have refused on moral or religious grounds to fill prescriptions for contraceptives. For example, in January 2004, in one of the earliest incidents to be widely publicized, a pharmacist at an Eckerd pharmacy in Texas was disciplined by his employer after he violated company policy by refusing to dispense emergency contraceptives to a rape victim.[3] In some cases, pharmacists also have refused to refer or transfer the prescription to another pharmacist or pharmacy, thus preventing some customers from obtaining their medications from another person or store.[4] In response to these reports, multiple states have enacted or are considering conscience clause laws that would specifically regulate whether or not pharmacists are legally permitted to refuse to distribute contraceptives due to moral or religious objections.

As indicated above, pharmacy conscience clause laws were initially designed to address situations in which pharmacists refused to fill valid prescriptions for birth control or emergency contraception. Although the emergency contraceptive Plan B still requires a prescription for women younger than age 18, the Food and Drug Administration (FDA) recently approved Plan B for over-the-counter status for women aged 18 or older. Because the FDA approval requires that Plan B be sold behind the pharmacy counter, however, some pharmacists may still refuse to sell the drug even if no prescription is required. While pharmacy conscience clause laws that address access to contraceptives may pertain to over-the-counter sales of Plan B, other laws that govern the filling of prescriptions may not cover situations involving such over-the-counter sales.

Currently, there are no federal laws that address whether or not a pharmacist may refuse to fill a prescription or sell contraceptives. The lack of federal legislation is not unusual, given that the practice of pharmacy is generally an issue of state law. Thus, pharmacies and pharmacists are primarily regulated by state boards of pharmacy,[5] and all of the existing pharmacy conscience clause laws have been enacted at the state level.

Nevertheless, several Members of Congress have introduced bills related to pharmacists who refuse to fill prescriptions for certain drugs. One bill, H.R. 1539 would require pharmacies to ensure that, if a pharmacist refused to fill a prescription on the basis of religious beliefs or moral convictions, then the prescription would be filled by another pharmacist employed by the pharmacy within four hours of such refusal. Likewise, companion bills H.R. 1652 and S. 809 would require pharmacies to ensure that prescriptions are filled without delay by another of their pharmacists if one pharmacist refuses and would also prohibit pharmacies from employing any pharmacist who acts with intent to prevent or deter a customer from filling a valid prescription. In addition, S. 778

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[2] For more information on abortion-related conscience clause laws, see CRS Report RS21428, *The History and Effect of Abortion Conscience Clause Laws*, by Jody Feder.

[3] Reuters, *Pharmacist Refuses Pill for Victim*, Chicago Tribune, Feb. 11, 2004, at C7.

[4] Rob Stein, *Because of Beliefs, Some Refuse To Fill Birth Control Prescriptions*, Wash. Post, March 28, 2005, at A1.

[5] For general information on state boards of pharmacy, see the National Association of Boards of Pharmacy website at [http://www.nabp.net/].

would require pharmacies that receive Medicare or Medicaid payments to ensure that valid prescriptions are filled without unnecessary delay or interference.

As noted above, several states have enacted laws regarding pharmacists who refuse to dispense birth control and emergency contraception. These laws vary widely from state to state. For example, some of these state laws specifically require pharmacists to fill valid prescriptions, while other states explicitly allow pharmacists to refuse to fill prescriptions if they have moral or religious objections. Still other states have statutes and regulations that are silent with respect to a pharmacist's right of refusal but that nonetheless contain provisions that offer protections to consumers whose prescriptions are rejected.

At least two states — Illinois and California — have laws that require pharmacists to dispense prescriptions. Under Illinois law, pharmacies must fill valid prescriptions for contraceptives without delay.[6] If the contraceptive or a suitable alternative is not in stock, then the pharmacy is required to either order the drug or, if the customer prefers, to transfer the prescription to another pharmacy or return the prescription to the customer.[7] The Illinois law, which was enacted under an emergency rule issued by the governor, is being challenged in several lawsuits.[8] In California, pharmacists are prohibited from preventing patients from obtaining legally prescribed drugs. However, pharmacists are permitted to refuse to dispense prescription drugs on moral or religious grounds if they notify their employer and if the pharmacy arranges for customers to have timely access to their medication despite the employee's refusal.[9]

In contrast to laws that specifically establish a duty to fill contraceptive prescriptions, many states have general laws that allow pharmacists to refuse to fill prescriptions under certain circumstances, such as when there are doubts about the validity of the prescription or when the pharmacist believes the prescription poses a safety risk.[10] Because such provisions do not cite moral or religious objections as legitimate grounds for refusing to dispense drugs, they could potentially be interpreted as implicitly requiring pharmacists to fill valid prescriptions despite their personal beliefs.

Other states have laws that, although they do not specifically address the question of whether or not a pharmacist can refuse to fill prescriptions, appear to offer some protection to consumers whose prescriptions have been rejected. For example, under a recently enacted Nevada law, pharmacists are required to transfer a prescription to another pharmacist at the request of the customer.[11] Thus, Nevada customers whose pharmacists refuse to fill a prescription for contraceptives can have their prescriptions transferred to

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[6] 68 Ill. Adm. Code § 1330.91(j).

[7] *Id.*

[8] Gretchen Ruethling, *Illinois Pharmacist Sues Over Contraceptive Rule*, N.Y. Times, June 10, 2005, at A18. The lawsuits were filed by the American Center for Law and Justice and by the Center for Law and Religious Freedom. For more information, see [http://www.aclj.org/] and [http://www.clsnet.org/clrfPages/index.phpx].

[9] Cal Bus & Prof Code § 733.

[10] *See, e.g.*, 32 M.R.S.A. § 13795(2); N.J.A.C. § 13:39-7.13; 8 NYCRR § 63.6.

[11] 2005 Nev. ALS 65 (to be codified at NRS § 639.2353).

another pharmacy or pharmacist. Other states have similar mandatory prescription transfer provisions that may offer protection to customers whose contraceptive prescriptions have been rejected.[12]

It is important to note that even in the absence of specific laws, general pharmacy laws may be interpreted to require pharmacists to fill prescriptions. For example, many states have laws that govern the professional conduct of pharmacists or that generally require the dispensation of drugs pursuant to a valid prescription. Indeed, the Wisconsin Pharmacy Examining Board recently pursued disciplinary action against a pharmacist who refused to fill a customer's birth control prescription or to transfer the prescription to another pharmacist. Finding that the pharmacist had violated rules against unprofessional conduct by "[e]ngaging in any pharmacy practice which constitutes a danger to the health, welfare, or safety of patient or public, including but not limited to, practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist which harmed or could have harmed a patient,"[13] the Board issued an order reprimanding the pharmacist, limiting his license, ordering him to attend a pharmacy ethics class, and requiring him to pay the costs of the legal proceedings.[14] Like Wisconsin, other states have similar rules of professional conduct that could potentially be applied to pharmacists who refuse to fill or transfer prescriptions for contraceptives.[15]

In addition to Wisconsin, there are other states that have interpreted their general pharmacy laws to prohibit pharmacists from refusing to fill or transfer valid prescriptions for contraceptives. For example, the North Carolina Board of Pharmacy has interpreted the state's pharmacy laws to include a duty of the pharmacist to promote the good for every patient. Recognizing that pharmacists have a right to avoid participating in activities that violate their morals but that patients have a right to obtain their medications, the Board has interpreted the pharmacy laws "to mean that if a pharmacist refuses to fill a prescription for emergency contraception, then that pharmacy has an obligation to get the patient and the prescription to a pharmacist who will dispense the prescription in a timely manner."[16]

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[12] For example, Texas law provides that a pharmacist "may not refuse to transfer original prescription information to another pharmacist," and Oklahoma law specifies that "[n]o legally-competent practitioner of the healing arts shall refuse to honor the requests of his patient to have his prescription transferred to the registered pharmacist or pharmacy of the patient's choice." 22 Tex. Admin. Code § 291.34(e)(6); 59 Okla. Stat. § 354.

[13] Wis. Adm. Code Phar. 10.03(2).

[14] In The Matter of The Disciplinary Proceedings Against Neil T. Noesen, Final Decision and Order LS0310091PHM of the State of Wisconsin Before the Pharmacy Examining Board (April 13, 2005), available at [http://drl.wi.gov/dept/decisions/docs/0405070.htm].

[15] For example, Maine, Minnesota, and North Dakota have laws that deem it to be unprofessional conduct for a pharmacist to refuse to dispense prescriptions that may ordinarily and reasonably be expected to be dispensed in a pharmacy by a pharmacist to be unprofessional conduct. CMR 02-392-030; Minn. R. 6800.2250; N.D. Admin. Code 61-04-04-01.

[16] North Carolina Board of Pharmacy, *Frequently Asked Questions for Pharmacists on Conscience Clause*, available at [http://www.ncbop.org/Conscience%20Clause.asp]. It is important to note, however, that although such a policy interpretation would be likely to be taken into consideration by a court, this type of agency guidance does not carry the full force of law.

Meanwhile, at least four states have laws that specifically permit pharmacists to refuse to fill valid prescriptions. Under Georgia law, "[i]t shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs,"[17] while the Arkansas code specifies that "[n]othing in [the law] shall prohibit a ... pharmacist ... from refusing to furnish any contraceptive procedures, supplies, or information."[18] Mississippi law also explicitly grants pharmacies and pharmacists the right to refuse to participate in any health care service — defined to include the dispensing of drugs — that violates his or her conscience.[19] Likewise, in South Dakota, pharmacists are not required to dispense medication if there is reason to believe that the medication would be used to destroy an unborn child.[20] Because "unborn child" is defined as an organism that exists at fertilization,[21] this provision could apply to some drugs, such as abortifacients and possibly emergency contraception, that — unlike standard birth control pills, which prevent fertilization from occurring in the first place — prevent fertilized eggs from implanting in the uterus.

Finally, several other states have general conscience clause laws that do not specifically mention pharmacists but that nonetheless appear to apply to them. For example, in Colorado, no private institution, physician, or "agent or employee of such institutions or physician" may be prohibited from refusing to provide contraceptives if such refusal is based on moral or religious objections,[22] while in Florida, doctors or "other people" may not be prevented from refusing to dispense birth control for religious reasons.[23]

Clearly, pharmacy conscience clause laws vary widely from state to state. While only a small number of states have laws that specifically authorize or deny a pharmacist's right to refuse to fill valid prescriptions or sell contraceptives for reasons of personal belief, a number of states are considering such laws.[24] Indeed, in Minnesota, several competing

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[17] Ga. Comp. R. & Regs. r. 480-5-.03.

[18] A.C.A. § 20-16-304.

[19] Miss. Code Ann. §§ 41-107-1 et seq.

[20] S.D. Codified Laws § 36-11-70.

[21] *Id*. at § 22-1-2(50A).

[22] C.R.S. 25-6-102.

[23] Fla. Stat. § 381.0051.

[24] Monica Davey and Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight*, N.Y. Times, April 19, 2005, at A1. According to the National Women's Law Center, bills to require pharmacists to dispense valid prescriptions for contraceptives were introduced in at least eight states in 2006, while bills to allow pharmacists to opt out of dispensing contraceptives were introduced in at least twenty states in 2006. National Women's Law Center, *Pharmacy Refusals 101*, August 2006, [http://www.nwlc.org/pdf/PharmacyRefusals101_08.24.06.pdf]. *See also*, National Conference of State Legislatures, *Pharmacist Conscience Clauses: Laws and Legislation*, March 2006, [http://www.ncsl.org/programs/health/conscienceclauses.htm].

proposals are pending, including a bill that would authorize a pharmacist's right to refuse and a bill that would prohibit it.[25]

In addition to states, local jurisdictions may enact laws as well. Recently, for example, the city of Austin, Texas passed a law that requires pharmacies that participate in the city's medical assistance program to fill valid prescriptions without delay, even if an individual pharmacist objects for moral reasons.[26] Moreover, individual stores and pharmacy chains have their own employment policies that govern such situations in the absence of state laws on the subject, and many of these policies appear either to require pharmacists to fill valid prescriptions or to allow their employees to refuse to fill prescriptions only if the employee transfers the prescription to another pharmacist or pharmacy.[27] Indeed, Walgreens has a policy that requires pharmacists who object to filling certain prescriptions to refer those prescriptions to another pharmacist or pharmacy,[28] and Wal-Mart, which, until recently, did not stock emergency contraception, has a similar policy regarding employees with moral or religious objections.[29]

Such policies echo the positions of several major health associations. For example, the American Medical Association "supports legislation that requires individual pharmacists or pharmacy chains to fill legally valid prescriptions or to provide immediate referral to an appropriate alternative dispensing pharmacy without interference,"[30] while the American Pharmaceutical Association "recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal."[31] Regardless of such policy positions, the issue of whether pharmacists should be allowed to refuse to fill valid prescriptions or sell contraceptives is likely to continue to generate a great deal of legislative debate in the near future.

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[25] 2005 Bill Tracking MN H.B. 2597; 2005 Bill Tracking MN H.B. 3032.

[26] Lisa Falkenberg, *Austin Prohibits Walgreens From Refusing to Fill Prescriptions*, The Houston Chronicle, Aug. 19, 2005, at B6.

[27] Stein, *supra* note 4, at A1.

[28] Falkenberg, *supra* note 26, at B6.

[29] Michael Barbaro, *In Reversal, Wal-Mart Will Sell Contraceptive*, NY Times, March 4, 2006, at C1.

[30] American Medical Association, H-120.947 *Preserving Patients' Ability to Have Legally Valid Prescriptions Filled*, available at [http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-120.947.HTM]

[31] American Pharmaceutical Association, *Current APhA Policies Related to the Practice Environment & Quality of Worklife Issues*, available at [http://www.aphanet.org/AM/Template.cfm?Section=Search&section=Control_Your_Practice1&template=/CM/ContentDisplay.cfm&ContentFileID=267].