

LEGAL REVIEW NOTE

LC#: LC2245, To Legal Review Copy, as of
February 5, 2015

Short Title: Requiring physical presence of
practitioners when performing abortion services

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Date: February 13, 2015

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC2245, as drafted, requires that a medical practitioner be physically present when performing or attempting to perform an abortion, including a chemical abortion, on a pregnant woman and be physically present when prescribing, administering, or dispensing a drug or device to a pregnant woman that is intended to cause a chemical abortion. LC2245 prohibits the use of telehealth services.

Although not jurisdictionally relevant, laws similar to LC2245 are in effect in other states and have withstood constitutional challenges in other states. See, e.g., *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, 855 N.W.2d 31.

However, LC2245 may raise potential constitutional conformity issues concerning Montana's unique constitutional guarantee of the right to privacy, Article II, section 10, which provides:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Montana's constitutional right to privacy is one of the most stringent protections of the right to privacy in the United States and provides broader protection of the right of privacy than is afforded under the United States Constitution. *See Armstrong v. St.*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364. This is apparent in the constitutional analysis of abortion legislation. While the United States Constitution protects "a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference or undue burden from the state," Montana's Constitution demands more, requiring that the government demonstrate a compelling state interest for infringing upon a woman's right of procreative autonomy. *Armstrong*, ¶ 40 (internal quotations omitted).

In *Armstrong v. St.*, the Montana Supreme Court struck down the "physician only" provisions of the Montana Abortion Control Act, Title 50, chapter 20, MCA, which prohibited physician assistants from performing abortions on pregnant women, noting that the legislation was an "attempt to make it as difficult, as inconvenient and as costly as possible for women to exercise their right to obtain, from the health care provider of their choice, a specific medical procedure" and holding that a woman's right to seek and obtain a pre-viability abortion from a health care provider of her choice was constitutionally protected. *Armstrong*, ¶ 65, ¶ 75.

Given Montana's broad right to privacy and the foregoing precedent, LC2245, as drafted, may raise a constitutional conformity issue regarding the infringement of a woman's right to privacy, specifically a woman's right to seek and obtain a pre-viability abortion from a health care provider of her choice.

Requestor Comments: See attached response from Rep. Regier.

Requestor Comments to LC 2245 legal review.

The legal review of LC2245 (HB 587) goes beyond the scope of the bill. It refers to *Armstrong v. St.* which dealt with who can perform an abortion. LC2245 does not address who is legally able to perform an abortion. Montana's constitution guarantees the individual right to privacy. As technology advances there are more and more cases of cyber attacks and computer hacking. Large international businesses have had financial records compromised. Telemedical communication would be subject to the same cyber threats. LC2245 would help secure the privacy of individuals seeking an abortion.

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