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DEPT. OF HEALTH AND HUMAN SERVICES

Jim Pillen, Governor

April 27, 2023,

Dear Health Professionals,

Problem: This guidance is intended to provide clarification regarding the proposed new Nebraska law (LB626) regulating abortion. It will be critically important that hospital systems and other health care institutions that care for pregnant women also provide guidance to support physicians when making decisions regarding the care of pregnant women.

In other states that have recently passed abortion laws, health care attorneys have recommended inaction when presented with complex situations. As an example, there has been at least one case in Texas where a woman who experienced previable premature rupture of membranes (PPROM). Even though the standard of care is to offer delivery (induction or D&E) and expectant management, the woman was told that the law would not allow delivery until she was infected and at imminent risk of an adverse outcome. PPROM is a complex situation where women can become very sick very quickly and prognosis for the fetus is poor. Recommendations clarifying this and other complex situations are urgently needed to avoid unnecessary adverse outcomes for women in Nebraska.

Nebraska LB626 (the "Nebraska Heartbeat Act") provides that "it shall be unlawful for any physician to perform or induce an abortion: (A) Before fulfilling the requirements of subsection (1) of this section [estimating the gestational age of the unborn child, performing an ultrasound in accordance with standard medical procedure to determine if a fetal heartbeat is present, and recording the results of this estimate and test in the pregnant woman's medical record], or (B) After determining that the unborn child has a detectable fetal heartbeat."1

Exception for Medical Emergencies: LB626 states an exception is allowed and an abortion may be performed if a **medical emergency** is present, defined as: Any condition which, **in reasonable medical judgment**, so complicates the medical condition of the pregnant woman as to necessitate the termination of her pregnancy **to avert her death or for which a delay in terminating her pregnancy will create a serious risk of substantial and irreversible physical impairment of a major bodily function.**2 For its part, **reasonable medical judgment** is defined as: a medical judgment that **could be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities** with respect to the medical conditions involved. 3

This definition, which provides a wide safe harbor for the judgment of an individual physician, informs how the entirety of the definition for "medical emergency" should be read.

Nowhere in LB626 is a requirement that the medical emergency be immediate.4 Physicians understand that it is difficult to predict with certainty whether a situation will cause a patient to become seriously ill or die, but physicians do know what situations could lead to serious outcomes. At the time of diagnosis of a potentially life-threatening pregnancy complication, physicians should exercise their best clinical judgment, and be

reassured that the law allows intervention consistent with prevailing national standards of care. LB626 is deferential to a physician's judgment in these circumstances. It is necessary only that a reasonably prudent physician **could** have made the same judgment that a medical emergency existed in that case.

Definition of Abortion: "Abortion" is defined as "the prescription or use of any instrument, device, medicine, drug, or substance to, or upon, a woman known to be pregnant with the specific intent of terminating the life of her unborn child". 5

LB626 states that **"Abortion shall under no circumstances be interpreted to include the following**:

1) Removal of ectopic pregnancy
2) Removal of the remains of an unborn child who has already died (as in miscarriage or stillbirth)
3) An act done with the intention to save the life, or preserve the health of, the unborn child
4) The accidental or unintentional termination of the life of the unborn child
5) During the practice of an in-vitro fertilization or another assisted reproductive technology, the termination or loss of the life of an unborn child who is not being carried inside a woman's body."6

PPROM (Previable Premature Rupture of Membranes): The American College of Obstetricians and Gynecologists (ACOG) addresses this situation in their 2020 practice bulletin—Prelabor Rupture of Membranes: "Women presenting with PROM before neonatal viability should be counseled regarding the risks and benefits of expectant management versus immediate delivery. Counseling should include a realistic appraisal of neonatal outcomes (which it documents elsewhere are uniformly poor). **Immediate delivery (termination of pregnancy by induction of labor or dilation and evacuation) and expectant management should be offered.** Physicians should provide patients with the most current and accurate information possible" (p.88).7

Physicians are busy, and most are not legally trained. They rely on the Board of Medicine and Surgery to provide more detailed guidance on statutes, regulations and scope of practice. The following information from the Chief Medical Officer is designed to educate and reassure physicians and promote good medical care for women in Nebraska:

1. **Provide immediate guidance for physicians** that LB626 allows termination of pregnancy under the following circumstances:
   - **A. Removal of a dead unborn child or delivery of uterine contents in the unavoidable and untreatable process of ending** due to spontaneous, inevitable, incomplete or septic abortion
   - **B. Removal or medical treatment of ectopic pregnancy**
   - **C.** Performance of a medical procedure, including termination of pregnancy, necessary in the physician's reasonable medical judgment (a medical judgment that **could be made** by a reasonably prudent physician knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved) to **avert the death of the pregnant woman, or to prevent the substantial, irreversible impairment of a major bodily function**
   - **D.** Remind physicians that risk to life or major bodily function **need not be "immediate",** only foreseeable
   - **E. Recommend detailed, meticulous documentation,** including the notation of current applicable CPT and ICD codes, guidance from professional organizations (such as ACOG when applicable), probable gestational age, diagnostic testing and informed consent counseling, including alternatives.

F. Remind those who may be unaware that existing Nebraska law (Nebraska Revised Statutes 28-343) mandates all physicians who perform an abortion to report it and any complications on forms provided by the Nebraska DHHS.

2. **Provide guidance regarding the appropriate use of medications** that can be used to induce abortions, but which also have other uses.
   A. **Misoprostol** can be used to treat miscarriage, induce labor, and provide cervical preparation for other gynecologic procedure such as IUD insertion or hysteroscopy. Additionally, it has non-gynecologic indications for peptic ulcer prevention.
   B. **Mifepristone plus misoprostol** can also be used for miscarriages, although most obstetricians are not REMS (Risk Evaluation and Mitigation Strategy) certified to prescribe mifepristone.
   C. **Methotrexate** is used to treat ectopic pregnancy and is also used for various rheumatologic conditions.
3. **Encourage hospital systems to create advance guidance for their physicians** in consultation with their legal department. Every hospital has a **multidisciplinary medical quality committee (medical executive committee)** as mandated by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). If an emergency arises in which appropriate treatment is uncertain, this committee should meet urgently to help the treating physician make a decision that treats the woman appropriately within the law. The guidance should include, at a minimum:
   A. **Medically indicated separation (induction or abortion)** may be performed if in the physician's "reasonable medical judgment" the termination is needed to avert the mother's death or where a delay would create a serious risk of substantial and irreversible physical impairment of a major bodily function. **Note that the risk of death need not be immediate, only foreseeable.**
   B. **Any physician, nurse or staff member who objects** to directly, or indirectly, performing or participating in a termination of pregnancy may **not be required to participate.**
   C. **Directions on how to document** the medical emergency, which is to be kept in the pregnant woman's medical file

Sincerely,

Dr. Timothy A. Tesmer
Chief Medical Officer, State of Nebraska

1 LB626, Section 4(2), https://nebraskalegislature.gov/FloorDocs/108/PDF/Intro/LB626.pdf
2 LB626, Section 3(3)(a)
3 LB626, Section 3(5)
4 LB626, https://nebraskalegislature.gov/FloorDocs/108/PDF/Intro/LB626.pdf
5 LB626, Section 3(1)(a)
6 LB626, Section 3(1)(b)
7 ACOG Practice Bulletin217: Prelabor Rupture of Membranes. Obstet Gynecol 2020:135(3):80-97