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Opinion No. 10-54

Coverage of Abortion Services

QUESTION

Do the provisions of SB 2686/HB 2681 apply to forms of birth control that may result in the expulsion of a fertilized egg before it is implanted in the uterine lining (IUD's, emergency contraception, and sometimes regular birth control pills)?

OPINION

In our opinion, the definition of "abortion" that is used in SB 2686/HB 2681 would not apply to such forms of birth control. However, as we noted in a prior opinion, on a case-by-case basis, administration of an abortifacient such as mifepristone could constitute an "abortion" as defined under Tenn. Code Ann. § 39-15-201(a)(1) if it were used after implantation of an embryo in the uterine lining.

ANALYSIS

Senate Bill 2686/House Bill 2681 would amend Title 56 of the Tennessee Code by adding the following new section:

> No health care plan required to be established in this state through an exchange pursuant to federal health care reform legislation enacted by the 111th Congress shall offer coverage for abortion services. For purposes of this section, "abortion" has the same meaning as defined in § 39-15-201.

The bill is intended to implement a "State opt-out" provision contained in the recently enacted federal Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (collectively referred to as the "federal Act"). Section 1303(a) of the federal Act, as amended by section 10104(c), provides, in pertinent part:

> (a) State Opt-Out of Abortion Coverage –
>
> (1) In general. – A State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State if such State enacts a law

to provide for such prohibition.[1]

Senate Bill 2686/House Bill 2681 defines the abortion coverage that it would prohibit qualified health plans from offering in a Tennessee exchange by referencing the definition of "abortion" contained in Tenn. Code Ann. § 39-15-201. That definition of "abortion" is:

> [T]he administration to any woman pregnant with child, whether the child be quick or not, of any medicine, drug, or substance whatever, or the use or employment of any instrument, or other means whatever, with the intent to destroy the child, thereby destroying the child before the child's birth.

Tenn. Code Ann. § 39-15-201(a)(1).

This definition of abortion is very broad. In a previous opinion, Op. Tenn. Att'y Gen. 01-030 (March 7, 2001), we considered its applicability to use of an abortifacient[2] such as mifepristone, also known as RU-486. We noted that by the generally accepted medical definition, pregnancy begins at the completion of implantation of the embryo in the uterine lining – which is accomplished approximately 12 to 16 days after fertilization. Termination of a pregnancy before this point is not classified as an abortion under generally accepted medical practice. Mifepristone can block the naturally produced hormone progesterone, thus causing the expulsion of the uterine lining. If this expulsion takes place before implantation occurs, a pregnancy does not occur. Under such circumstances, the use of mifepristone would be classified as a contraceptive rather than an "abortion" within the meaning of Tenn. Code Ann. § 39-15-201(a)(1). However, if administered after the embryo has been implanted in the uterine lining, the use of mifepristone serves to cause an abortion. We concluded that whether the use of mifepristone constitutes an "abortion" as defined under Tenn. Code Ann. §§ 37-10-302(1) and 39-15-201(a)(1) would be determined on a case-by-case basis, and would be based on whether the drug were used before or after implantation of the embryo.[3] Our opinion also noted that the definition of "abortion" contained in Tenn. Code Ann. § 39-15-201(a)(1) plainly requires that the action to terminate a pregnancy be taken intentionally for the purpose of terminating the pregnancy.

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[1] If a State does not elect the opt-out provision, qualified health plans offered through its exchange may not be required to provide coverage of any abortion services as part of their essential health benefits but may voluntarily choose to do so. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1303(b)(1)(A), 10104(c) (2010). If a qualified health plan chooses to provide coverage for abortions for which federal funding is prohibited, it may not use federal funds or tax credits and cost-sharing reductions otherwise available under the federal Act to pay for such services, and must ensure compliance with these prohibitions by collecting separate payments from plan enrollees and segregating funds. *Id.* §§ 1303(b)(1), (2), 10104(c).

[2] Black's Law Dictionary (8th ed. 2004), defines an abortifacient as "[a] drug, article, or other thing designed or intended to produce an abortion."

[3] Our opinion cited "RU-486: Legal and Policy Issues Confronting the Food and Drug Administration," Csilla Muhl, Journal of Legal Medicine, June, 1993, for the medical information provided therein.

We therefore conclude that the definition of "abortion" that is used in SB 2686/HB 2681 would not apply to forms of birth control that may result in the expulsion of a fertilized egg before it is implanted in the uterine lining. However, on a case-by-case basis, administration of an abortifacient such as mifepristone could constitute an "abortion" as defined under Tenn. Code Ann. § 39-15-201(a)(1) if it were used after implantation of an embryo in the uterine lining.

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