CENTER FOR REPRODUCTIVE RIGHTS

A First Look Back at the 2010 State Legislative Session

August 27, 2010

Every year, anti-choice state legislators propose measures intended to restrict women's access to abortion, including mandatory delays, biased counseling provisions and other burdensome and unnecessary requirements. On average, more than six hundred bills are proposed annually and dozens are passed, making it increasingly difficult for women in many states to access abortion. 2010 has been one of the most challenging state legislative sessions for women's access to abortion in many years. States considered and enacted some of the most extreme restrictions on abortion in recent memory, as well as passing laws creating dozens of other significant new hurdles. At the same time, pro-choice legislators, advocates and governors continued to stand up for women's health and rights and in many cases defeated harmful legislation. As we begin to assess the impact of the 2010 session on women's access to reproductive healthcare, the Center offers this preliminary recap of some of the major trends and most onerous laws enacted this session.

Some of the Major Trends in 2010

Biased Counseling/Ultrasound

In 2010, as in the last several years, anti-choice proponents sought to enact dozens of "biased counseling" requirements, which compel physicians to provide patients with state-mandated information before a patient is permitted to obtain abortions. Under such laws, physicians and other healthcare professionals are obligated to give women who seek abortions information that may not be medically accurate or that may be inappropriate for her circumstances (such as telling a rape victim that the father may be liable for child support). Providers may also be required to read a script designed to dissuade women from having abortions.

Many of the more recently passed laws have included requirements that healthcare providers perform ultrasounds and offer patients the option to view the ultrasound image and hear a fetal heartbeat, or require patients to wait a specified period of time between receiving the state-mandated information and being permitted to obtain an abortion.

Ultrasound requirements are particularly demeaning to women, implying both that they do not understand their pregnancies and that they cannot make reasoned decisions without receiving information the state deems important. Women seeking abortions have carefully considered their

options and life circumstances, and these requirements serve only as an attempt to shame them and make them feel guilty about their decisions.

For women who have wanted pregnancies or who have been victims of rape, incest, or abuse, these requirements can also result in unnecessary emotional suffering. These bills also interfere with the doctor/patient relationship, forcing physicians to give each woman "one size fits all" treatment, instead of allowing the physician to treat each patient individually according to his or her professional judgment.

Exchange Bans

This year, the debate over abortion in federal health care reform was a major impetus for aggressive efforts in the states. In March, Congress passed and the President signed the Patient Protection and Affordable Care Act (PPACA). Included in this Act was a section, commonly referred to as the "Nelson Amendment" after its sponsor, Sen. Ben Nelson (D.-Neb.), that restricts the means by which insurers can offer insurance coverage for abortion in the state insurance exchanges that will be created by 2014. In addition to imposing these restrictions, the Nelson Amendment also explicitly gave states the ability to ban abortion coverage from state exchanges altogether.

Two important and troubling aspects of the Congressional fight over abortion in the PPACA emerged. First, opponents' claim that abortion is not an essential and fundamental part of access to comprehensive health care further threatened to stigmatize and burden the right to an abortion. Yet access to abortion is essential to women's ability to protect their health and well-being throughout their reproductive years. It is also an extraordinarily common procedure: By the age of forty-five, approximately one in three women in this country will have had an abortion.[i]

Health organizations including the World Health Organization, the American College of Obstetricians and Gynecologists, the American Public Health Association, and the Association of Reproductive Health Professionals recognize abortion as a critical part of comprehensive reproductive health care.[ii] Anti-abortion activists and legislators ignored that fact, and instead used the healthcare reform process to further restrict women's access to abortion.

Second, the Nelson Amendment explicitly invited anti-choice state legislators to act by emphasizing in law that states could prohibit abortion coverage in the state-based exchanges created by the reform. As discussed below, several states have already taken up that invitation and passed bills banning insurance coverage in the not-yet-created state exchanges.

While passage of the PPACA occurred relatively late in the 2009-2010 state legislative season, reaction in the states was immediate. Although many legislatures were nearing the end of their sessions and had passed important bill-filing deadlines, ten states began immediately to consider bills banning or limiting insurance coverage for abortion in the not-yet-created state exchanges.[iii]

Moreover, while the Nelson Amendment (and other federal restrictions on abortion) contains exceptions for abortions sought by victims of rape and incest or in situations where the life of the woman is threatened, several states considered bans on coverage that would extend beyond federal law, sometimes banning coverage altogether. By the middle of July, when most legislatures had adjourned for the year, five states had enacted "exchange bans" (Arizona, Louisiana, Mississippi, Missouri, Tennessee) and bills containing such bans passed in the legislatures in Florida and Oklahoma before being vetoed by those states' governors.

The language of these bills varied. Some banned insurance coverage for abortion with no exceptions at all, while others incorporated a range of exceptions addressing health, life, rape and incest. One bill, in Louisiana, initially included a ban on abortion coverage in all insurance plans in the state, both inside and outside of the exchange. The bills introduced this session were no doubt just a preview of what the 2011 legislative session will bring.

Ballot Initiatives in 2010-2011: Personhood and Parental Notice

Although most restrictions on women's access to abortion are enacted in state legislatures, there is a movement among anti-abortion activists to resort to state ballot initiatives, often to push an extreme agenda that would likely fail if proposed in the legislature. Unlike a statute that must be passed by both houses of a legislature and signed by a governor, a ballot measure can be placed on the ballot if a group can collect a sufficient number of signatures and, once on the ballot, can typically be passed by a majority of voters in the next election. Thus far this year, one ballot measure aimed at restricting reproductive rights has been passed and another will be on the ballot in November.

On August 24th, Alaska voters approved a measure that will require that before a young woman can have an abortion her physician must give notice to one of her parents at least 48 hours before the procedure. Even for a young woman in an abusive home, the only way to avoid this notification will be to seek a court order or to get a signed, notarized statement from a law enforcement officer or one of a small qualifying group of family members attesting to personal knowledge of the abuse. This new law's mandate of parental notification interferes with families and places the most vulnerable young women in even more danger, at risk of violence or of endangering their health through delay or by attempting to end the pregnancy themselves through dangerous means.

In addition to Alaska's parental involvement initiative, this year saw a new trend arise among ballot initiatives: so-called "personhood" measures. These proposals would amend state constitutions to recognize life from the moment of conception and to endow fertilized eggs, zygotes and fetuses with the status of a "person" under the law. Not only would such measures unconstitutionally ban abortion, they would also ban many forms of birth control and could result in the end of assisted reproductive technology, such as in-vitro fertilization (IVF).

Furthermore, such measures would have unintended and unpredictable impacts on thousands of state laws that use the word "person."

At the start of 2010, "personhood" ballot initiative campaigns had begun to take shape in at least nine states. However, by August, only two proposals had received enough signatures to be placed on the ballot, in Colorado for the November 2010 election, and in Mississippi for November 2011.

Notably, in 2008, Colorado was the first state to consider a personhood initiative and voters overwhelmingly rejected it, 73 percent to 27 percent. In addition, the Mississippi ballot initiative is now the subject of a pre-election court challenge.

State by State: Major Restrictions on Women's Access to Abortion

Arizona

In 2010, Arizona enacted a law (SB 1305) prohibiting any public entity from using public funds to pay for abortions except in certain circumstances where the women's health or life are severely threatened, or in cases of rape or incest. The ban applies to all public employees, as well as any other recipient of public funding. In addition, the law prohibits insurers from participating in the federally-mandated state exchanges from covering abortion. This exchange ban contains an exception for situations in which the woman's health or life are severely threatened, but does not contain exceptions for victims of rape or incest. Taken together, the impact of this law will be to reduce access to reproductive healthcare for Arizona women across all income levels.

Idaho

Idaho also took steps to reduce access to a range of reproductive healthcare services this year by passing a law (SB 1353) allowing healthcare professionals to refuse to provide or assist in abortion care, or in stem cell research or end of life treatment, if the care violates his or her "conscience." Health professionals must provide care only in life-threatening situations if no other healthcare provider is available.

Although many states have refusal bills, Idaho's law is particularly troubling because it wrongly defines "abortifacient" to include emergency contraception, even though emergency contraception acts to prevent a pregnancy from occurring, while an abortifacient terminates an existing pregnancy. Because emergency contraception and other hormonal forms of contraception prevent pregnancy in the same way, SB 1353 blurs the line between abortion and contraception, potentially allowing healthcare professionals to refuse to dispense or even provide information about contraceptives.

Louisiana

Louisiana moved aggressively in 2010 to restrict women's access to abortion, both by imposing new requirements on abortion patients and by targeting abortion providers by making it more difficult for them to provide services.

First, Louisiana enacted a bill (HB 1370) expanding the power of the Department of Health to permanently close abortion clinics for *any* violation of the state's regulatory code, making it much easier to close down an abortion facility than it is to close other types of facilities. Moreover, if the department closes a clinic, the law now prohibits any owner or manager of that clinic from ever opening or managing an abortion clinic in the state in the future. This law targets abortion clinics, their owners and their senior employees.

Through a second law (HB 1453), the legislature denied those physicians who provide abortions access to the State's Patient Compensation Fund (PCF), a fund established to protect healthcare providers from the costs of malpractice insurance. The PCF allows healthcare providers to participate in a program that conducts initial screening of all malpractice claims and limits physicians' malpractice liability above a certain dollar amount. The new law prevents physicians who perform most abortions from receiving PCF coverage for those procedures. The explicit exclusion of abortion service providers from the PCF demonstrates the legislature's desire to make the practice of abortion care too expensive for providers, thereby discouraging them from continuing to provide services. This law is now being challenged by the Center in federal court.

After enactment of federal healthcare reform, Louisiana also directly attacked women's ability to access abortion by passing HB 1247, which will prohibit insurers from offering any coverage for abortion services in the federally-mandated state exchanges. Under this extreme law, insurers cannot offer coverage even for abortions necessary due to life-threatening medical conditions.

Finally, Louisiana enacted a new ultrasound requirement (SB 528) that requires any woman seeking an abortion to have an ultrasound and health care providers to offer woman an opportunity to view the ultrasound image, hear an explanation of the image, and have a copy of the ultrasound print. The law also requires providers to give incorrect and misleading information to patients about the purpose of the ultrasound.

Mississippi

As soon as the PPACA passed, legislators in Mississippi responded by passing a bill (SB 3214) that bars any insurer from offering insurance coverage for abortion in the state exchange, except when the woman's life is endangered by "a physical disorder, physical illness or physical injury" or in cases of rape or incest. The legislature was so eager to pass this bill that it circumvented its own bill introduction deadlines and procedural rules to do so.

Missouri

This year, Missouri legislators enacted a comprehensive biased counseling law containing a myriad of new restrictions on both abortion patients and providers (SB 793). The most onerous new requirements include a "two trip" provision, requiring women to visit abortion facilities in person at least twenty-four hours before they are permitted to obtain an abortion; a requirement that abortion patients be given a large packet of new information compiled and mandated by the state; and a requirement that abortion patients be offered the opportunity to see an ultrasound image and hear the fetal heart-tone. The state-created materials will contain this statement: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being." Finally, the law includes a complete prohibition on insurance coverage for "elective abortions" in the state exchange.

Nebraska

This year, Nebraska enacted two of the most extreme abortion restrictions in the past few decades. The first bill (LB 1103), which will become law in October, bans abortions at twenty-weeks gestation (*i.e.*, before viability), with only limited exceptions for situations in which an abortion would be necessary to either save a woman's life or to prevent the risk of substantial and irreversible physical impairment of a major bodily function. The law excludes mental health from its narrow health exception, and contains a special clause prohibiting physicians from performing an abortion even if the physician believes there's a risk the woman may commit suicide. Notably, the law lacks exceptions for fetal anomalies, rape or incest, and subjects providers to penalties including imprisonment.

In addition, the state also enacted a new abortion "patient-screening" bill (LB 594) with provisions so complex, confusing and vague that it would be impossible for providers to comply. Among other onerous, bizarre requirements, the law forces abortion providers in the state to review virtually all of the peer-reviewed studies ever published, and to create a list of all of the risk factors ever identified as having a statistical association with complications from abortion. The doctor must then counsel each patient about each of these risks, regardless of whether they are relevant to the particular patient or are grounded in sound medicine. The law also gives patients the right to sue the physician for having failed to counsel about *any* potential risk factor, with the possibility of a $10,000 fine for each risk factor missed.

Planned Parenthood of the Heartland challenged the law in federal court. After the court granted a preliminary injunction against the law on July 14th, the state of Nebraska announced that it did not intend to continue to defend the law. On August 26th, the court approved the parties' agreement to make the injunction permanent.

Oklahoma

Over the last few years, Oklahoma has taken some of the most aggressive steps of any state to restrict or burden women's access to abortion and other reproductive health care. In 2008 and 2009, the state enacted laws containing many provisions that restrict access to abortion (SB 1878 (2008); HB 1595 (2009)). The Center for Reproductive Rights filed lawsuits challenging those laws and succeeded in having them struck down based on a provision of the Oklahoma Constitution that prohibits the legislature from enacting laws that address more than one subject.

Despite those victories, the Oklahoma legislature came back in 2010 determined to pass each of the restrictions as a separate bill. It enacted seven of them into law, including three over the veto of Governor Brad Henry.

One of the most onerous new laws (HB 2780) requires abortion providers to perform ultrasounds on all patients and to display the ultrasound to each woman while simultaneously providing a detailed verbal description of the image. Leaving nothing to physician discretion, the law requires the physician or a "certified [ultrasound] technician" to describe specific aspects of the fetus, including its "members and internal organs."

Aside from serious medical emergencies, there are no exceptions to this law—only the slight caveat that the woman will not be punished if she averts her eyes from the screen. Although Oklahoma Governor Henry vetoed this bill, finding it to be an unconstitutional invasion of women's privacy, the Oklahoma legislature overrode that veto. The Center immediately challenged the law on behalf of abortion providers and their patients, and on July 19, 2010, a state judge issued a preliminary injunction, enjoining the law while the case is pending.

The Oklahoma legislature also enacted a reporting law (HB 3284) containing some of the most complex and burdensome requirements ever proposed in this country. The law requires physicians to walk through thirty-seven questions with each patient, grilling her on her life circumstances and the reasons she is choosing to terminate her pregnancy, and then requires the physicians to provide this information to the state. As with the ultrasound law, the legislature enacted this law over the veto of Governor Henry. Most provisions of the Act will not be operative until April 2012.

In a third attack on women's access to reproductive healthcare, the legislature enacted, again over the Governor's veto, a law that prohibits any tort claims for damages on the basis of "wrongful life" or "wrongful birth." The law essentially gives physicians and other medical professionals permission to lie to or intentionally mislead pregnant patients, including concealing information about fetal anomalies, withholding vital medical information, and failing to perform available tests, without fear of legal consequences.

The three laws described above are the most extreme enacted in Oklahoma this year, and are some of the most extreme enacted across the country. But Oklahoma went even further, enacting four additional laws that impose other new requirements on abortion patients and providers and restrict women's access to reproductive healthcare.

First, the state passed a broad refusal law (SB 1891), permitting employees of healthcare facilities to refuse to provide abortions, along with several other types of healthcare services, and permitting healthcare facilities themselves to refuse to admit patients requiring such care.

Next, the state enacted a law (SB 1902) requiring that in order to provide medication abortion, the physician providing the abortion must be present in the room when the patient takes the first medication required for the procedure. This law seeks to preclude abortion providers from practicing telemedicine, which is becoming more and more common, and enables providers to treat patients in rural areas or that otherwise have difficulty accessing healthcare.

Third, the state passed a law (SB 1890) prohibiting physicians from providing abortions sought solely on the basis of the gender of the fetus (except where there is a genetic anomaly linked to gender). Finally, the state enacted a law (HB 3075), requiring all facilities that provide abortions to post large, detailed and conspicuous signs in each patient waiting room or treatment room informing patients, among other things, that the abortion facility is prohibited from coercing patients into having abortions.

South Carolina

This year, South Carolina enacted a law (HB 3245) requiring patients to access state-mandated biased counseling materials at least twenty-four hours before they are permitted to obtain abortions. While some patients will be able to access these materials on the Internet, others may have to come to the clinic twice, go to their county department of health, or arrange to have the materials sent to them in the mail, potentially delaying their appointments even more than twenty-four hours and compromising their ability to keep their abortion confidential.

Tennessee

Tennessee enacted two restrictive laws this year, one intended to burden both providers and patients and the other aimed directly at patients. The first law (SB 3812) requires any facilities that perform abortions to post a very large sign in each patient waiting or consultation room stating that it is unlawful to coerce a woman into having an abortion.

Second, shortly after the enactment of the PPACA, Tennessee's legislature passed one of the first exchange bans (SB 2681). The law prohibits insurers from covering abortion through the federally mandated state exchange under *any* circumstances – there are no exceptions and no provisions permitting women to buy additional insurance coverage for abortion.

Utah

This year, Utah enacted two laws impacting women's reproductive health and rights. The first law (HB 462) imposes severe criminal penalties on pregnant women who cause the termination of their own pregnancies. This law targets pregnant woman in significant and unintended ways, subjecting women who experience miscarriages to potential criminal prosecution and inflicting criminal penalties on women who are already suffering such anguishing life circumstances that they would undertake desperate and dangerous measures to end their pregnancies.

The second law (HB 200) requires abortion providers who perform ultrasounds to display the ultrasound image to each patient, although she can choose not to look at it, and also to offer her an opportunity to hear a detailed explanation of the image. The law also requires providers to give patients additional information about the state-mandated counseling materials. This law creates yet another in the series of steps that must be performed by patient and doctor before a woman is permitted to obtain an abortion.

Virginia

Virginia passed a law (HB 30) prohibiting state funds from being used to pay for abortions other than in cases of rape, incest or when the woman's life is at risk. The law also has the effect of prohibiting insurance coverage of such abortions for public employees.

Conclusion

At this point in the year, 2010 has already seen many restrictive laws enacted. The Center for Reproductive Rights will continue to analyze the impact of this year's legislation on women's reproductive health and rights, and to work with advocates and legislators to oppose any similar legislation proposed in the future. For more information on individual states' new laws and state legislative activity across the country, please contact Jordan Goldberg, State Advocacy Counsel, at jgoldberg@reprorights.org. For press inquiries, please contact Dionne Scott, at dscott@reprorights.org.

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[i] Guttmacher Institute, "An Overview of Abortion in the United States," http://www.guttmacher.com/media/presskits/2005/06/28/abortionoverview.html (last visited July 28, 2010).

[ii] American College of Gynecologists and Obstetricians, Guidelines for Women's Health Care: A Resource Manual 431-32 (2007); Association of Reproductive Health Professionals, Position Statements: Abortion, http://www.arhp.org/about-us/position-statements#1 (last visited July 28, 2010); American Public Health Association (APHA), Policy Statement, Need for State Legislation Protecting and Enhancing Women's Ability to Obtain safe, Legal Abortion Services Without Delay or Government Interference, Oct. 28, 2008, *available at* http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1369; World Health Organization (WHO), WHO: Preventing Unsafe Abortion, http://www.who.int/reproductivehealth/topics/unsafe_abortion/hrpwork/en/index.html (last visited July 28, 2010).

[iii] The states that considered or passed exchange bans in 2010 were: Arizona, Florida, Georgia, Louisiana, Michigan, Mississippi, Missouri, Oklahoma, South Carolina, Tennessee.