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HOUSE BILL NO. 227

Offered January 8, 2020

Prefiled December 28, 2019

A BILL to amend and reenact §§ 32.1-127 and 54.1-2915 of the Code of Virginia and to amend the Code of Virginia by adding in Article 9 of Chapter 4 of Title 18.2 a section numbered 18.2-76.3, relating to abortion; born alive human infant; treatment and care; penalty.

Patrons—Freitas, Avoli, Byron, Cole, M.L. and LaRock; Senators: Chase and Reeves

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 32.1-127 and 54.1-2915 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 9 of Chapter 4 of Title 18.2 a section numbered 18.2-76.3 as follows:

§ 18.2-76.3. Failure to provide care and treatment to a human infant born alive; penalty.

A. Every physician licensed by the Board of Medicine who attempts or assists in the attempt to perform an abortion or cause a miscarriage for the purpose of terminating a human pregnancy and who is present at the time such abortion is attempted or such miscarriage is attempted to be caused shall, in the case of a human infant who has been born alive, as defined in § 18.2-71.1, following performance of such attempted abortion or causing of a miscarriage, (i) exercise the same degree of professional skill, care, and diligence to preserve the life and health of the human infant who has been born alive as a reasonably diligent and conscientious health care practitioner would render to any other child born alive at the same gestational age and (ii) take all reasonable steps to ensure the immediate transfer of the human infant who has been born alive to a hospital for further medical care.

B. Any person with knowledge that a physician licensed by the Board of Medicine has failed to comply with the provisions of subsection A shall immediately report such failure to law enforcement.

C. Any physician licensed by the Board of Medicine who fails to comply with the provisions of subsection A is guilty of a Class 4 felony.

D. The mother of a human infant who has been born alive shall not be subject to prosecution for any criminal offense pursuant to this section.

§ 32.1-127. Regulations.

A. The regulations promulgated by the Board to carry out the provisions of this article shall be in substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals and by specialists in matters of public health and safety, including health and safety standards established under provisions of Title XVIII and Title XIX of the Social Security Act, and to the provisions of Article 2 (§ 32.1-138 et seq.).

B. Such regulations:

1. Shall include minimum standards for (i) the construction and maintenance of hospitals, nursing homes and certified nursing facilities to ensure the environmental protection and the life safety of its patients, employees, and the public; (ii) the operation, staffing and equipping of hospitals, nursing homes and certified nursing facilities; (iii) qualifications and training of staff of hospitals, nursing homes and certified nursing facilities, except those professionals licensed or certified by the Department of Health Professions; (iv) conditions under which a hospital or nursing home may provide medical and nursing services to patients in their places of residence; and (v) policies related to infection prevention, disaster preparedness, and facility security of hospitals, nursing homes, and certified nursing facilities. For purposes of this paragraph, facilities in which five or more first trimester abortions per month are performed shall be classified as a category of "hospital";

2. Shall provide that at least one physician who is licensed to practice medicine in this Commonwealth shall be on call at all times, though not necessarily physically present on the premises, at each hospital which operates or holds itself out as operating an emergency service;

3. May classify hospitals and nursing homes by type of specialty or service and may provide for licensing hospitals and nursing homes by bed capacity and by type of specialty or service;

4. Shall also require that each hospital establish a protocol for organ donation, in compliance with federal law and the regulations of the Centers for Medicare and Medicaid Services (CMS), particularly 42 C.F.R. § 482.45. Each hospital shall have an agreement with an organ procurement organization designated in CMS regulations for routine contact, whereby the provider's designated organ procurement organization certified by CMS (i) is notified in a timely manner of all deaths or imminent deaths of patients in the hospital and (ii) is authorized to determine the suitability of the decedent or patient for

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organ donation and, in the absence of a similar arrangement with any eye bank or tissue bank in Virginia certified by the Eye Bank Association of America or the American Association of Tissue Banks, the suitability for tissue and eye donation. The hospital shall also have an agreement with at least one tissue bank and at least one eye bank to cooperate in the retrieval, processing, preservation, storage, and distribution of tissues and eyes to ensure that all usable tissues and eyes are obtained from potential donors and to avoid interference with organ procurement. The protocol shall ensure that the hospital collaborates with the designated organ procurement organization to inform the family of each potential donor of the option to donate organs, tissues, or eyes or to decline to donate. The individual making contact with the family shall have completed a course in the methodology for approaching potential donor families and requesting organ or tissue donation that (a) is offered or approved by the organ procurement organization and designed in conjunction with the tissue and eye bank community and (b) encourages discretion and sensitivity according to the specific circumstances, views, and beliefs of the relevant family. In addition, the hospital shall work cooperatively with the designated organ procurement organization in educating the staff responsible for contacting the organ procurement organization's personnel on donation issues, the proper review of death records to improve identification of potential donors, and the proper procedures for maintaining potential donors while necessary testing and placement of potential donated organs, tissues, and eyes takes place. This process shall be followed, without exception, unless the family of the relevant decedent or patient has expressed opposition to organ donation, the chief administrative officer of the hospital or his designee knows of such opposition, and no donor card or other relevant document, such as an advance directive, can be found;

5. Shall require that each hospital that provides obstetrical services establish a protocol for admission or transfer of any pregnant woman who presents herself while in labor;

6. Shall also require that each licensed hospital develop and implement a protocol requiring written discharge plans for identified, substance-abusing, postpartum women and their infants. The protocol shall require that the discharge plan be discussed with the patient and that appropriate referrals for the mother and the infant be made and documented. Appropriate referrals may include, but need not be limited to, treatment services, comprehensive early intervention services for infants and toddlers with disabilities and their families pursuant to Part H of the Individuals with Disabilities Education Act, 20 U.S.C. § 1471 et seq., and family-oriented prevention services. The discharge planning process shall involve, to the extent possible, the father of the infant and any members of the patient's extended family who may participate in the follow-up care for the mother and the infant. Immediately upon identification, pursuant to § 54.1-2403.1, of any substance-abusing, postpartum woman, the hospital shall notify, subject to federal law restrictions, the community services board of the jurisdiction in which the woman resides to appoint a discharge plan manager. The community services board shall implement and manage the discharge plan;

7. Shall require that each nursing home and certified nursing facility fully disclose to the applicant for admission the home's or facility's admissions policies, including any preferences given;

8. Shall require that each licensed hospital establish a protocol relating to the rights and responsibilities of patients which shall include a process reasonably designed to inform patients of such rights and responsibilities. Such rights and responsibilities of patients, a copy of which shall be given to patients on admission, shall be consistent with applicable federal law and regulations of the Centers for Medicare and Medicaid Services;

9. Shall establish standards and maintain a process for designation of levels or categories of care in neonatal services according to an applicable national or state-developed evaluation system. Such standards may be differentiated for various levels or categories of care and may include, but need not be limited to, requirements for staffing credentials, staff/patient ratios, equipment, and medical protocols;

10. Shall require that each nursing home and certified nursing facility train all employees who are mandated to report adult abuse, neglect, or exploitation pursuant to § 63.2-1606 on such reporting procedures and the consequences for failing to make a required report;

11. Shall permit hospital personnel, as designated in medical staff bylaws, rules and regulations, or hospital policies and procedures, to accept emergency telephone and other verbal orders for medication or treatment for hospital patients from physicians, and other persons lawfully authorized by state statute to give patient orders, subject to a requirement that such verbal order be signed, within a reasonable period of time not to exceed 72 hours as specified in the hospital's medical staff bylaws, rules and regulations or hospital policies and procedures, by the person giving the order, or, when such person is not available within the period of time specified, co-signed by another physician or other person authorized to give the order;

12. Shall require, unless the vaccination is medically contraindicated or the resident declines the offer of the vaccination, that each certified nursing facility and nursing home provide or arrange for the administration to its residents of (i) an annual vaccination against influenza and (ii) a pneumococcal vaccination, in accordance with the most recent recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention;

13. Shall require that each nursing home and certified nursing facility register with the Department of State Police to receive notice of the registration or reregistration of any sex offender within the same or a contiguous zip code area in which the home or facility is located, pursuant to § 9.1-914;

14. Shall require that each nursing home and certified nursing facility ascertain, prior to admission, whether a potential patient is a registered sex offender, if the home or facility anticipates the potential patient will have a length of stay greater than three days or in fact stays longer than three days;

15. Shall require that each licensed hospital include in its visitation policy a provision allowing each adult patient to receive visits from any individual from whom the patient desires to receive visits, subject to other restrictions contained in the visitation policy including, but not limited to, those related to the patient's medical condition and the number of visitors permitted in the patient's room simultaneously;

16. Shall require that each nursing home and certified nursing facility shall, upon the request of the facility's family council, send notices and information about the family council mutually developed by the family council and the administration of the nursing home or certified nursing facility, and provided to the facility for such purpose, to the listed responsible party or a contact person of the resident's choice up to six times per year. Such notices may be included together with a monthly billing statement or other regular communication. Notices and information shall also be posted in a designated location within the nursing home or certified nursing facility. No family member of a resident or other resident representative shall be restricted from participating in meetings in the facility with the families or resident representatives of other residents in the facility;

17. Shall require that each nursing home and certified nursing facility maintain liability insurance coverage in a minimum amount of \$1 million, and professional liability coverage in an amount at least equal to the recovery limit set forth in § 8.01-581.15, to compensate patients or individuals for injuries and losses resulting from the negligent or criminal acts of the facility. Failure to maintain such minimum insurance shall result in revocation of the facility's license;

18. Shall require each hospital that provides obstetrical services to establish policies to follow when a stillbirth, as defined in § 32.1-69.1, occurs that meet the guidelines pertaining to counseling patients and their families and other aspects of managing stillbirths as may be specified by the Board in its regulations;

19. Shall require each nursing home to provide a full refund of any unexpended patient funds on deposit with the facility following the discharge or death of a patient, other than entrance-related fees paid to a continuing care provider as defined in § 38.2-4900, within 30 days of a written request for such funds by the discharged patient or, in the case of the death of a patient, the person administering the person's estate in accordance with the Virginia Small Estates Act (§ 64.2-600 et seq.);

20. Shall require that each hospital that provides inpatient psychiatric services establish a protocol that requires, for any refusal to admit (i) a medically stable patient referred to its psychiatric unit, direct verbal communication between the on-call physician in the psychiatric unit and the referring physician, if requested by such referring physician, and prohibits on-call physicians or other hospital staff from refusing a request for such direct verbal communication by a referring physician and (ii) a patient for whom there is a question regarding the medical stability or medical appropriateness of admission for inpatient psychiatric services due to a situation involving results of a toxicology screening, the on-call physician in the psychiatric unit to which the patient is sought to be transferred to participate in direct verbal communication, either in person or via telephone, with a clinical toxicologist or other person who is a Certified Specialist in Poison Information employed by a poison control center that is accredited by the American Association of Poison Control Centers to review the results of the toxicology screen and determine whether a medical reason for refusing admission to the psychiatric unit related to the results of the toxicology screen exists, if requested by the referring physician;

21. Shall require that each hospital that is equipped to provide life-sustaining treatment shall develop a policy governing determination of the medical and ethical appropriateness of proposed medical care, which shall include (i) a process for obtaining a second opinion regarding the medical and ethical appropriateness of proposed medical care in cases in which a physician has determined proposed care to be medically or ethically inappropriate; (ii) provisions for review of the determination that proposed medical care is medically or ethically inappropriate by an interdisciplinary medical review committee and a determination by the interdisciplinary medical review committee regarding the medical and ethical appropriateness of the proposed health care; and (iii) requirements for a written explanation of the decision reached by the interdisciplinary medical review committee, which shall be included in the patient's medical record. Such policy shall ensure that the patient, his agent, or the person authorized to make medical decisions pursuant to § 54.1-2986 (a) are informed of the patient's right to obtain his medical record and to obtain an independent medical opinion and (b) afforded reasonable opportunity to participate in the medical review committee meeting. Nothing in such policy shall prevent the patient, his agent, or the person authorized to make medical decisions pursuant to § 54.1-2986 from obtaining

182 legal counsel to represent the patient or from seeking other remedies available at law, including seeking
183 court review, provided that the patient, his agent, or the person authorized to make medical decisions
184 pursuant to § 54.1-2986, or legal counsel provides written notice to the chief executive officer of the
185 hospital within 14 days of the date on which the physician's determination that proposed medical
186 treatment is medically or ethically inappropriate is documented in the patient's medical record;

187 22. Shall require every hospital with an emergency department to establish protocols to ensure that
188 security personnel of the emergency department, if any, receive training appropriate to the populations
189 served by the emergency department, which may include training based on a trauma-informed approach
190 in identifying and safely addressing situations involving patients or other persons who pose a risk of
191 harm to themselves or others due to mental illness or substance abuse or who are experiencing a mental
192 health crisis;

193 23. Shall require that each hospital establish a protocol requiring that, before a health care provider
194 arranges for air medical transportation services for a patient who does not have an emergency medical
195 condition as defined in 42 U.S.C. § 1395dd(e)(1), the hospital shall provide the patient or his authorized
196 representative with written or electronic notice that the patient (i) may have a choice of transportation by
197 an air medical transportation provider or medically appropriate ground transportation by an emergency
198 medical services provider and (ii) will be responsible for charges incurred for such transportation in the
199 event that the provider is not a contracted network provider of the patient's health insurance carrier or
200 such charges are not otherwise covered in full or in part by the patient's health insurance plan; ~~and~~

201 24. Shall establish an exemption, for a period of no more than 30 days, from the requirement to
202 obtain a license to add temporary beds in an existing hospital or nursing home when the Commissioner
203 has determined that a natural or man-made disaster has caused the evacuation of a hospital or nursing
204 home and that a public health emergency exists due to a shortage of hospital or nursing home beds; *and*

205 25. *Shall require every hospital to establish a protocol for (i) the treatment and care of a human*
206 *infant who has been born alive, as that term is defined in § 18.2-71.1, following performance of an*
207 *abortion and (ii) requiring the immediate reporting to law enforcement of any failure of any person*
208 *required to provide treatment and care to a human infant who has been born alive following*
209 *performance of an abortion in accordance with the provisions of clause (i) or § 18.2-76.3.*

210 C. Upon obtaining the appropriate license, if applicable, licensed hospitals, nursing homes, and
211 certified nursing facilities may operate adult day care centers.

212 D. All facilities licensed by the Board pursuant to this article which provide treatment or care for
213 hemophiliacs and, in the course of such treatment, stock clotting factors, shall maintain records of all lot
214 numbers or other unique identifiers for such clotting factors in order that, in the event the lot is found to
215 be contaminated with an infectious agent, those hemophiliacs who have received units of this
216 contaminated clotting factor may be apprised of this contamination. Facilities which have identified a lot
217 which is known to be contaminated shall notify the recipient's attending physician and request that he
218 notify the recipient of the contamination. If the physician is unavailable, the facility shall notify by mail,
219 return receipt requested, each recipient who received treatment from a known contaminated lot at the
220 individual's last known address.

221 **§ 54.1-2915. Unprofessional conduct; grounds for refusal or disciplinary action.**

222 A. The Board may refuse to issue a certificate or license to any applicant; reprimand any person;
223 place any person on probation for such time as it may designate; impose a monetary penalty or terms as
224 it may designate on any person; suspend any license for a stated period of time or indefinitely; or
225 revoke any license for any of the following acts of unprofessional conduct:

226 1. False statements or representations or fraud or deceit in obtaining admission to the practice, or
227 fraud or deceit in the practice of any branch of the healing arts;

228 2. Substance abuse rendering him unfit for the performance of his professional obligations and duties;

229 3. Intentional or negligent conduct in the practice of any branch of the healing arts that causes or is
230 likely to cause injury to a patient or patients;

231 4. Mental or physical incapacity or incompetence to practice his profession with safety to his patients
232 and the public;

233 5. Restriction of a license to practice a branch of the healing arts in another state, the District of
234 Columbia, a United States possession or territory, or a foreign jurisdiction, or for an entity of the federal
235 government;

236 6. Undertaking in any manner or by any means whatsoever to procure or perform or aid or abet in
237 procuring or performing a criminal abortion;

238 7. Engaging in the practice of any of the healing arts under a false or assumed name, or
239 impersonating another practitioner of a like, similar, or different name;

240 8. Prescribing or dispensing any controlled substance with intent or knowledge that it will be used
241 otherwise than medicinally, or for accepted therapeutic purposes, or with intent to evade any law with
242 respect to the sale, use, or disposition of such drug;

243 9. Violating provisions of this chapter on division of fees or practicing any branch of the healing arts

in violation of the provisions of this chapter;

10. Knowingly and willfully committing an act that is a felony under the laws of the Commonwealth or the United States, or any act that is a misdemeanor under such laws and involves moral turpitude;

11. Aiding or abetting, having professional connection with, or lending his name to any person known to him to be practicing illegally any of the healing arts;

12. Conducting his practice in a manner contrary to the standards of ethics of his branch of the healing arts;

13. Conducting his practice in such a manner as to be a danger to the health and welfare of his patients or to the public;

14. Inability to practice with reasonable skill or safety because of illness or substance abuse;

15. Publishing in any manner an advertisement relating to his professional practice that contains a claim of superiority or violates Board regulations governing advertising;

16. Performing any act likely to deceive, defraud, or harm the public;

17. Violating any provision of statute or regulation, state or federal, relating to the manufacture, distribution, dispensing, or administration of drugs;

18. Violating or cooperating with others in violating any of the provisions of Chapters 1 (§ 54.1-100 et seq.), 24 (§ 54.1-2400 et seq.) and this chapter or regulations of the Board;

19. Engaging in sexual contact with a patient concurrent with and by virtue of the practitioner and patient relationship or otherwise engaging at any time during the course of the practitioner and patient relationship in conduct of a sexual nature that a reasonable patient would consider lewd and offensive;

20. Conviction in any state, territory, or country of any felony or of any crime involving moral turpitude;

21. Adjudication of legal incompetence or incapacity in any state if such adjudication is in effect and the person has not been declared restored to competence or capacity;

22. Performing the services of a medical examiner as defined in 49 C.F.R. § 390.5 if, at the time such services are performed, the person performing such services is not listed on the National Registry of Certified Medical Examiners as provided in 49 C.F.R. § 390.109 or fails to meet the requirements for continuing to be listed on the National Registry of Certified Medical Examiners as provided in 49 C.F.R. § 390.111; or

23. Failing or refusing to complete and file electronically using the Electronic Death Registration System any medical certification in accordance with the requirements of subsection C of § 32.1-263. However, failure to complete and file a medical certification electronically using the Electronic Death Registration System in accordance with the requirements of subsection C of § 32.1-263 shall not constitute unprofessional conduct if such failure was the result of a temporary technological or electrical failure or other temporary extenuating circumstance that prevented the electronic completion and filing of the medical certification using the Electronic Death Registration System; or

24. *Failing to comply with the requirements of § 18.2-76.3.*

B. The commission or conviction of an offense in another state, territory, or country, which if committed in Virginia would be a felony, shall be treated as a felony conviction or commission under this section regardless of its designation in the other state, territory, or country.

C. The Board shall refuse to issue a certificate or license to any applicant if the candidate or applicant has had his certificate or license to practice a branch of the healing arts revoked or suspended, and has not had his certificate or license to so practice reinstated, in another state, the District of Columbia, a United States possession or territory, or a foreign jurisdiction.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 854 of the Acts of Assembly of 2019 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.