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S. 3223

To establish certain duties for pharmacies to ensure provision of Food and Drug Administration-approved contraception, medication related to contraception, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 17, 2021

Mr. BOOKER (for himself, Mrs. MURRAY, Mr. BROWN, Mr. WHITEHOUSE, Ms. WARREN, Mr. MERKLEY, Ms. BALDWIN, Mr. BLUMENTHAL, Mr. WYDEN, Ms. SMITH, Mr. MURPHY, Mr. MENENDEZ, Mr. KAINE, Ms. ROSEN, Ms. HIRONO, Ms. KLOBUCHAR, Mr. HEINRICH, Mrs. GILLIBRAND, Mr. MARKEY, Mrs. SHAHEEN, Mr. PADILLA, and Mr. VAN HOLLEN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To establish certain duties for pharmacies to ensure provision of Food and Drug Administration-approved contraception, medication related to contraception, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Access to Birth Control
5 Act”.

1 **SEC. 2. FINDINGS.**

2 Congress finds as follows:

3 (1) Family planning is basic health care. Access
4 to contraception helps prevent unintended pregnancy
5 and control the timing and spacing of planned
6 births.

7 (2) As a result of the enactment of the Patient
8 Protection and Affordable Care Act (Public Law
9 111–148), approximately 64,300,000 women had
10 coverage of the full range of Food and Drug Admin-
11 istration-approved contraceptive methods without
12 cost sharing in 2020.

13 (3) The Patient Protection and Affordable Care
14 Act saved women \$1,400,000,000 on birth control
15 pills alone in 2013.

16 (4) According to the Centers for Disease Con-
17 trol and Prevention, nearly $\frac{2}{3}$ of women between the
18 ages of 15 and 49 are currently using a contracep-
19 tive method.

20 (5) Although the Centers for Disease Control
21 and Prevention included family planning in its pub-
22 lished list of the Ten Great Public Health Achieve-
23 ments in the 20th Century, the United States still
24 has one of the highest rates of unintended preg-
25 nancies among industrialized nations.

1 (6) Each year, approximately 2,800,000 preg-
2 nancies, nearly half of all pregnancies, in the United
3 States are unintended.

4 (7) Access to birth control helps people achieve
5 their goals of whether, and when, to get pregnant.
6 However, studies show that when people are unable
7 to access contraceptive care that fits their lives, they
8 are more likely to face unintended pregnancies.

9 (8) Contraceptives are used for a range of med-
10 ical purposes in addition to preventing pregnancy,
11 such as treating abnormal cycles and endometriosis.

12 (9) The Food and Drug Administration has ap-
13 proved multiple emergency contraceptive methods as
14 safe and effective in preventing unintended preg-
15 nancy and has approved over-the-counter access to
16 some forms of emergency contraception for all indi-
17 viduals, regardless of age. If taken soon after unpro-
18 tected sex or primary contraceptive failure, emer-
19 gency contraception can significantly reduce a per-
20 son's chance of unintended pregnancy.

21 (10) Legal contraception is a protected funda-
22 mental right in the United States and should not be
23 impeded by one individual's personal beliefs.

24 (11) Reports of pharmacists refusing to fill pre-
25 scriptions for contraceptives, including emergency

1 contraceptives, or provide emergency contraception
2 over-the-counter have surfaced in States across the
3 Nation, including Alabama, Arizona, California, the
4 District of Columbia, Georgia, Illinois, Louisiana,
5 Massachusetts, Michigan, Minnesota, Missouri, Mon-
6 tana, New Hampshire, New Mexico, New York,
7 North Carolina, Ohio, Oklahoma, Oregon, Rhode Is-
8 land, Tennessee, Texas, Washington, West Virginia,
9 and Wisconsin.

10 (12) One-third of women have experienced a
11 delay in accessing their contraception because of the
12 ongoing coronavirus pandemic. The Centers for Dis-
13 ease Control and Prevention recognizes the impor-
14 tance of access to contraception, particularly during
15 the pandemic.

16 (13) Pregnant people have a much higher risk
17 of dying once infected with COVID–19, which high-
18 lights the importance of people being able to make
19 and exercise decisions about whether and when to
20 become pregnant.

1 **SEC. 3. DUTIES OF PHARMACIES TO ENSURE PROVISION OF**
2 **FDA-APPROVED CONTRACEPTION AND MEDI-**
3 **CATION RELATED TO CONTRACEPTION.**

4 Part B of title II of the Public Health Service Act
5 (42 U.S.C. 238 et seq.) is amended by adding at the end
6 the following:

7 **“SEC. 249. DUTIES OF PHARMACIES TO ENSURE PROVISION**
8 **OF FDA-APPROVED CONTRACEPTION AND**
9 **MEDICATION RELATED TO CONTRACEPTION.**

10 “(a) IN GENERAL.—Subject to subsection (c), a
11 pharmacy that receives Food and Drug Administration-
12 approved drugs or devices in interstate commerce shall
13 maintain compliance with the following:

14 “(1) If a customer requests a contraceptive or
15 a medication related to a contraceptive that is in
16 stock, the pharmacy shall ensure that the contracep-
17 tive or the medication related to a contraceptive is
18 provided to the customer without delay.

19 “(2) If a customer requests a contraceptive or
20 a medication related to a contraceptive that is not
21 in stock and the pharmacy in the normal course of
22 business stocks contraception or the medication re-
23 lated to contraception, the pharmacy shall imme-
24 diately inform the customer that the contraceptive or
25 the medication related to a contraceptive is not in

1 stock and without delay offer the customer the fol-
2 lowing options:

3 “(A) If the customer prefers to obtain the
4 contraceptive or the medication related to a
5 contraceptive through a referral or transfer, the
6 pharmacy shall—

7 “(i) locate a pharmacy of the cus-
8 tomer’s choice or the closest pharmacy
9 confirmed to have the contraceptive or the
10 medication related to a contraceptive in
11 stock; and

12 “(ii) refer the customer or transfer
13 the prescription to that pharmacy.

14 “(B) If the customer prefers for the phar-
15 macy to order the contraceptive or the medica-
16 tion related to a contraceptive, the pharmacy
17 shall obtain the contraceptive or the medication
18 related to a contraceptive under the pharmacy’s
19 standard procedure for expedited ordering of
20 medication and notify the customer when the
21 contraceptive or the medication related to a
22 contraceptive arrives.

23 “(3) The pharmacy shall ensure that—

24 “(A) it does not operate an environment in
25 which customers are intimidated, threatened, or

1 harassed in the delivery of services relating to
2 a request for contraception or a medication re-
3 lated to contraception;

4 “(B) its employees do not interfere with or
5 obstruct the delivery of services relating to a re-
6 quest for contraception or a medication related
7 to contraception;

8 “(C) its employees do not intentionally
9 misrepresent or deceive customers about the
10 availability of contraception or a medication re-
11 lated to contraception or its mechanism of ac-
12 tion;

13 “(D) its employees do not breach medical
14 confidentiality with respect to a request for a
15 contraception or a medication related to contra-
16 ception or threaten to breach such confiden-
17 tiality; or

18 “(E) its employees do not refuse to return
19 a valid, lawful prescription for a contraception
20 or a medication related to contraception upon
21 customer request.

22 “(b) CONTRACEPTIVES OR MEDICATION RELATED TO
23 A CONTRACEPTIVE NOT ORDINARILY STOCKED.—Noth-
24 ing in subsection (a)(2) shall be construed to require any
25 pharmacy to comply with such subsection if the pharmacy

1 does not ordinarily stock contraceptives or medication re-
2 lated to a contraceptive in the normal course of business.

3 “(c) REFUSALS PURSUANT TO STANDARD PHAR-
4 MACY PRACTICE.—This section does not prohibit a phar-
5 macy from refusing to provide a contraceptive or a medi-
6 cation related to a contraceptive to a customer in accord-
7 ance with any of the following:

8 “(1) If it is unlawful to dispense the contracep-
9 tive or the medication related to a contraceptive to
10 the customer without a valid, lawful prescription and
11 no such prescription is presented.

12 “(2) If the customer is unable to pay for the
13 contraceptive or the medication related to a contra-
14 ceptive.

15 “(3) If the employee of the pharmacy refuses to
16 provide the contraceptive or the medication related
17 to a contraceptive on the basis of a professional clin-
18 ical judgment.

19 “(d) RELATION TO OTHER LAWS.—

20 “(1) RULE OF CONSTRUCTION.—Nothing in
21 this section shall be construed to invalidate or limit
22 rights, remedies, procedures, or legal standards
23 under title VII of the Civil Rights Act of 1964.

24 “(2) CERTAIN CLAIMS.—The Religious Free-
25 dom Restoration Act of 1993 (42 U.S.C. 2000bb et

1 seq.) shall not provide a claim concerning, or a de-
2 fense to a claim under, a covered title, or provide a
3 basis for challenging the application or enforcement
4 of a covered title.

5 “(e) PREEMPTION.—This section does not preempt
6 any provision of State law or any professional obligation
7 made applicable by a State board or other entity respon-
8 sible for licensing or discipline of pharmacies or phar-
9 macists, to the extent that such State law or professional
10 obligation provides protections for customers that are
11 greater than the protections provided by this section.

12 “(f) ENFORCEMENT.—

13 “(1) CIVIL PENALTY.—A pharmacy that vio-
14 lates a requirement of subsection (a) is liable to the
15 United States for a civil penalty in an amount not
16 exceeding \$1,000 per day of violation, not to exceed
17 \$100,000 for all violations adjudicated in a single
18 proceeding.

19 “(2) PRIVATE CAUSE OF ACTION.—Any person
20 aggrieved as a result of a violation of a requirement
21 of subsection (a) may, in any court of competent ju-
22 risdiction, commence a civil action against the phar-
23 macy involved to obtain appropriate relief, including
24 actual and punitive damages, injunctive relief, and a
25 reasonable attorney’s fee and cost.

1 “(3) LIMITATIONS.—A civil action under para-
2 graph (1) or (2) may not be commenced against a
3 pharmacy after the expiration of the 5-year period
4 beginning on the date on which the pharmacy alleg-
5 edly engaged in the violation involved.

6 “(g) DEFINITIONS.—In this section:

7 “(1) The term ‘contraception’ or ‘contraceptive’
8 means any drug or device approved by the Food and
9 Drug Administration to prevent pregnancy.

10 “(2) The term ‘employee’ means a person hired,
11 by contract or any other form of an agreement, by
12 a pharmacy.

13 “(3) The term ‘medication related to contracep-
14 tion’ or ‘medication related to a contraceptive’
15 means any drug or device approved by the Food and
16 Drug Administration that a medical professional de-
17 termines necessary to use before or in conjunction
18 with contraception or a contraceptive.

19 “(4) The term ‘pharmacy’ means an entity
20 that—

21 “(A) is authorized by a State to engage in
22 the business of selling prescription drugs at re-
23 tail; and

24 “(B) employs one or more employees.

1 “(5) The term ‘product’ means a Food and
2 Drug Administration-approved drug or device.

3 “(6) The term ‘professional clinical judgment’
4 means the use of professional knowledge and skills
5 to form a clinical judgment, in accordance with pre-
6 vailing medical standards.

7 “(7) The term ‘without delay’, with respect to
8 a pharmacy providing, providing a referral for, or
9 ordering contraception or a medication related to
10 contraception, or transferring the prescription for
11 contraception or a medication related to contrac-
12 tion, means within the usual and customary time-
13 frame at the pharmacy for providing, providing a re-
14 ferral for, or ordering other products, or transferring
15 the prescription for other products, respectively.

16 “(h) EFFECTIVE DATE.—This section shall take ef-
17 fect on the 31st day after the date of the enactment of
18 this section, without regard to whether the Secretary has
19 issued any guidance or final rule regarding this section.”.

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