11491 HOUSE J:DICIARY

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February 22, 2005

The Honorable Tom Anderson
Alaska State House of Representatives
State Capitol (MS 3100)
Juneau, AK 99801-1182

Dear Representative Anderson:

I know you are aware that many interested parties have worked for quite some time to come to agreement on legislation for the licensure of occupations relating to radiological technology, radiation therapy, and nuclear medicine technology. I'm pleased to inform you that as a result of those efforts, and the tremendous effort put forth by you and your staff, Providence Health System in Alaska supports HB 150.

I appreciate your willingness to work with Providence and all other interested parties to come up with a piece of legislation that reflects a commitment to quality improvement in this facet of Alaska's health care delivery. Thank you for giving us the opportunity to work on this legislation and our sincere appreciation goes to you for your patience.

Sincerely,

Laurie Herman

Laurie Herman
Regional Director, Government Affairs

-----Original Message-----
From: Pearce, Clyde E
Sent: Monday, January 23, 2006 9:22 AM
To: Heath_Hilyard@legis.state.ak.us
Subject: FW: Mis-Use of radiation

-----Original Message-----
From: Pearce, Clyde E
Sent: Friday, January 20, 2006 1:38 PM
To: 'djru@sphosp.com'
Subject: Mis-Use of radiation

The review of cases is not complete, but I understand you are in a hurry to obtain this information so am sending it now.

MIS-USE OF RADIATION IN ALASKA -
Findings from Radiological Health Inspections.

In **Anchorage** a small clinic using untrained staff exposed patients to at least 64 times the amount of radiation required to obtain a diagnostic image, because the operator had no idea what technique to use and her supervisor advised a corrective measure that actually increased the exposure. The image was totally black due to excessive radiation, but her supervisor advised her to increase the exposure because a black image meant to her that not enough radiation was used. The operator was ignorant and her supervisor, and supposedly "trainer", was also ignorant of basic imaging concepts. There is no way to tell how much exposure the patient actually received, only that it was *at least* 64 times more than required for that first image, based on retrospective testing by the Radiological Health Program.*

A patient was over-exposed in **Petersburg** also because no applicable technique chart was available and the operator did not verify the technique was correct prior to making the exposure. This problem of guessing at techniques has been found in approximately 20% of facilities statewide.*

A facility in **Fairbanks** was found to be using the "technique by guess" approach and after the inspector conducted a repeat analysis of their discard file found that approximately half the images were repeated due to overexposure or underexposure. Underexposure causes excessive exposure to patients because although they have already been exposed they must be exposed again at a higher amount in order to achieve a diagnostic image.*

A facility in **Fairbanks** routinely exposes patients to excessive amounts of radiation because the operator does not know anatomy and positioning, resulting in repeated exposures in an attempt to visualize the true nature of the patient's anatomy. A skull exam can be performed in a way that exposes the eye lens to twenty times (20) as much radiation as the correct method, while using the same radiation exposure technique for either. Likewise, a chest x-ray performed one way causes a woman's breasts to receive

thirteen (13) to twenty-two (22) times as much radiation even though the same exact exposure technique would be used either way. Slight modifications or errors in position result in failure to demonstrate anatomical features essential to enabling a physician to make a correct diagnosis, so that a solid background knowledge of human anatomy and radiographic positioning is essential to keeping radiation exposures low. This error is not correctable using automated x-ray machines.*

Two facilities in southeast Alaska (**Craig** and **Petersburg**) were routinely exposing patients to between eight (8) and ten (10) times the amount of radiation required for optimum images due to mismatched films and screens. Old films with old screens require more radiation that the newer rare earth screens with green-sensitive film. However, when old technology (old screens) was mixed with new technology (green sensitive extremity film) the exposures are much higher than the old technology alone. Even using matched film and screens can cause unacceptable exposure levels when screens designed for extremity imaging (improved details, with higher dose) are used inappropriately for axial body procedures. This error is not correctable using automated x-ray machines.

A digitized x-ray machine being used in **Eagle River** was causing higher exposures than the previously used film/screen combination because the machine was not adjusted properly. Unlike film/screen systems, the over exposures were not obvious to the operator because the electronic system automatically adjusts the image no matter what amount of radiation is used. Automatic imaging (Computed radiography and digital radiography units) has the POTENTIAL to reduce exposures, however they can be operated at higher exposure levels than is required for film if not used properly.

A facility in **Juneau** has been reported to routinely use fluoroscopy to pre-position patient's prior to exposing a film in the apparent belief that this reduces repeats due to positioning errors. This ignores the fact that the patient has already been exposed to one of the highest exposure procedures, in addition to the follow-up radiography exposures. Follow-up of this report will be conducted. This error is not correctable using automated x-ray machines.*

Approximately forty-eight (48) % of facilities are unable to provide documentation that operators are provided facility specific radiation safety instructions as required by Alaska radiation control regulations (18 AAC 85.430).

A facility in **Fairbanks** had a gassy x-ray tube, but because neither the operator nor the owner were not knowledgeable about the characteristics of gassy tubes this was missed for a prolonged period of time. Gassy tubes are incapable of producing consistent output, making high repeat exposures inevitable. This error is not correctable using automated x-ray machines.

A facility on the **Alaska Peninsula** had two operators with no formal training in radiology practicing positioning and exposure techniques by x-raying each other. This is

illegal and hazardous to the operators. This error is not correctable using automated x-ray machines.*

Approximately thirty-one (31) percent of facilities do not have a processor quality control program. Increasing exposure to the patients until a useable image is obtained often compensates for poor processing conditions. This increases repeat images, and greatly increases the exposures beyond optimum requirements. Developer that is too cold, low replacement rates, pH errors and contamination of processing tanks contribute significantly to excessive exposures. *

Approximately thirty-six (36) percent of facilities do not perform repeat analysis of spoiled images. Repeat analysis is required y federal law for mammography, and encouraged for all imaging procedures to identify problems that are correctable and indications that a machine may need repair. As a result of failure to regularly perform repeat analysis inspecti ..s reveal that old procedures previously responsible for higher exposures than necessary continue to be followed, with no reduction in exposure to patients or operators.*

Facilities in **Kodiak**, **Petersburg** and **Juneau** have demonstrated lack of knowledge on how to use lead shielding correctly, resulting in exposure to reproductive organs that are up to one-hundred (100) times higher than necessary for the study. Aprons and gloves significantly reduce exposures to shield areas and are required by regulations. This error is not correctable using automated x-ray machines.*

A facility in **Petersburg** documented accidental exposure of the film storage bin to visible light on four different occasions, ca..sing a direct financial loss of approximately $4,000. Howe.er, in an attempt to salvage some of the loss spoiled film was used which had been sensitized to light and x-rays. This reduces image contrast and can mask pathology, as well as changing the film response speed so that techniques become less predictable and exposure repeat rates increase.

A facility in **Girdwood** experienced a fogged film bin and the operator had no awareness of the cause of that problem or its implications for diagnostic accuracy.

Inappropriate technique charts are posted which causes the wrong techniques to be used and increases the number of repeat exposures in eleven (11) percent of facilities. On inspections it is not unusual to find a high frequency generator where rare earth screens are used, green sensitive film is used, and a 10:1 grid is in the table or wall mounted cassette holder. But the facility has posted a technique chart for a single-phase full wave generator using blue tungstate screens and blue sensitive film with an 8:1 grid. There is no way that the posted techniques would work with the system they are using.

Twenty seven percent (27%) of facilities conduct no radiation safety in-service training, or require continuing education for their operators. This is not currently required in the regulations yet many new developments affect even older facilities that have not changed their procedures or equipment in may years. Occupational exposure limits have been

lowered, biological effects have been found to occur at lower exposures than previously believe, and some standard procedures have been found to be ineffective. This error is not correctable using automated x-ray machines.*

Thirteen (13) facilities failed to demonstrate evidence of collimation of the x-ray beam. Biological effects are directly related to the size and volume of tissue exposed and irradiation of large areas of the body, especially body parts that extend beyond the size of the film, causes unnecessary exposure to adjacent anatomical organs (including reproductive organs). In addition, when larger amounts of tissue are irradiated scatter is increased which diminishes image contrast and diagnostic quality. A missed diagnosis can result from excessive scatter. Operators increase their exposure to scatter when more scatter is produced. This error is not corrected by using automated x-ray machines.*

Seven (7) facilities were found to be routinely holding patients during exposures instead of using immobilizing devices or a family member. For the patient, and family member, the procedure may be a one-time event, but for operators who routinely do this it is a cumulative exposure to them. The primary source of radiation exposure to operators is scatter from the patient, and the primary beam is one thousand (1000) times greater than scatter radiation at one meter from the patient. This amounts to a considerable exposure to operators.*

Numerous failures occur that are not quantifiable in terms of exposure received or excess dollars spent.
Examples include failure to post a CAUTION RADIATION sign on a door, which creates the potential for a visitor or patient to inadvertently enter the room while x-rays are present, as they seek a restroom or exit.

Those items marked with an asterisk (*) are important historically as they related to a study performed by the University of Minnesota which found that operators of medical x-ray machines had three times the breast cancer rate of the general public. This applied only to those who practiced up through the 1940's and into the 1950's, but no longer applies nationally due to improvements in methods and procedures. The items marked with an asterisk and found in Alaska represent those practices that have changed nationally, but persist in Alaska. In other words, while breast cancer is not shown to exist at a higher rate among operators using newer procedures (thirty-nine states require formal training of operators) in Alaska many of the same conditions that contributed to that problem in the 1950's still exists. These include using excessive x-ray beam sizes, low energy/high quantity exposure techniques, no processing quality control program, no repeat analysis, operators x-raying each other, operators routinely holding patients during exposures, inappropriate use of fluoroscopy, and lack of appropriate technique charts.

FURTHER COMMENTS:

Every state has radiation control regulations which recognize that although there is great value in using ionizing x-rays it can be hazardous to patients and operators if not used wisely. The National Institute of Environmental Sciences has formally re-affirmed in 2005 that x-radiation is a carcinogen.

New study results, presented by continuing education offerings in Alaska in 2005, revealed that the National Institutes of Health subcommittee, Biological Effects of Ionizing Radiation (BEIR) discovered greater biological effects from x-rays than had been believed previously. This resulted in the US Nuclear Regulatory Commission, and most states, adopting lower occupational exposure limits for operators. Alaska's current Radiation Control regulations do not reflect this new research finding.

Proper use of lead shielding can reduce exposures to reproductive organs as much as 95% if used, according to NCRP Report 34, and ICRP Report 16. If not used, of course, exposures are correspondingly higher than necessary.

A nationwide study still in process is being conducted by the Radiological Health Program to evaluate four questions:

1. After implementation of the requirement for operators of medical x-ray equipment to be formally trained in your state did you experience a significant reduction of available qualified operators?
2. After implementation of the requirement for operators of medical x-ray equipment to be formally trained in your state was there an increase in the salaries (therefore cost) of imaging services due to tighter restrictions?
3. After implementation of the requirement for operators of medical x-ray equipment to be formally trained in your state were there any offices, clinics, or hospitals closed as a result of restrictions on who could operate the x-ray equipment?
4. After implementation of the requirement for operators of medical x-ray equipment to be formally trained in your state were there any instances of limited or loss of access by patients to vitally needed imaging services?

To date, every response received has indicated none of these effects occurred in a state. Two states, California and Michigan indicated that there were cost savings that resulted from increased efficiencies brought about by requiring operators to know what they were doing.

Last year there were two reports on the effects of diagnostic x-rays which indicated that a percentage of cancers were caused by diagnostic x-rays, and that diagnostic exposure levels as seen in Alaska were shown to reduce intellectual capacity of men exposed as infants in Sweden. I will look up the details on percentages and researcher if this would be helpful. I believe the percentages were that 5% of all cancers were due to diagnostic x-rays, and 1% of diagnostic x-rays resulted in cancer... two different ways of looking at the same data.

Breast cancer is now detected much earlier than was the case prior to the federal mammography regulations which began in 1994, which requires extensive formal training of operators, and it has demonstrated clearly that lives are saved because of the required higher level of competency. While it is less obvious that other healthcare imaging procedures necessarily save lives there is abundant scientific evidence that radiation is a carcinogen and a measurable portion of cancers are caused by x-rays. What is less clear is what proportion of those cancers caused by x-rays lead to disfiguring or death. National standards imposed on mammographers in Alaska are analogous to a form of "licensure" already in effect to a restricted segment of operators of x-ray machines. Federal law prohibits anyone performing this procedure who has not completed a formal two-year program, passed a national examination, and also completed forty hours of formal training and supervised clinical experience in mammography. The latent period between radiation exposure and disease make it less obvious when a cancer is caused by the radiation. However, international research has confirmed repeatedly that there is that connection. By analogy, there is no doubt that the Holocaust in Europe occurred even though most people alive today did not personally see it. Similarly, there is no doubt that radiation abuse causes cancer, even when most people do not actually see those cases. There is also no doubt that radiation abuse occurs in Alaska, and lack of formal training in how to use it correctly is a major factor in that abuse.

From: Pearce, Clyde E [mailto:Clyde_Pearce@health.state.ak.us]
Sent: Monday, January 23, 2006 1:59 PM
To: Heath Hilyard
Subject: Costs - Another perspective FYI

Concerns have been raised about the costs of healthcare and how they might rise if operators of x-ray equipment in Alaska are required to be formally trained in how to use it safely. Although these concerns have been addressed in other communications, it is important to also consider the costs of not requiring formal training of operators. The belief that implementation might negatively impact costs, while ignoring that failure to implement has cost implications needs to be addressed. In other words, whether or not HB 150 passes there are cost considerations. There is no free lunch.

In any business the public is served by offering a product or service, and in exchange that public agrees to pay for the product or service offered if they want to have it. There is an implied obligation on the part of the seller that the product or service is useful and safe. The customer expects usefulness and safety. People only eat in restaurants where they perceive the food is safe to eat. They buy clothing that they expect will be useable for a reasonable period of time. We expect the cars, computers, tires, clothes driers and other technology to operate as advertised and to do so without causing a fire or the emission of dangerous fumes in our homes. When we visit a healthcare practitioner we expect to receive care that is competent and safe. We do not wish to spend money on methods or procedures that provide no benefit.

In order for a business to provide useful and safe products there are certain actions they must take, some of which cost the seller money. There are procedures for cleaning pots and pans, to make them safe for the preparation of food. If the cook drops a steak on the floor it should not be fed to a customer, so it becomes a useless expense to the vendor. If a vehicle gas tank explodes on impact or a tire fails at high speed the vendor must make good on any sales already made to customers, and discontinue selling that product until the problem is fixed. This represents a cost to the manufacturer, and part of the cost of operation. If a manufacturer or vendor is unable or unwilling to pay the costs to provide a safe and useful product they should not be allowed to continue in that business. What usually happens is that they meet the basic costs of doing business, and pass that cost on to customers so that they continue to earn sufficient profit to stay in business. The point is, there are costs to conducting business in a safe manner, and those costs must be met whether they are paid directly by the company or indirectly through charges to the customer.

Whenever a person has medical imaging performed in order to address a healthcare concern they likewise expect that the procedure performed will be useful and safe. With radiation it is not as obvious when a procedure is neither useful nor safe, as it would be with a tire that fails or a dryer that causes a fire. Unsafe procedures may cause cancer, but usually not until years after the exposure. Unsafe procedures can cause radiation burns, cataracts, shortening of lifespan and other adverse health effects. But these all

result after some delay due to the latent nature of radiation. Also, most healthcare practitioners do not have the education or experience to recognize a radiation injury when they see one, so that even when the effects occur people tend not to see them. But the scientific literature abounds with documentation that these effects occur. And they occur at diagnostic levels of exposure. A competent physician has the training to make decisions that weigh the risks against the benefits of exposure. Usually, the benefits and necessity of receiving the procedure out weigh the risks, if we assume the risks are "normal" for that procedure. The normal risks of having a pelvis x-ray are very small, when that procedure is performed using all of the techniques and procedures available to minimize radiation dose and maximize diagnostic quality. However, when exposure doses are several times higher than optimum, or when diagnostic quality is inadequate the risks rise exponentially. At some point the risks exceed the health benefit, and the patient who is fully informed might choose not to have that test performed.

A practitioner who hires a low wage untrained person to perform a complicated procedure, presumably to keep business costs down, appears to be saving money. However, the costs of performing the procedure in a safe manner that is useful (diagnostic) are what they are. An operator who does not know how to perform the procedure safely, cannot recognize non-diagnostic images, and does not know how to correct for errors is not saving the employer money. The costs to assure reasonable safety have been bypassed by the facility, but the costs must be met. So who pays them? It is obviously the patient who pays them. When a facility cuts costs by hiring unqualified staff it is their customers who pay the price of lack of safety. The customer pays every time the procedure must be repeated at a different facility because the first x-ray exam was inadequate. The customer pays every time they are re-exposed because the operator did not use standardized procedures, exposure tables, or quality control methods to insure the procedure was performed correctly the first time. The customer pays every time pathology is missed because the images were inadequate to make a proper diagnosis. The customer pays whenever they develop a radiation related disease such as cancer or cataracts because safety was not provided. The customer pays whenever proper treatment must be delayed and pain endured longer because the procedure was not performed correctly. The customer pays when the necessary x-ray exam should expose a small part of the body, but a much larger area was exposed because the operator was afraid to restrict the beam since it might "cut-off" some of the image. The customer pays when their unborn baby is exposed to radiation unnecessarily.

And it not just the customer who must pay. An operator of x-ray equipment who does not understand how to perform the procedures correctly is exposing him or her self to a radiological carcinogen at higher levels than if their work was in a non-radiation specialty. When the operator holds a patient without using a lead apron, or repeats exposures which increase their own exposure to scatter radiation, he or she is not acting in their own best health interests. The health of the operator should be a concern for the operator and for their family as well. Every family hopes and expects their parent(s) to work a long and productive life in whatever field they chose. Operators should not bear the costs for radiation abuse because their employer would not assume their responsibility

to insure the operator is fully knowledgeable of their own risks, or facility standards are not designed to minimize those risks to the lowest practical level.

In the end, the facility does not even escape paying the costs of radiation abuse. Informed patients share information, and some will not visit certain facilities because of their reputation. Studies have shown that the costs of requiring fully competent operators can be lower. There is potential waste in how much film, chemicals, and other supplies are used for medical imaging. Those costs increase when exposures are repeated. An x-ray tube that is misused will cost several thousand dollars to replace it, and it can be destroyed in a few exposures if misused. A facility in Alaska that documented film storage exposure incidents showed over four thousand dollars lost in wasted film just from improper use of the darkroom. Missed diagnoses and misdiagnoses are causes for legal action against facilities and staff. How many lost lawsuits does it take to make up the difference between the "cost" of hiring a person with no understanding or credentials in medical imaging versus a fully trained, tested, and experienced operator?

The bottom line is that there is a cost associated with providing safety. Customers expect safety to be an integral component of their health care. If the facility does not assume responsibility for guaranteeing safety for their customers, that cost is simply passed on directly to the customer. Unfortunately, there is no truth in packaging. Customers of medical imaging services do not usually know when responsibility for their safety has been passed directly to them. Customers of medical imaging services do not know how to even evaluate the safety of the procedures they have. This makes it a moral issue, when the customer is in no position to evaluate their risks it is an essential responsibility of the provider to take those steps necessary to protect their customers, that is, patients. It is unethical to shift that burden to patients based on their ignorance of the principle of caveat emptor in medical imaging.

If the provider of health care products or services fails to take that responsibility their services represent fraud. If the provider fails to act responsibility when their services have such profound potential health risks, it becomes necessary for some other entity to step in to advocate for the public. That entity in the case of HB 150 is state government.

HB

321

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: January 9, 2006 **FURTHER REFERRALS: Finance**

Date of Committee Action: 02/08/06

The JUDICIARY Committee considered: **HB 321**

HOUSE BILL NO. 321 **AGGRAVATED DRUNK DRIVING**

"An Act relating to high risk operation of a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance and to refusal to submit to a chemical test."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 321 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
DPS				X
LAW			X	

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gara			✓	
	Coghill			✓	
	Dyatt			✓	
	WILSON			✓	
	ANDERSON	X			
Chair	McGuire	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB321-LAW-CJL-1-18-0
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to high risk operation of a motor vehicle, aircraft, or watercraft while under the influence..."
RDU CRIMINAL
Compo. nt Criminal Justice Litigation
Sponsor Representative Ramras
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING						
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL						

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 28.35.030 (Motor Vehicles- Operating a vehicle, aircraft or watercraft while under the influence...) by doubling the mandatory minimum sentence for drunk driving if the blood alcohol content (or the equivalent as measured by breath) is .16 or more. The mandatory minimum for refusal to be tested would also be doubled.

Passage of this legislation will have an indeterminate fiscal impact on Law because offenders will be less likely to enter a plea with the increased mandatory penalty. Law estimates that at least half the drunk driving cases currently involve a blood alcohol content of .16 and above.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/16/06 11:04 AM
Approved by: Kathryn Daughhetee for David Márquez, Attorney General
Date 1/16/2006
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB321-DPS-AST-1-17-06
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: Aggravated drunk driving that increases the amount of time to be served
RDU: Alaska State Troopers
Component: AST Detachments
Sponsor: Representative Ramras
Requester: House Judiciary Committee
Component No.: 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

If passed, this bill will provide enhanced jail terms for those convicted of refusal to submit to a chemical test as well as Driving Under the Influence (DUI) when their alcohol levels are found to be over .160 while operating a motor vehicle.

With the increased penalties, it can be reasonably expected that the defendant will mount a much more aggressive defense. As a result, there will be an increase in court testimony time. The cost associated with this increased court time is extremely variable and nearly impossible to predict. For now, this cost would be absorbed by utilizing existing resources of the department.

Prepared by: Lieutenant James Helgoe
Phone 907-269-4532
Division: Alaska State Troopers
Date/Time 1/17/06 11:4[illegible] AM
Approved by: Commissioner William Tandeske
Date 1/17/2006
Agency: Department of Public Safety

(Revised 9/23/2004 OMB)

Representative Jay Ramras
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V-Chair, Economic Develop.
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Alaska State Legislature

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House District 10

House of Representatives

Sponsor Statement
HB 321

"An Act relating to high risk operation of a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance and to refusal to submit to a chemical test."

This bill proposes new statutory language, which addresses tougher Driving Under the Influence (DUI) laws. Presently, it is a crime in Alaska to operate a vehicle with a blood alcohol level of .08 or greater. This proposed legislation would not change the current law, but would create an enhanced crime of high risk driving under the influence. A person commits the crime of high risk driving under the influence, if it is determined by a chemical test that a person's blood alcohol concentration (BAC) is .16 or greater. A person who is convicted of high risk DUI would face double the minimum sentences of those convicted of DUI. Under this legislation, sentencing for refusal to submit to a chemical test would also be made tougher, to concur with the high risk DUI sentences.

Current information from the National Highway Traffic Safety Administration (NHTSA) shows that 31 states have already adopted laws dealing with enhanced penalties for high-blood alcohol level driving offenses. The NHTSA also reports that over half of all alcohol-related fatalities involve someone with a .15 BAC or higher. The high-risk driver provision of this bill will take clear aim against the most egregious drunk driving offenders, providing stiffer penalties is a legal remedy to bring their numbers down. As we have seen from the needless and tragic incidents that have occurred in the Interior this summer, now is the time for Alaska to address stricter penalties for higher-risk driving under the influence.

This legislation is part of a full approach to improve alcohol management in Alaska. Earlier legislation introduced, which has been signed into law, involved renewal of alcohol server education cards. This legislation allows professional servers to renew their alcohol server education cards, by demonstrating their knowledge by passing the written test without having to retake the introductory course.

Representative_Jay_Ramras@legis.state.ak.us

Representative Jay Ramras
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House District 10

House of Representatives

Sectional Summary
HB 321/High Risk DUI
Work Order 24-LS1099\G

"An Act relating to high risk operation of a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance and to refusal to submit to a chemical test."

Section 1. AS 28.35.030(b) States that when the court finds that a defendant had a BAC of 0.16 or greater the court shall impose a minimum sentence of imprisonment as follows:

(i) not less than 144 consecutive hours and a fine of not less than $1,500 if it is a first offense;

(ii) not less than 40 days and a fine of not less than $3,000 if the person has been previously convicted once;

(iii) not less than 80 days and a fine of not less than $4,000 if the person has previously been convicted twice;

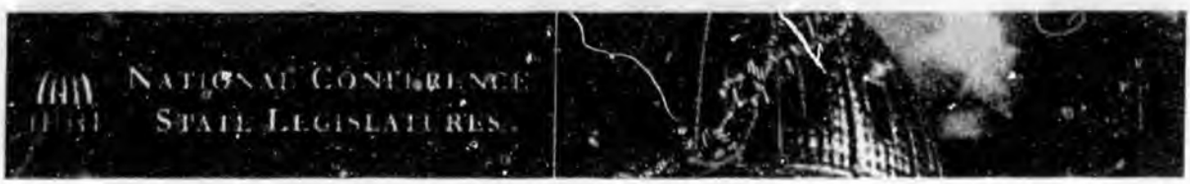
(iv) not less than 140 days and a fine of not less than $5,000 if the person has previously been convicted three times and is not subject to felony DUI charges;

(v) not less than 360 days and a fine of not less than $7,000 if the person has been convicted four or more times and is not subject to felony DUI charges.

Section 2. AS 28.35.030(k) Technical amendment.

Section 3. AS 28.35.032(g) Increases minimum sentencing requirements for the crime of refusal to submit to a chemical test to the same as those imposed in section 1, under AS 28.35.030(b).

Representative_Jay_Ramras@legis.state.ak.us



National Conference of State Legislatures

National Highway Traffic Safety Administration

State High BAC Laws
December 2004

This chart is based on Appendix A from "Evaluation of Minnesota's High BAC Law," a report issued by the National Highway Traffic Safety Administration showing the status of State High BAC laws as of as of January 1, 2002. The chart was updated through January 10, 2005 using the joint NCSL/NCSL Legislative Tracking Database.

State High-BAC Standards and Penalties

State	High BAC	Illegal Per Se BAC	Enhanced Penalty for High-BAC Offenses
Arizona	.15	.08	If high BAC, mandatory jail 30 consecutive days; all but 10 consecutive days may be suspended if screening/treatment program completed. Mandatory 10 consecutive days for standard 1st offense; all but 24 consecutive hours may be suspended if complete screening/treatment. Jurisdictions may provide work release program after 48 consecutive hours in jail for high-BAC offenders vs. 24 consecutive hours for other offenders. Jurisdictions also may provide home monitoring program after 15 consecutive days in jail for high-BAC vs. 24 consecutive hours. Maximum 6 months (with 30 consecutive days) vs. 6 months (10 consecutive days). Mandatory minimum fine $250 and $250 assessment vs. $250. Upon conviction, 12-month administrative ignition interlock required (or court may require) for high-BAC offenders after license suspension ends or conviction, whichever is later vs. no requirement.
Arkansas	.15	.08	For administrative license suspension, high-BAC offenders receive 180 days suspension or 30 days suspension followed by 150 days restricted driving privileges vs. 120 days suspension with restricted license. Restricted license can be available to all 1st offenders. Court can order ignition interlock.
California	.20	.08	Court may consider BAC = .20 as a special factor in imposing enhanced sanctions and determining whether to grant probation and may give high BAC "heightened consideration" in ordering an ignition interlock up to 3 years. In counties with licensed alcohol education/ counseling program, offenders placed on probation with high BAC must participate in program for at least 6 months vs. 3 months.
Colorado	.15 .20	.08	For state's mandatory treatment/screening program for all offenders, assessment tool recommends Level I if BAC ≥ .15; judge, however, has discretion. If BAC = .20: mandatory 90 days jail (10 days if participate in alcohol education/treatment program) vs. 5 days unless participate in program. $500-1500 fine vs. $300-1,000. 60-120 days (mandatory 60) community service vs. 48-96 hours (mandatory 48). Administrative licensing action for BAC > .20: completion of alcohol education or treatment program required for license reinstatement. If driving under the influence (DWI)

			charge is reduced to the lesser charge of driving while impaired, and if BAC = .20, then "because of such aggravating factor," sanctions imposed must be for (greater) DWI offense.
Connecticut	.16	.08	120 days administrative driver license suspension vs. 90 days, but all offenders may obtain restricted license after 30 days. Under state's diversion program, completion of pre-trial rehabilitation/alcohol education results in dismissal. If BAC = .16, offender attends more sessions at higher cost than other offenders.
Delaware	.16 .20	.08	BAC = .16: not automatically eligible, but can apply, for "First Offense Election Process" (dismissal of criminal charges upon completion of education/treatment program). BAC = .20: DMV conducts "character review" (references and interview) prior to reinstating license.
Florida	.20	.08	Fine $500- $1,000 vs. $250 -$500. Maximum 9 months jail vs. 6 months. Judge cannot accept guilty plea to lesser offense.
Georgia	.15	.08	Court cannot accept nolo contendere plea if violate illegal per se law and BAC = .15.
Idaho	.20	.08	Mandatory minimum 10 days jail (beginning with 48 consecutive hours) vs. no mandatory minimum; maximum 1 year vs. 6 months. Fine up to $2,000 vs. $1,000. Mandatory minimum 1 year driver license court suspension after release from confinement vs. mandatory minimum 30 days suspension followed by restricted license for 60-150 days.
Illinois	.15 .20	.08	BAC one of several criteria for assignment to "risk category" for completion of treatment program for license reinstatement: BAC < .15 = minimal risk (10 hours education); .15-.19 BAC = moderate risk (10 hours education and 12 hours early intervention); BAC = .20 = significant risk (10 hours education and 20 hours treatment). High risk multiple offenders must receive = 75 hours of treatment for reinstatement.
Indiana	.15	.08	BAC = .15 is a Class B felony. Maximum fine $5000 vs. $500. Maximum jail 1 year vs. 60 days.
Iowa	.15	.08	High-BAC offenders excluded from deferred judgment or sentence generally available to 1st offenders. Mandatory minimum 48 hours jail vs. no mandatory jail. Mandatory minimum $500 fine. For other offenders, minimum is $500, or $1,000 if personal injury or property damage crash. However, court may order unpaid community service in lieu of fine.
Kentucky	.18	.08	BAC = .18 is one of several "aggravating circumstances"; enhanced penalty is mandatory minimum 4 days jail, which "shall not be suspended, probated, conditionally discharged, or subject to any other form of early release." Must also be detained 4 hours after arrest. Other 1st offenders must receive one of the following: $200-$500 fine, 48 hours-30 days jail or community labor, or 48 hours-30 days community service.
Louisiana	.15	.08	Mandatory 48 hours [illegible] prior to probation. For other 1st offenders, in lieu of minimum 10 days jail, may participate in substance abuse/driver improvement program and 1) serve 2 days jail, or 2) perform 4 days community service.
Maine	.15	.08	Mandatory minimum 48 hours jail prior to probation alternatives vs. no mandatory jail.
Minnesota	.20	.08	Effective 1/1/2001, DWI offenses are categorized into three degrees based on the number of aggravating factors present, which include a prior DWI offense, BAC > .20, and driving with passenger < 16 years old and > 36 months

			younger than driver. Criminal penalties if high BAC only aggravating factor, i.e., second degree DWI. Include maximum jail 1 year vs. 90 days, mandatory minimum fine $900 vs. $210, maximum fine $3,000 vs. $700. If BAC > .20 court also may impose additional penalty assessment of $1,000. In addition, court may stay sentence except license revocation if offender submits to level of care recommended in required chemical use assessment report. Court must order high-BAC offenders person to submit to recommended level of care. Mandatory "hold for court": unless maximum bail is imposed after arrest, high-BAC offender released from jail only if agree to abstain from alcohol with daily electronic alcohol monitoring. Mandatory administrative pre-conviction license revocation 180 days (30 days hard revocation) vs. 90 days (15 days hard), mandatory post-conviction license revocation 50 days (30 days hard revocation) vs. 30 days (15 days hard). Administrative plate impoundment equal to license revocation period if BAC = .20.
Missouri	.15	.08	Upon conviction, the court must order offender to complete substance abuse program. For persons with administrative per se violations, driving privileges cannot be restored until successfully complete program. For cause, court may modify but may not waive this requirement if BAC > .15
Montana	.18	.08	Court may restrict driving to vehicle with ignition interlock device, if device is reasonably available, for BAC = .18.
Nevada	.18	.08	Offenders with BAC = .18 must be evaluated for alcohol/drug abuse prior to sentencing, with $100 fee. Also serve minimum 2 days jail or 48 hours community service. Other 1st offenders may receive suspended sentence if participate in treatment program but must serve 1 day jail or 48 hours community service.
New Hampshire	.16	.08	Class A misdemeanor vs. violation. Up to 1 year jail vs. no jail. Mandatory minimum fine $500 vs. $350; maximum $2,000 vs. $1,000. Mandatory minimum 1 year license revocation vs. 90 days. Administrative revocation of registration of vehicle registered to offender revoked for same period as license revocation; hardship registration available vs. no revocation. May receive conditional discharge, which may include up to 50 hours community service.
New Mexico	.16	.08	Mandatory minimum 48 consecutive hours jail vs. no mandatory jail.
North Carolina	.15 .16	.08	Person convicted with BAC = .15 must complete substance abuse assessment and treatment program, if indicated, to reinstate license. BAC = .16 considered gross impairment and an aggravating factor in sentencing; level of punishment is determined by weighting aggravating and mitigating factors. Also, to obtain restricted license after hard suspension, ignition interlock must be installed for one year, and driving with BAC = .04 prohibited.
Ohio	.17	.08	Mandatory jail time doubled from 3 consecutive days (may attend 3 consecutive days driver's intervention program in lieu of jail) to 6 days (may attend program for 3 days in lieu of 3 days jail but must serve 3 days jail).
Oklahoma	.15	.08	In addition to other penalties for all offenders, offenders convicted of driving with BAC = .15 receive mandatory minimum 28 days inpatient treatment, followed by minimum 1 year of supervision, periodic testing, and aftercare at defendant's expense, 480 hours of community service following aftercare, and minimum 30 days ignition interlock device. This shall not "preclude the defendant being charged or punished under other DWI statutes." Note: For any type of DWI offense, probation before judgment available. Deferred judgment also available upon guilty plea if complete alcohol/drug program.

Rhode Island	.15	.08	In contrast to .10 = BAC <.15, offenders with BAC = .15 receive $500 fine vs. $100-$300 fine, 20-60 hours public community restitution and/or imprisonment for up to 1 year vs. 10-60 hours public community restitution and/or imprisonment for up to 1 year. Note: .08 < BAC < .10 is a civil offense.
South Dakota	.17	.08	Courts must require pre-sentencing alcohol evaluations vs. no such requirement
Tennessee	.20	.08	Mandatory minimum 7 consecutive days of jail vs. 48 consecutive hours. It appears that in certain counties with more than 100,000 residents, court may allow 200 hours community service in lieu of jail term.
Utah	.16	.08	As an alternative to imprisonment or community service, an offender may be allowed to participate in home confinement electronic monitoring program; alcohol testing may be part of program. Court also may order alcohol or drug treatment and may require ignition interlock as condition of probation. For each of these sanctions court must give reasons on record if not imposed/ordered if offender had BAC > .16.
Virginia	.15	.08	Mandatory minimum jail: 5 days if BAC .15 - .20; 10 days if BAC > .20; no mandatory minimum if BAC < .15. Ignition interlock required for any high BAC offense. First offender may attend Virginia Alcohol Safety Action Program (VASAP) to obtain restricted license. BAC = .20 is one of several criteria used to indicate longer and more intensive education.
Washington	.15	.08	Mandatory minimum 2 days jail or 30 days electronic home monitoring vs. 24 hours or 15 days for standard offense. Ignition interlock device (after license suspension or revocation period) not less than 1 year vs. court discretion. Mandatory minimum fine $925 vs. $685. Mandatory court driver license suspension/revocation 1 year vs. 90 days. Deferred prosecution program for all 1st offenders results in issuance of 5-year probationary license and dismissal of charge upon completion of 2-year treatment program. Court must order ignition interlock if BAC = .15.
Wisconsin	.17 .20 .26	.08	Fine penalties for persons convicted of 3rd, 4th, and 5th DWI are doubled if BAC .17-.199, tripled if BAC .20-.249, and quadrupled if BAC = .25. The law does not include enhanced penalties for high-BAC 1st offenders. Wisconsin law also provides that if BAC is known (for first or subsequent offenses), the "court shall consider that level as a factor in sentencing."

Sources: Appendix A from "Evaluation of Minnesota's High BAC Law," issued by the National Highway Traffic Safety Administration; 50-state bill searches for 2002, 2003 and 2004 via joint NCSL/NHTSA bill tracking database; Westlaw searches; Lexis searches.

Denver Office: Tel: 303-364-7700 | Fax: 303-364-7800 | 7700 East First Place | Denver, CO 80230 | Map
Washington Office: Tel: 202-624-5400 | Fax: 202-737-1069 | 444 North Capitol Street, N.W., Suite 515 | Washington, D.C. 20001

TRAFFIC TECH
NHTSA Technology Transfer Series

Number 248 May 2001

Enhanced Sanctions For Higher Bacs A Summary Of States' Laws

Enhanced sanctions for drivers convicted a second or third time for Driving Under the Influence (DUI) have been in place for many years. Recently, many states have considered *hard core* offenders as those drivers who are arrested with high blood alcohol concentration (BACs). Twenty-nine states have a statute, regulation, or rule that provides for differential treatment for DUI offenders with higher BACs (than the state's standard illegal limit) such as .15 or .20 BACs, even for drivers who are first time offenders.

The National Highway Traffic Safety Administration (NHTSA) sponsored a study by Preusser Research Group to examine whether these higher sanctions for higher BACs are effective in reducing DUI recidivism and alcohol-related crashes in selected states. The study will document how the law is being enforced and any problems the states are having in implementing or enforcing the law. The first step in this project is to summarize the high BAC systems in the 29 states.

Enactment of Systems

Most of the 29 states enacted their high BAC statutes since 1990. Ten states have implemented laws since 1998, and five more states recently have strengthened their existing high BAC sanctions. Some states noted widespread public support for the legislation and most states reported little opposition.

States with more extensive or more recent sanctions reported higher levels of publicity about the sanctions. Jail or vehicle-based sanctions, in particular, received considerable press attention in some states.

States define *high* BAC in various ways and the threshold ranges from .15 to .20 BAC. Some states selected the average BAC of offenders as the threshold. Other states set the threshold at double the legal BAC limit.

Types of Sanctions for First Offenders

The types of sanctions for high BAC first offenders include the following:

- Longer or more intensive education or treatment
- Additional or enhanced driver sanctions such as jail, license sanctions, or fines
- Use of vehicle sanctions such as ignition interlocks and vehicle plate impoundment

Implementation Concerns

Most states reported few problems with implementing high BAC sanctions. Several noted concerns that include:

- High BAC sanctions may further complicate an already complicated DUI system
- Higher sanctions may increase the number of BAC test refusals at time of arrest
- Courts and/or prosecutors may allow high BAC offenders to plead down to a lower charge
- Courts may view the high BAC penalties as burdensome and thus fail to impose the penalties
- Concerns about jail overcrowding and limited availability of treatment facilities may limit the effectiveness of these jail sanctions.

29 States with Enhanced Sanctions for Higher BACs

State	High BAC	Standard BAC	State	High BAC	Standard BAC
Arkansas	.18	.10	Maine	.15	.08
Arizona	.18	.10	Minnesota	.20	.10
California	.20	.08	Nevada	.18	.10
Colorado	.15/.20	.10	New Hampshire	.16	.08
Connecticut	.16	.10	New Mexico	.16	.08
Delaware	.16/.20	.10	North Carolina	.15/.16	.08
Florida	.20	.08	Ohio	.17	.10
Georgia	.15	.10	Oklahoma	.15	.10
Idaho	.20	.08	Rhode Island	.15	.08
Illinois	.15/.20	.08	South Dakota	.17	.10
Indiana	.15	.10	Tennessee	.20	.10
Iowa	.15	.10	Virginia	.20	.08
Kansas	.15	.08	Washington	.15	.08
Kentucky	.18	.08	Wisconsin	.17/.20/.25	.10
Louisiana	.15	.10			

HOW TO ORDER

For a copy of ***Evaluation of Enhanced Sanctions for Higher BACs: Summary of States' Laws***(26 pages plus appendices), write to the Office of Research and Traffic Records, NHTSA, NTS-31, 400 Seventh Street, S.W., Washington, D.C. 20590, fax (202) 366-7096, or download from *http://www.nhtsa.dot.gov* Amy Berning was the contract manager for this project.

U.S. Department

of Transportation
National Highway
Traffic Safety
Administration
400 Seventh Street, S.W. NTS-31
Washington, DC 20590

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VIA TELEFAX

January 18, 2006

The Honorable Jay Ramras
State Capitol, Room 104
Juneau, AK 99801-1182

Re: HB 321

Dear Representative Ramras:

I am the lobbyist for State Farm Insurance Companies. As I discussed with your staff earlier this morning, State Farm supports House Bill 321 and encourages the Legislature to pass this worthy bill.

Sincerely,

Sheldon E. Winters

LtrRamras013EW.wpd

HB

322

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 26, 2006 **FURTHER REFERRALS:**

Date of Committee Action: 04/26/06

The JUDICIARY Committee considered: **HB 322**

HOUSE BILL NO. 322 **SAFE SURRENDER OF BABIES**

"An Act relating to infants who are safely surrendered by a parent shortly after birth."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 322 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
HJUD/HSS	2			X

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
[redacted]				

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gara	✓			
	KOTT	✓			
	ANDERSON	X			
	Greenberg	–			
Chair:	McGuire	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 322 (JUD)
() Publish Date: 4/26/2006

Revision Date/Time (Note if correction):
Dept. Affected: HSS

Title: Infants Safely Surrendered by a Parent Shortly After Birth
RDU
Component

Sponsor: LeDoux
Requester: HJUD
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2006) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Shalon Szymanski
Phone 907-465-6841
Division: House Judiciary Committee
Date/Time 04/26/06 3:45 p.m.

Approved by: Rep. Lesil McGuire, Chair
Date 4/26/2006
Agency: House Judiciary Committee

(Revised 9/7/2005 OMB)

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 26, 2006 **FURTHER REFERRALS:**

Date of Committee Action: 04/26/06

The JUDICIARY Committee considered: **HB 322**

HOUSE BILL NO. 322 **SAFE SURRENDER OF BABIES**

"An Act relating to infants who are safely surrendered by a parent shortly after birth."

Recommends it be replaced with [ ] HCS *or* [X] CS for HB 322 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
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***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
				X

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
[redacted]	[redacted]	[redacted]		

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Crava	✓			
	LOTT	✓			
	[illegible]				
	ANDERSON	X			
	Bruenberg	–			
Chair:	McGuire	✓			
Chair:					

ALASKA STATE LEGISLATURE

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Representative Gabrielle LeDoux

SPONSOR STATEMENT

HB 322

"An Act relating to infants who are safely surrendered by a parent shortly after birth."

This is a bill that will allow parents to safely surrender an infant shortly after birth without fear of being criminally prosecuted. The parent may, without expressing an intent to return for the infant, leave the infant in the physical custody of a person who the parent reasonably believes is a peace officer, a physician or hospital employee in a hospital or hospital emergency room, or a volunteer with or employee of a fire station or emergency medical service who is performing activities within the scope of the volunteer's or employee's fire services of emergency medical services duties.

There are similar laws in other states and this is a way of encouraging people to not abandon infants in a way that could lead to injury or death. A record regarding the surrender of an infant is confidential and not subject to public inspection.

Representative_Gabrielle_LeDoux@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 21, 2006

SUBJECT: Sectional (CSHB 322( )(Work Order No. 24-LS1110\F))

TO: Representative Gabrielle LeDoux
Attn: Christine

FROM: Jean M. Mischel
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Provides a short title.

Section 2. Adds a new section in title 11 prohibiting the criminal prosecution for surrendering a child under AS 47.10.013(a) as added by sec. 3 of the Act.

Section 3. Provides an acceptable procedure for abandoning an infant under three days of age safely, including reporting requirements and immunity provisions.

Section 4. Makes a conforming amendment necessitated by sec. 5 of the Act.

Section 5. Provides an exception for providing family support services when an infant has been safely abandoned as described in the Act.

Section 6. Provides a definition of infant as a child who is less than three days of age.

JMM:med
06-329.med

Legislative Research Services

Alaska State Legislature
Legislative Affairs Agency
Division of Legal and Research Services

State Capitol, Juneau, AK 99801
Phone: 907-465-3991
Fax: 907-465-3908

January 27, 2006

Memorandum

TO: Representative Gabrielle LeDoux
FROM: Becky Taylor
Legislative Analyst
RE: Safe Haven Laws in Other States
LRS Report 06.118

You asked for an overview of safe haven laws. Specifically, you were interested in which states have such laws, when these laws were enacted, where and up until what age infants can be dropped off in different states, and how these laws address the issue of parental rights.

Safe Haven laws are intended to reduce infant abandonment and abuse by providing mothers in crisis with designated locations where they can leave an infant and know that the child will be safe and cared for. Hospitals, police and fire stations, and emergency medical service agencies are often used as safe haven locations. Age limits of 72 hours or 30 days are most common, although North Dakota's safe havens will accept children up to a year old. A few states require a check of the putative father registry, and include provisions to contact the putative father, but most do not require notification of fathers who may not be aware of the child's birth.

At least forty-six states have enacted safe haven laws. According to the Child Welfare League of America, forty-one of these states passed safe haven legislation between 1999 and August 2002. Currently, Alaska, Hawaii, Nebraska, and Vermont appear to be the only states that do not have safe haven laws. Massachusetts was the most recent state to enact this type of legislation with the 2004 Safe Haven Act of Massachusetts. A number of organizations have compiled information about these laws. We have attached the following publications that address your specific questions in more detail:

- "Infant Safe Haven Laws," *State Statute Series 2004*, National Adoption Information Clearinghouse, U.S. Department of Health and Human Services, current through November 2004.
- "Update: Safe Havens for Abandoned Infants," National Conference of State Legislatures, October 21, 2003.
- Williams-Mbengue, Nina, "Safe Havens for Abandoned Infants," *NCSL State Legislative Report*, Volume 26, Number 8, National Conference of State Legislatures, September 2001.
- "Baby Abandonment Project," Child Welfare League of America, August 2002. As you will see, this document provides brief summaries of the various laws current as of 2002, including information, in many cases, specific to your questions. The on-line version of this compilation of state laws includes links to the text of each state's bill, and is available at *http://www.cwla.org/programs/pregprev/flocrittsafehaven.htm.*

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

National Clearinghouse on Child Abuse and Neglect Information
National Adoption Information Clearinghouse
NAIC

Gateways to Information: Protecting Children and Strengthening Families

State Statutes Series 2004

Infant Safe Haven Laws

State legislatures have felt the need to address infant abandonment and infanticide in response to a reported increase in the abandonment of infants.

Beginning in Texas in 1999, "Baby Moses laws" or infant safe haven legislation has been enacted as an incentive for mothers in crisis to safely relinquish their babies to a safe haven where the baby will be protected and provided with medical care until a permanent home can be found. Safe haven laws generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for safely surrendering the baby to a safe haven.

To date, approximately[1] 46[2] States have enacted safe haven legislation to provide a vehicle for the safe relinquishment of unwanted newborns.

Who May Leave a Baby at a Safe Haven

In most States with safe haven laws, a parent may surrender the baby to a safe haven. In four States (Georgia, Maryland, Minnesota, and Tennessee),[3] only the mother may relinquish the infant, while Idaho specifies that only a custodial parent may surrender the infant. Other States allow either parent of the baby, an agent of the parent (someone who has the parent's approval),[4] or another person having custody of the child[5] to take the baby to a safe haven. Five States[6] do not specify the person who may relinquish an infant.

Safe Haven Providers

Safe haven providers include hospitals, emergency medical services, police stations, and fire stations. Generally, anyone on staff at these institutions can receive an infant, and the provider is authorized to provide any care and treatment the infant may require.

---

[1] The word *approximately* is used to stress the fact that the States frequently amend their laws, so this information is current only through November 2004.
[2] Alaska, Hawaii, Nebraska, Vermont, the District of Columbia, and the territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands have not yet addressed the issue of abandoned newborns in legislation.
[3] Maryland and Minnesota do allow the mother to approve another person to deliver the infant on her behalf.
[4] In 10 States: Arizona, Arkansas, Connecticut, Iowa, Missouri, North Dakota, Rhode Island, South Carolina, Utah, and Wyoming
[5] In California and Kansas
[6] Delaware, Maine, New Jersey, New Mexico, and New York

National Adoption Information Clearinghouse
330 C St., SW
Washington, DC 20447
(888) 251-0075 or (703) 352-3488
naic@caliber.com
http://naic.acf.hhs.gov

U.S. Department of Health and Human Services
Administration for Children and Families
Administration on Children, Youth and Families
Children's Bureau

In many States, the provider is required to ask the parent for family and medical history information. In some States, the provider is required to attempt to give the parent or parents information about the legal effects of leaving the infant and information about referral services. In all cases, the relinquishing parent may not be compelled either to provide personal information or to accept the information offered.

The focus of these laws is protecting newborns, and in approximately 16 States,[7] infants who are 72 hours old or younger may be relinquished to a designated safe haven. Many other States accept infants up to 1 month old,[8] while North Dakota's safe havens will accept a child as old as 1 year.[9]

Immunity From Liability

Safe haven providers are given protection from liability for anything that might happen to the infant while in their care unless there is evidence of major negligence on the part of the safe haven.

Protections for the Parents

Anonymity for the parent or agent of the parent may be expressly guaranteed in statute,[10] or the statute may state that the safe haven cannot compel the parent or agent of the parent to provide identifying information.[11] Some States provide an assurance of confidentiality for any information that is provided.[12]

In addition to the guarantee of anonymity, many States limit prosecution[13] or provide that safe relinquishment of the infant is an affirmative defense[14] in any prosecution[15] of the parent or his/her agent for any crime against the child, such as abandonment, neglect, or child endangerment.

The privileges of anonymity and immunity will be forfeited in most States if there is evidence of abuse or neglect of the child.

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[7] Alabama, Arizona, California, Colorado, Florida, Illinois, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Ohio, Tennessee, Utah, Washington, and Wisconsin

[8] In 14 States: Arkansas, Connecticut, Idaho, Louisiana, Maine, Missouri, Montana, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, South Carolina, and West Virginia

[9] Other States specify varying age limits in their statutes: 5 days (New York); 7 days (Georgia, Massachusetts, New Hampshire, North Carolina, and Oklahoma); 14 days (Delaware, Iowa, Virginia, and Wyoming); 45 days (Indiana and Kansas); 60 days (South Dakota and Texas); and 90 days (New Mexico).

[10] In approximately 13 States: Arizona, Delaware, Florida, Illinois, Kentucky, Ohio, Oklahoma, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming

[11] In 26 States: Arizona, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming.

[12] In 12 States: Connecticut, Delaware, Idaho, Iowa, Kentucky, Maine, Michigan, Montana, New Mexico, Rhode Island, South Carolina, and Tennessee

[13] In approximately 7 States (Arizona, Connecticut, Illinois, Louisiana, Nevada, Pennsylvania, and South Dakota), the statutes state that a safe relinquishment is not considered a violation of the law. In 21 States, the relinquishing parent is provided immunity from prosecution: California, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri (if the child is 5 days old or younger), Montana, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Wisconsin, and Washington.

[14] In a State with an affirmative defense provision, a parent or agent of the parent can be charged and prosecuted, but the act of leaving the baby safely at a safe haven can be a defense to an accusation of abandonment, abuse, neglect, or child endangerment.

[15] In 17 States: Alabama, Arkansas, Colorado, Delaware, Indiana, Maine, Michigan, Mississippi, Missouri (if the child is 6 days old or older, but less than 30 days old), New Jersey, New York, Oregon, Texas, Utah, Virginia, West Virginia, and Wyoming

Consequences of Relinquishment

In most States with safe haven laws, custody of the infant who has been relinquished will be transferred to the department that handles child protective or child welfare cases.

The department has responsibility for placing the child, usually in a pre-adoptive home, and for petitioning the court for termination of the birth parent's parental rights. Several States have procedures in place for a parent to reclaim the infant,[16] usually within a specified time period and before any petition to terminate parental rights has been granted. A few States[17] also have provisions for a nonrelinquishing father to petition for custody of the child.

This publication is a product of the State Statutes Series prepared by the National Adoption Information Clearinghouse (NAIC). While every attempt has been made to be as complete as possible, additional information on these topics may be in other sections of a State's code as well as agency regulations, case law, and informal practices and procedures.

Electronic copies of this publication may be downloaded from the Clearinghouse website at http://naic.acf.hhs.gov/general/legal/statutes/safehaven.cfm.

- To find statute information for a particular State, go to http://naic.acf.hhs.gov/general/legal/statutes/search and select the specific State and topic.
- To find information on all of the States and territories, view the complete PDF at http://naic.acf.hhs.gov/general/legal/statutes/safehavenall.pdf or call the Clearinghouse at (888) 251-0075 or (703) 352-3488 to order a copy.

[16] Approximately 16 States have provisions for the relinquishing parent to petition to reclaim the child: California, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, New Mexico, Rhode Island, Tennessee, and Wyoming.
[17] In approximately 4 States: Louisiana, South Dakota, Tennessee, and Utah.

Child Welfare Project

UPDATE: SAFE HAVENS FOR ABANDONED INFANTS
October 21, 2003

Forty-five states now have some type of safe haven legislation. (The following states do not have safe haven legislation: AK, HI (Vetoed 7/2/03), MA, NE and VT.) Most of the laws designate hospitals, emergency medical services, fire stations and police stations as safe locations. One exception is New York, which stipulates that the baby may be left with a suitable person or may be left in a suitable location so long as an appropriate person is promptly notified. Immunity is granted generally to employees who are required to accept and care for relinquished infants. About half of the states will not prosecute parents who relinquish unharmed infants. The remainder allows an affirmative defense to prosecution. State laws vary on the age of infants who may be relinquished. The ages range from 72 hours old or younger up to 5 days old or younger. The most common ages found in the statues are 72 hours and 30 days.

How Effective are the Laws?

The laws continue to have a limited effect. A number of states have begun to report on infants abandoned after the passage of the safe haven legislation. As of September 2001, approximately 33 babies had been legally relinquished including five each in Texas, Michigan and Alabama, six in New Jersey, four in California, two in Connecticut, Minnesota and Ohio and one each in Kansas and South Carolina. The numbers are approximate because officials in several states reported that they are not officially tracking the numbers of infants or that they had unofficial media counts of infants. Officials in New York, West Virginia and Florida reported that they were not sure that any infants had been relinquished because their laws do not require reporting or tracking that information. As of September 2002, state agency officials in California report that they have had 20 infants abandoned through the law since their legislation went into effect. New Jersey reported 10 safe haven infants, a 63% reduction in infant abandonment, since the passage of their law in 2000 (compared to 8 abandonments prior to the passage of the law). Illinois reported 2 safe haven abandonments since their law was enacted in 2001.

Unlawful abandonment continues to be a problem. As of September 2001, Texas reported at least 12 infants had been abandoned illegally since the passage of its law, but the abandonments occurred before the start of a public awareness campaign. None have been abandoned outside safe havens since this publicity. Louisiana reported that five infants had been abandoned illegally since passage of its law. Three babies died, and the parents were prosecuted. At least five babies were illegally abandoned in California; two more of them were found dead. In Connecticut, one baby was discarded near a highway. Three babies had been abandoned illegally in Colorado. In one case, the mother attempted to regain custody. Michigan reported nine attempts including one in which a judge ruled that the case was not a safe haven surrender because the parents had not been given enough information on their legal rights. As of September 2002, California reported 21 illegal abandonments and 17 infants abandoned found deceased. Illinois reported four infants illegally abandoned and found deceased. Illinois averaged 25 illegal abandonments over the previous four-year period.

Areas of Concerns for Policymakers

Child welfare experts, state agency officials and state lawmakers continue to examine a number of critical issues related to infant safe haven legislation:

Need for Examination of Statewide Services for Women at Risk

Many child welfare experts state that, although safe haven legislation may be a good idea, it needs to be part of a larger effort to enhance services for women who are at risk of abandoning their infants. Experts from the fields of child welfare, mental health, youth services, the medical establishment and teen pregnancy will want to work with young parents to examine the existing system of services. Such an examination might provide some answers about why this population of parents is unable -or unwilling- to use these services.

Lack of a Comprehensive Strategy for the Prevention of Infant Abandonment

Critics are concerned that states are not viewing safe haven programs as an integral part of child abuse prevention. Has infant abandonment been considered in the state's child abuse prevention efforts? Does the strategy target young women at risk of abandonment? These are just a few questions policymakers may want to ask as they work with public health, child protection, child abuse prevention, mental health, families and others to develop a comprehensive strategy to prevent infant abandonment.

Anonymity and Termination of Parental Rights

Child welfare experts are apprehensive that the anonymity provided to parents in the safe haven laws conflicts with biological parents' due process rights in termination of parental rights proceedings. As previously mentioned, states have attempted to address this critical issue by providing some type of notice or search for the biological parents of the abandoned infant in an effort to include them in judicial proceedings related to the adoption of the infant. States will want to carefully examine their termination of parental rights statutes to avoid conflicts with safe haven laws.

Relationship to Existing Child Welfare Statutes

Likewise, states may want to examine all their existing statutes related to adoption, paternity, custody and all judicial proceedings associated with child abandonment. It also is important that states clarify their definitions of infant abandonment. For example, several states with new laws exempt safe haven abandonment from the statutory definition of abandonment, child abuse or child neglect. Other states add safe haven abandonment to their existing definition of abandonment.

Father's Rights

A few states require a check of the putative father registry and include provisions to contact the putative father, but most do not contain provisions to address notification of fathers who may not be aware of the child's birth. Critics contend that denying notification unfairly presumes that these fathers do not want to care for their children. Utah's legislation addresses this concern by requiring a search of the confidential registry for unmarried biological parents and requiring that notice be sent to each potential father identified in the registry. The termination of parental rights hearing must be scheduled as soon as possible if no one has identified himself as the father (or if the mother has not identified herself) within two weeks after notice is complete. If a non-relinquishing parent is not identified, the surrender of the newborn shall be considered grounds for termination of parental rights of both parents.

Adoption

Adoption advocates are particularly concerned about the lack of medical and family history. They note that a lack of information about their backgrounds is often troublesome for adopted children and worry about the stability of the child and his or her adopted family later in life. They fear that the lack could be a setback to the trend in adoption policy to provide the adoptee with information about the birth family. Adoption and other child welfare experts also point out that the legislation may not be necessary because most states will not prosecute women who give birth and relinquish their newborns in the hospital. Additionally, every state allows women to voluntarily relinquish their infants for adoption.

Parental Irresponsibility

Many policymakers are concerned that these laws may only encourage parental irresponsibility. Since so little is known about the women who abandon their babies, there is no proof that the legislation will discourage mothers from leaving their infants in unsafe places. For women who might otherwise seek help from family, friends and social service agencies, the enactment of safe haven laws might encourage them to anonymously abandon their newborns rather than take advantage of their traditional network of support.

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NCSL
STATE LEGISLATIVE
REPORT
ANALYSIS OF STATE ACTIONS ON IMPORTANT ISSUES

SEPTEMBER 2001 VOLUME 26, NUMBER 8

Safe Havens for Abandoned Infants

By Nina Williams-Mbengue, *Policy Speciaiist*

After 13 infants were abandoned in the Houston, Texas, area within a 10-month period in 1999, state lawmakers acted to encourage desperate parents to leave their children in a safe location rather than simply abandoning them. Since the Texas law was adopted, 34 more states have enacted so-called "safe haven" laws. All the statutes generally promise that women who relinquish unharmed infants in designated safe places will not be prosecuted or provide that abandonment in compliance with the law constitutes an affirmative defense to prosecution.

So far, the effects of the new laws appear to be limited. Although some newborns have been left at hospitals or police and fire stations, others continue to be found in unsafe places. Serious concerns remain regarding the general lack of research on abandoned babies and their mothers, the implications of these laws on states' adoption and child welfare practices, the rights of the infant's father and the relatively small number of infants involved. Some child welfare experts have expressed concern that the laws do not include an examination of existing statewide child abuse prevention strategies and services for women at risk.

This report examines what is known about infant abandonment, provides an overview of key aspects of the legislation, describes state experience with the new laws and discusses some policy implications for lawmakers.

Discarded Infants and Boarder Babies

The infants referred to are those abandoned in public places—other than hospitals—such as parks, roadsides and dumpsters. They also are known as "discarded infants" and should be distinguished from "boarder babies," who are abandoned in hospitals due to pre- or perinatal drug or HIV exposure as described in the Abandoned Infants Assistance Act (P.L. 104-23). In this law, Congress defined abandoned infants as "...infants and young children who are medically cleared for discharge from acute care hospital settings but who remain hospitalized because of a lack of appropriate out-of-hospital placement alternatives."

The Scope of the Problem

What do we know about the incidence of infant abandonment? Unfortunately, national and state data on the number of abandoned infants are practically nonexistent. Most states do not keep track of these infants and, so far, the federal government does not require states to do so. A recent media survey

conducted by the U.S. Department of Health and Human Services (HHS) reported 65 babies abandoned in public places in 1991. This number increased to 105 in 1998, with 33 of the babies found dead. HHS officials state these numbers could simply reflect heightened media interest in the issue and do not necessarily indicate an actual increase in baby abandonment.

Abandonment of infants in public places appears to be part of a much larger problem. Due to parental drug addiction, 31,000 infants were abandoned in hospitals in 1998. The number of children who suffer abuse and neglect from parents or caretakers each year is even greater. According to HHS, 836,000 children were confirmed as abused in 1999. Of those children, 1,100 died.

What Do We Know about Mothers Who Abandon Their Infants?

Little is known about women who discard their newborns. Most of the women are never found. Anecdotal evidence indicates that most of the women are very young, their race and income vary. Most are very much in denial of their pregnancies and appear to be unaware of or afraid to use the resources available to help them before and during their pregnancies. Questions also exist about the fathers' role, the mothers' family situation and how often the pregnancy is the result of rape or sexual abuse.

Most women who discard their newborns are very much in denial of their pregnancies and appear to be unaware of or afraid to use the resources available to help them before and during their pregnancies.

Some experts suggest that women who are likely to abandon their infants also are the most likely to commit infanticide. In 1996, researcher Michelle Oberman studied women who commit infanticide. Her conclusions may shed light on women who abandon their babies. Oberman noted that the most fundamental shared characteristic of these women is their "seemingly self-imposed silence and isolation during pregnancy." Often, not even the woman's family and close friends are aware of her pregnancy. Oberman also asserted that women who commit infanticide are in "massive denial." The combination of denial and isolation means that these women do not seek prenatal care and do not make any plans for the birth or care of the baby.

The women Oberman studied represent every race, ethnicity and socioeconomic background. Most are young, single and live with parents, guardians or other relatives. If forced to live on their own, they would be poor and, presumably, financially unable to care

for an infant. The women may have suffered rape or abuse and the pregnancy is most likely their first. Surprisingly, women who commit infanticide are unlikely to have a history of substance abuse.

In response to the limited information on infant abandonment, federal House Resolution 465, introduced and passed in April 2000, recommended that local, state and federal statistics be kept on the number of infants abandoned in public places. Federal House Resolution 422, also introduced in 2000, sought to establish a Baby Abandonment Task Force to collect information and maintain a database (through the Bureau of Justice Statistics) on incidents of child abandonment, including information on demographics, circumstances, outcomes and trends. The legislation was reintroduced in January 2001 as H.R. 7, the "Baby Abandonment Prevention Act of 2001." Additionally, the "Safe Havens Support Act of 2001." H.R. 2018, proposes using TANF funds to support infant safe haven programs and requires HHS to conduct a study to determine the number of infants relinquished, abandoned or found dead and the characteristics and demographics of parents who have abandoned an infant.

Thirty-five states (including 19 that passed laws in the 2001 session) now have some type of safe haven legislation.

Review of State Laws

Most states have child abandonment laws that allow authorities to prosecute parents or caretakers who willingly and permanently abandon their children. The goal of the new safe haven laws is to allow a parent to safely leave a baby without fear of prosecution for child abandonment and without resorting to the dangerous practice of leaving an infant in a trash bin, in a wooded area or beside a highway.

Thirty-five states (including 19 that passed laws in the 2001 session) now have some type of safe haven legislation. Most of the laws designate hospitals, emergency medical services, fire stations and police stations as safe locations. One exception is New York, which stipulates that the baby may be left with a suitable person or may be left in a suitable location so long as an appropriate person is promptly notified. Immunity is granted generally to employees who are required to accept and care for relinquished infants. About half of the states will not prosecute parents who relinquish unharmed infants. The remainder allow an affirmative defense to prosecution. State laws vary on the age of infants who may be relinquished. The ages range from 72 hours old or younger up to 5 days old or younger. The most common ages found in the statues are 72 hours and 30 days.

Some of the issues addressed in statute include anonymity, parental rights public awareness and court procedure. (See sidebar for additional provisions.)

Anonymity

A number of states with safe haven legislation do not specifically mention anonymity. Twenty-four states do allow for anonymity, in which the person leaving the child is not required to disclose any information or may remain anonymous. The laws state that the receiving entity may request relevant medical history information about the infant and the infant's parents, but the parents are not required to provide that or any other information. Most of the laws also require that the receivers offer the parent written or verbal information about the safe haven law, what will happen to the baby, adoption alternatives and how to contact social services. They also may offer medical history forms that the parent may voluntarily and anonymously mail in later.

Anonymity provisions, while meant to encourage parents to safely drop off their newborns, create difficulties for the child welfare and legal systems.

The goal of the anonymity provisions is to encourage women to safely surrender their infants without fear of identifying themselves. South Carolina requires the person accepting the infant to offer information about the legal repercussions of relinquishment. The person receiving the infant also must attempt to obtain information about the infant, but the parent is not required to share anything. In addition, the parent must receive a self-addressed, stamped envelope to mail to the Department of Human Services with information about the child. Minnesota receivers must not inquire about identity, but may ask about medical history and may tell the parent how to contact social services. California, Connecticut, New Mexico and North Dakota issue the parent a numbered identification bracelet. If the parent changes his or her mind, possession of the bracelet in Connecticut, New Mexico and North Dakota creates a presumption that the parent has standing to participate in a custody hearing. In California, a parent can reclaim custody within 14 days of surrendering the child if he or she has a matching bracelet. Tennessee requires the facility receiving the infant to seek identifying and medical history information whenever possible and to inform the parent that such information will facilitate the infant's adoption. The parent is not required to provide the information.

Termination of Parental Rights

The anonymity provisions, while meant to encourage parents to safely drop off their newborns, create difficulties for the child welfare and legal systems. In order to free abandoned infants for adoption, states must hold termination of parental rights proceedings in court

to remove a parent's legal rights and obligations to his or her child. To abide by constitutional requirements for due process for parents, the state must attempt to locate and notify the parents of the termination proceeding and give them an opportunity to respond and appear in court.

Twenty-one states (see sidebar) address the termination of parental rights proceeding notification requirement in several different ways. Generally, they either state that the act of voluntarily surrendering the infant to a safe haven terminates parental rights or they provide for some type of notice to parents or require the department to conduct a reasonable search to locate the biological parents. South Carolina requires the Department of Social Services to publish notice of an abandoned newborn and to send a news release to broadcast and print media in the area with information about the infant, including the permanency hearing date and location. Iowa's law outlines the termination of parental rights process and the timelines for filing petitions. The legislation also requires notice to be provided to any known parent and to possible putative fathers registered with the state registrar of vital statistics. Florida's law creates a presumption that the parent leaving the newborn consents to the termination of his or her parental rights; however, the parent may claim the child up until the court enters a judgment terminating parental rights. The law also requires the department or a child-placing agency that has custody of the infant to initiate a diligent search to notify and obtain consent from the parent whose identity and location are unknown, other than the surrendering parent. Several states give parents a specified amount of time in which to claim maternity or paternity of the infant. If they do not petition for custody within that time period, they waive right to notice of, or participation in, any judicial proceeding for the adoption of the infant.

South Carolina requires the Department of Social Services to publish notice of an abandoned newborn.

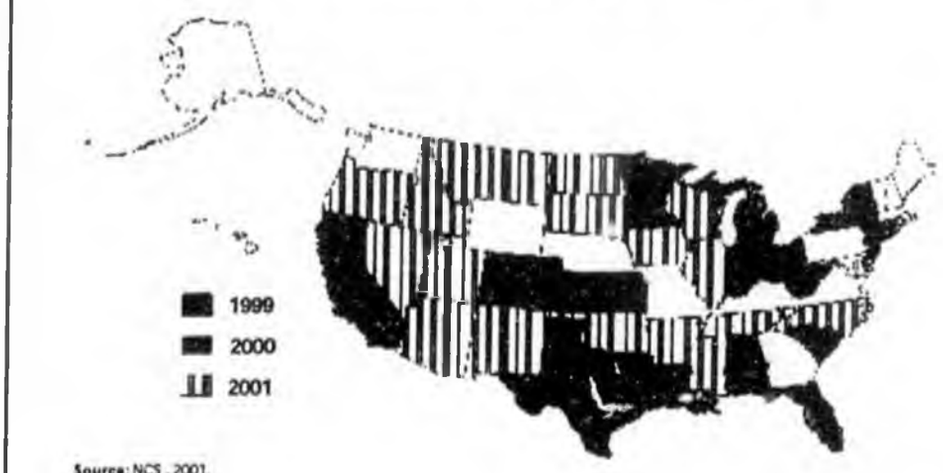
Public Awareness

Thirteen states require media and public awareness campaigns to alert parents who are at risk of abandoning their infants to the new legal alternative. New Jersey's legislation requires the establishment of a public information program to promote safe placement alternatives for newborns, including a 24-hour, toll-free hotline. The law also appropriated $500,000 for the program.

In addition to the 19 states that enacted legislation so far in 2001 (see figure 1), 11 considered bills. As was the case in 2000, the proposals seek to grant immunity to parents who

surrender unharmed infants in designated locations. Most of the provisions are similar to those already discussed.

Figure 1. State Enactments Regarding Abandoned Infants



Source: NCS, 2001.

State Experience: How Effective Are the New Laws?

So far, the laws appear to have had a limited effect. Several states have begun to report on infants abandoned after the passage of the safe haven legislation. Approximately 33 babies have been legally relinquished including five each in Texas, Michigan and Alabama, six in New Jersey, four in California, two in Connecticut, Minnesota and Ohio and one each in Kansas and South Carolina. The numbers are approximate because officials in several states reported that they are not officially tracking the numbers of infants or that they had unofficial media counts of infants. Officials in New York, West Virginia and Florida reported that they were not sure that any infants had been relinquished because their laws do not require reporting or tracking that information.

Major Provisions of Safe Haven Legislation

Parent will not be prosecuted: Ariz., Calif., Conn., Fla., Idaho, Iowa, Ill., Kan., Minn., Mont., Nev., N.M., N.D., Ohio, Okla., R.I., S.C., S.D. Tenn. and Wis.
Affirmative defense: Ala., Ark., Colo., Del., Ind., La., Mich., Miss., N.J., N.Y., N.C., Ore., Texas, Utah and W. Va.
Termination of parental rights: Calif., Conn., Del., Fla., Idaho, Ill., Iowa, La., Mont., Nev., N.J., N.C., Ohio, Ore., R.I., S.C., S.D., Tenn., Utah, W. Va., and Wis.
Missing child registry search: Ark., Fla., La., N.J., Okla. and S.C.
Public awareness: Conn., Fla., Iowa, Ill., Mont., N.J., N.Y., N.C., Okla., Ore., S.C. and Tenn.
Funds available for infant: N.M. and Wis.
Genetic testing to determine maternity/paternity: Del., Fla., Idaho, Ill. And Ohio
Putative father registry search: Ill., Tenn., and Utah
Additional study of infant abandonment: Colo., Idaho, Ill., La. and N.J.

Unfortunately, safe haven legislation has not prevented all cases of unlawful abandonment. Texas reported at

least 12 infants have been abandoned illegally since the passage of its law, but the abandonments occurred before the start of a public awareness campaign. None have been abandoned outside safe havens since this publicity. Louisiana reported that five infants have been abandoned illegally since passage of its law. Three babies died, and the parents are being prosecuted. At least five babies were illegally abandoned in California; two more of them were found dead. In Connecticut, one baby was discarded near a highway. Three babies have been abandoned illegally in Colorado. In one case, the mother is attempting to regain custody. Michigan reported nine attempts including one in which a judge ruled that the case was not a safe haven surrender because the parents had not been given enough information on their legal rights.

Updated lists of abandoned infant enactments and bills can be found at NCSL's Child Welfare Web Site at http://www.ncsl.org/programs/cyf/cw.htm.

Several states also reported on their public awareness campaigns, which they believe will be key to the effective implementation of the new laws. Texas did not include provisions for public awareness and continued to find abandoned babies until a private foundation donated money for a campaign. New Jersey used its $500,000 appropriation to produce public service announcements, posters, pocket cards and brochures and has advertised the program in local and college newspapers, on billboards and on buses. Michigan included a $200,000 appropriation to establish a toll-free information line and distribute press releases, a brochure and a poster targeting youth. Connecticut developed a brochure for distribution in high schools, middle schools, homeless shelters and drug treatment centers. The effects of these campaigns remain to be seen.

States reported on their efforts to provide training for personnel responsible for receiving and caring for infants as an essential component. The New Jersey Hospital Association provides ongoing training for hospital staff, and the state's attorney general works with prosecutors to ensure that parents who legally relinquish infants are not prosecuted. Michigan developed protocols and training material to be sent to entities that are designated to receive the infants. California sent material to hospitals and conducted a training for hospital supervisors on procedures for accepting infants. Connecticut will work with the state hospital association to train hospital workers and will develop training material for law enforcement officers.

Many officials see voluntary data collection about the mothers as a critical element in developing better policy to address the needs of women who abandon their babies.

Finally, many officials see voluntary data collection about the mothers as a critical element in develc,. ng better policy to address the needs of women who abandon their babies. The

information could include the mother's medical history, race, length and condition of the pregnancy, any history of sexual or substance abuse, family situation, economic background, presence of domestic violence and information about the father. There is also a need to collect as much information as possible about the infant, including medical history, date of birth, preferred name for the child, sex, location of the birth and any problems encountered at birth.

Areas of Concern for Policymakers

Proponents of safe haven legislation believe that these laws will significantly reduce the risk that a newborn will be abandoned in a manner that may result in death. They also feel that the laws will protect parents who believe they have no option other than abandonment, but who want to deliver their newborn to a safe shelter. Others hope that the laws may offer young women an immediate alternative to abandoning their infants, while giving policymakers and the public time to examine the issue and create system-wide reform to include teen pregnancy prevention programs, prenatal counseling, health services, adoption promotion and other support programs.

Many child welfare experts state that safe haven legislation needs to be part of a larger effort to enhance services for women who are at risk of abandoning their infants.

Critics of safe haven laws continue to voice concern in a number of areas that could have major implications for state lawmakers.

Need for Examination of Statewide Services for Women at Risk

Many child welfare experts state that, although safe haven legislation may be a good idea, it needs to be part of a larger effort to enhance services for women who are at risk of abandoning their infants. Experts from the fields of child welfare, mental health, youth services, the medical establishment and teen pregnancy will want to work with young parents to examine the existing system of services. Such an examination might provide some answers about why this population of parents is unable -or unwilling- to use these services.

Lack of a Comprehensive Strategy for the Prevention of Infant Abandonment

Critics are concerned that states are not viewing safe haven programs as an integral part of child abuse prevention. Has infant abandonment been considered in the state's child abuse prevention efforts? Does the strategy target young women at risk of abandonment? These are just a few questions policymakers may want to ask as they work with public

health, child protection, child abuse prevention, mental health, families and others to develop a comprehensive strategy to prevent infant abandonment.

Anonymity and Termination of Parental Rights

Child welfare experts are apprehensive that the anonymity provided to parents in the safe haven laws conflicts with biological parents' due process rights in termination of parental rights proceedings. As previously mentioned, states have attempted to address this critical issue by providing some type of notice or search for the biological parents of the abandoned infant in an effort to include them in judicial proceedings related to the adoption of the infant. States will want to carefully examine their termination of parental rights statutes to avoid conflicts with safe haven laws.

Relationship to Existing Child Welfare Statutes

Likewise, states may want to examine all their existing statutes related to adoption, paternity, custody and all judicial proceedings associated with child abandonment. It also is important that states clarify their definitions of infant abandonment. For example, several states with new laws exempt safe haven abandonment from the statutory definition of abandonment, child abuse or child neglect. Other states add safe haven abandonment to their existing definition of abandonment.

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A few states require a check of the putative father registry and include provisions to contact the putative father, but most do not contain provisions to address notification of fathers who may not be aware of the child's birth. Critics contend that denying notification unfairly presumes that these fathers do not want to care for their children. Utah's legislation addresses this concern by requiring a search of the confidential registry for unmarried biological parents and requiring that notice be sent to each potential father identified in the registry. The termination of parental rights hearing must be scheduled as soon as possible if no one has identified himself as the father (or if the mother has not identified herself) within two weeks after notice is complete. If a non-relinquishing parent is not identified, the surrender of the newborn shall be considered grounds for termination of parental rights of both parents.

Adoption

Adoption advocates are particularly concerned about the lack of medical and family history. They note that a lack of information about their backgrounds is often troublesome for adopted children and worry about the stability of the child and his or her adopted family later in life. They fear that the lack could be a setback to the trend in adoption policy to provide the adoptee with information about the birth family. Adoption and other child welfare experts also point out that the legislation may not be necessary because most states will not prosecute women who give birth and relinquish their newborns in the hospital. Additionally, every state allows women to voluntarily relinquish their infants for adoption.

Adoption advocates are particularly concerned about the lack of medical and family history.

Parental Irresponsibility

Many policymakers are concerned that these laws may only encourage parental irresponsibility. Since so little is known about the women who abandon their babies, there is no proof that the legislation will discourage mothers from leaving their infants in unsafe places. For women who might otherwise seek help from family, friends and social service agencies, the enactment of safe haven laws might encourage them to anonymously abandon their newborns rather than take advantage of their traditional network of support.

Conclusion

State safe haven laws are in various stages of implementation. The effectiveness of these new laws has yet to be measured. It is important that states begin to collect data about abandoned infants and their mothers. Such data could be researched to develop a profile of mothers who engage in this behavior to better target prevention and intervention efforts. Policymakers who are considering such legislation will want to carefully examine their states' existing statutory framework in the areas of juvenile court procedure, termination of parental rights and adoption practice to determine the future ramifications of abandoned infant laws.

References

1. " Brief Summary: Information Related to Discarded Infants," National Abandoned Infants Assistance Resource Center, August 2000 (http://ist-socrates.berkeley.edu/~aiarc/discarded/discardfs.htm).

State Legislative Reports

"Automobile Pollution and Efficiency in the Year 2000" (Vol. 25, No. 13) (ISBN 1-58024-124-7)	November 2000
"Religious Land Use—State and Federal Legislation" (Vol. 25, No. 14) (ISBN 1-58024-129-8)	December 2000
"Greenhouse Gas Reduction—State Case Studies" (Vol. 25, No. 15) (ISBN 1-58024-130-1)	December 2000
"The Link Between Energy Efficiency and Air Quality" (Vol. 25, No. 16) (ISBN 1-58024-134-4)	December 2000
"State Crime Legislation in 2000" (Vol. 26, No. 1) (ISBN 1-58024-143-3)	January 2001
"Juvenile Justice State Legislation in 2000" (Vol. 26, No. 2) (ISBN 1-58024-145-X)	February 2001
"State Incentives for Energy Efficiency" (Vol. 26, No. 3) (ISBN 1-58024-156-5)	April 2001
"Postsecondary Enrollment Options Programs" (Vol. 26, No. 4) (ISBN 1-58024-158-1)	April 2001
"Child and Family Service Reviews: Implications for State Oversight of Local Child Care Welfare Agencies" (Vol. 26, No. 5) (ISBN 1-58024-161-1)	May 2001
"Implementing High-Stakes Assessment of Student Achievement" (Vol. 26, No. 6) (ISBN 1-58024-163-8)	May 2001
"Breast and Cervical Cancer Treatment" (Vol. 26, No. 7) (ISBN 1-58024-171-9)	July 2001
"Safe Havens for Abandoned Infants" (Vol. 26, No. 8) (ISBN 1-58024-179-4)	September 2001

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	A	B	C	D	E	F
1	**STATE**	**Days to surrender**	**Who can surrender**	**Focus of Law**	**Anonymity for parent or agent of parent may be expressly guaranteed in statute**	**Statute states that the safe haven cannot compel parent or agent of parent to provide identifying info**
2	Alabama	3 days		Protecting newborns		
3	Arizona	3 days	a parent or a parents agent	Protecting newborns	Yes	Yes
4	Arkansas	30 days	a parent or a parents agent			
5	California	3 days	a parent or a parents agent or another person having custody of the child	Protecting newborns		Yes
6	Colorado	3 days		Protecting newborns		
7	Connecticut	30 days	a parent or a parents agent			Yes
8	Delaware	14 days	not specified		Yes	Yes
9	Florida	3 days		Protecting newborns	Yes	
10	Georgia	Less than 1 week	Mother only			
11	Idaho	30 days	Custodial parent			Yes
12	Illinois	3 days		Protecting newborns	Yes	
13	Indiana	45 days				Yes
14	Iowa	14 days	a parent or a parents agent			Yes
15	Kansas	45 days	a parent or a parents agent or another person having custody of the child			
16	Kentucky	14 days		Protecting newborns	Yes	
17	Louisiana	30 days				Yes
18	Maine	31 days	not specified			Yes
19	Massachusetts	Less than 1 week				Yes
20	Maryland	Less than 3 days	Mother only/or another person approved by the mother to deliver infant on her behalf	Protecting newborns		

	A	B	C	D	E	F
21	Michigan	3 days		Protecting newborns		Yes
22	Minnesota	3 days	Mother only/or another person approved by the mother to deliver infant on her behalf	Protecting newborns		Yes
23	Mississippi			Protecting newborns		
24	Missouri	Less than 30 days	a parent or a parents agent			
25	Montana	30 days				Yes
26	Nevada	30 days				Yes
27	New Hampshire					Yes
28	New Jersey	30 days	not specified			Yes
29	New Mexico	90 days	not specified			Yes
30	New York	5 days	not specified			
31	North Carolina	7 days				Yes
32	North Dakota	1 year	a parent or a parents agent			Yes
33	Ohio	3 days		Protecting newborns	Yes	
34	Oklahoma	7 days			Yes	Yes
35	Oregon	30 days				Yes
36	Rhode Island	30 days	a parent or a parents agent			
37	South Carolina	30 days	a parent or a parents agent			Yes
38	South Dakota	60 days				Yes
39	Tennessee	3 days	Mother only	Protecting newborns		Yes
40	Texas	60 days			Yes	
41	Utah	3 days	a parent or a parents agent	Protecting newborns	Yes	
42	Washington	3 days		Protecting newborns	Yes	
43	West Virginia	30 days			Yes	Yes
44	Wisconsin	3 days		Protecting newborns	Yes	
45	Wyoming		a parent or a parents agent		Yes	Yes

Baby Abandonment Project

The list below identifies the 41 states that have passed "safe haven" laws between 1999 and August 2002.

Alabama

House Bill 115 (Signed by Governor May 11, 2000)

Online Text of Bill: Not available -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Emergency medical services providers, hospitals
- *Liability*: Affirmative defense to prosecution

Arizona

House Bill 2001 (Signed by Governor April 23, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Firefighter, Emergency medical services technician, Hospital, Outpatient treatment center, Child welfare agency, Licensed adoption agency, Church or House of worship
- *Liability*: Immune from prosecution for abuse

Arkansas

House Bill 1070/ Act 236 (Signed by Governor Feb 13 2001)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Emergency department of licensed hospital, Law enforcement agency
- *Liability*: Affirmative defense to prosecution for endangering the welfare of a minor

California

Senate Bill 1368 (Signed by Governor September 28, 2000)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Hospital emergency room, Other location designated by board of supervisors
- *Liability*: Immune from prosecution

Colorado

Senate Bill 00-171 (Signed by Governor June 3, 2000)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Hospital, Fire station
- *Liability*: Affirmative defense to prosecution

Connecticut

Public Act 00-207 (Signed by Governor October 1, 2000)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospital emergency room
- *Liability*: Immune from prosecution

Delaware

House Bill 120 (Signed by Governor July 9, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 14 days
- *Safe Havens*: Emergency department of a hospital
- *Liability*: Defense to Prosecution

Florida

House Bill 1901 and Amendment HB475
(Signed by Governor June 2, 2000 and May 23, 2001)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 3 days
- *Safe Havens*: Hospitals, Fire stations, Emergency medical services stations
- *Liability*: Immune from prosecution for neglect

Georgia

House Bill 360
(Signed May 2002)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: Less than one week
- *Safe Havens*: Employee, volunteer or staff member of a medical facility
- *Liability*: Immune from prosecution for the crimes of cruelty of a child or abandonment of a dependent child.

Idaho

Senate Bill 1037 (Signed by Governor April 9, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospitals, Physicians' offices and clinics, Medical personnel responding to 911 call, Nurses and physician assistants
- *Liability*: Immune from prosecution for abandonment

Illinois

House Bill 0632, Senate Bill 216, Public Act 92-0408 (Signed by Governor August 20, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Hospital, fire station, emergency medical facility
- *Liability*: Relinquishment does not violate the criminal code or constitute a basis for a finding of abuse, neglect or abandonment

Indiana

Senate Bill 330 and Amendment House Bill 1829
(Signed by Governor March 17, 2000 and May 17, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 45 days
- *Safe Havens*: Emergency medical services provider
- *Liability*: Affirmative defense to prosecution

Iowa

Senate File 355 (Signed by Governor April 24, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 14 days
- *Safe Havens*: Hospital emergency rooms, Health care facilities
- *Liability*: Immune from prosecution for abandonment or neglect

Kansas

House Bill 2838 (Signed by Governor 2000)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 45 days
- *Safe Havens*: Fire station, City or county health department, Medical care facility
- *Liability*: Immune from prosecution for abandonment

Kentucky

KRS Chapter 311

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Haven*: Emergency medical services provider, Police Station, Fire Station
- *Liability*: Relinquishing parent not considered to have abandoned or endangered the child

Louisiana

House Bill 223 (Signed by Governor April 17, 2000)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospitals, Public health units, Fire stations, Police stations, Pregnancy crisis facility
- *Liability*: Affirmative defense to prosecution for abandonment, molestation, or cruelty

Maine

LD 1670 (Signed March 22, 2002)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 31 days
- *Safe Havens*: Emergency Room of a Hospital, Hospital Staff Member, Firefighter, Police Officer, Medical Services Provider
- *Liability*: - Affirmative defense to the crime of abandonment

Maryland

Senate Bill 82 (Adopted March 22, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: Less than 3 days old
- *Safe Havens*: Hospital personnel
- *Liability*: - Relinquishment not seen as a criminal act if child is unharmed

Michigan

Senate Bill 1053 (Signed by Governor June 26, 2000)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours

- *Safe Havens*: Fire departments, Hospitals, Police stations
- *Liability*: Affirmative defense to prosecution for injury or abandonment

Minnesota

Senate File 2615 (Signed by Governor April 2000)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Hospitals
- *Liability*: Immune from prosecution

Mississippi

House Bill 169 (Signed by Governor March 23, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Hospitals, Adoption agencies
- *Liability*: Affirmative defense to prosecution

Missouri

House Bill 1443 (Approved by Governor July 2, 2002; Effective August 28, 2002)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: Less than 30 days old
- *Safe Havens*: On duty hospital staff, firefighters, emergency medical technician, and law enforcement
- *Liability*: : Immune from prosecution on child abandonment and endangering welfare of child who is less than 5 days old; affirmative defense for child abandonment and endangerment of welfare to child who is between 6-30 days old

Montana

Senate Bill 0132 (Signed by Governor April 19, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Fire departments, Hospitals, Law enforcement agencies

- *Liability*: Immune from prosecution for abandonment

Nevada

Senate Bill 191 (Signed by Governor May 31, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospital, obstetric center or independent center for emergency medical care, fire-fighting agency, law enforcement agency
- *Liability*: Not in violation of the law simply by virtue of delivering a child to a safe haven

New Jersey

Chapter 58 (Signed by Governor July 7, 2000)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: State, county or municipal police stations, Hospital emergency rooms
- *Liability*: Affirmative defense to prosecution for abandonment

New Mexico

Senate Bill 94 (Signed by Governor March 14, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 90 days
- *Safe Havens*: Hospitals, Health care clinics
- *Liability*: Immune from prosecution for abandonment or abuse

New York

SO06688 (Signed by Governor June 18, 2000)

Online Text of Bill: Not available -- CWLA Summary

Key Points:

- *Age*: 5 days
- *Safe Havens*: Appropriate person or suitable location
- *Liability*: Affirmative defense to prosecution for abandonment or desertion

North Carolina

House Bill 275 / Session Law 2001-291 (Signed by Governor July 19, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 7 days
- *Safe Havens*: Health care provider, law enforcement officer, social services worker, certified emergency medical service worker, any adult
- *Liability*: Immune from prosecution

North Dakota

SB 2129 (Signed by Governor March 28, 2001)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 1 year
- *Safe Havens*: Hospitals
- *Liability*: Immune from prosecution

Ohio

House Bill 660 (Signed by Governor January 5, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Emergency medical service workers, Peace officers, Hospitals
- *Liability*: Immune from prosecution

Oklahoma

House Bill 1122 (Signed by Governor April 30, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 7 days
- *Safe Havens*: Medical services providers, Police stations, Fire stations, Child protective services agencies, Hospitals, Medical facilities
- *Liability*: Immune from prosecution for abandonment or neglect

Oregon

Senate Bill 199 (Signed by Governor June, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospitals, Birthing Centers, Physicians' offices, Sheriffs' offices, Police stations
- *Liability*: Affirmative defense to prosecution for abandonment

Rhode Island

Senate Bill 94 (Signed by Governor July 9, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospital, medical emergency facility, fire station, police station
- *Liability*: Immune from prosecution for abandonment

South Carolina

House Bill 4743 (Signed by Governor June 6, 2000)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospitals, Hospital outpatient facilities
- *Liability*: Immune from criminal prosecution

South Dakota

Senate Bill 92 (Signed by Governor March 3, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 60 days
- *Safe Havens*: Health care facilities or clinics, Law enforcement officers, Emergency medical technicians, Firefighters
- *Liability*: Immune from prosecution

Tennessee

Senate Bill 774 / Public Act 388 (Signed by Governor July 19, 2001)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Hospitals, Birthing centers, Community health clinics, Out-patient "walk-in" clinics
- *Liability*: Immune from criminal prosecution

Texas

House Bill 3423, Senate Bill 783 (Signed by Governor June 6, 1999; amended March 21, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 60 days
- *Safe Havens*: Emergency medical services provider, Licensed child-placing agency, Licensed residential child-care provider
- *Liability*: Affirmative defense to prosecution

Utah

House Bill 12 Substitute (Signed by Governor March 15, 2001)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Hospitals with emergency rooms
- *Liability*: Immune from prosecution for neglect or abandonment

Washington

SB 5236 (April 3, 2002)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Emergency department of a licensed hospital during hours of operation, or Fire station during hours of operation and while fire personnel are present
- *Liability*: Relinquishing parent is not subject to criminal liability under parts of law in question.

West Virginia

House Bill 4300 (Signed by Governor March 11, 2000)

Online Text of Bill -- CWLA Summary

Key Points:

- *Age*: 30 days
- *Safe Havens*: Hospitals, Health care facilities
- *Liability*: Affirmative defense to certain prosecutions

Wisconsin

Assembly Bill 54 (Signed by Governor April 6, 2001)

Online Text of Bill (Requires PDF) -- CWLA Summary

Key Points:

- *Age*: 72 hours
- *Safe Havens*: Law enforcement officers, Emergency medical technicians, Hospitals, 911 responders
- *Liability*: Immune from civil or criminal prosecution

No Data

Alaska, Hawaii, Massachusetts, Nebraska, New Hampshire, Pennsylvania, Vermont, Virginia, Wyoming

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Print Now

URL: http://www.cwla.org/programs/pregprev/flocrittsafehaven.htm

Planned Parenthood of Alaska

Testimony
House Bill 322

Planned Parenthood of Alaska applauds Representatives LeDoux and Representative Gruenberg for introducing the "Safe Surrender" bill. House Bill 322 allows a parent to surrender a newborn at a designated safe place where someone can attend to the infant's needs. Any parent who relinquishes an unharmed infant under this bill will have total anonymity. Sixteen states have already passed similar laws. President Bush signed the first Safe Surrender bill into law while he was governor of Texas.

The decriminalization of infant abandonment is an important step to help young women deal with an unwanted pregnancy. Alaska's open adoption law, while securing adoptee rights, may deter women from adoption and push them toward abortion. Many of these women do not want their families to know about their pregnancy. There is no guarantee of privacy in open adoption; furthermore, adoption is a complicated and intrusive process. It requires permission from the father, questioning, paper work, etc. Safe Surrender is an offer of assistance to women who might otherwise abandon a newborn. Under existing law the police track down a woman who abandons an infant. Illegal abandonment can lead to a baby's death and the mother's prosecution.

This is a first step. Safe Surrender does not address the societal ills that lead to unintended pregnancy and the drastic acts of infanticide and abandonment. Teens need to know if they make a mistake their family and society will treat them compassionately. Young people need to have honest and medically accurate sex education. We need enhanced out-reach and support for at-risk parents. Greater access to birth control, including insurance coverage of all FDA approved contraception, should be made available.

Therefore, Planned Parenthood of Alaska supports this bill.

Sincerely,

Clover Simon, MSW
Planned Parenthood of Alaska
4001 Lake Otis Pkwy
Anchorage, AK 99503
907.770.9705

ALASKA WOMEN'S LOBBY

AWL Mission: To defend and advance the rights and needs of Women, Children and Families in Alaska

P.O. Box 20891
Juneau, Alaska 99802-0891
www.akwomenslobby.org

Position Paper
HB 322, SAFE SURRENDER OF BABIES
April 2006

The Alaska Women's Lobby supports HB 322. The bill is an important safety measure to increase the likelihood that troubled parents will turn over their newborns to medical or other emergency personnel instead of leaving them in potentially dangerous situations.

Beginning in Texas in 1999, "Baby Moses laws" or infant safe haven legislation has been enacted as an incentive for mothers in crisis to safely relinquish their babies to a safe haven where the baby will be protected and provided with medical care until a permanent home can be found. Safe haven laws generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for safely surrendering the baby to a safe haven. According to a report of the Alan Gattmacher Institute, as of June 2005, these laws exist in 45 states. It is time for Alaska to join these other states.

Variations by state include limits on the infant's age at time of relinquishment (72 hours to 1 year) and the people and places authorized to accept the infants (e.g., Emergency Medical Services, hospitals, fire stations, and police stations). Most state policies adopt a "no questions asked" approach, but some states require that a person accepting the infant ask for a medical history. We support the one year time length this bill suggests.

One important issue to consider as the bill moves through the committee process is public education about the bill when it becomes law. In 2003, 15 states had mandated public information campaigns to increase public awareness of safe haven legislation. Several common elements of such campaigns include toll-free hotlines, pamphlets and written material, and public service messages. Funding should be provided so that once the service is available, those who are eligible to receive the infants can be trained and the public can be made aware of the service throughout the state.

Thank you for hearing this piece of legislation. Creating avenues for parents to relinquish newborns in a way that protects both the parents and the newborns should lessen the odds of finding babies abandoned in dumpsters or empty parking lots.

STATE OF ALASKA

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

OFFICE OF CHILDREN'S SERVICES

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110630
JUNEAU, ALASKA 99811-0630
PHONE: (907) 465-3170

April 24, 2006

Honorable Representative Gabrielle LeDoux
Alaska State Legislature
State Capitol, Room 412
Juneau, AK 99801-1182

Dear Representative LeDoux:

Thank you for your work this legislative session on House Bill 322. Passage of this bill may prevent harm to some infants as it allows a parent to safely surrender their child without fear of criminal prosecution.

The Office of Children's Services supports HB 322 and is interested in collaborating with you on new state law that would provide an infant who may otherwise be abused or neglected with the opportunity for a stable and loving home.

Thank you for your commitment to Alaska's children and their families.

Sincerely,

Tammy Sandoval
Deputy Commissioner

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB322-DHSS-OCS-04-24-06
( ) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: INFANTS SAFELY SURRENDERED BY A PARENT SHORTLY AFTER BIRTH
RDU: Children's Services
Component: Family Preservation

Sponsor: LEDOUX
Requester: HOUSE (HES)
Component No.: 1628

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	100.0	100.0	100.0	100.0	100.0	100.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUE (0)						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF	100.0	100.0	100.0	100.0	100.0	100.0
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Estimate of any current year (FY2006) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill provides for the safe surrender of infants whereby the parent may not be criminally prosecuted for surrendering an infant in the manner described.

Drawing on other states' experience with similar laws, the OCS believes that adequate public education is key to success. If the desired effect of this bill is to stop abandonment of babies, the public needs to be made aware of their options. This fiscal note would cover estimated costs for a campaign that provides for media advertising, brochures, posters, etc., to be distributed in hospitals, clinics, doctors' offices, public assistance offices, and other public areas. Estimated costs are based on similar campaigns and promotions managed within OCS.

Prepared by: Tammy Sandoval, Deputy Commissioner
Phone 465-3191
Division: Office of Children's Services
Date/Time 04/21/2006
Approved by: Karleen Jackson, Commissioner
Date 04/24/2006
Agency: Department of Health and Social Services

(Revised 9/7/2005 OMB)

HB

323

REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

SPONSOR STATEMENT

HB 323

"An Act relating to material witnesses; amending Rule 58.1, Alaska Rules of Civil Procedure, and Rule 204, Alaska Rules of Appellate Procedure; and providing for an effective date."

Written in Alaska's constitution is an acknowledgement of an individual's freedom and an individual's corresponding obligation to our state. Striking a balance between the needs of society to prosecute crime, the rights of a defendant to witnesses on their behalf and the right of an individual to be free from unreasonable arrest is the central issue in House Bill 323 Detention of Material Witnesses.

A material witness is a "witness whose testimony is crucial to either the defense or prosecution."[1] Regrettably, citizens do not always come forward to fulfill their "corresponding obligations" as a witness during the investigation or prosecution of a crime. Nearly all states and the federal government have adopted statutes dealing with the pretrial confinement of material witnesses and HB 323 sets the guidelines and protections for issuing a material witness order in the state of Alaska.

Giving the court system the ability to compel a person to testify protects both the needs of society and the rights of the individual. For law enforcement officials, material witnesses can be the deciding factor in bringing indictments and prosecuting crime. For defendants, a material witness order can ensure that testimony crucial to their defense is offered. For individuals, the process in HB 323 protects them from unreasonable arrests or confinement.

HB 323 attempts to balance these competing interests to give law enforcement officials tools to fight crime and individuals testimony crucial to their defense.

[1] Black's Law Dictionary 826 (5th ed. abridged 1983)

Email: Representative_Kevin_Meyer@legis.state.ak.us • **Toll Free:** (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

January 9, 2006

REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

MEMORANDUM

DATE: **January 9, 2006**

TO: **Representative Kevin Meyer**

FROM: **Mike Pawlowski**

RE: **Sectional Analysis for HB 323**
(Version No. 24 – LS1198\G)

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 Adds a new section authorizing a prosecuting attorney or defense attorney to apply to the superior court for an order compelling a person to appear at a material witness hearing under certain circumstances. Authorizes the Superior Court to issue an order to appear, an arrest with a warrant, and an arrest without a warrant. Establishes procedures for a material witness hearing. Specifies restrictions on and conditions of the confinement or release of a material witness. Entitles a material witness to fees provided in Rule 7, Alaska Rules of Administration. Authorizes a material witness to apply to the court for an order directing that a deposition be taken, and specifies the appealable nature of a material witness order.

Section 2. Gives the court of appeals appellate jurisdiction in actions and proceeding issued under section 1.

Section 3. Requires the office of public advocacy to provide legal representation to material witnesses.

Section 4. Adds an indirect court rule amendment to Alaska Rules of Civil Procedure.

Section 5. Specifies an effective date of July 1, 2006.

Email: Representative_Kevin_Meyer@legis.state.ak.us • Toll Free: (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

REPORT AND RECOMMENDATIONS RELATING TO MATERIAL WITNESSES

NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
Newark, New Jersey 07102
(201)648-4575

C:\rpts\matwit.doc

INTRODUCTION

The New Jersey material witness statute authorizes a judge to detain a person believed to be a material witness to a crime.[1] The statute, enacted in 1898, is not written in plain English and does not address the problems posed by the arrest and confinement of material witnesses who are often innocent witnesses to crimes. The material witness statute implicates the right of citizens to remain free from unreasonable arrest, and the state's need to prosecute crime. The present material witness statute does not protect either the citizen's or the state's interest as the decision in State v. Misik discussed below makes clear. The right of innocent citizens to remain free, as well as the need to prosecute crime, are serious matters requiring fair and well-balanced legislation. The New Jersey Law Revision Commission recommends the repeal of the present material witness statute and the adoption of its proposed statute.

In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the court found that a warrant issued under the material witness statute violated the Fourth and Fourteenth Amendments of the United States Constitution, and article 1, paragraph 1 of the New Jersey Constitution, because the statute failed to require a pre-deprivation hearing and to prescribe other procedural safeguards to enforce due process requirements.[2] The court prescribed guidelines to implement the statute consistent with the federal and New Jersey constitutions. The court recommended that the Supreme Court promulgate rules or that "the legislature enact additional statutory provisions in order to carry out the mandate of the Due Process Clause of both the federal and state constitutions." Id. at 385.

The Supreme Court Committee on Criminal Practice is considering the issue, but has not yet recommended a rule.[3] Because the guidelines that would make the material witness statute meet constitutional concerns raise issues of substantive law, the legislature, not the Supreme Court, is the proper forum to establish the guidelines. The rule-making power of the Supreme Court is limited to procedural issues. N. J. Const. art. IV, ° II, Ā 3. Even if the court rule deals with some matters of substance, it cannot treat

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1 The term "material witness statute" refers to N.J.S. 2A:162-2, N.J.S. 2A:162-3 and N.J.S. 2A:162-4. The key provision, N.J.S. 2A:162-2, provides: "Every judge and magistrate shall, when in his judgment the ends of justice so require, bind by recognizance with sufficient surety, any person who shall declare against another person for any crime punishable by death or imprisonment in state prison, or any person who can give testimony against any person so accused of any such crime, whether the offender be arrested, imprisoned, bailed or not." N.J.S. 2A:162-3 mainly concerns the conditions of confinement; N.J.S. 2A:162-4 requires the county to pay the witness a fee of $3 per day of confinement.

2 The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The fourteenth amendment provides in pertinent part that "nor shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV.

Article 1, paragraph 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N. J. Const. art. 1, Ā 1.

3 The existing court rule, R. 3:26-3, merely reiterates the broad language of N.J.S. 2A:162-2.

the range of substantive issues or employ the range of remedies available to legislation. Moreover, to rely on the Supreme Court Committee on Criminal Practice to amend the existing court rule on material witnesses to rectify the constitutional defects of a statute is an abdication of legislative responsibility.

The Commission identified several procedural and substantive problems in the material witness statute: N.J.S. 2A:162-2 through N.J.S. 2A:162-4. First, N.J.S. 2A:162-2 does not specify whether a criminal action must be pending before the state may apply for a warrant to arrest a person alleged to be a material witness. The failure of the statute to specify the preconditions for a warrant have engendered uncertainty as to when the statute is applicable. Second, the statute does not contain procedural safeguards to make certain that the arrest and detention of the witness comply with federal and state constitutional due process requirements. Third, while 2A:162-3 forbids lodging the material witness in an ordinary jail, it does not require the court to impose the least restrictive constraint to detain the witness. Fourth, 2A:162-4 sets the payment of an unreasonably low fee of $3 per day for detained witnesses. The material witness statutes do not deal with other issues such as warrantless arrests, finality of the order for purposes of appeal and the effects of taking the witness's deposition.

The Commission examined the material witness statutes of other states, the case law in New Jersey and the scholarly literature. None of the foreign material witness statutes addressed all important issues. The Commission thus drafted a comprehensive statute to regulate judicial orders directing the appearance or detention of a material witness. The proposed statute has three objectives: (1) to strike a balance between the need of the law enforcement community to prosecute crime and the right of the citizen not charged with a crime to remain free from arrest, (2) to resolve the inconsistencies in the common law, and (3) to establish the payment of a reasonable fee for confined witnesses and create other procedural rules to effectuate the interests of the law enforcement community and material witnesses.

The statute affords both the state and the defendant the right to apply for material witness orders if three threshold requirements are met: (1) an indictment, accusation or complaint for a crime is pending, or a criminal investigation before a grand jury is pending (2) the alleged witness has information material to the pending criminal action and (3) the alleged witness is unlikely to respond to a subpoena. The proposed statute specifies the content of the application for a material witness order, and lists the rights that must be afforded to a witness during a material witness hearing. In addition, the proposed statute establishes standards of review for the issuance of material witness orders, and sets the conditions of release and of confinement. The statute permits police officers to arrest an alleged material witness without a warrant in emergencies, but requires them to bring the witness before a judge immediately after arrest. Finally, the proposed statute increases to $40 per day the fee paid to detained witnesses, and gives material witnesses additional rights such as the right to appeal and to modify the material witness order.

Background

a. Material witness: definition and foreign law.

A material witness is "a witness whose testimony is crucial to either the defense or prosecution." Black's Law Dictionary 826 (5th ed. abridged 1983). "In most states, he may be required to furnish bond for his appearance and, for want of surety he may be confined until he testifies." Id. A material witness often is an innocent observer of a crime who happens to be in the wrong place at the wrong time. For example, a tourist from California who witnesses a crime in Newark by chance and gives a report to the police is a potential material witness in New Jersey. One court has observed that a material witness is "an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government ... the deprivation of liberty, although temporary by definition, can be measured in weeks or even months." Application of Cochran, 434 F. Supp. 1207, 1213 (D. Neb. 1977).

Material witness statutes authorize the arrest and detention of alleged material witnesses. Carlson, Jailing the Innocent: The Plight of the Material Witness, 55 Iowa L. Rev. 1 (1969). "Nearly all states and the federal government have enacted provisions dealing with pretrial confinement of material witnesses." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. U. L. Q. 1, 21 (1980). Witness laws are justified under the concept that every citizen has a duty to testify. Hurtado v. United States, 410 U.S. 578, 589 (1973). Most material witness statutes are old. For example, the New Jersey material witness statutes derive from 1898. "[W]hen dusted off and put into operation, these archaic statutes result in innocent citizens spending weeks -- even months -- in custody." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. L. Q. 1 (1980).

Several states have developed modern legislation in the area of material witness detention. E.g. Ariz. Rev. Stat. Ann. sec. 13-4083(b) (1989) (deposition of detained witness requires discharge); Hawaii Rev. Stat. sec 835-2 (1988) (detention system based on material witness order); and N.Y. Crim. Pro. Law sec. 620.20 (McKinney 1984) (detention system based on material witness order). However, notwithstanding this legislative activity, most state statutes contain little or no procedural or substantive protection for detained witnesses. Carlson and Voelpel, supra at 27. None of the newer state statutes address the constitutional concerns raised in State v. Misik, or resolve the procedural and substantive problems identified by the Commission. Thus none of the material witness laws of foreign states provides a model to follow.

The federal material witness law also does not constitute a model law. The federal law is not a single comprehensive statute. Rather, the federal material witness law consists of a matrix of statutes and rules. 18 U.S.C. 3144 (1989)(release or detention of a material witness); 18 U.S.C. 3142 (1989)(release or detention of a defendant pending trial); 28 U.S.C. 1821 (1989)(witness fees); 18 U.S.C. 3006(a) (1989) (assignment of counsel rule); Fed. R. Crim. P. 46 (release from custody); and Fed. R. Crim. P. 15 (deposition of detained witness). In addition to being unduly complicated, the federal statutes and rules fail to authorize the arrest of material witnesses. The

judiciary had to infer the power to arrest from the federal material witness statute. Bacon v. United States, 449 F. 2d 933, 937 (9th Cir. 1971).

b. New Jersey law and State v. Misik

In Misik, a Superior Court judge issued a warrant for the arrest of Janos Misik as a material witness pursuant to N.J.S. 2A:162-2 based on the ex parte application of a detective of the New Jersey State Police. State v. Misik, 238 N. J. Super. at 371. The application alleged that Misik had information concerning the commission of environmental crimes and that his arrest was necessary because he would not be available for service by subpoena. Id.

The affidavit in support of the application contained the following allegations: (1) Misik had knowledge that his employer, Petro King Terminal Corporation, released petroleum products into the Hackensack River, (2) Misik, though initially cooperative with the police, had missed an appointment, (3) Misik was a foreigner suspected of being an illegal alien because he once failed to produce his "green card" to the police, (4) Misik lived on a boat displaying a "for sale" sign, (5) Misik did not give the police the exact location of his boat in the marina and (6) Misik had a criminal record for drug offenses. State v. Misik, 238 N. J. Super. at 371. No criminal action or proceeding against Petro King Terminal Corporation was pending when the State applied for the arrest warrant.

The court held an in camera discussion with an assistant prosecutor concerning the State's authority to obtain an ex parte arrest warrant of Misik. The assistant prosecutor maintained that the State had authority to arrest Misik without a warrant. State v. Hand, 101 N. J. Super. 43, 55-56 (Law Div. 1968) holds that a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is a material witness. The court then issued the warrant which authorized the police to arrest Misik. The warrant required the police to bring Misik before the court immediately after his arrest so that the court could inform Misik of his rights and the nature of the proceedings.

The police arrested Misik the day the arrest warrant was issued and, contrary to the court's order, brought Misik to the prosecutor's office, not the court. State v. Misik, 238 N. J. Super. at 372. The police subjected Misik to a lengthy custodial interrogation and detained him overnight in jail where he was treated like a prisoner contrary to N.J.S. 2A:162-3. The next morning Misik was brought to court handcuffed and in prison garb. State v. Misik, 238 N. J. Super. at 372. Misik's attorney objected to the procedures adopted by the court to issue the arrest warrant and requested leave to file a brief challenging the constitutionality of the material witness statutes. The court released Misik on his own recognizance, subject to the condition that he report weekly to the prosecutor's office for one month. Id. The court informed the prosecutor that if the State did not convene a grand jury investigation of Petro King Terminal Corporation within one month, the court would vacate the reporting requirement. Id. The court further

granted leave to Misik's attorney to file a brief challenging the constitutionality of the material witness statute. Id. at 373.

At the hearing, the court held that the federal and New Jersey constitutions require that an alleged material witness be provided with notice and an opportunity to be heard before being detained under the New Jersey material witness statute. State v. Misik, 238 N. J. Super. at 388. The court also held that a criminal action must be pending against an accused before a person may be apprehended or detained as an alleged material witness. Id. In support of its holding, the court found that the "express language of the statute compels the conclusion that a criminal action must be pending against an accused before a court may sanction the detention of a person believed to be a material witness." Id. at 375. The court also noted that "it is well-established that our Rules do not give a prosecutor any pre-trial subpoena power independent of the grand jury." Id. at 376. Consequently, Misik was free to refuse to cooperate with the police. Because the prosecutor could not compel Misik's appearance by subpoena absent a grand jury investigation, the court found that the prosecutor had misused the material witness statute to detain and arrest Misik. Id. at 377.

The court also found that Misik was deprived of his constitutional rights under both the federal and New Jersey constitutions. The judge stated that "Misik was arrested without prior notice and an opportunity to be heard before he was arrested and committed to jail", and thus found that the arrest and detention violated the due process requirements of the Fourteenth Amendment of the United States Constitution and article 1, paragraph 1 of the New Jersey Constitution. State v. Misik, 238 N. J. Super. at 377. The court also stated that "it was patently unreasonable under the Fourth Amendment of the United States Constitution to have arrested and detained Misik because of his refusal to cooperate with the police." Id. While the court found that the procedures followed to arrest Misik violated the federal and New Jersey constitutions, the court did not hold that the New Jersey material witness statute (N.J.S. 2A:162-2) was unconstitutional. Id. at 384.

Because the statute is silent as to constitutional safeguards, the court looked to federal and foreign state legislation for guidance. E.g. 18 U.S.C. ° 3142 (e) and (f) and ° 3144 (detention subject to clear and convincing evidence standard); N.Y. Crim. Pro. Law. ° 620.30 (McKinney 1984) (order directs alleged material witness to appear at pre-deprivation hearing); Neb. Rev. Stat. ° 29-507 (1989) (specifies the conditions of release for material witnesses). The court, deciding the New Jersey statute could be rehabilitated if procedural safeguards were established, then set forth a list of guidelines to fill the gap. State v. Misik, 238 N. J. Super. at 385-86.

Most important, the court held that a person could not be arrested or detained as a material witness unless the justification for the arrest or detention was based on probable cause. The judge stated, "This court believes that at the very least a heavy burden of proof should be imposed upon the State whenever it decides it is necessary to seek detention of an innocent person, not even a suspect, much less an accused." Id. at 383. The court cited Addington v. Texas, 441 U.S. 418 (1979) in support of its position. In

Addington, the United States Supreme Court established the "clear and convincing" standard of proof to commit a person for mental care on an involuntary basis. The United States Supreme Court stated, "The function of a standard of proof, as that concept is embodied in the Due Process and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. at 423 (citation omitted). The court in Misik found that the interests at stake in material witness proceedings are the liberty interests of an innocent citizen and the State's need to gather evidence of crimes. The clear and convincing standard allocates the risk of error to the state and thus minimizes the risk of erroneous decisions. It also reflects the value society places on individual liberty." Id. at 426 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)]. The court in Misik thus held that the "clear and convincing" standard is constitutionally compelled for the arrest and detention of material witnesses.

Prior to Misik, the two principal decisions on New Jersey material witness law were State v. Price, 108 N. J. Super. 272 (Law Div. 1970) and State v. Hand, 101 N. J. Super. 43 (Law Div. 1968). When read together, Price, Hand and Misik do not constitute a coherent statement of law on material witnesses, and therefore do not provide clear guidelines to the court, prosecutor or defendant. The inconsistencies concern primarily the right of the police to arrest a material witness without a warrant, and the necessity of a pending criminal action to detain a material witness.

For example, the court in Price indicated that the police may not hold a potential witness unless there is a pending criminal action against an accused. State v. Price, 108 N. J. Super. at 280-281. To the contrary, the court in Hand sanctions the detention of a person believed to be a material witness despite the absence of any formal charges against an accused. State v. Hand, 101 N. J. Super. at 56. The court in Misik held that a pending criminal action is necessary to obtain a material witness order. State v. Misik, 238 N. J. Super. at 385. In addition, the court in Hand authorizes the warrantless arrest of potential material witnesses. State v. Hand, 101 N. J. Super. at 56. The court in Misik prohibits the warrantless arrest of potential material witnesses. State v. Misik, 238 N. J. Super. at 388. The court in Misik stated that "under no circumstances may a person be arrested or detained without court process ...." Id. The decisions in Misik and Hand thus directly contradict one another on this issue. Because Price, Hand and Misik are law division opinions, each decision has equivalent legal weight and thus the inconsistencies generated by them unsettle the law on material witnesses.

PROPOSED STATUTE

2C:104-1. Definitions

a. A material witness is a person who has information material to the prosecution or defense of a crime.

b. A material witness order is a court order fixing conditions necessary to secure the appearance of a person who is unlikely to respond to a subpoena and who has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury.

Source: New

COMMENT

This section defines a material witness and a material witness order. A material witness is a person who has information crucial to the prosecution or defense. A material witness order is a court order finding that a person is a material witness, and commanding the person to appear before the court. A material witness order may not issue unless the court finds that: (1) a person is a material witness, (2) the person is unlikely to respond to a subpoena and (3) there is a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury. The material witness statute therefore does not apply to offenses that are not crimes. See, N.J.S. 2C:1-4(a) and 1-14(k). The inclusion of definitions cures the defect noted by State v. Misik that the former statute did not define a material witness or material witness order. State v. Misik, 238 N. J. Super. 367, 374 (Law Div. 1989)

2C:104-2. Application for material witness order

a. The Attorney General, county prosecutor or defendant in a criminal action may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing, if there is probable cause to believe that (1) the person has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, and (2) the person is unlikely to respond to a subpoena. The application may be accompanied by an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts supporting the belief that the person possesses information material to the pending criminal action or investigation, and (4) a summary of the facts supporting the claim that the alleged material witness is unlikely to respond to a subpoena.

c. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

Source: 2A:162-2

COMMENT

Subsection (a) substantially changes the source section, which merely established the power to bind material witnesses. Subsection (a) allows the Attorney General, county prosecutor or defendant to apply to the Superior Court for a material witness order. The present statute does not give defendants the right to apply for material witness orders. Subsection (a) gives defendants the right to secure the testimony of witnesses to balance the powers of the State and defendants in criminal proceedings. The federal statute and the laws of several foreign jurisdictions provide defendants the right to obtain material witness orders. 18 U.S.C. 3144 (1989); Hawaii Rev. Stat. sec. 835-2(a)(1988); N.Y. Crim Pro. Law sec. 620.20 (1) (McKinney 1984); and N.C. Gen. Stat. sec. 15A-803(a)(1990).

The Superior Court may issue a material witness order when there is probable cause to believe that: (1) there is a pending indictment, accusation, or complaint for a crime, or a criminal investigation before a grand jury, (2) a person possesses information material to the pending criminal action and (3) the person is unlikely to respond to a subpoena. These requirements derive from the guidelines prescribed by State v. Misik, 238 N. J. Super. at 385-386.

However, the requirements of this subsection differ in one important respect from the Misik guidelines. Misik limits applications for material witness orders to situations where a complaint, indictment or accusation is pending. Subsection (a), in addition, allows applications where a grand jury is conducting an investigation. The addition recognizes that a witness's testimony may be necessary to determine the identity of the person to be indicted. To the extent that the present statute may not allow the use of material witness orders in aid of grand jury investigations this section represents a change in the law. See, State v. Price, 108 N. J. Super. 272, 280-281 (Law Div. 1970).

Subsection (b) requires the party making an application for a material witness order to provide facts to the court establishing the need for the material witness order. The affidavit must contain a summary of the facts believed to be known by the alleged material witness and their relevance to the pending investigation. The affidavit also must contain a summary of facts showing that the person is unlikely to respond to a subpoena, and a summary of facts supporting the affiant's belief that the person is a material witness. The requirements of subsection (b) are intended to provide a court with information needed to make an independent judgment on the application. Mere conclusory allegations do not satisfy these requirements. When applicable, subsection (b) requires the application to include a copy of the pending indictment, accusation or complaint.

Subsection (c) governs the special situation where the applicant seeks the arrest of the alleged material witness. In this event, the application must establish that, without the arrest, the material witness will not be available as a witness.

2C:104-3. Order to appear

a. If there is probable cause to believe that a material witness order may issue against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness.

b. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing, unless the judge adjusts the time period for good cause, and shall advise the person of: (1) the time and place of the hearing and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.

Source: New

COMMENT

Subsection (a) identifies the standard of review governing an application for a material witness order. The standard of review is the probable cause standard. To issue a material witness order, the judge must find that it is more probable than not that the facts set forth in the application are true.

Subsection (b) requires the party who obtains a material witness order to serve a copy of the order and application upon the person named in the application. Service must take place at least 48 hours before the hearing unless the judge enlarges or contracts the prescribed time period. The judge may alter the prescribed time period if the party making the application for a material witness order demonstrates that exigent circumstances justify a deviation from the prescribed time period. The order to appear informs the alleged material witness of the time and place of the hearing and of the right to counsel.

2C:104-4. Arrest With Warrant

a. If there is clear and convincing evidence that the person named in the application will not be available as a witness unless immediately arrested, the judge may issue an arrest warrant. The arrest warrant shall require that the person be brought before the court immediately after arrest. If the arrest does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge.

b. The judge shall inform the person of: (1) the reason for arrest, (2) the time and place of the hearing to determine whether the person is a material witness, and (3) the right to an attorney and to have an attorney appointed if the person cannot afford one.

c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless confined, the judge may order the person confined until the material witness hearing which shall take place within 48 hours of the arrest.

Source: 2A:162-2

COMMENT

Subsection (a) establishes the standard of review that the judge applies to an application for an arrest warrant. The standard of review is the "clear and convincing" evidence standard. State v. Misik, 238 N. J. Super. at 386. The "clear and convincing" standard is the intermediate standard of proof located between the preponderance of the evidence and reasonable doubt standards. Addington v. Texas, 441 U.S. 418, 423 (1979). While it is difficult to define the term "clear and convincing" evidence precisely, it denotes a rigorous level of proof. The "clear and convincing" standard of proof minimizes the risk of erroneous decisions and reflects the value society places on individual liberty. Id. at 425 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)].

Subsection (a) also directs that the person be brought before the court immediately after arrest. If the arrest takes place outside of regular court hours, the person must be brought before the emergency-duty Superior Court judge. The purpose of this requirement is to make certain that the arrested person has an immediate judicial review of the arrest. The statute does not specify a penalty for noncompliance with the requirement to bring the arrested person before the court immediately after arrest, since a violation of a court order is a contempt of court.

Subsection (b) requires the judge at this first appearance to inform the arrested person of the time and place of the material witness hearing and the right to counsel.