



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS



Telephone: (517) 373-5383
Fax: (517) 373-1986

House Bill 4170 (Substitute H-1 as passed by the House)
House Bills 4171 and 4173 (as passed by the House)
House Bill 4174 (Substitute H-1 as passed by the House)
Sponsor: Representative Jim Tedder (H.B. 4170)
Representative Laura Cox (H.B. 4171)
Representative Hank Vaupel (H.B. 4173)
Representative Leslie Love (H.B. 4174)
House Committee: Health Policy
Senate Committee: Health Policy

Date Completed: 10-3-17

CONTENT

House Bill 4170 (H-1) would add Part 56B (Physician Orders for Scope of Treatment) to the Public Health Code to do the following:

- **Require the Michigan Department of Health and Human Services (DHHS) Director to form an advisory committee to make recommendations for a standardized physician orders for scope of treatment (POST) form, which would contain medical orders jointly agreed to by a patient and his or her health professional, and an information form.**
- **Require the Department to create the POST form and information form, and promulgate rules, after considering the committee's recommendations.**
- **Prescribe the information that would have to be included on the POST form and the information form.**
- **Specify the individuals who could consent to the medical orders on a POST form, and who could revoke a POST form.**
- **Permit a health professional who was treating a patient in an acute care setting to use a POST form as a communication tool.**
- **Provide that an individual would not be subject criminal prosecution, civil liability, or professional disciplinary for providing medical treatment or emergency medical services consistent with a POST form.**

House Bills 4171, 4173, and 4174 would include the provisions for a POST form in the Estates and Protected Individuals Code, the Adult Foster Care Facility Licensing Act, and the Michigan Do-Not-Resuscitate Procedure Act, respectively.

House Bills 4171, 4173, and 4174 (H-1) are tie-barred to House Bill 4170, which is tie-barred to each of those bills. Each bill would take effect 90 days after it was enacted.

House Bill 4170 (H-1)

Definitions

"Patient" would mean an adult with an advanced illness or an adult with another medical condition that, despite available curative therapies or modulation, compromises his or her health so as to make death within one year foreseeable though not a specific or predicted prognosis.

"Advanced illness" would mean a medical or surgical condition with significant functional impairment that is not reversible by curative therapies and that is anticipated to progress toward death despite attempts at curative therapies of modulation.

"Health professional" would mean an individual licensed, registered, or otherwise authorized to engage in the practice of a health profession under Article 15 (Occupations).

"Attending health professional" would mean a physician, physician's assistant, or certified nurse practitioner, who had primary responsibility for the treatment of a patient and was authorized to issue the medical orders on a POST form. To qualify as an attending health professional, a certified nurse practitioner would have to act under the supervision of the physician in a manner consistent with Article 15.

"Patient representative" would mean a patient advocate or a guardian.

Advisory Committees

Within 90 days after the bill took effect, the Michigan Department of Health and Human Services Director would have to appoint members of and convene an ad hoc advisory committee. The committee would have to consist of 11 members. Four members would have to be individuals representing each of the following:

- A health facility or an adult foster care facility, or an organization or professional association representing health facilities or adult foster care facilities.
- A palliative care provider.
- Emergency medical services (EMS) personnel.
- A medical control authority.

Seven members could include, but not be limited to, individuals representing a health professional and a patient advocacy organization.

"Health facility" would mean a health facility or agency licensed Under Article 17 (Facilities and Agencies). It would not include a hospital unless specifically provided.

Within 180 days after the committee was convened, it would have to make recommendations to the DHHS on all of the following:

- The creation of a standardized POST form.
- Medical orders to be included on the POST form that related to emergency and nonemergency situations.
- The creation of an information form.
- The procedures for the use of a POST form within a residential setting.
- The circumstances under which a photocopy, facsimile, or digital image of a completed POST form would be considered valid for purposes of a health professional, a health facility, an adult care facility, or EMS personnel complying with the orders for medical treatment on the POST form.

After the Department received the recommendations from the committee, it would be abolished.

After considering the recommendations of the advisory committee, the Department would have to do all of the following:

- Develop a standardized POST form that had a distinct format and was printed on a specific stock and color of paper to make the form easily identifiable.
- Develop an information form.
- Promulgate rules for the procedures for the use of a POST form within a residential setting, including the circumstances under which a photocopy, facsimile, or digital image of a completed POST form would be considered valid for purposes of a health professional, a health facility, an adult foster care facility, or EMS personnel complying with the medical orders on the form.

("Residential setting" would mean a setting outside of a hospital, including an adult foster care facility.)

Within three years after the bill took effect, the Director would have to appoint an ad hoc advisory committee consisting of 11 members in the same manner as the ad hoc committee would have to be appointed as described above.

The Director would have to call the first meeting of the committee. Within 90 days after the first meeting of the committee was convened, it would have to submit to the DHHS a report that contained recommendations on all of the following:

- Any changes to the rules promulgated by LARA that the committee considered necessary or appropriate.
- Any changes to the POST form or the information form that the committee considered necessary or appropriate.
- Any legislative changes that the committee considered necessary or appropriate.

After the DHHS received the recommendations from the committee, it would be abolished.

Standardized POST Form

The POST form would at least have to include all of the following:

- A space for the printed name of the patient, the patient's age, and the patient's diagnosis or medical condition that warranted the medical orders on the POST form.
- A space for the signature of the patient or the patient representative who consented to the medical orders indicated on the POST form and a space to indicate the date that patient or the patient representative signed the form.
- A space for the printed name and signature of the attending health professional who issued the medical orders on the POST form.
- Sections containing medical orders that directed specific types or levels of treatment to be provided in a setting outside of a hospital to which a patient or a patient representative could provide consent.
- A space for the date and the initials of the attending health professional and either the patient or his or her representative, and a statement that, by dating and initialing the POST form, the individuals confirmed that the medical orders on it remained in effect.
- A statement that a patient or patient representative had the option of executing a POST form and that consenting to the medical order on the POST form was voluntary.
- A statement that the POST form would be void if the patient's name, age, diagnosis or medical condition, or signature, or the name of the attending health professional, was not provided on it.
- A statement that if a section on the POST form regarding a specific type of level of treatment was left blank, the blank section would be interpreted as authorizing full treatment for the patient for that treatment, but a blank section on the form regarding a

specific type or level of treatment would not invalidate the entire form or other medical orders on the form.

- A space for the printed name and contact information of the patient representative, if applicable.

The Department also would have to include on the POST form a statement that for the form to remain in effect, it would have to be reviewed, dated, and initialed by either the attending health professional and the patient or the attending health professional and the patient representative, if any of the following occurred:

- One year had expired since the patient and the attending health professional or the patient representative and the attending health professional had signed or initialed the POST form.
- There had been an unexpected change in the patient's medical condition.
- The patient was transferred from one care setting or care level to another care setting or care level.
- The patient's treatment preferences changed.
- The patient's attending health professional changed.

The Department could publish information or materials regarding the POST form on its website.

Information Form

The Department would have to include on the information form at least all of the following:

- An explanation of who was considered a patient with an advanced illness for purposes of executing a POST form.
- An explanation of how a patient advocate was designated under the Estates and Protected Individuals Code.
- A statement indicating that by, signing the information form, the patient or the patient representative acknowledged that he or she had the opportunity to review the information form before executing a POST form.
- A space for the signature of the patient or the patient representative and a space to indicate the date the patient or the patient representative reviewed the information form.

The Department also would have to include on the information form an introductory statement in substantially the following form:

The POST form is intended to be used as part of an advance care planning process. The POST form is not intended to be used as a stand-alone advance health care directive that unilaterally expresses the patient's medical treatment wishes. The POST form contains medical orders that are jointly agreed to by the patient and the attending health professional or the patient representative and the attending health professional. The medical orders on the POST form reflect both the patient's expressed wishes or best interests and the attending health professional's medical advice or recommendation. An advance care planning process that uses the POST form must recommend that the patient consider designating an individual to serve as the patient's patient advocate to make future medical decision on behalf of the patient if the patient becomes unable to do so.

("Patient advocate" would mean an individual presently authorized to make medical treatment decisions on behalf of a patient under Sections 5506 to 5515 of the Estates and Protected Individuals Code.)

Before a patient, or his or her representative, and an attending health professional signed a POST form, the attending health professional would have to provide the patient or the patient representative with the information form and, if the patient did not have a patient representative, the attending health professional would have to recommend to the patient that he or she considered designating an individual to serve as the patient's patient advocate to make future medical decisions on behalf of the patient if he or she became unable to do so. The attending health professional also would have to consult with the patient or patient representative and explain to the patient or patient representative the nature and content of the POST form and the medical implications of the medical orders contained on the form. The patient or patient representative would have to sign the information form at the time he or she signed the POST form. The attending health professional who signed the POST form would have to place the information form that was signed by the patient or the patient representative in the patient's permanent record. The attending health professional who signed the POST form also would have to obtain a copy or duplicate of the form and make it part of the patient's permanent medical records. The patient or the patient representative would have to maintain possession of the original POST form.

Consent

The following individuals could consent to the medical orders contained on a POST form:

- The patient if he or she were capable of participating in the medical treatment decisions included on the POST form.
- A patient representative who was a patient advocate or a guardian, if a patient were not capable of participating in the medical treatment decisions included on the POST form.

If a patient representative were consenting to the medical orders contained on the POST form, the patient representative would have to comply with the patient's expressed wishes. If the patient's wishes were unknown, the patient representative would have to consent to the medical orders in the following manner:

- If the patient representative were a guardian, in a manner that was consistent with the patient's best interest.
- If the patient representative were a patient advocate, subject to Section 5509(1)(e) of the Estates and Protected Individuals Code.

(That section specifies that a patient advocate may make a decision to withhold or withdraw treatment that would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.

"Guardian" would mean a person with the power and duties to make medical treatment decisions on behalf of a patient to the extent granted by court order under Section 5314 of the Estates and Protected Individuals Code.)

Execution

If a POST form were validly executed after a patient advocate designation that contained written directives regarding medical treatment, or another advance health care directive that contained written directives regarding medical treatment, the medical orders indicated on the POST form would be presumed to express the patient's current wishes.

If a POST form were validly executed after a do-not-resuscitate (DNR) order was executed under the Michigan Do-Not-Resuscitate Procedure Act, the medical orders indicated on the form would be presumed to express the patient's current wishes.

If an individual had reason to believe that a POST form had been executed contrary to the wishes of the patient or, if the patient were a ward, contrary to the wishes or best interests of the ward, the individual could petition the probate court to have the form and the condition of its execution reviewed. If the probate court found that the POST form had been executed contrary to the wishes of the patient or, if the patient were a ward, contrary to the wishes or best interests of the ward, the court would have to issue an injunction voiding the effectiveness of the POST form and prohibiting compliance with the form.

A health facility or agency would not be permitted to require the execution of a POST form under proposed Part 56B as a condition for admission or the receipt of services.

Revocation

A patient could revoke a POST form at any time and in any manner that the patient was able to communicate his or her intent to revoke the POST form. If the patient's revocation were not in writing, an individual who witnessed the patient's expressed intent to revoke the POST form would have to describe in writing the circumstances of the revocation, sign the writing, and provide the writing to the patient, patient representative, or attending health professional, as applicable.

The patient representative could revoke the POST form at any time the patient representative considered revoking the POST form to be consistent with the patient's wishes or, if the patient's wishes were unknown, in the patient's best interests.

If a change in the patient's medical condition made the medical orders on the POST form contrary to generally accepted health care standards, the attending health professional could revoke the POST form. If an attending health professional revoked a POST form, he or she would have to take reasonable actions to notify the patient or the patient representative of the revocation and the change in the patient's medical condition that warranted the revocation.

Upon revocation of a POST form, the patient, patient representative, or attending health professional would have to write "revoked" over the signature of the patient or patient representative, as applicable, and over the signature of the attending health professional, on the POST form that was contained in the patient's permanent medical record and on the original POST form if the original POST form were available. If a patient or patient representative revoked the POST form, the patient or patient representative would have to take reasonable actions to notify one or more of the following of the revocation:

- The attending health professional.
- A health professional who was treating the patient.
- The health facility that was directly responsible for the medical treatment or care and custody of the patient.
- The patient.

Compliance with POST Form

Emergency medical services personnel would have to provide or withhold treatment to a patient according to the orders on a POST form unless any of the following applied:

- The emergency medical services being provided by the EMS personnel were necessitated by an injury or medical condition that was unrelated to the diagnosis or medical condition that was indicated on the patient's POST form.
- The orders on the POST form requested medical treatment that was contrary to generally accepted health care standards or emergency medical protocols.
- The POST form contained a medical order regarding the initiation of resuscitation if the patient suffered cessation of both spontaneous respiration and circulation, and the EMS personnel had actual notice of a DNR order that was executed under the Michigan Do-Not-Resuscitate Procedure Act, after the POST form was validly executed.
- The POST form had been revoked in a manner provided in Part 56B and the EMS personnel had actual notice of the revocation.

("Actual notice" would mean that term as defined in Section 2 of the Michigan Do-Not-Resuscitate Procedure Act (the physical presentation of an order, a revocation of an order, or other written document authorized under the Act from or on behalf of a declarant). "Actual notice" also would include the physical presentation of a POST form or a revoked POST form, or the electronic transmission of a POST form or a revoked POST form if the recipient of the form sent an electronic confirmation to the patient, patient representative, or attending health professional, who sent the electronic transmission, indicating that the POST form or revoked POST form had been received. It also would include knowledge of a patient's intent to revoke the POST form by a health professional who was treating the patient, by an attending health professional, or by EMS personnel.)

If a health professional or health facility were unwilling to comply with the medical orders on a validly executed POST form because of a policy, religious belief, or moral conviction, the health professional or health facility would have to take all reasonable steps to refer or transfer the patient to another health professional or health facility. If an adult foster care facility were unwilling to comply with the medical orders on a validly executed POST form for the reasons described in these provisions, the adult foster care facility would have to take all reasonable steps to refer or transfer the patient to another adult foster care facility (as provided in House Bill 4173).

Immunity from Liability

A person would not be subject to criminal prosecution, civil liability, or professional disciplinary action for any of the following:

- Providing medical treatment that was contrary to the medical orders indicated on a POST form if the person did not have actual notice of the form.
- Providing medical treatment that was consistent with the medical orders indicated on a POST form if the person did not have actual notice that the form was revoked.
- Providing emergency medical services consistent with generally accepted health care standards or emergency medical protocols, regardless of the medical orders indicated on the POST form.

Scope of Part 56B

The provisions of Part 56B would be cumulative and would not impair or supersede a legal right that a patient or patient representative could have to consent to or refuse medical treatment for himself or herself or on behalf of another.

Part 56B would not create a presumption that a patient who had executed a POST form intended to consent to or refuse medical treatment that was not addressed in the medical orders on the POST form.

The part also would not create a presumption that a patient or patient representative who had not executed a POST form intended to consent to or refuse any type of medical treatment.

Insurance

A life insurer would be prohibited from doing any of the following because of the execution or implementation of a POST form:

- Refusing to provide or continue coverage to the patient.
- Charging the patient a higher premium.
- Offering a patient different policy terms because the patient had executed a POST form.
- Considering the terms of an existing policy of life insurance to have been breached or modified.
- Invoking a suicide or intentional death exemption or exclusion in a policy covering the patient.

A health insurer would be prohibited from doing any of the following:

- Requiring the execution of a POST form to maintain or be eligible for coverage.
- Charging a different premium based on whether a patient or patient representative had executed a POST form.
- Considering the terms of an existing policy to have been breached or modified if the patient or patient representative had executed a POST form.

Medical Control Authority

Under the Code, a medical control authority must establish written protocols for the practice of life support agencies and licensed EMS personnel within its region. The medical control authority must develop and adopt the protocols in accordance with procedures established by the Department and must include certain specific protocols.

Under the bill, a medical control authority also would have to develop and adopt protocols for complying with Part 56B.

House Bill 4171

Under the Estates and Protected Individuals Code, an individual, on his or her own behalf, or any person interested in the individual's welfare, may petition for a finding of incapacity and appointment of a guardian.

Before a petition is filed, the court must provide the person intending to file the petition with written information that sets forth alternatives to appointment of a full guardian, including a limited guardian, conservator, patient advocate designation, DNR order, or durable power of attorney with or without limitations on purpose, authority, or time period, and an explanation of each alternative. The bill would include a POST form in the list of alternatives the court must provide to the intended filer.

Upon the filing of a petition, the court must set a date for the hearing on the issue of incapacity.

A guardian ad litem appointed for an individual alleged to be incapacitated has certain duties, including explaining to the individual the hearing procedure and the individual's right to request limits on the guardian's power to execute a DNR order on behalf of the individual.

The bill would permit the individual also to request a limitation on the guardian's power to execute a POST form.

Additionally, the bill would require the guardian ad litem to inform the individual that if a guardian were appointed, the guardian could have the power to execute a POST form on behalf of the individual and, if meaningful communication were possible, discern if the individual objected to having a POST form executed on his or her behalf.

The Code requires a guardian to consider the appropriateness of executing a patient advocate designation, DNR order, or durable power of attorney with or without limitations on purpose, authority, or duration. The bill would require a guardian also to consider the appropriateness of executing a POST form.

The bill also would require a guardian to inform the court whether a ward objected to having a POST form executed on his or her behalf.

The Code provides that the power of a guardian to execute a DNR order does not affect or limit his or her power to consent to a physician's order to withhold resuscitative measures. The bill also provides that a POST form would not affect or limit a guardian's power to consent to a physician's order to withhold resuscitative measures.

Under the bill, a guardian would have the power to execute, reaffirm, and revoke a POST form on behalf of a ward. However, a guardian would not be permitted to execute a POST form unless the guardian did all of the following:

- Within 14 days before executing the POST form, visited the ward and, if meaningful communication were possible, consulted with the ward about executing the POST form.
- Consulted directly with the ward's attending physician as to the specific medical indications that warranted the POST form.

If a guardian executed a POST form on behalf of a ward, after the form was first executed, the guardian would have the duty to do all of the following, at least annually:

- Visit the ward and, if meaningful communication were possible, consult with the ward about reaffirming the form.
- Consult directly with the ward's attending physician as to specific medical indications that could warrant reaffirming the form.

Additionally, the Code requires a guardian to report certain information on the condition of the ward and the ward's estate. The bill would require the guardian also to report whether he or she had executed, reaffirmed, or revoked a POST form on behalf of the ward during the past year.

House Bill 4173

The Adult Foster Care Facility Licensing Act specifies that a licensee providing foster care to a resident who is enrolled in a licensed hospice program and whose assessment plan includes a DNR order, is considered to be providing protection to the resident for purposes of the Act and rules promulgated under the Act if, in the event the resident suffers cessation of both spontaneous respiration and circulation, the licensee contacts the licensed hospice program. Under the bill, this provision also would apply to an assessment plan that included a validly executed POST form under proposed Part 56B of the Public Health Code.

Additionally, the bill would require an adult foster care facility to comply with medical orders provided on a validly executed POST form as required under Part 56B.

If an adult foster care facility were unwilling to comply with the medical orders provided on a validly executed form because of a policy, religious belief, or moral conviction, the facility would have to take all reasonable steps to refer or transfer the patient to another adult foster care facility.

House Bill 4174 (H-1)

Under the Michigan Do-Not-Resuscitate Procedure Act, one or more of the following health professionals who arrive at a declarant's location outside of a hospital must determine if the declarant has one or more vital signs, whether or not the health professional views or has actual notice of an order that is alleged to have been executed by the declarant or other person authorized to execute an order on the declarant's behalf:

- A paramedic.
- An emergency medical technician.
- An emergency medical technician specialist.
- A physician.
- A nurse.
- A medical first responder.
- A respiratory therapist.

The bill would include a physician's assistant among the health professionals subject to this requirement.

The Act specifies that if one of the above health professionals determines that the declarant has no vital signs, and if the health professional determines that the declarant is wearing a DNR identification bracelet or has actual notice of a DNR order for the declarant, the health professional must not attempt to resuscitate the declarant. Under the bill, the health professional would be subject to the following provision.

If a health professional had actual notice of a DNR order and were aware of the existence of a validly executed POST form under proposed Part 56B of the Public Health Code, that contained a medical order regarding the initiation of resuscitation if the individual suffered cessation of both spontaneous respiration and circulation, the health professional would have to comply with the most recent order or form.

MCL 333.20919 et al. (H.B. 4170)
MCL 700.1106 et al. (H.B. 4171)
MCL 400.706 et al. (H.B. 4173)
MCL 333.1052 et al. (H.B. 4174)

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

House Bill 4170 (H-1)

The bill would have a minor negative fiscal impact on both State and local units of government. Under the bill, the State would face a one-time cost increase in order to create an ad hoc advisory committee and finance the required duties of the committee. The bill also would have

a future minor negative cost implication because of the requirement to create of a follow-up ad hoc advisory committee in three years' time.

Under the bill, the Department of Health and Human Services would have to create procedures to guide the development of protocols for complying with POST forms to be implemented later by regional medical control authorities. The development of these protocols would create minor one-time administrative costs.

House Bills 4171, 4173, and 4174 (H-1)

The bills would have no fiscal impact on State or local government.

Fiscal Analyst: Ellyn Ackerman
Ryan Bergan
Josh Sefton

SAS\S1718\s4170sa

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.