

Subject: Guidance on Abortion Laws

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From: General Counsel

To: **REDACTED BY SUBMITTER**



TO: University of Idaho Employees

FROM: General Counsel

DATE: Sept. 23, 2022

SUBJECT: Guidance on Abortion Laws

University of Idaho is committed to operating within the confines of laws of the state of Idaho which restrict expenditures of funds and activities of university employees in the areas of abortion and contraception. The Office of General Counsel is distributing this memorandum summarizing these laws, in the context of university operations, to assist university employees in complying with the restrictions.

Executive Summary

During all times that university employees are performing their jobs, the law prohibits them from taking any action, and from using or providing institution funds or facilities, for any of the following:

- Promoting abortion;
- Providing or performing an abortion;

- Counseling in favor of abortion;
- Referring for abortion;
- Providing facilities for an abortion or for training to provide or perform an abortion;
- Dispensing drugs classified as emergency contraception by the FDA, except in the case of rape as defined in section 18-6101, Idaho Code;
- Contracting with abortion providers; and
- Advertising or promoting services for abortion or for the prevention of conception.

Individuals convicted of violating these laws face some, or all, of the following:

- Misdemeanor or felony convictions (with imprisonment and fines);
- Mandatory reimbursement of funds used in violation of the law;
- Mandatory loss of state employment; and
- Permanent bar from future state employment.

Some related activities are permitted, with certain limitations, such as:

- Directing students to sources of information outside the university; and
- Having classroom discussions on topics related to abortion when limited to discussions and topics relevant to the class subject and instructor neutrality in the discussion.

Conclusion

In this new and evolving legal landscape, how these laws will be enforced remains unclear. Accordingly, the university and its employees should be aware of the potential risks and penalties

associated with conduct that may be perceived to violate the laws. The Office of the General Counsel is working with select university administrators to gather questions and prepare answers which will be posted as an ongoing Q&A. In addition, we will continue to monitor application of the laws statewide and apprise the university of any changes to this guidance accordingly. Questions can be directed to counsel@uidaho.edu.

Summary of Applicable Laws and Recommendations for Compliance in the Context of University Operations

Counselling in favor of abortion – Referring for abortion – Promoting abortion – Providing facilities for abortion or abortion training

(No Public Funds for Abortion Act - Idaho Code Section 18-8701 through Section 18-8711)

Prohibited Activities under the law

University employees, while on the job, cannot take any actions or utilize any university resources to:

- Counsel in favor of abortion
- Promote abortion
- Provide institutional facilities or institutional funding for providing an abortion or abortion training
- Provide referrals for abortion
- Contract with abortion providers
- Dispense emergency contraception as classified by the FDA

Counseling or interacting with students. Those university employees who counsel, or otherwise regularly interact with

students in any fashion as part of their employment, should be aware of these prohibitions and proceed cautiously at any time that a discussion moves in the direction of reproductive health, including abortion. If a discussion moves into this area, students should be clearly informed that Idaho law prohibits the university and its employees from counseling in favor of abortion, referring for abortion or promoting abortion. The earlier this occurs in a conversation that is moving into the subject, the less the risk to the employee.

Non-counseling context. These prohibitions apply to the activities of university employees while “on the job” even outside the context of counselling students. Employees who wish to counsel, promote or advocate in favor of abortion must do so outside of the performance of their job duties and without use of any university resources. In addition, there can be no statements or inferences that the university supports any such activities or positions. This is similar to the university’s policy on political activities which, while recognizing the rights of individuals to engage in political activities, requires that this be done on the employee’s personal time and without any use of university resources.

Providing for or performing abortions or providing referrals for abortion. Providing or performing abortions is prohibited. Irrespective of the new laws, this is not an activity expected of university employees nor a service provided by the university. That said, the new laws now make doing so on university time or using university resources a crime. Providing referrals for abortion is also prohibited while on university time or using university resources.

Contracting with abortion providers. Contracting with abortion providers by the university is barred. This is being addressed through university Purchasing.

Dispensing certain drugs. Dispensing certain drugs is also barred. The university and its employees are barred from dispensing drugs classified as emergency contraception by the FDA, except in the case of rape as defined in section 18-6101, Idaho Code.

Advertising or offering abortion services and birth control

(Idaho Code Section 19-603)

Prohibitions for advertising or promoting services for abortion or for the prevention of conception are found in Idaho Code §18-603. The language of this statute is not a model of clarity, stating that a person other than a licensed physician, or a licensed health care provider acting under a physician or under a physician's order, "*who wilfully [sic] publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise to assist in the accomplishment of any such purpose, is guilty of a felony.*"

While the topic of abortion (including facilitating a miscarriage) are addressed under the discussion above, the scope of what is meant by "prevention of conception" and to have "offered services by notice, advertisement, or otherwise..." is unclear and untested in the courts. Since violation is considered a felony, we are advising a conservative approach here, that the university not provide standard birth control itself.

Specific activities that may continue

University employees may, with certain limitations:

- Direct students to sources of information outside university
- Have classroom discussions on topics related to abortion or contraception limited to discussions and topics relevant to

the class subject and instructor neutrality

- Provide condoms for the purpose of helping prevent the spread of STDs and not for purposes of birth control

Information outside university. Directing students to sources of information outside of the university is permitted if done properly and with neutrality. Directing students to private groups or agencies of another state, where students can receive a discussion of *all* aspects of the topic and be presented with *all alternatives* legally available to them, is not barred, however, in doing so, university employees must remain neutral on the subject of abortion and simply reference the ability of the outside sources to have a broader discussion of all aspects of the topic.

General Counsel's Office is preparing a short, written statement that can be given to students who are seeking broader information in this area than what the university can give.

Classroom Discussions. Classroom discussion of the topic should be approached carefully. While academic freedom supports classroom discussions of topics related to abortion, these should be limited to discussions and topics relevant to the class subject. The laws discussed above, specifically including those addressing promoting abortion, counseling in favor of abortion and referring for abortion, will remain applicable. Academic freedom is not a defense to violation of law, and faculty or others in charge of classroom topics and discussion must themselves remain neutral on the topic and cannot conduct or engage in discussions in violation of these prohibitions without risking prosecution.

Counseling on or Providing Birth Control. Counselling on birth control, as well as providing the means for birth control, can be done through the licensed physicians and their health care workers at Student Health locations run by Moscow Family

Medicine, our Student Health provider. The university can provide condoms for the purpose of helping prevent the spread of STDs but not for purposes of birth control.

CTC and WWAMI

Licensed professionals in the Counselling and Testing Center (CTC) who are engaged in sessions with students falling under the medical counselor/patient privilege are being addressed separately through the CTC director. WWAMI students and faculty are being addressed separately through the WWAMI director.

General Counsel

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