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LEGISLATIVE UPDATE FROM THE 94TH GENERAL ASSEMBLY: ARKANSAS BILLS AFFECTING PREGNANT AND POSTPARTUM MOTHERS

Garrett Bannister*

I. INTRODUCTION

The State of Arkansas credits itself as being one of the most “pro-life” states in the Nation.¹ Indeed, after the United States Supreme Court overturned *Roe v. Wade*² and its progeny in its landmark decision, *Dobbs v. Jackson Women’s Health Org.*,³ Arkansas was swift in restricting almost all abortions in the Natural State.⁴

Arkansas’s decision was met with plaudits from its supporters and reproval by its dissenters.⁵ Those who disapprove

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1. See ARK. CONST. amend. LXVIII, § 2 (“The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.”); see also *Governor Hutchinson Addresses Arkansas Rating as No. 1 Pro-Life State*, ARK. MONEY & POL., [https://perma.cc/E9UZ-HLMH] (last visited Apr. 20, 2023).

2. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

3. 142 S. Ct. 2228 (2022).

4. See Arkansas Human Life Protection Act, No. 180, § 2, 2019 Ark. Acts 746, 751 (codified at ARK. CODE ANN. §§ 5-61-301 to -304 (West 2019) (effective June 24, 2022)); see also Ronak Patel & Michael Hibblen, *Arkansas Officials React to Abortion Ruling; ‘Trigger Law’ to Take Effect*, KUAR NEWS (June 24, 2022, 11:14 AM), [https://perma.cc/674U-LS8N].

5. Compare Madison Hardcastle, *Arkansas Being the Most Pro-Life State Described as ‘Incredible News’*, KATV NEWS (Jan. 5, 2023, 2:40 PM), [https://perma.cc/NJ2T-8K7P] (“Arkansans should be proud of their State legislators for enacting such good laws.”), with Gwen Faulkenberry, *‘Pro-Life’ Doesn’t Mean What Arkansas Lawmakers Think It Means*,

of both the *Dobbs* decision and Arkansas's laws prohibiting abortion often claim that "pro-life" or "anti-abortion" legislation is dangerous to women's health, specifically, their reproductive health and rights.⁶ To address these concerns, Arkansas's 94th General Assembly has proposed several bills that would provide pregnant and postpartum mothers and their children with medical and financial assistance.⁷ Specifically, these bills would provide

ARK. TIMES (Sept. 28, 2021, 11:13 AM), [<https://perma.cc/88UZ-ZZHR>] ("For the loudest pro-lifers there's no mercy for anyone who is no longer a fetus: The buck stops at birth.").

6. Evan D. Bernick & Jill Wieber Lens, *Abortion, Original Public Meaning, & the Ambiguities of Pregnancy*, 123 MICH. L. REV. (forthcoming 2023) (manuscript at 67-68) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342905]).

7. See S.B. 195, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (amending and updating laws regarding newborn surrenders); S.B. 111, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (allowing certain insurers to offer family leave insurance); S.B. 74, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (amending the authority of a surrogate under the Arkansas Healthcare Decisions Act); H.B. 1098, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (clarifying that a parent may leave a newborn child with medical provider staff following delivery of the child under the Safe Haven Act); H.B. 1035, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (requiring screening for depression of birth mothers at the time of birth and mandating that insurance policies cover screening for depression of birth mothers at the time of birth); H.B. 1102, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (ensuring that newborns are screened for conditions recommended by the U.S. Department of Health and Human Services); H.B. 1006, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (requiring certain employers to provide paid maternity leave); H.B. 1103, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (providing home visitation services for a newborn infant and the parents of a newborn infant); H.B. 1161, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (creating the Support for Pregnant and Parenting Students Act); H.B. 1034, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (regulating the reimbursement rate of a birth under an insurance policy in Arkansas and establishing the reimbursement rate for a birth to be at least the same as the reimbursement rate for a birth by cesarean section); H.B. 1011, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (requiring Medicaid coverage and reimbursement for depression screening for pregnant women); H.B. 1010, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (requiring Medicaid coverage for postpartum mothers for one year after giving birth); S.B. 426, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (extending maternity leave for State employees); H.B. 1196, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (modifying the requirements for public housing and creating the Housing Welfare Reform Act of 2023); H.B. 1385, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (ensuring that healthcare providers are properly reimbursed by the Arkansas Medicaid Program for providing long-acting reversible contraception immediately and during postpartum); H.R. 1010, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (recognizing the importance of pregnancy help organizations in Arkansas); H.J.R. 1008, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (amending the Arkansas Constitution concerning reproductive freedom and repealing ARK. CONST. amend. LXVIII, § 2); H.B. 1301, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (amending the Arkansas Human Life Protection Act and the Arkansas Unborn Child Protection Act to exclude an abortion in the case of a fetal abnormality incompatible with life); H.B. 1684, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (adding an exception to the Arkansas Human Life Protection Act and the Arkansas Unborn Child Protection Act to save health of the mother in a medical emergency); H.B. 1670, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (amending the Arkansas Human Life Protection Act and the Arkansas Unborn Child Protection Act to add an exception for a pregnancy that is the result of incest).

pregnant and postpartum mothers with health screenings, help high school-aged parents graduate, and require insurance coverage for a variety of postpartum health initiatives.⁸

This article is not a discussion of *Dobbs*' legal or political merits. Rather, this article addresses some of the Arkansas General Assembly's most notable attempts to accommodate mothers during its first legislative session in the wake of *Dobbs*. This article will explain what these bills aim to accomplish and will flag the areas that may have unanticipated legal consequences.

II. PROPOSED BILLS

A. House Bill 1006: An Act to Amend the Law Regarding Employment; to Require Certain Employers to Provide Paid Maternity Leave; and for Other Purposes⁹

State Representative Aaron Pilkington (R–Dist. 69) introduced House Bill 1006 on November 18, 2022.¹⁰ The stated purpose of this bill is to give mothers who work for businesses providing abortion-related assistance an additional incentive to carry their pregnancies to term.¹¹

This bill, if enacted, would require employers who cover the costs of abortions or abortion-related travel expenses to offer at least twelve weeks' paid maternity leave to full-time mothers who give birth to their child.¹² The employer would not be required to file maternity leave paperwork with the State.¹³ Mothers could not combine state- and employer-provided maternity leave

8. See Mary Hennigan, *In Post-Roe Arkansas, a Bipartisan Bill Would Support Pregnant and Parenting Students*, ARK. TIMES, (Feb. 2, 2023, 10:03 AM), [<https://perma.cc/4HWP-4GJE>].

9. As of the time of writing, H.B. 1006 failed to clear the Arkansas Senate Public Health, Welfare, and Labor Committee. Representative Pilkington has stated that he will ask the Senate Committee to send the bill to Senate floor for a vote. See Michael R. Wickline, *Bill Requiring Companies That Pay Expenses for Abortions to Provide 12 Weeks of Paid Maternity Falls Short in Committee*, ARK. DEMOCRAT-GAZETTE (Feb. 23, 2023, 3:20 AM), [<https://perma.cc/PC8A-CLAR>].

10. Legislative History of H.B. 1006, ARK. STATE LEGISLATURE., [<https://perma.cc/MS3S-CFJK>] (last visited Apr. 21, 2023).

11. See Wickline, *supra* note 9.

12. H.B. 1006, 94th Gen. Assemb., Reg. Sess. § 1, at 2 (Ark. 2023).

13. *Id.*

benefits to receive additional time off.¹⁴ And it would permit covered employers to combine several forms of paid leave to satisfy the twelve-week leave requirement, if applicable.¹⁵ The employee would be provided 100% salary, or the average of twelve weeks' pay (whichever is applicable) during the mother's leave.¹⁶

1. Which employers would be affected if the bill is enacted?

The bill would apply to any employer who: (1) covers abortions or travel expenses related to abortions; (2) employs at least fifty people (3) each working day¹⁷ (4) for at least twenty weeks¹⁸ of the current or preceding calendar year, (5) offers a health benefit plan, and (6) is engaged in or affects commerce.¹⁹ A covered employer is also anyone who acts directly or indirectly in the interest of a covered employer to any of the employees of the covered employer (e.g., a joint-owner), a successor in interest of a covered employer, and public agencies.²⁰

2. Who would be the direct beneficiaries of this proposed legislation?

To be entitled to the twelve-week maternity leave, a mother must: (1) have recently given birth, (2) have worked for the same covered employer for at least one year, (3) be classified as a full-time employee for the covered employer at the time of giving birth, and (4) be enrolled in the employer's health benefits plan.²¹

14. *Id.*

15. *Id.*

16. *Id.*

17. Ark. H.B. 1006 § 1, at 1. The term "working day" is ambiguous. It is unclear whether this means (i) "business day" (i.e., Monday through Friday), or (ii) any day the employer is operating business.

18. *Id.* It is unclear whether the twenty weeks requirement is fulfilled by (i) multiplying twenty by seven (140) and then aggregating the total number of days the employer is operating business, triggering the requirement once the employer has 140 days of operations, or (ii) twenty weeks is calculated by the traditional work week (Monday through Friday), thus resulting in the requirement being triggered at 100 operating days.

19. *Id.*

20. *Id.*

21. *Id.* § 1, at 1-2.

3. *What does this process look like? A Hypothetical:*

Angela begins working for Walmart²² on January 1. Walmart hires her as a part-time employee responsible for watching over and assisting with the Walmart self-checkout. Angela becomes pregnant on April 10. On June 1, Walmart promotes Angela to full-time worker status, Angela enrolls in Walmart's health insurance offered as part of the promotion, and Angela can take up to two weeks paid time off per year. Angela gives birth on January 12 of the following year.

If H.B. 1006 were law, Angela would be entitled to receive at least twelve weeks' paid maternity leave: Angela is the birth mother, she is enrolled in Walmart's health benefit plan, she has worked for Walmart for at least one year at the time she gave birth, and she is a full-time employee at the time she gave birth. Further, Walmart employs at least fifty people for at least twenty weeks' worth of working days and covers travel expenses to obtain an abortion. Walmart, however, would be permitted to credit Angela's two weeks' paid time off toward her twelve-week maternity leave.²³ That is, if Angela had not used any paid time off, Walmart could apply those two weeks' paid leave toward the twelve weeks maternity leave. Thus, Angela would still receive twelve weeks' maternity leave, but she would not have any more paid personal time off until the next year.

4. *What are the anticipated legal issues with this bill?*

The biggest issue with this bill is that it does not specify whether the woman qualifying for the paid maternity leave must be an Arkansas resident. This raises jurisdictional issues: any businesses that affect commerce in Arkansas (as well as meeting the other criteria set forth above) would be subject to this requirement. In other words, because the bill does not specify the mother claiming the leave need not be an Arkansas resident, a woman working for Walmart in New York could, theoretically, demand leave and sue in Arkansas if the leave is denied.

22. Emma Goldberg, *Walmart Expands Employee Abortion Coverage and Will Include Travel Expenses*, N.Y. TIMES (Aug. 19, 2022), [<https://perma.cc/3B6G-EMF6>].

23. Ark. H.B. 1006 § 1, at 2.

The bill also does not state whether the woman needs to keep her child. That is, the bill would not prevent a woman from giving birth, giving her child up for adoption, and then claiming the paid maternity leave. This may or may not be a drafting issue since the purpose of the bill is to encourage mothers to keep their pregnancies.

Another potential legal issue is whether the State can specifically target companies who employ more than fifty people, as opposed to requiring all businesses covering abortion-related expenses to provide this leave. The Arkansas Constitution requires that “[i]n all cases where a general law can be made applicable, no special law shall be enacted.”²⁴ The fifty-employee requirement is likely intended to target big name businesses in Arkansas (e.g., Walmart),²⁵ but that is unlikely to render the law unconstitutional. This is because the bill is, at least facially, drafted to apply generally (i.e., to *any and all*) to businesses that employ more than fifty people and cover abortion-related expenses.²⁶ Moreover, this bill will likely jump the “targeting” hurdle because “covered employers” under this bill are the same businesses affected by the Federal Family and Medical Leave Act—this bill just adds the requirements that the business must be one that covers abortion-related expenses and the leave must be paid.²⁷

This bill does, however, raise an interesting *policy* issue. By only requiring businesses who employ more than fifty people and cover abortion-related expenses to also provide paid maternity leave, would this incentivize women to seek employment with larger businesses instead of smaller businesses? If this did occur, it would unintentionally harm smaller businesses by creating more demand for employees and the negative consequences that follow (e.g., less business hours and less profits). But this risk would be very difficult to determine because every business provides different benefits for its employees, which may or may

24. ARK. CONST. art. V § 25.

25. See generally Goldberg, *supra* note 22.

26. On the other hand, “special legislation” would “arbitrarily separate some person, place or thing from those upon which, but for such separation, it would operate.” See Whorton v. Dixon, 363 Ark. 330, 336, 214 S.W.3d 225, 230 (2005) (cleaned up) (quoting Eady v. Lansford, 351 Ark. 249, 92 S.W.3d 57 (2002)).

27. See Ark. H.B. 1006 § 1, at 1-2. See generally 29 U.S.C. § 2611(4)(A).

not include paid maternity leave. This factor could provide some mitigation against the unintended harm.

B. House Bill 1103: An Act to Create the Universal Newborn Home Birth Visitation Program to Provide Home Visitation Services for a Newborn Infant and the Parents of a Newborn Infant; and for Other Purposes²⁸

State Representative Julie Mayberry (R–Dist. 27) introduced House Bill 1103 on January 10, 2023.²⁹ The Universal Newborn Home Birth Visitation Program (the “Program”) would expand an already existing program so that it would eventually apply to the entire State.³⁰ The bill would be enacted at sections 20-8-1201 to -1208 of the Arkansas Code.³¹

1. What would the Home Visitation Program do?

House Bill 1103 would offer postpartum home visits for mothers free of cost.³² The purpose of these visits would be to

28. State Representative Pilkington introduced a similar but less comprehensive bill, H.B. 1035, which would (1) require medical providers attending a birth to facilitate an optional depression screening for a postpartum mother within six weeks of birth and (2) require insurance companies and Medicaid to cover the costs of their insureds’ screenings. H.B. 1035, 94th Gen. Assemb. Reg. Sess. (Ark. 2023). H.B. 1035 passed both the House of Representatives and the Senate and was transferred to Governor Sanders’s desk on March 17, 2023. See Legislative History of H.B. 1035, ARK. STATE LEGISLATURE, [<https://perma.cc/8S3Y-RMAB>] (last visited Apr. 21, 2023). Governor Sanders signed this bill into law on March 21, 2023. *Id.*

29. Legislative History of H.B. 1103, ARK. STATE LEGISLATURE, [<https://perma.cc/SS7B-QC7K>] (last visited Apr. 21, 2023).

30. According to State Representative Mayberry, “We do have some home-visiting programs that exist, but when we compare what Arkansas has been putting financially toward those programs, it’s been piddly compared to other states.” Ozarks at Large, *The Possibility of Universal Newborn Home Health in Arkansas*, KUAF NAT’L PUB. RADIO, at 00:38, (Jan. 27, 2023, 1:10 PM), [<https://perma.cc/4MM7-G74V>]. One such home-visiting program has been offered to residents of Union County, Arkansas, since 2011 and is funded through philanthropy. *Family Connects Union County*, ARK. HOME VISITING NETWORK, [<https://perma.cc/J7U3-5644>] (last visited May 12, 2023); *Home Visiting Programs*, ARK. DEPT. OF HEALTH, [<https://perma.cc/5GCF-2PTX>] (last visited May 12, 2023).

31. Title 20 is Arkansas’s Public Health and Welfare title; subtitle 2 concerns health and safety matters; and chapter 8 lists several state-wide health programs. ARK. CODE ANN. §§ 20-8-101 to -1104.

32. H.B. 1103, 94th Gen Assemb., Reg. Sess. (Ark. 2023). The Department of Health would not be required to offer the Program in every county the first few years of implementation; rather, the Department would only be required to initially offer it in ten counties. For similar home-visitation programs currently in place, see *Mental Health*

screen mothers for postpartum depression and to connect the mother and/or child with any services that may help them develop in a healthy way.³³ This is a voluntary program and declining home visits would carry no negative consequences when applying for other services available to pregnant women.³⁴ The visits would also be available to adoptive parents and mothers who undergo a stillbirth.³⁵

The bill would require at least one home nurse visit within thirty days after the birth.³⁶ But the Program would “[p]rovide the opportunity for no more than two (2) additional visits during the newborn infant’s first three (3) months of life, with such additional visits occurring based on the family’s choice, as well as need and availability as determined by the [Department of Health].”³⁷

The home visits would be conducted by nurses licensed in Arkansas.³⁸ The nurses would conduct “an evidence-based evaluation of the physical, emotional, and social factors affecting [parents and their infants], including . . . a health and wellness check of the newborn and an assessment of the physical and mental health of [the postpartum mother]”.³⁹ The nurses would also “provide support services to the parent of a newborn infant, including . . . breastfeeding education and assistance to [postpartum mothers] in recognizing the symptoms of, and coping

Concerns for New Parents, N.J. DEP’T. OF HEALTH, [https://perma.cc/WSC8-Z99W] (last visited Apr. 21, 2023) and *Maternal, Infant and Early Childhood Home Visiting (MIECHV)*, OR. HEALTH AUTH., [https://perma.cc/L6YL-V32A] (last visited April 21, 2023).

33. Commenting on H.B. 1103, State Representative Mayberry also stated in a radio interview with KUAF that “[t]he goal of this bill is to make sure that every new mom feels loved and supported, ‘and that every new baby comes into the world with extra help.’” Ozarks at Large, *supra* note 30, at 00:18. The anticipated benefits are to “enable a [postpartum mother] to access the clinical and social resources the woman needs to successfully navigate the transition from pregnancy to parenthood,” and to reduce the rates of “morbidity and mortality” in postpartum mothers (like hemorrhaging or a pulmonary embolism). H.B. 1103, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

34. H.B. 1103, 94th Gen. Assemb., Reg. Sess. § 1, at 4 (Ark. 2023).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* When asked if Arkansas currently has the ability to divert nursing resources to a home visitation program like this one, Representative Mayberry indicated that Arkansas may not necessarily have a nursing shortage. See Ozarks at Large, *supra* note 30, at 06:54. She responded that Arkansas has enough nurses, but many of them may have left the profession because of burnout. *Id.*

39. Ark. H.B. 1103 § 1, at 4.

with, [postpartum depression].”⁴⁰ The nurses would, in effect, act as a second line of defense (after the family itself) against some of the negative effects that can occur after the birth of a child.

The bill would require the Department of Health to attempt to schedule a home nurse visit prior to a woman’s discharge from the hospital and develop a method for providing information about the Program to parents who have a home birth.⁴¹ The Department of Health would also be required to provide information about and referrals to services that address the specific needs of newborn infants and parents of a newborn infant, e.g., referring postpartum women to a “central intake agency” who would refer the women to community resources, support services, community-based organizations, social service agency programs, and/or medically necessary follow-up healthcare.⁴² And the bill would require the Department of Health to improve State outcomes in areas including maternal health, infant health and development, and parenting skills.⁴³ These requirements are directly aimed at improving Arkansas’s infant mortality rate and maternal death rate, which are among the highest in the Nation.⁴⁴

The bill would also require hospitals and birthing facilities to advise women on the benefits of receiving a home nurse visit within thirty days after an infant’s birth.⁴⁵ And it would require that all health benefit plans offered, issued, or renewed in Arkansas (including Medicaid) cover the prices of services provided under the Program.⁴⁶

40. *Id.* § 1, at 4-5.

41. *Id.* § 1, at 5.

42. *Id.*

43. *Id.* § 1, at 4.

44. See Nat’l Ctr. for Health Stat., *Infant Mortality Rates by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, [<https://perma.cc/6J5D-BH7M>] (last visited May 13, 2023) (indicating that Arkansas’s infant mortality rate is 7.38 per 1,000 live births, surpassed only by Mississippi and Louisiana); Nat’l Ctr. for Health Stat., *Maternal Deaths and Mortality Rates: Each State, the District of Columbia, United States, 2018-2021*, CTRS. FOR DISEASE CONTROL & PREVENTION, [<https://perma.cc/5LHJ-BUBP>] (indicating that Arkansas has the highest maternal mortality rate in the United States).

45. Ark. H.B. 1103 § 1, at 5.

46. *Id.* § 1, at 6-7.

2. *Who would be directly affected?*

Because of the Program’s breadth, several parties would be directly affected by H.B. 1103: the Arkansas Department of Health, insurance companies offering health benefit plans, the Arkansas Department of Human Services, the Arkansas State Insurance Department, home visitation nurses, postpartum mothers opting into the Program, and third-party medical providers who offer medical resources for postpartum mothers.

a. Department of Health

The Arkansas Department of Health would establish the “Universal Newborn Home Nurse Visitation Program” to provide voluntary, home-visitation services for newborn infants and their parents.⁴⁷ This means the Department of Health would need to: (1) develop a plan for the managed, statewide rollout of the Program; and (2) consult with the State Insurance Department to establish criteria for the coverage of services provided under the Program by insurance carriers offering a health benefit plan.⁴⁸

The Department of Health would also need to: (1) create a “resource guide” that provides information about the Program and other services available to pregnant women, postpartum mothers, and parents of a newborn infant; (2) require that this resource guide be distributed to parents when they are informed of the Program (presumably during a woman’s scheduled prenatal visit before delivery); and (3) require that parents of a newborn infant be notified of their right to schedule a home visit.⁴⁹

Next, the Department of Health would be responsible for assessing how effectively the Program supports healthy child development and strengthens families.⁵⁰ This would require the Department of Health to collect and analyze data from third-party providers (e.g., primary care providers, insurance carriers, hospitals, social service providers, community-based organizations, maternal-child healthcare consortia, etc.) who provide care to families opting into the Program.

47. *Id.* § 1, at 3.

48. *Id.* § 1, at 3-4.

49. *Id.* § 1, at 5.

50. *See* Ark. H.B. 1103 § 1, at 8.

While the Department of Health is directly tasked with managing the Program, H.B. 1103 would permit the Department of Health to delegate certain responsibilities to one or more third-party vendors who have expertise in home-visitation programs.⁵¹ These responsibilities include analyzing and evaluating data concerning the effectiveness of the program, hiring and staffing nurses, providing training on the implementation of the Program, and other administrative tasks.⁵² But if a contract is entered into with a third-party vendor, the Department of Health must ensure the data-sharing complies with state and federal law.

b. Insurance Companies⁵³

Private insurance companies offering health benefit plans in Arkansas would need to: (1) notify a covered person of the services provided by the program, upon application by the covered person for coverage of a newborn infant; (2) ensure that the health benefit plan does not contain any provision that requires a covered person to receive the services provided by the Program as a condition of coverage; (3) ensure that the health benefit plan does not contain any provision that denies or limits benefits to the covered person if that person declines the services provided under the Program; (4) waive copayments, coinsurances, deductibles, or any other cost-sharing services under the Program; and (5) submit to the State Insurance Department a report on the claims submitted for services provided under the Program, in a form and manner prescribed by the State Insurance Department.⁵⁴

Moreover, insurance companies would have the discretion to determine reimbursement to healthcare providers for expenses incurred for services provided under the Program utilizing: (1) a value-based payment methodology; (2) an invoice claim process;

51. *See Id.*; *see also, e.g., Family Connects Model*, FAM. CONNECTS INT'L, [<https://perma.cc/M4F3-ADQT>] (last visited May 13, 2023). Representative Mayberry touts Family Connects as an ideal vendor for its success in her interview with KUAF. *See Ozarks at Large*, *supra* note 30, at 03:47.

52. *See* Ark. H.B. 1103 § 1, at 5.

53. For an estimate of the financial and actuarial effects of H.B. 1103 on self-insured health plans, *see* SEGAL, PURPOSE OF HB 1103, at 1-3 (Mar. 13, 2023) [<https://perma.cc/GT64-C9DN>] (Fiscal Impact Statement).

54. Ark. H.B. 1103 §1, at 6.

(3) a capitated payment arrangement; (4) a payment methodology that considers the need for an agency or organization providing services under the program to expand its capacity to provide services and address health disparities; or (5) any other payment arrangement agreed to by the health benefit plan and an agency or organization providing services under the program.⁵⁵

c. Department of Human Services⁵⁶

The Arkansas Department of Human Services—the agency managing the Arkansas Medicaid Program—would follow the same mandates as private insurance companies for notifying insureds of coverage, reporting data to the Department of Health, waiving cost-sharing services, and establishing a method of determining reimbursements.⁵⁷ But the Department of Human Services would have the additional requirement that it must apply for any federal waiver, Medicaid state plan amendment, or other authorization necessary for it.⁵⁸

d. State Insurance Department

The State Insurance Department would be required to do two things. First, the Insurance Department would need to work with the Department of Health during the Program’s “rollout” phase to determine which services should be covered by insurance companies and/or the Medicaid Program.⁵⁹ Second, the Insurance Department would establish a method for insurance companies and the Medicaid Program to submit claims for services provided under the Program.⁶⁰ The Insurance Department would then share the information contained in these reports with Department of Health.⁶¹

55. *Id.*

56. For more on the expected fiscal impact on Medicaid, see ARK. DEP’T OF HUM. SERVS., ARKANSAS MEDICAID PROGRAM—FISCAL IMPACT ESTIMATE FOR HB 1103, at 1-2 (2023), [<https://perma.cc/3JGB-6BCN>] (estimating the annual total impact to be \$2,394,00).

57. Ark. H.B. 1103 § 1, at 7.

58. *Id.* § 1, at 8.

59. *Id.* § 1, at 3-4.

60. *Id.* § 1, at 6.

61. *Id.*

3. *What would be the Program's anticipated legal implications?*

The biggest area of concern with the Program is its requirement that women's and children's medical information be shared between three or possibly four different parties. This raises obvious HIPAA concerns.⁶² While the bill does require that any implicated party comply with all applicable state and federal laws concerning personal medical information, this would still be an area that State agencies, insurance companies, medical providers, and third-party vendors should take particular care.

Next, the Program could raise potential child protection issues. The Program would require nurses to visit a family's home to check the status of the mother and child.⁶³ Licensed nurses are mandated reporters of child maltreatment.⁶⁴ Since nurses normally encounter children in a hospital setting, and the Program is designed to check the health and well-being of the mother and child, the nurses visiting the homes would likely need training on how to identify signs of domestic abuse in the home setting.

There is also a question of liability in the case of injury, illness, or death. If the Program were in place, a family opted into a home visit, and then either the infant or the mother was injured or died from a nurse's malpractice, who would be liable? The bill does not provide for a unique cause of action or expressly limit liability in the case of injury. But the home-visitation nurses would be contracted through the Department of Health,⁶⁵ thereby making them agents of the State (absent any contractual agreement to the contrary). Thus, sovereign immunity would likely preclude the nurses from being liable in the case of injury or death.⁶⁶ Sovereign immunity would not apply, however, to any doctors the women or infants are recommended to visit. Because

62. See, e.g., 45 C.F.R. § 164.502(b)(1) (2013) (“[A] covered entity or business associate must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.”).

63. Ark. H.B. 1103 § 1, at 4-5.

64. See ARK. CODE ANN. § 12-18-402(b)(14) (West 2021).

65. Ark. H.B. 1103 § 1, at 5.

66. If the nurses' contract with the Department of Health did provide that the nurses would maintain liability for any malpractice, the nurses would not be able to raise sovereign immunity as an affirmative defense. Instead, they would be subject to malpractice liability under ARK. CODE ANN. § 16-114-201 (West 2013).

they would not be in privity of contract with the State, any doctors the women visit would be subject to the same malpractice liability set forth in the Arkansas Medical Malpractice Act.⁶⁷

C. Act 128: Support for Pregnant and Parenting Students Act

State Representative Ashley Hudson (D–Dist. 75) introduced House Bill 1161 on January 18, 2023.⁶⁸ This bill passed the Arkansas General Assembly on February 22, 2023, and Governor Sarah Huckabee Sanders signed it into law as Act 128 on February 24, 2023.⁶⁹ Act 128, or the Support for Pregnant and Parenting Students Act (also known as the “Pregnant and Parenting Students Act”), is designed to give parents assistance in completing their education while taking care of their young kids.⁷⁰

Specifically, the Pregnant and Parenting Students Act gives students through high school the ability to excuse school days for pregnancy or parenting-related conditions.⁷¹ These “conditions” include: labor, delivery, recovery after delivery (at least ten days

67. See ARK. CODE ANN. § 16-114-201 to -213.

68. Legislative History of H.B. 1161, ARK. STATE LEGISLATURE, [https://perma.cc/2B5S-DDNF] (last visited May 13, 2023).

69. *Id.* For additional commentary on Act 128, see Neal Earley, *State House Committee Advances Bill That Would Give Pregnant, New Parents Excused Absences*, ARK. DEMOCRAT-GAZETTE (Feb. 28, 2023, 5:08 AM), [https://perma.cc/KLD3-DCPP]. Representative Hudson stated that “the bill is aimed at alleviating a burden for teen parents, who may have to take time off from school to deal with medical and legal appointments that may arrive before or after the birth of a child.” *Id.* She further noted that “outcomes are better for the parent and for the baby if their parents are able to obtain their high school degree Certainly, [it] opens up a lot more opportunity for income, for getting jobs and for furthering their education, which of course opens up a lot more opportunity for their child.” *Id.* Olivia Gardner, Director of Education Policy at Arkansas Advocates for Children and Families, said, “This would lower the chance of a student falling so behind academically that they risk dropping out of school altogether.” *Id.* She went on to note that, “[u]nfortunately[,] this is a sad situation that is all too common in our state.” *Id.* The article’s author notes that “Arkansas has the second-highest teen birth rate in the nation, behind only Mississippi, according to 2020 statistics from the Centers for Disease Control and Prevention,” and that Representative Hudson modeled her bill “after a Louisiana law and her experience growing up in small-town Illinois, where teenage pregnancies were common.” *Id.*

70. Tess Vrbin, *Bill to Help Pregnant and Parenting Teenagers Finish High School Advances in Arkansas House*, ARK. ADVOC. (Feb. 7, 2023, 1:22 PM), [https://perma.cc/9P54-NWUC].

71. H.B. 1161, 94th Gen. Assemb., Reg. Sess. § 1, at 1 (Ark. 2023).

for both the mother and father), prenatal and postnatal medical appointments, legal appointments related to pregnancy or parenting (e.g., adoptions, custody, and visitation appointments), and illness of a child of a parent enrolled at a public school.⁷² The absences will not count towards the requirement that public schools drop students who miss ten consecutive school days.⁷³ The school must accept documentation from a student's physician and permission from a parent, legal guardian, or someone standing in loco parentis as validation for a student's absence.⁷⁴

After a pregnancy- or parenting-related absence, the school must give the student a reasonable amount of time to make up the missed schoolwork. There is no definition of what a "reasonable" amount of time is, but it cannot be less than the number of days the student was absent.⁷⁵ The student—not the school—may choose from different options to make up missed work. These options include: retaking the semester in which the student is enrolled; participating in an online course credit recovery program; being granted six weeks to continue at the same pace and finish the semester at a later date, provided the student can complete her work within the current school year or she attends previously scheduled summer school classes made available by the school; and receiving home-based instruction services to the extent made available by the school.⁷⁶

The school must also provide reasonable accommodation for an enrolled, breastfeeding mother to express milk, breastfeed, or address other breastfeeding needs (e.g., access to a lactation room, permission to bring breast pump materials, a refrigerated place to store expressed milk, etc.).⁷⁷ The school is not required, however, to grant a student an excused absence for leaving campus to breastfeed a child at home.⁷⁸

Finally, the Pregnant and Parenting Student Act requires public school districts associated with high schools to provide

72. *Id.* § 1, at 1-2.

73. *Id.* § 1, at 2. *See generally* ARK. CODE ANN. § 6-18-213(f) (West 2021).

74. Ark. H.B. 1161 § 1, at 2-3.

75. *Id.* § 1, at 2.

76. *Id.*

77. *Id.* § 1, at 3.

78. *Id.*

student-parents with information regarding available childcare options. This law has no anticipated fiscal impact.⁷⁹

1. What are the anticipated legal issues with the Act?

This law is not likely to have many significant legal implications because its primary purpose is to preclude certain types of school absences from being considered “unexcused.” One potential issue that may arise, though, is if and for how long the mother may take her child to school. The law is clear that the woman may breastfeed her child on campus,⁸⁰ but it does not state whether she can take her child to school with her, whether someone else must drop the child off and pick the child up, whether she can keep her child with her all day (including during classes), or whether the mother can do this for multiple years.⁸¹ This law is drafted such that the school need only make “reasonable accommodations” for breastfeeding mothers,⁸² but it provides neither what a “reasonable” accommodation would be regarding how long a mother can take her child to school nor who determines whether the accommodation is reasonable.

Because the standard is “reasonable,” the school need not accommodate the “best” or “most convenient” accommodation. Thus, there is a strong argument that it would be reasonable for a mother to take her child with her for the whole school day, at least for the first six to twelve months after the child’s birth. This is because infants frequently nurse throughout the day⁸³—making it impracticable for someone to drop-off and pick-up the child in between nursing—and breastmilk and/or formula is the child’s primary source of food for about one year.⁸⁴ But this becomes less reasonable after one year because the child can eat solid food

79. Ark. Dep’t. of Educ., Fiscal Impact Statement for H.B. 1161, ARK. STATE LEGISLATURE (Feb. 2, 2023), [<https://perma.cc/WW4A-SEZ9>].

80. Ark. H.B. 1161 § 1, at 3.

81. For example, some women only breastfeed for six months, some for eighteen months, and others for many years. *See How Much and How Often to Breastfeed*, CTRS. FOR DISEASE CONTROL & PREVENTION, [<https://perma.cc/JPE7-ZE8F>] (Apr. 11, 2022).

82. Earley, *supra* note 69.

83. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 81 (“[A] baby may want to eat as often as every 1 to 3 hours.”).

84. *Id.*

as his primary source of food without suffering nutritional or immune deficiencies.⁸⁵

III. CONCLUSION

Arkansas has adopted a “pro-life” legislative agenda in the wake of *Dobbs*,⁸⁶ and there are presently over twenty proposed bills that would either directly or indirectly affect pregnant and postpartum women.⁸⁷ The legislative initiatives discussed in this article are among the proposals that would have direct impacts on Arkansas mothers. House Bill 1106 would be Arkansas’s first State-mandated maternity leave for private sector employees, but it would only apply to women working for an employer that covers abortion expenses. House Bill 1103 would create a home-visitation program to screen postpartum mothers for postpartum depression and connect women with resources when needed. And Act 128 requires school districts through high school to excuse absences and missed class time for parent-students who need to take time to care for their children. While the long-term ramifications of these bills remain uncertain, they are illustrative of how the General Assembly intends to help women with the difficulties of motherhood going forward.

85. See *When, What, and How to Introduce Solid Foods*, CTRS. FOR DISEASE CONTROL & PREVENTION, [<https://perma.cc/9JDP-XACV>] (Aug. 24, 2021).

86. See *Arkansas*, AM. SOC’Y FOR REPROD. MED., [<https://perma.cc/QM82-3HYW>] (last visited May 14, 2023).

87. See sources cited *supra* note 7 (many of these require insurance companies to cover the costs associated with pregnancy or postpartum medical expenses).