

Legislative Analysis



PHYSICIAN ORDERS FOR SCOPE OF TREATMENT (POST) FORM

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House Bill 4170 (proposed H-1 substitute)
Sponsor: Rep. Jim Tedder

House Bill 4173 as introduced
Sponsor: Rep. Hank Vaupel

House Bill 4171 as introduced
Sponsor: Rep. Laura Cox

House Bill 4174 (proposed H-1 substitute)
Sponsor: Rep. Leslie Love

Committee: Health Policy
Complete to 6-13-17

BRIEF SUMMARY:

House Bill 4170 would amend the Public Health Code to provide for a *physician orders for a scope of treatment (POST) form*, which is an advance care planning tool that would include a patient's medical condition, the signatures of the patient or patient representative and attending health professional, and a list the treatments which may be administered outside of a hospital. House Bills 4171, 4173, and 4174 would incorporate the POST form into the Estates and Protected Individuals Code (EPIC), the Adult Foster Care Facility Licensing Act, and the Michigan Do-Not-Resuscitate Procedure Act.

In general, a POST form is a companion document to the better-known advance directive, which delegates power of attorney for health care authority and scenario-based treatment directives. A POST form gives more specific instructions for care of seriously ill patients.

DETAILED SUMMARY:

House Bill 4170 (MCL 333.20919; proposed Part 56B and 333.20192a)

The bill would add a Part 56B (Physician Orders for Scope of Treatment) to **the Public Health Code**, which would describe the provisions and functions of a POST form. It would also prohibit a health facility or agency from requiring the execution of a POST form as a condition for admission or the receipt of services. Finally, the bill would provide that a medical control authority must establish written protocols for complying with Part 56B, in accordance with procedures established by the Michigan Department of Health and Human Services (MDHHS), and may not establish a protocol that conflicts with Part 56B.

Advisory committee

Within 90 days after the bill takes effect, the MDHHS director must appoint members to and convene an ad hoc advisory committee, which may include one individual 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 personnel; and a medical control authority. The other seven members of the committee may include individuals representing a health professional or a patient advocacy organization.

Within 180 days after the committee is convened, it must make recommendations to MDHHS on all of the following:

- The creation of a standardized POST form (subject to the form requirements listed below).
- Medical orders to be included on the POST form that relate 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 is considered valid for purposes of a health professional, a health facility, an adult care facility, or emergency medical services personnel complying with the orders for medical treatment on the POST form.

The committee is abolished after MDHHS receives the recommendations.

By three years after the bill takes effect, the MDHHS director will appoint an ad hoc committee in the same manner as the original committee, and set its first meeting. Within 90 days of that meeting, the committee must submit recommendations for any changes to the rules, POST form, or information form, and legislative changes to Part 56B that the committee deems necessary or appropriate. The committee is abolished after MDHHS receives the recommendations.

Standardized POST form

After considering the committee's recommendations, MDHHS will develop a standardized POST form that has a distinct format and is easily identifiable. The form must include all of the following:

- A space for the patient's printed name, age, and the diagnosis or condition that warrants the medical orders on the POST form.
- A space for the signature of the patient or patient representative who consents to the medical orders on the POST form, and a space for the date signed.
- A space for the printed name and signature of the attending health professional who issues the medical orders on the POST form.
- Sections containing medical orders that direct specific types or levels of treatment to be provided in a setting outside of a hospital to which a patient or patient representative may provide consent. The orders may direct the circumstances under which the health professional who is treating the patient must consult with a patient representative regarding consenting to the withholding or withdrawing of medically assisted nutrition and hydration if the patient is unable to participate in medical treatment decisions. The orders must not authorize withholding or withdrawing or nourishment unless the patient or patient representative consents at the time it is withdrawn.

- A space for the date and initials of the attending health professional and the patient or patient representative to extend the POST form if circumstances have changed. The POST form must also include a statement that, by dating and initialing the form, the individuals confirm that the medical orders on the form remain in effect.
- A statement that in order to remain in effect, the POST form must be initialed by the requisite parties if any of the following has occurred: (1) one year has expired since the individuals signed or initialed the POST form, (2) there has been an unexpected change in the patient's medical condition, (3) the patient is transferred from one care setting or care level to another, (4) the patient's treatment preferences change, or (5) the patient's attending health professional changes.
- A statement that the patient or patient representative has the option of executing a POST form and that consenting to the medical orders on the POST form must be voluntary.
- A statement that the POST form is void if the names or signatures (or any of the information in the first three bullet points) are not provided.
- A statement that if a section on the POST form regarding a specific type or level of treatment is left blank, it will be interpreted as authorizing full treatment for that treatment, but does 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.

POST form in a residential setting; when a copy is acceptable

After considering the committee's recommendations, MDHHS must also promulgate rules for the procedures for the use of a POST form within a residential setting. The rules must include the circumstances under which a photocopy, facsimile, or digital image of a completed POST form will be considered valid for purposes of a health professional, a health facility, an adult foster care facility, or emergency medical services personnel complying with the medical orders on the form. Information or materials regarding the POST form may be published on the MDHHS website.

MDHHS must develop an information form

An information form developed by MDHHS must describe the attributes and effect of a POST form, as well as a space for the patient or patient representative to sign and date to indicate that they have reviewed the form. MDHHS will create this form after reviewing the committee's recommendations.

Consent to the medical orders on a POST form

A patient capable of participating in medical treatment decisions may consent to the medical orders on a POST form. If the patient is not capable, a patient representative who is a patient advocate or a guardian may consent to the medical orders. A patient representative who is consenting to the medical orders on the POST form must comply with the patient's expressed wishes. If the patient's wishes are unknown, and the representative is a guardian, the representative must consent in a manner that is consistent with the patient's best interests. If the patient's wishes are unknown and the representative is a patient advocate, the 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 advocate is authorized to make such a decision, and the patient acknowledges that such a decision could or would allow the patient's death.

Before a patient/patient representative and attending health professional sign a POST form, the health professional must provide the patient/patient representative with the information form and consult with and explain to the patient/patient representative the nature and content of the POST form and the medical implications of the medical orders contained on the POST form. The health professional must include a copy of the POST form in the patient's permanent medical record (as well as the information form, signed at the same time) and give the original to the patient/patient representative.

Revocation of a POST form

The patient may revoke a POST form at any time and in any manner that the patient is able to communicate an intent to revoke. If the patient's revocation is not in writing, an individual who witnesses the patient's expressed intent to revoke must describe in writing the circumstances of the revocation, and sign and provide the description to the attending health professional, another health professional who is treating the patient, or the health facility caring for the patient, as applicable.

Likewise, the patient representative may revoke the POST form at any time he or she considers revocation to be consistent with the patient's wishes or in the patient's best interest.

Additionally, the attending health professional who signed the POST form may revoke if a change in the patient's medical condition makes the medical orders on the form contrary to generally accepted health care standards. In this case, the health professional must take reasonable actions to notify the patient/patient representative of the revocation and the change that warranted it.

A POST form may be revoked by any of the parties listed by writing "revoked" over the signature of the patient or patient representative, as applicable, and the attending health professional who signed the form, on both the copy in the patient's file and the patient's copy. A patient/patient representative who revokes must take reasonable actions to notify one or more of the following: the attending health professional, another health professional who is treating the patient, or the health facility caring for the patient (as well as the patient, if the representative revokes the form).

Effect of a POST form

In an acute care setting, a health professional who is treating the patient may use a completed POST form as a communication tool.

Emergency medical services personnel must provide or withhold treatment to a patient according to a POST form unless one of the following applies:

- The services are necessitated by an injury or medical condition that is unrelated to the diagnosis or condition that is indicated on the form;

- The orders on the form request medical treatment that is contrary to generally accepted health care standards or emergency medical protocols;
- The form addresses the initiation of resuscitation if the patient stops breathing and the heart stops beating, and the personnel has actual knowledge that the patient has a do-not-resuscitate (DNR) order.
- The personnel has actual knowledge that the form has been revoked in the required manner.

If a health professional, health facility, or adult foster care facility is unwilling to comply with the medical orders on a validly executed POST form because of a policy, religious belief, or moral conviction, that party must take all reasonable steps to refer or transfer the patient to another health professional or facility.

Liability for failure to comply with POST form

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

- Providing medical treatment that is contrary to the medical orders on the POST form if the person did not have actual notice of the form.
- Providing medical treatment that is 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 certain emergency medical protocols (when services are necessitated by an injury or medical condition that is unrelated to the diagnosis or condition that is indicated on the form, or the orders on the form request medical treatment that is contrary to generally accepted health care standards or emergency medical protocols), regardless of the orders on the POST form.

Timing of POST form's execution

If a POST form is validly executed after a patient advocate designation or another advance health care directive that contains written directives regarding medical treatment, or after a DNR order, the POST form is presumed to express the patient's current wishes.

Challenging a POST form

If a person has reason to believe a POST form has been executed contrary to the wishes of the patient or, if the patient is a ward, contrary to the wishes or best interests of the ward, the person may petition the probate court to have the POST form and conditions of its execution reviewed. If the court agrees with the petitioner, it will issue an injunction voiding the effectiveness of the form and prohibiting compliance.

Life insurance and health insurance implications

In response to the execution or implementation of a POST form, a life insurer may not refuse to provide or continue coverage to a patient; charge the patient a higher premium; offer a patient a different policy because the patient has executed a POST form; consider the terms of an existing policy of life insurance to have been breached or modified; or

invoke a suicide or intentional death exemption or exclusion in a policy covering the patient.

Likewise, a health insurer may not require execution of a POST form in order to maintain or be eligible for coverage, charge a different premium depending on whether a POST form has been executed, or consider execution a breach or modification of an existing policy.

General provisions

The provisions in the bill do not impair or supersede a legal right that a patient/patient representative may have to consent or refuse medical treatment for himself or herself or on behalf of another. Part 56B does not create a presumption that a patient who has executed a POST form intends to consent to or refuse medical treatment that is not addressed in the form; nor does it create a presumption that a patient/patient who has not executed a POST form intends to consent to or refuse any type of medical treatment.

Definitions

- **Actual notice** includes 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 sends 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 has been received. Actual notice also includes knowledge of a patient's intent to revoke the POST form by a health professional who is treating the patient, by an attending health professional, or by emergency medical services personnel.
- **Advanced illness** means 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 or modulation.
- **Patient** means a person with an advanced illness or another medical condition that compromises his or her health so as to make death within one year foreseeable though not a specific or predicted prognosis.

House Bill 4171 (MCL 700.1106, 700.5303, 700.5305, and 700.5314)

The bill would account for the POST form in the **Estates and Protected Individuals Code**. Generally, it would make similar provisions for a POST form as currently exist for a DNR order.

Currently, before a petition of incapacity and appointment of a guardian may be filed, the court must provide the person intending to file with written alternatives to filing, including a limited guardian, conservator, patient advocate designation, or DNR order. The bill would add a POST form to the list of alternatives the court must provide to the proposed filer.

A guardian ad litem's duties for an allegedly incapacitated person include all of the following:

- Explaining the patient's rights to a patient at a hearing procedure to request limits on the guardian's power to execute a DNR order or POST form on behalf of the patient.
- Informing the patient that if a guardian is appointed, the guardian may have the power to execute a POST form on behalf of the patient and, if meaningful communication is possible, discern if the patient objects to having a POST form executed on his or her behalf.
- Determining whether there are one or more appropriate alternatives to appointment of a full guardian (or whether one or more actions should be taken in addition to the appointment), including execution of a patient advocate designation, DNR order, POST form, or durable power of attorney, and informing the court to that effect.
- Determining whether the patient objects to having a POST form executed on his or her behalf, and informing the court to that effect.

A guardian has certain powers and duties, to the extent granted by court order, which include the power to give the consent or approval necessary in order for the patient to receive medical or other professional care. The power of a guardian to execute a DNR order or POST form does not limit the guardian's power to consent to a physician's order to withhold resuscitative measures in a hospital.

The bill would also provide that, to the extent granted by court order, a guardian has the power to execute, reaffirm, and revoke a POST form on behalf of a patient. However, in order to execute a POST form, the guardian must have (1) visited the patient within the last 14 days and consulted with the patient about the POST form if meaningful communication is possible, and (2) consulted directly with the patient's attending physician as to the specific medical indications that warrant the POST form. If the guardian executes the POST form, the guardian must fulfill each of these conditions at least annually.

Finally, in the guardian's annual report on the condition of the patient and patient's estate, the guardian must specify whether he or she has executed, reaffirmed, or revoked a POST form on behalf of the patient in the past year.

House Bill 4173 (MCL 400.706 and 400.726a)

The bill would incorporate the definition for POST form into the **Adult Foster Care Facility Licensing Act**, and specify that a hospice employee is deemed to be providing "protection" under the act by contacting the hospice program if a patient with a DNR order or POST form stops breathing and the patient's heart stops. Additionally, the bill would require an adult foster care facility to comply with the medical orders on a POST form or, if the facility is unwilling to comply because of a policy, religious belief, or moral conviction, to take all reasonable steps to transfer the patient to another facility.

House Bill 4174 (MCL 333.1061 and proposed 333.1061a)

The bill would amend the **Michigan Do-Not-Resuscitate Procedure Act** to require a health professional with actual knowledge of a do-not-resuscitate (DNR) order, who is also aware of a POST form, to comply with the most recent order or form.

Currently, a health professional who aids a patient outside of a hospital must determine if the patient has one or more vital signs, regardless of whether the health professional views or has actual knowledge of a DNR order executed by the patient or on the patient's behalf. If the health professional determines that the patient does not have any vital signs, and the patient has signed a DNR order or is wearing a DNR bracelet, the health professional must not attempt to resuscitate the patient.

The bill would create a new section in the act to provide that, if the health provider has actual knowledge of a DNR order and is aware of a validly executed POST form that contains a medical order regarding resuscitation if the patient's heart stops and the patient stops breathing, the health professional must comply with the most recent order or form.

Tie-Bars

House Bills 4171, 4173, and 4174 are tie-barred to HB 4170, which is tie barred to those three bills in return. This means that none of the bills could take effect unless all are enacted. All four bills would take effect 90 days after enactment.

BACKGROUND INFORMATION:

Reportedly, 39 states have forms recognized in statute that specify the type of care a person with an advanced illness would prefer in a medical emergency situation¹ (although some level of POST forms exist in 49 states and Washington D.C., with South Dakota as the only outlier).² In some states, these documents are called Physicians Order for Life Sustaining Treatment (POLST) forms or Medical Orders for Scope of Treatment (MOST) forms. POST forms are available in some Michigan communities, including Lansing, Grand Rapids, Houghton, and Marquette. The proposed legislation would make the form available on a statewide basis.

POST forms are intended to fill a possible gap left despite the existence of an advance directive and out-of-hospital Do-Not-Resuscitate (DNR) form. A DNR form only addresses cardiac life support and applies when a person's heart and breathing stops.³ A POST form is more specific and addresses medical interventions such as intubation, transport, antibiotics, cardioversion, tube feeding, and hospitalization.

See the following link for the Michigan POST form:

https://www.michigan.gov/documents/lara/Honoring_Residents_Choices_-_POST_Resource_453775_7.pdf

¹ States without POST forms: Alabama, Arizona, Arkansas, Connecticut, Michigan, Mississippi, Nebraska, North Dakota, Rhode Island, South Carolina, South Dakota; <https://www.everplans.com/articles/state-by-state-polst-forms>

² Status of POST forms on a state-by-state basis: <http://polst.org/programs-in-your-state/>

³ Michigan DNR instructions and form;

https://www.michigan.gov/documents/mdch/DNR_update_March_14_final_release_453815_7.pdf

FISCAL IMPACT:

House Bill 4170 as introduced has modest one-time fiscal implications for the Department of Health and Human Services (DHHS) to establish an initial ad hoc advisory committee, develop a standardized post form, promulgate rules for the use of a post form and circumstances under which a post form is considered valid, and establish a follow-up ad hoc advisory committee in three years. Regional medical control authorities must establish protocols for complying with the new Part 56B for local emergency medical services, in coordination with DHHS, which may have one-time modest cost implications for those entities.

House Bills 4171 & 4174 have no fiscal implications for state or local units of government.

House Bill 4173 would have no significant fiscal impact on the Department of Health and Human Services.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.