

LEGISLATIVE BILL 690

Approved by the Governor May 30, 2019

Introduced by Cavanaugh, 6; McCollister, 20; Blood, 3.

A BILL FOR AN ACT relating to treatment and corrections; to amend sections 13-910 and 81-8,219, Revised Statutes Cumulative Supplement, 2018; to adopt the Healthy Pregnancies for Incarcerated Women Act; to provide exemptions for claims under the Political Subdivisions Tort Claims Act and the State Tort Claims Act; and to repeal the original sections.
Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 7 of this act shall be known and may be cited as the Healthy Pregnancies for Incarcerated Women Act.

Sec. 2. The Legislature finds and declares:

(1) Restraining a pregnant woman can pose undue health risks to the woman and her pregnancy;

(2) The majority of female prisoners and detainees in Nebraska are nonviolent offenders;

(3) Restraining prisoners and detainees increases their potential for physical harm from an accidental trip or fall. The impact of such harm to a pregnant woman can negatively impact her pregnancy;

(4) Freedom from physical restraints is especially critical during labor, delivery, and postpartum recovery after delivery. Women often need to move around during labor and recovery, including moving their legs as part of the birthing process. Restraints on a pregnant woman can interfere with medical staff's ability to appropriately assist in childbirth or to conduct sudden emergency procedures; and

(5) The Federal Bureau of Prisons, the United States Marshals Service, the American Correctional Association, the American College of Obstetricians and Gynecologists, the American Medical Association, and the American Public Health Association all oppose or severely limit the routine shackling of women during labor, delivery, and postpartum recovery because it is unnecessary and dangerous to a woman's health and well-being and creates an unnecessary risk to the baby during birth.

Sec. 3. For the purposes of the Healthy Pregnancies for Incarcerated Women Act:

(1) Administrator means the Director of Correctional Services, the sheriff or other person charged with administration of a jail, or any other official responsible for the administration of a detention facility;

(2) Detainee includes any adult or juvenile female detained under the immigration laws of the United States at any detention facility;

(3) Detention facility means any:

(a) Facility operated by the Department of Correctional Services;

(b) City or county jail;

(c) Juvenile detention facility or staff secure juvenile facility as such terms are defined in section 83-4,125; or

(d) Any other entity or institution operated by the state, a political subdivision, or a combination of political subdivisions for the careful keeping or rehabilitative needs of prisoners or detainees;

(4) Labor means the period of time before a birth during which contractions are of sufficient frequency, intensity, and duration to bring about effacement and progressive dilation of the cervix;

(5) Postpartum recovery means, as determined by her physician, the period immediately following delivery, including the entire period a woman is in the hospital or infirmary after birth;

(6) Prisoner means any adult or juvenile incarcerated or detained in any detention facility and includes, but is not limited to, any adult or juvenile who is accused of, convicted of, sentenced for, or adjudicated for violations of criminal law or the terms and conditions of parole, probation, pretrial release, post-release supervision, or a diversionary program; and

(7) Restraints means any physical restraint or mechanical device used to control the movement of a prisoner or detainee's body or limbs, including, but not limited to, flex cuffs, soft restraints, hard metal handcuffs, a black box, Chubb cuffs, leg irons, belly chains, a security or tether chain, or a convex shield.

Sec. 4. (1) A detention facility shall not use restraints on a prisoner or detainee known to be pregnant, including during labor, delivery, or postpartum recovery or during transport to a medical facility or birthing center, unless the administrator makes an individualized determination that there are extraordinary circumstances as described in subsection (2) of this section.

(2) Restraints for an extraordinary circumstance are only permitted if the administrator makes an individualized determination that there is a substantial flight risk or some other extraordinary medical or security circumstance that dictates restraints be used to ensure the safety and security of the prisoner or detainee known to be pregnant, the staff of the detention facility or medical facility, other prisoners or detainees, or the public, except that:

(a) If the doctor, nurse, or other health professional treating the prisoner or detainee known to be pregnant requests that restraints not be used, any detention facility employee accompanying the prisoner or detainee shall immediately remove all restraints;

(b) Under no circumstances shall leg or waist restraints be used on the prisoner or detainee known to be pregnant unless the prisoner or detainee presents an immediate and serious risk of harm or a substantial and immediate flight risk; and

(c) Under no circumstances shall any restraints be used on any prisoner or detainee in labor or during childbirth unless the prisoner or detainee presents an immediate and serious risk of harm or a substantial and immediate flight risk.

(3) Upon a prisoner's or detainee's admission to a medical facility or birthing center for labor or childbirth, no detention facility employee shall remain present in the room during labor or childbirth unless specifically requested or approved by medical personnel. A detention facility employee may ask medical personnel to allow such employee to remain present. If a detention facility employee's presence is requested or approved by medical personnel, the employee shall, if practicable, be female.

(4) If a prisoner or detainee known to be pregnant is transported to a medical facility or birthing center and restraints are used, the administrator of the detention facility shall inform the relevant staff at the medical facility or birthing center of the risks and dangers of removing the restraints from the specific prisoner or detainee.

(5) If restraints are used on a prisoner or detainee known to be pregnant pursuant to subsection (2) of this section:

(a) The type of restraint applied and the application of the restraint must be done in the least restrictive manner necessary; and

(b) The administrator shall make written findings within ten days as to the extraordinary circumstances that dictated the use of the restraints. These findings shall be kept on file by the detention facility for at least five years and be made available for public inspection, except that no individually identifying information of the prisoner or detainee shall be made public under this section without the prisoner's or detainee's prior written consent.

Sec. 5. Any prisoner or detainee restrained in violation of the Healthy Pregnancies for Incarcerated Women Act may file a civil action which shall be pursued as a tort claim under the Political Subdivisions Tort Claims Act or the State Tort Claims Act.

Sec. 6. (1) On or before October 1, 2019, each detention facility in this state shall adopt and promulgate rules and regulations to carry out the Healthy Pregnancies for Incarcerated Women Act. A detention facility may also adopt and promulgate such rules and regulations developed by the Jail Standards Board or the Nebraska Commission on Law Enforcement and Criminal Justice. Such rules and regulations shall be included in any handbook for prisoners or detainees.

(2) On and after October 1, 2019, a detention facility shall inform each prisoner or detainee of the rules and regulations adopted and promulgated under this section upon admission to the detention facility.

(3) On or before November 1, 2019, a detention facility shall inform any prisoner or detainee in custody of the detention facility, who has not previously been informed, of the rules and regulations adopted and promulgated under this section.

Sec. 7. On or before June 1, 2020, and each June 1 thereafter, each administrator of a detention facility shall submit a report describing any use of restraints on a pregnant prisoner or detainee in the preceding calendar year. The Director of Correctional Services shall submit such report to the Inspector General of the Nebraska Correctional System. An administrator of a detention facility operated by a political subdivision shall submit such report to the Jail Standards Board. The report shall not contain individually identifying information of any prisoner or detainee. Such reports shall be made available for public inspection.

Sec. 8. Section 13-910, Revised Statutes Cumulative Supplement, 2018, is amended to read:

13-910 The Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610 shall not apply to:

(1) Any claim based upon an act or omission of an employee of a political subdivision, exercising due care, in the execution of a statute, ordinance, or officially adopted resolution, rule, or regulation, whether or not such statute, ordinance, resolution, rule, or regulation is valid;

(2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused;

(3) Any claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to such political subdivision to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety;

(4) Any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order. Nothing in this subdivision shall be construed

to limit a political subdivision's liability for any claim based upon the negligent execution by an employee of the political subdivision in the issuance of a certificate of title under the Motor Vehicle Certificate of Title Act and the State Boat Act except when such title is issued upon an application filed electronically by an approved licensed dealer participating in the electronic dealer services system pursuant to section 60-1507;

(5) Any claim arising with respect to the assessment or collection of any tax or fee or the detention of any goods or merchandise by any law enforcement officer;

(6) Any claim caused by the imposition or establishment of a quarantine by the state or a political subdivision, whether such quarantine relates to persons or property;

(7) Any claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, except that this subdivision does not apply to a claim under the Healthy Pregnancies for Incarcerated Women Act;

(8) Any claim by an employee of the political subdivision which is covered by the Nebraska Workers' Compensation Act;

(9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of any political subdivision in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the political subdivision;

(10) Any claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway as defined in section 60-624, bridge, public thoroughfare, or other public place due to weather conditions. Nothing in this subdivision shall be construed to limit a political subdivision's liability for any claim arising out of the operation of a motor vehicle by an employee of the political subdivision while acting within the course and scope of his or her employment by the political subdivision;

(11) Any claim arising out of the plan or design for the construction of or an improvement to any highway as defined in such section or bridge, either in original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the political subdivision or some other body or employee exercising discretionary authority to give such approval;

(12) Any claim arising out of the alleged insufficiency or want of repair of any highway as defined in such section, bridge, or other public thoroughfare. Insufficiency or want of repair shall be construed to refer to the general or overall condition and shall not refer to a spot or localized defect. A political subdivision shall be deemed to waive its immunity for a claim due to a spot or localized defect only if (a) the political subdivision has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim or (b) the claim arose during the time specified in a notice provided by the political subdivision pursuant to subsection (3) of section 39-1359 and the state or political subdivision had actual or constructive notice; or

(13)(a) Any claim relating to recreational activities for which no fee is charged (i) resulting from the inherent risk of the recreational activity, (ii) arising out of a spot or localized defect of the premises unless the spot or localized defect is not corrected by the political subdivision leasing, owning, or in control of the premises within a reasonable time after actual or constructive notice of the spot or localized defect, or (iii) arising out of the design of a skatepark or bicycle motocross park constructed for purposes of skateboarding, inline skating, bicycling, or scootering that was constructed or reconstructed, reasonably and in good faith, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction or reconstruction. For purposes of this subdivision, a political subdivision shall be charged with constructive notice only when the failure to discover the spot or localized defect of the premises is the result of gross negligence.

(b) For purposes of this subdivision:

(i) Recreational activities include, but are not limited to, whether as a participant or spectator: Hunting, fishing, swimming, boating, camping, picnicking, hiking, walking, running, horseback riding, use of trails, nature study, waterskiing, winter sports, use of playground equipment, biking, roller blading, skateboarding, golfing, athletic contests; visiting, viewing, or enjoying entertainment events, festivals, or historical, archaeological, scenic, or scientific sites; and similar leisure activities;

(ii) Inherent risk of recreational activities means those risks that are characteristic of, intrinsic to, or an integral part of the activity;

(iii) Gross negligence means the absence of even slight care in the performance of a duty involving an unreasonable risk of harm; and

(iv) Fee means a fee to participate in or be a spectator at a recreational activity. A fee shall include payment by the claimant to any person or organization other than the political subdivision only to the extent the political subdivision retains control over the premises or the activity. A fee shall not include payment of a fee or charge for parking or vehicle entry.

(c) This subdivision, and not subdivision (3) of this section, shall apply

to any claim arising from the inspection or failure to make an inspection or negligent inspection of premises owned or leased by the political subdivision and used for recreational activities.

Sec. 9. Section 81-8,219, Revised Statutes Cumulative Supplement, 2018, is amended to read:

81-8,219 The State Tort Claims Act shall not apply to:

(1) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused;

(2) Any claim arising with respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer;

(3) Any claim for damages caused by the imposition or establishment of a quarantine by the state whether such quarantine relates to persons or property;

(4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contract rights, except that this subdivision does not apply to a claim under the Healthy Pregnancies for Incarcerated Women Act;

(5) Any claim arising out of misrepresentation or deceit, except that, in cases of adoption or placement, the State Tort Claims Act shall apply to a claim arising out of misrepresentation or deceit by the Department of Health and Human Services in failing to warn, notify, or inform of a ward's mental and behavioral health history, educational history, and medical history, including any history as a victim or perpetrator of sexual abuse;

(6) Any claim by an employee of the state which is covered by the Nebraska Workers' Compensation Act;

(7) Any claim based on activities of the Nebraska National Guard when such claim is cognizable under the Federal Tort Claims Act, 28 U.S.C. 2674, or the federal National Guard Claims Act, 32 U.S.C. 715, or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(8) Any claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to the state to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the state had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety;

(9) Any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order. Such claim shall also not be filed against a state employee acting within the scope of his or her office. Nothing in this subdivision shall be construed to limit the state's liability for any claim based upon the negligent execution by a state employee in the issuance of a certificate of title under the Motor Vehicle Certificate of Title Act and the State Boat Act except when such title is issued upon an application filed electronically by an approved licensed dealer participating in the electronic dealer services system pursuant to section 60-1507;

(10) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of any governmental entity in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the governmental entity;

(11) Any claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway as defined in section 60-624, bridge, public thoroughfare, or other state-owned public place due to weather conditions. Nothing in this subdivision shall be construed to limit the state's liability for any claim arising out of the operation of a motor vehicle by an employee of the state while acting within the course and scope of his or her employment by the state;

(12) Any claim arising out of the plan or design for the construction of or an improvement to any highway as defined in such section or bridge, either in original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval;

(13) Any claim arising out of the alleged insufficiency or want of repair of any highway as defined in such section, bridge, or other public thoroughfare. Insufficiency or want of repair shall be construed to refer to the general or overall condition and shall not refer to a spot or localized defect. The state shall be deemed to waive its immunity for a claim due to a spot or localized defect only if the state has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim;

(14)(a) Any claim relating to recreational activities on property leased, owned, or controlled by the state for which no fee is charged (i) resulting

from the inherent risk of the recreational activity, (ii) arising out of a spot or localized defect of the premises unless the spot or localized defect is not corrected within a reasonable time after actual or constructive notice of the spot or localized defect, or (iii) arising out of the design of a skatepark or bicycle motocross park constructed for purposes of skateboarding, inline skating, bicycling, or scootering that was constructed or reconstructed, reasonably and in good faith, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction or reconstruction. For purposes of this subdivision, the state shall be charged with constructive notice only when the failure to discover the spot or localized defect of the premises is the result of gross negligence.

(b) For purposes of this subdivision:

(i) Recreational activities include, but are not limited to, whether as a participant or spectator: Hunting, fishing, swimming, boating, camping, picnicking, hiking, walking, running, horseback riding, use of trails, nature study, waterskiing, winter sports, use of playground equipment, biking, roller blading, skateboarding, golfing, athletic contests; visiting, viewing, or enjoying entertainment events, festivals, or historical, archaeological, scenic, or scientific sites; and similar leisure activities;

(ii) Inherent risk of recreational activities means those risks that are characteristic of, intrinsic to, or an integral part of the activity;

(iii) Gross negligence means the absence of even slight care in the performance of a duty involving an unreasonable risk of harm; and

(iv) Fee means a fee to participate in or be a spectator at a recreational activity. A fee shall include payment by the claimant to any person or organization other than the state only to the extent the state retains control over the premises or the activity. A fee shall not include payment of a fee or charge for parking or vehicle entry.

(c) This subdivision, and not subdivision (8) of this section, shall apply to any claim arising from the inspection or failure to make an inspection or negligent inspection of premises owned or leased by the state and used for recreational activities; or

(15) Any claim arising as a result of a special event during a period of time specified in a notice provided by a political subdivision pursuant to subsection (3) of section 39-1359.

Sec. 10. Original sections 13-910 and 81-8,219, Revised Statutes Cumulative Supplement, 2018, are repealed.