



american society for  
emergency contraception

## DISTRIBUTION OF EMERGENCY CONTRACEPTION (EC) BY ORGANIZATIONS: LEGAL ISSUES

### QUICK FACTS

Emergency contraception is a way to prevent pregnancy that can be used after unprotected sex. Nonprofit organizations fill a gap in access by distributing over-the-counter (OTC) EC to individuals. Providing OTC medication to others, including EC, is not a criminal activity and bears minimal risk of civil liability. You can reduce the potential of legal liability by:

- Not giving medical advice
- Taking reasonable product safety measures, such as checking for product tampering and expiration dates
- Maintaining confidentiality

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* does not affect EC. OTC EC is not an abortifacient, thus it will not work if a person is already pregnant.

#### **How does distribution of EC work?**

Emergency contraception is a way to prevent pregnancy that can be used after unprotected sex. Using EC does not terminate an existing pregnancy. EC prevents pregnancy from occurring. Many types of EC are available in the US without a prescription or minimum age requirement. Some states require health professionals to obtain parental consent before providing EC to a minor with few exceptions. Consult local statutes and regulations to determine whether or not a minor may obtain and consent to certain contraceptive services in your state.

#### **Can organizations involved in distribution of EC face liability for their activities?**

Providing OTC medication to others, including EC, is not a criminal activity. In addition, individuals and organizations who distribute EC have minimal risk of civil liability and can take steps to further minimize their liability. They are unlikely to face claims related to distribution of medication such as product liability. They could potentially face claims such as negligence, invasion of privacy, or emotional distress, although the risk of liability for such claims is small.

#### **What is Title X?**

The Title X Family Program (Title X) is a federal program that provides grants to public agencies and nonprofit organizations for the delivery of approved family planning and reproductive health services. Food and Drug Administration (FDA)-approved contraceptive products like levonorgestrel, also known as the "morning-after pill," are made available to individuals through Title X programs. Services rendered are voluntary and confidential and the Department of Health and Human Services (HHS) adopted a policy prohibiting Title X programs from requiring parental consent and notification for the provision of services to minors. However, the Texas federal district court ruling in *Deanda v. Becerra*, which is currently on appeal to the Fifth Circuit, may impact the current policy prohibiting Title X programs from requiring parental consent and notification.

## What steps can organizations take to reduce the potential of legal liability?

Organizations can reduce potential liability in the following ways:

- **Do not give medical advice:** Some professionals, such as doctors and pharmacists, are licensed to provide medical advice. These special roles may carry a duty to provide accurate advice and liability if that advice results in harm. Organizations who distribute EC that are not licensed to provide medical advice and should avoid doing so. If they pass on information about how to take EC, they should be clear this is not medical advice and recommend the receiving individual consult a medical professional with further questions.
- **Take reasonable safety measures:** Everyone has a duty to act reasonably in their interactions with others. Reasonable actions in the distribution of EC may include such precautions as storing medication in a safe place and in accordance with the manufacturer's instructions, checking the product for tampering, keeping it in its original packaging, and checking the expiration date before distribution, among other things. When making EC available in a vending machine, ensure that the machine is in proper operating condition, that it undergoes routine maintenance, and that any mandatory labeling information appears prominently.
- **Maintain confidentiality:** Confidential information may include, e.g., the identity of who is receiving EC, or a recipient's address or contact information. It is important to limit the disclosure of confidential information to only individuals who need to have it. disclosure of confidential information to only individuals who need to have it.

## Is distribution of EC subject to HIPAA regulations?

Distribution networks are not likely subject to the federal Health Insurance Portability and Accountability Act (HIPAA) because of the way their activities are structured. HIPAA only applies to entities that engage in certain types of transactions related to receiving and paying for medical care, which do not include the type of distribution and payment structures adopted by the EC networks discussed herein.