



STATE OF OREGON
Legislative Counsel Committee

May 15, 2015

To: Zena Rockowitz, Committee Administrator
Senate Committee on Health Care

From: Lorey H. Freeman, Senior Deputy Legislative Counsel

Subject: -A4 amendments to House Bill 2948

Accompanying this memo are the -A4 amendments to House Bill 2948, which provide that a health care provider who makes a disclosure in accordance with section 2 of the bill is not subject to any civil liability for making the disclosure.

Please note that some Oregon Supreme Court decisions have called into question whether the Legislative Assembly can convey civil immunity of the type considered in these amendments.

In *Clarke v. OHSU*,¹ the Oregon Supreme Court held that the Legislative Assembly could not eliminate remedies that were available under the common law. The *Clarke* decision related to the Oregon Tort Claims Act, which addresses the liability of public bodies, but the decision also raises questions about laws that provide immunity to private individuals, such as the Good Samaritan Law or the limitation of liability provided in these amendments. Justice Balmer's concurring opinion in the *Clarke* case suggested that statutes like the Good Samaritan Law could survive under the *Clarke* analysis, stating that:

[T]he legislature has determined that important public policies will be advanced by encouraging certain activities and has modified common-law causes of action involving those who participate in such activities. . . . The majority's decision, like this court's earlier Remedy Clause cases, allows the legislature to respond to what it perceives to be important public policy needs, as long as it does not eliminate a common-law cause of action without providing an adequate substitute remedy.²

We are not sure whether Justice Balmer's opinion will prevail when the court is faced with this question, and we are unsure as to what the "adequate substitute remedy" is under a statute limiting civil liability, but we wanted to bring this issue to your attention.

Encl.

¹ 343 Or. 581 (2007).

² 343 Or. at 617.