

Implications of the Supreme Court's *Dobbs* Decision Removing Abortion Service Protections for Clinicians

Frequently Asked Questions

August 16, 2022

The U.S. Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* to overrule *Roe v. Wade* not only revoked a right to reproductive health and privacy but has created a tremendous amount of uncertainty for both those accessing reproductive health services, including abortion, and those who provide care to people who are pregnant, or otherwise seek any reproductive health or OB-GYN services. The potential for uncertainty and, worse, criminalization of a clinician is real. This has created a chilling effect throughout the United States with patients already being denied the best standard of care for fear of criminal penalty.

This is not the way to ensure safe treatment. While your union has your back and will defend our members from the cruel and chilling implications of *Dobbs*, it is important that every clinician knows what their legal rights and potential exposure are, understanding that implications will vary state by state.

Here is a list of frequently asked questions. We will update this document as more information becomes available:

Professional Practice Concerns

In states that have banned or restricted access to abortion, federal law still obligates clinicians to administer life-saving medical care; but without clear guidance on determining if a pregnancy is life-threatening, clinicians are left in a chasm between their medical judgment and restrictive state laws.

Q: Do clinicians have discretion in determining if a pregnancy is life-threatening?

- According to [guidance from the Department of Health and Human Services](#), under the Emergency Medical Treatment and Active Labor Act (EMTALA), the determination of an emergency medical condition (EMC) and the necessary course of treatment to address an EMC are **under the purview of the physician or other qualified medical professional**.

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- In [a letter to healthcare clinicians](#), HHS Secretary Xavier Becerra emphasized this stating, “As frontline healthcare clinicians, the federal EMTALA statute protects your clinical judgment and the action that you take to provide stabilizing medical treatment to your pregnant patients, **regardless of the restrictions in the state where you practice.**”

Q: Will regulations enumerate only specific medical conditions that qualify for a “life of the mother” exemption to an abortion ban?

- HHS guidance states, “Emergency medical conditions involving pregnant patients may include **but are not limited to:** ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.” (Emphasis added.)
- In a letter to clinicians clarifying EMTALA guidance, HHS Secretary Becerra states, “**Any state laws or mandates that employ a more restrictive definition of an emergency medical condition are preempted by the EMTALA statute.**”

Q: Can clinicians take mental health conditions into account in this assessment? What about other safety risks such as domestic abuse?

- **This is not yet clear.**
- EMTALA defines an emergency medical condition as a medical condition that in the absence of immediate medical attention could reasonably be expected to result in “placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy.”
- One could argue that psychological distress and physical abuse both would fit into this category, though the direct link to pregnancy as the emergency medical condition is more complicated. We should expect legal challenges regarding this issue in the coming months.

Q: What documentation and/or review is required for proving an abortion was legal under an exemption? What medical information needs to be documented and disclosed? Who is this information disclosed to?

- [Latest Health Insurance Portability and Accountability Act \(HIPAA\) guidance](#) permits but does not require covered entities to disclose protected health information (PHI) about an individual for law enforcement purposes “pursuant to process and as otherwise required by law,” under certain conditions. For example, a covered entity may respond to a law enforcement request made through such legal processes as a court order or court-

ordered warrant, or a subpoena or summons, by disclosing only the requested PHI, provided that all of the conditions specified in the Privacy Rule for permissible law enforcement disclosures are met.

Q: Do “life of the mother” exemptions require approval before the procedure can take place?

- HHS Secretary Becerra stated, “If a physician believes that a pregnant patient presenting at an emergency department, including certain labor and delivery departments, is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, **the physician must provide that treatment.**” This indicates that federal statute not only protects clinicians in situations that require quick action but also requires them to take this action.

Q: Are exemption cases reviewed? If yes, by whom? What happens if a review determines an abortion was not legal under an exemption?

- If the exemption is related to an emergency medical condition as determined by a clinician under EMTALA, the federal statute protects necessary stabilizing care, including abortion, even in states bans.

Q: What options can clinicians legally discuss with patients in states with abortion bans?

- Latest HHS guidance on HIPAA states that the Privacy Rule does not permit reporting to law enforcement if a patient expresses intent to seek a legal abortion in another state because it does not qualify as a “serious and imminent threat to the health or safety of a person or the public.”

Q: How will bans impact those who practice in multiple states or who practice via telehealth? If a patient and clinician are in different states, which state's abortion laws are in effect? What options can be discussed? What prescriptions can be issued?

- HHS’s new patient-facing website reproductiverights.gov states: “Federal regulation permits medication abortion to be dispensed by telehealth and sent by mail via certified prescribers and pharmacies.”
- [Attorney General Merrick Garland indicated](#) that states may not use a disagreement with the Food and Drug Administration’s expert judgment about safety and efficacy to ban mifepristone, an FDA-approved medication used to assist in ending early pregnancy, including passing a miscarriage.

Professional liability

Q: Are clinicians subject to malpractice litigation for denying an abortion to a patient who later dies from pregnancy complications? Are they subject to discipline by a state board? Are their licenses in jeopardy?

- Hospitals and/or medical personnel could be subject to a complaint under EMTALA if they do not provide stabilizing care for an emergency medical condition. A violation of EMTALA could result in civil monetary penalties and/or exclusion from Medicare and state healthcare programs for physicians.

Q: Can pharmacists have their license suspended or revoked for filling prescriptions for abortion pills? Or, for answering questions about this medication?

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Criminal liability

Following the *Dobbs* decision, clinicians may worry about criminal liability for providing reproductive healthcare and worry about criminal liability for denying necessary care. These complexities will vary by state, but here's what we know about federal protections.

Q: Are clinicians criminally liable for denying an abortion to a patient who later dies of pregnancy complications?

- The EMTALA entitles any patient seeking emergency care for a medical condition to a screening to determine whether an emergency medical condition exists. If a qualified medical professional determines the patient has an EMC, the patient is entitled to stabilizing treatment within the capability of the hospital.
- [Latest EMTALA guidance](#) states, "A physician's professional and legal duty to provide stabilizing medical treatment to a patient who presents to the emergency department and is found to have an emergency medical condition **preempts any directly conflicting state law or mandate that might otherwise prohibit such treatment.**" (Emphasis added.)
- **EMTALA enforcement is complaint driven.** If investigation of a complaint finds that a hospital and/or individual clinician violated EMTALA, it could result in termination of Medicare provider agreements, and/or **civil monetary penalties.**

Q: Can a clinician be prosecuted for providing an abortion to someone who has traveled from a state with a ban to get the abortion?

- [Attorney General Garland affirmed](#) the constitutional necessity of patients remaining free to travel to legally access abortion.
- [Attorney General Garland affirmed](#) the Department of Justice position that states cannot impose criminal or civil liability on federal employees performing duties in a manner authorized by federal law. This should protect federally employed clinicians from any liability in providing an abortion regardless of the state they are in.

Q: Are clinicians required to report if a patient intends to get or gets an abortion in another state? What is the consequence for not reporting?

- Reporting a patient’s intent to seek a legal abortion in another state is a violation of the Privacy Rule under the [latest HIPAA guidance](#).

Q: Can pharmacists be prosecuted for filling prescriptions for abortion pills?

- [Attorney General Garland indicated](#) that states may not use a disagreement with the FDA’s expert judgment about safety and efficacy to ban mifepristone, an FDA-approved medication used to assist in ending early pregnancy, including passing a miscarriage.

Patient privacy

Q: How is information on routine pregnancy tests protected?

- [HIPAA’s Privacy Rule](#) allows for disclosure of protected health information in the event “the covered entity in good faith believes [PHI] to be evidence of a crime that occurred on the covered entity’s premises.”
- This raises concerns about the extent of federal protections for the privacy of health records related to pregnancy and/or abortion services in states where abortion has been or will be criminalized.

Q: If a patient terminates a life-threatening pregnancy, what medical information needs to be reported to prove it was life-threatening? To whom is this information reported?

- [Latest HIPAA guidance](#) permits but does not require covered entities to disclose PHI about an individual for law enforcement purposes “pursuant to process and as otherwise required by law,” under certain conditions. For example, a covered entity may respond to a law enforcement request made through such legal processes as a court order or court-ordered warrant, or a subpoena or summons, by disclosing only the requested PHI,

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