

Challenges for Healthcare Providers Post-Dobbs: Patient Privacy, Emergency Treatment, Pharmacy, IVF, and More

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October 26, 2022



Overview

- *Dobbs v. Jackson Women's Health Organization*
- State requirements and challenges
- Data privacy and security
- Emergency treatment
- Reproductive services
- Best practices for ensuring compliance



Dobbs v. Jackson Women's Health, 142 S.Ct 2228 (2022) held there was no federal constitutional right to abortion and returned the matter to the states to regulate individually.

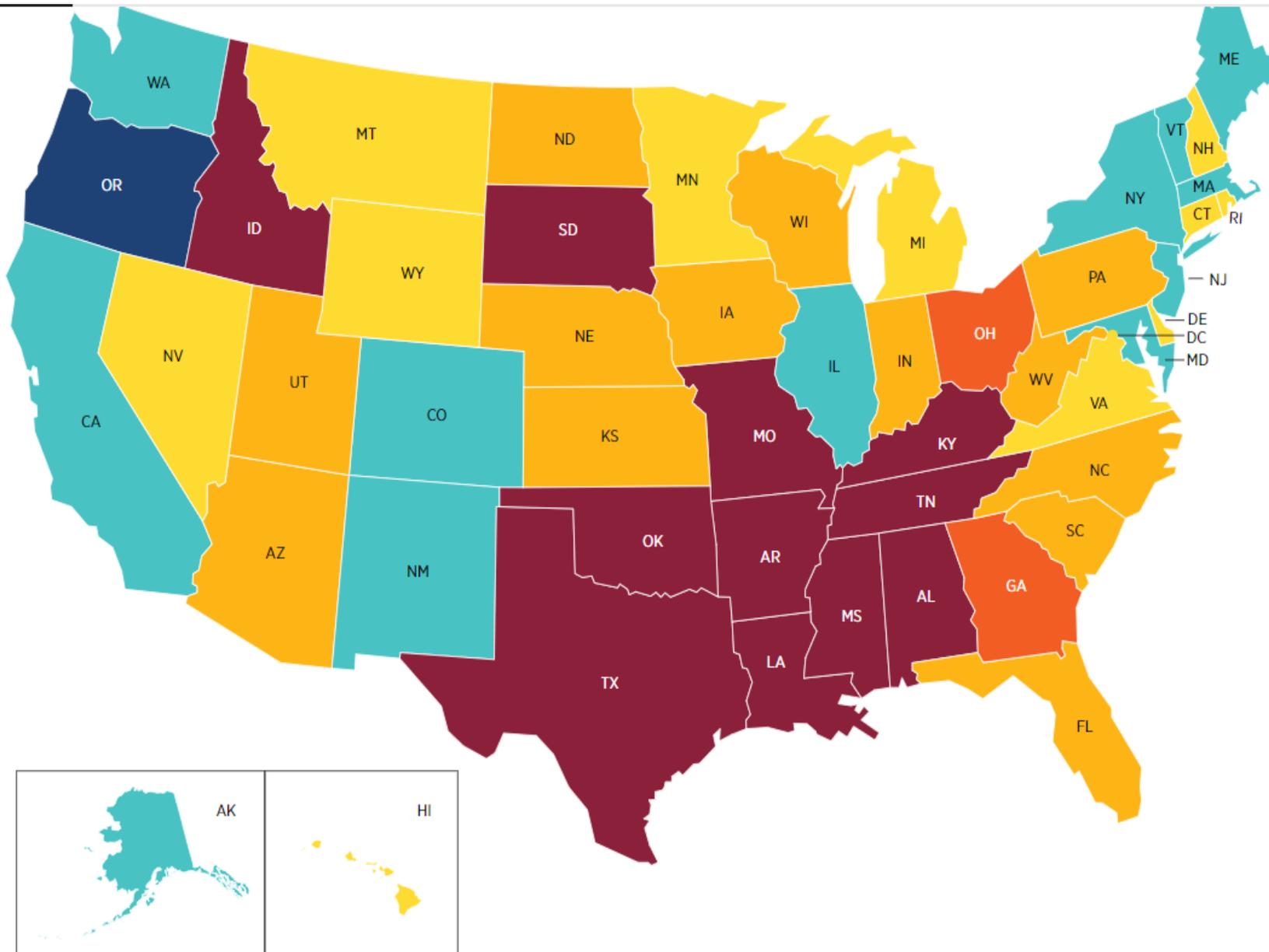
States are free to pass varying abortion bans and some states already had laws that became effective on the reversal of *Roe v. Wade*.

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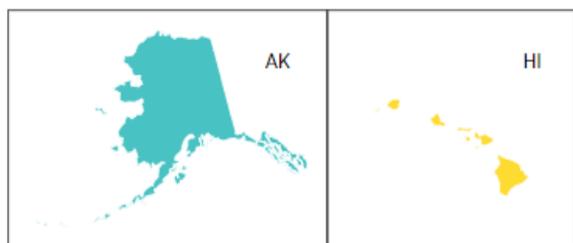


What is the state of the law now?

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- Most restrictive
- Very restrictive
- Restrictive
- Some restrictions/protections
- Protective
- Very protective
- Most protective



Types of Civil and Criminal Abortion Bans

Civil “Bounty” Laws

- Allows private citizens to sue others suspected of attempting, providing, or intending an abortion.
- No less than \$10,000 in damages.

Criminal “Trigger” Laws

- In effect after *Roe* reversal/judgement
- Prohibit all abortions. Exceptions vary by state.
- Penalty: up to life in prison (Texas).

Criminal Pre-*Roe* Laws

- In effect immediately upon reversal of *Roe*.
- Prohibit all abortions. Exceptions vary by state.
- Substantially lower penalties than trigger laws.

Criminal Liability: Texas Health and Safety Code Chapter 170A

- Knowingly performing, inducing, or attempting an abortion.
- Person seeking the abortion is not punishable.
- Only exception is to save the life of the mother. (In some states this is an **affirmative defense only**)

Aiding and Abetting

- Depends on the specific law and whether it has its own aiding and abetting provision or whether aiding and abetting is a more general concept.
- For instance, the Texas trigger law does not have an aiding and abetting provision. Must look to Texas Penal Code Section 7.02(a)(2): “acting with intent to promote or assist in the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit **the offense**.” But, the act that is aided and abetted must be a **criminal offense**. In Texas it is not an offense for the person obtaining an abortion.
- Other laws have imbedded aiding and abetting statutes.

Aiding and Abetting- General and Specific

- Texas Pre- Roe 1925 laws have imbedded aiding and abetting: “whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.”
- Texas Bounty Law: Knowingly engaging in conduct that aids and abets... an abortion... including paying for or reimbursing the costs of an abortion through insurance or otherwise...regardless of whether the person knew or should have known that the abortion would be performed.”

More to Come on Nov. 8

State Ballot Measures Limiting Abortion

1. Kansas (Aug 2) – Amend Constitution to state nothing in Constitution creates a right to abortion – **FAILED**
2. Kentucky – Amend Constitution to state that nothing in Constitution creates a right to abortion
3. Montana – Infants born alive at any stage are legal persons; require medical care

State Ballot Measures Protecting Access to Abortion

1. California – Amend Constitution to provide that state cannot interfere with individual's right to reproductive freedom
2. Michigan – Amend the Constitution to provide Constitutional right to reproductive freedom, including abortion
3. Vermont – Amend Constitution to provide a right to personal reproductive autonomy

“

[S]ome other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion. In my view, the answer is no based on the constitutional right to interstate travel.

Dobbs v. Jackson Women’s Health Organization, 597 U.S. ____
(2022) (Kavanaugh, J., concurring)



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“ We recognize that traveling to obtain reproductive care may not be feasible in many circumstances. But under bedrock constitutional principles, women who reside in states that have banned access to comprehensive reproductive care must remain free to seek that care in states where it is legal. Moreover, under fundamental First Amendment principles, individuals must remain free to inform and counsel each other about the reproductive care that is available in other states.

Attorney General Merrick Garland, June 24, 2022



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“ As it remains the policy of my Administration to support women’s access to reproductive healthcare services, including their ability to travel to seek abortion care in States where it is legal, I am directing my Administration to take further action to protect access to reproductive healthcare services and to address the crisis facing women’s health and public health more broadly.

[T]he Secretary of HHS shall consider actions to advance access to reproductive healthcare services, including, to the extent permitted by Federal law, through Medicaid for patients traveling across State lines for medical care.

*Executive Order on Securing Access to Reproductive and Other Healthcare Services,
August 3, 2022*



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Data privacy and security

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Federal Law Requirements

- HIPAA
- The Privacy Act
- FERPA
- FTC Requirements

HIPAA Guidance

HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care

Access to comprehensive reproductive health care services, including abortion care, is essential to individual health and well-being. ¹ The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule ² (Privacy Rule) supports such access by giving individuals confidence that their protected health information (PHI), ³ including information relating to abortion and other sexual and reproductive health care, will be kept private.

The Office for Civil Rights (OCR) administers and enforces the Privacy Rule, which establishes requirements with respect to the use, disclosure, and protection of PHI by covered entities (health plans, health care clearinghouses, and most health care providers) ⁴ and, to some extent, by their business associates. ⁵ **These regulated entities can use or disclose PHI, without an individual's signed authorization, ⁶ only as expressly permitted or required by the Privacy Rule. ⁷ , ⁸**

The Privacy Rule permissions for disclosing PHI without an individual's authorization for purposes not related to health care, such as disclosures to law enforcement officials, are narrowly tailored to protect the individual's privacy and support their access to health services. This guidance addresses these types of permitted disclosures and their limitations.

HHS Rulemaking

- HHS May Write Rule To Prevent Algorithmic Health Discrimination, Protect Consumers
- October 4, 2022 4:08PM ET
- “The guidance says there should be extra protections for sensitive types of data that AI and algorithms may collect, including data about pregnancy and abortion care. It lists as two problematic examples location data that can reveal when people visit abortion clinics, and consumer data that revealed a teenage girl’s pregnancy to her family by sending baby-related targeted advertisements to their home. Law enforcement access to data about abortion in states where the procedure is illegal has been a major concern for reproductive rights advocates since the *Dobbs v. Jackson Women’s Health* decision.”

State Law Requirements

- California
- Other “GDPR”-like States
- Other Information-Specific Requirements under State Law

California

New Law Buffers California Companies From Abortion Data Requests

Companies such as Alphabet Inc. and Meta Platforms Inc. are shielded from turning over user messages or searches to law enforcement in states that ban abortion under a new California law that's likely to sow legal uncertainty. It's part of a package of legislation the governor signed Tuesday that's meant to expand the state's reputation as a reproductive sanctuary state.

Tech Shield: The search warrant bill ([A.B. 1242](#)) seeks to prevent California-based companies that provide communications or computing services from being compelled to cooperate with out-of-state search warrants related to abortion probes. Other states' law enforcement agencies seeking data must attest that their investigation doesn't involve a crime related to an abortion that would be considered lawful in California.

Part of a Package: Other abortion-related [laws signed](#) Tuesday by Gov. Gavin Newsom (D) will expand resources for care and boost protections for both patients and providers. Another data-related law ([A.B. 2091](#)) will prohibit health-care providers, service plans, contractors, or employers from releasing medical information in response to a subpoena that would identify a person seeking an abortion.

Emerging Issues

- Contractual Requirements
- Data Aggregation
- Anonymization/De-Identification
- Social Media
- Website Tracking Applications
- Electronic Medical Records
- Legal Process



Other Key Issues for Health Care Providers

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EMTALA

- DHHS Written Guidance:
 - EMTALA continues to apply
 - Hospitals must furnish stabilizing treatment to any individual presenting at the hospital with an Emergency Medical Condition (“EMC”)
 - EMC is determined by the physician
 - EMCs can include ectopic pregnancy, complications from pregnancy loss, or emergent hypertension
 - If abortion is the stabilizing treatment, the hospital must provide within its capability or capacity – can only transfer if hospital does not have the capability or capacity (fear of state law repercussions not an exception)
- 2 States Challenged; 2 Divergent Results – Texas and Idaho
 - Texas Court – EMTALA does **not** preempt state abortion laws, because EMTALA is silent as to abortion and there is balance between protection of the mother’s life and the life of the unborn child
 - Idaho Court – EMTALA likely **does** preempt state abortion laws where abortion is required to stabilize an EMC

Medication Abortion

- In 2020, medication abortion accounted for 54% of U.S. abortions
- Many state abortion bans bar the prescription or dispensing of abortion-inducing medications
- FDA has yet to speak on whether it believes FDA approval preempts state law restrictions
- FDA's REMS for mifepristone approved in 2019 contains an in-person dispensing requirement
 - Only clinics, medical offices and hospitals could dispense
- In-person dispensing requirement temporarily lifted during COVID PHE
 - In December 2021, FDA permanently lifted the in-person dispensing requirement
 - But FDA has not yet approved standards for pharmacies to become certified to dispense
 - State laws governing scope of practice and authority to prescribe may still apply

Telehealth and Interstate Practice

- With the easing of FDA dispensing rules, and with the significant rise in the use of telemedicine since the pandemic, it is assumed the use of telemedicine to prescribe medication abortions will increase dramatically, where permitted
 - State restrictions may limit use of telemedicine for out-of-state patients
- Telemedicine services are deemed provided in the state where *the patient* is located
- Practitioners must be licensed to practice in the state where the patient is located and care provided is subject to standards of practice in that state
- Various state laws restrict the use of medication abortions in several ways:
 - Outright ban on the prescription of abortion-inducing medications
 - Prohibit or restrict out-of-state providers from writing prescriptions
 - Prohibit or restrict pharmacies from dispensing prescriptions written by out-of-state prescribers
 - Prohibit or restrict mail-order pharmacies from sending medications into the state

Traveling Patients

- Significant number of patients traveling from restrictive states to permissive states for abortion care
 - Colorado seeing a 2-week wait for abortion care (expected 80% increase in patients)
 - California could see a 3,000% increase in potential demand
 - Planned Parenthood of Greater New York increasing appointment capacity by 20%
- If a patient is in the state, that state law applies even if they traveled from elsewhere
- Open questions:
 - Can/Will states expand prescriptive authority for medication abortion services to NPs, PAs, Pharmacists, etc. to ease access issues?
 - Risks to providers and patients if the patient travels back to a restrictive state to receive follow-up care?

IVF

- Several states' abortion restrictions begin at fertilization or grant personhood rights to embryos or fertilized eggs
- Impact on IVF not yet clear and varies by state
 - Some states require the pregnancy to be in the uterus for the restriction to attach
 - Some states specifically exclude IVF from the restrictions
 - Some states specifically preclude abortion due to gender, race, or potential disabilities detected through genetic testing (common in IVF)
- Implications:
 - Standard practices in fertility labs that may be viewed as harm to an embryo
 - Decisions on which and how many fertilized eggs or embryos to implant
 - Disposing of unused fertilized eggs or embryos



Best practices for ensuring compliance

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Best Practices Post-Dobbs

- Understand that there are still a lot of unanswered questions – seek counsel
- Know your state’s laws and your hospital’s P&Ps with respect to abortion care
- Consider whether second opinion is required or advisable
- Document circumstances (e.g., the medical emergency) leading to abortion care clearly and thoroughly
- Even with split in courts, take EMTALA risks seriously (key way for feds to enforce)
- Consider varying risks for traveling patients
- Stay tuned . . . More to come!

Best Practices Post-Dobbs - Data Privacy and Security

- Review Website Privacy Policy, Terms of Use, Notice of Privacy Practices, and Other User Agreements
- Review Website “Widgets” and other Applications
- Discuss Reproductive Health Data Sharing with Workforce Members, including for Medical Records and Legal Process
- Review Electronic Medical Record Functionality and Capabilities
- Review and Revise HIPAA Policies and Procedures, including to address State Law Requirements, if More Stringent
- Consider Additional Workforce Training



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