

Providing Care Post Dobbs:

Legal Considerations for Clinicians

July 27, 2023



Lawyering for Reproductive Justice



Legal Disclaimer

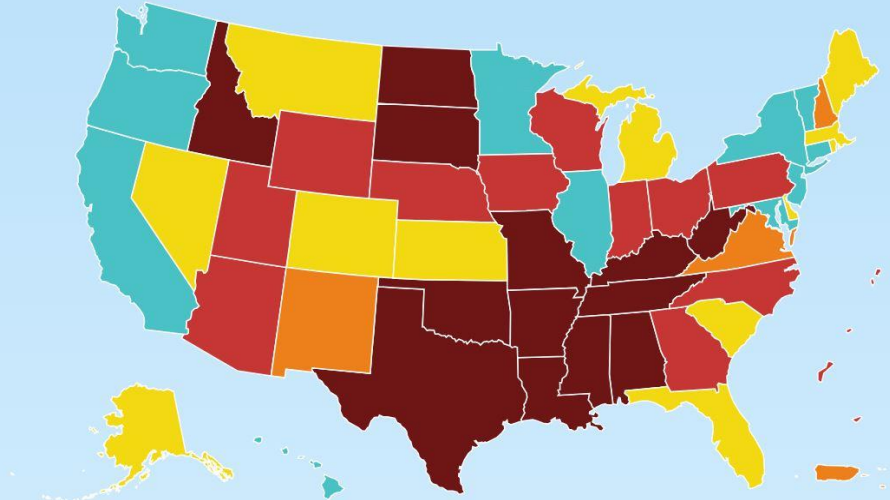
This presentation is educational information only.

This presentation is not legal advice and does not create an attorney-client relationship.

Consult with your attorney before making changes to your abortion care services.

If you don't have an attorney, you can contact the
Abortion Defense Network at abortiondefensenetwork.org.

Road Map



- Intro and State of abortion law - 15 minutes
- Resource List - 5 minutes
- SMA and the Law - 30 minutes
- HIPAA updates - 10 minutes
- EMTALA - 10 minutes
- 5-minute break / recording stops
- Cross State Abortion Care - 15 minutes
- Hypothetical Scenarios - 5 minutes
- Questions / Scenario Discussion - 20 minutes

Dobbs v. Jackson Women's Health Organization, June 2022

Overturs Roe v. Wade

Under *Roe*, states could regulate, but not prohibit, abortion prior to viability because individuals had a right to decide whether to have an abortion.

First individual liberty right to ever be withdrawn by the Court.

Allows Prohibitions

The majority states that “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.”

The majority purports to “return that authority to the people and their elected representatives.”

History and Tradition

The majority adopts an “originalist” test for identifying constitutional rights that only recognizes rights it finds “deeply rooted in history and tradition,” and concludes that abortion is not so rooted.

Around *Dobbs*, states begin implementing total abortion bans.

Today, 14 states have total prohibitions on abortion—TX, OK, LA, AR, MO, MS, AL, TN, KY, WV, IN, SD, ND, ID.

**More states have gestational bans,
including—GA (6), NE (12), NC
(12), FL (15), AZ (15), UT (18).**

Exceptions

Health or Life

- States have various health or life exceptions.

Rape or incest

- Very few laws have exceptions for rape or incest.

Tennessee

- This ban had no exceptions, just affirmative defenses, although this law is now amended.

Not abortions

- No fetal cardiac activity or ectopic—not an abortion and not prohibited by any ban.

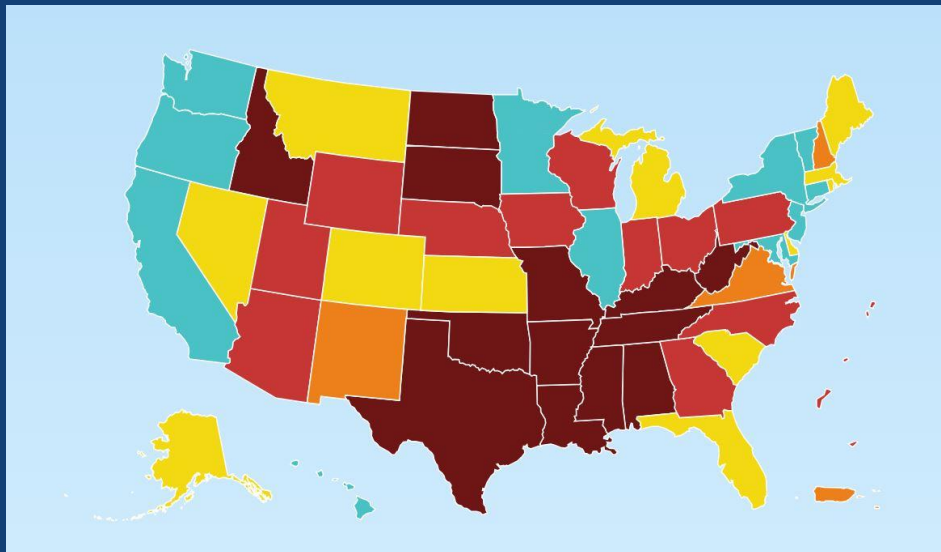
**Some state courts have found
fundamental rights to health or
life-saving abortions—ND, OK.**

**Ongoing efforts to clarify
exceptions/EMTALA
obligations—TX, ID.**

Know what abortion laws exist in your state so you can advocate for yourselves and your patients.

If you need legal advice, reach out to the Abortion Defense Network.
More resources shared with this training.

***Center for Reproductive Rights, After Roe Fell
Interactive Map, <https://reproductiverights.org/after-roe-fell-abortion-laws-by-state/>
Visit to learn about the laws in your state.***





- Goal is to help you remove obstacles and barriers to providing care
 - **EMPLOYMENT CONTRACT TOOLKIT** for Clinicians Who Want to Moonlight as Abortion Providers (document)
 - **Know Your Rights: Existing Laws May Protect Health Care Professionals Who Provide Or Support Abortion From Discrimination In Employment** (document)
 - **Answers and resources to questions around state bans, federal protections for health care professionals, applying for medical licenses in multiple states, and privacy protections while relocating**
-
- **Support and information if you experience discrimination**



**NATIONAL
WOMEN'S
LAW CENTER**

Justice for Her. Justice for All.

MOONLIGHTING

MARCH 2019

EMPLOYMENT CONTRACT TOOLKIT
for Clinicians Who Want to
Moonlight as Abortion Providers

EMPLOYMENT CONTRACT TOOLKIT

for Clinicians Who Want to
Moonlight as Abortion Providers

**WHAT TO LOOK
FOR IN AN
EMPLOYMENT
CONTRACT**

**NEGOTIATING
TO REMOVE
OR ALTER
RESTRICTIVE
CLAUSES**

**USING MEDICAL
PROFESSIONALISM
AND ETHICS AS
A CONTRACT
NEGOTIATION
TOOL**

**USING THE LAW
AS A CONTRACT
NEGOTIATION
TOOL TO REMOVE
OR ALTER
RESTRICTIVE
CLAUSES**

**WHEN YOU
ARE ALREADY
UNDER A
CONTRACT**

Provider Support - How can I help?

Provide general guidance and information on what to look for when understanding an employment offer and contract to help ensure you're able to provide abortions as part of your clinical work

Connect you with an employment lawyer in your state who has specifically asserted they would like to help providers

Help you with other legal needs such as finding a lawyer who can help you create a legal instrument to buy a home with so your home address is not under your name



Abortion Access Legal Defense Fund

The fund is designed to help people pay for certain legal expenses they are facing because they are **Abortion Patients** or **Supporters**—individuals and entities who sought abortion or helped someone obtain an abortion or information about abortion care.

Abortion Supporters include individuals or organizations that have tried to help someone seeking an abortion. You could be an abortion supporter, for example, if you:

- are an abortion fund or work for one,
- are a practical support organization or work for one,
- are a friend or family member of an abortion patient, or
- are a teacher or social worker,

and have in any way helped someone obtain an abortion or information about one.

Part of the Abortion Defense Network

Contact Information

Leila Jade Levi

Senior Counsel for Reproductive Rights and Health

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202-261-2387

Abortion Defense Network

Do you need **legal advice, representation,** or help paying legal expenses related to abortion care?

Everyone deserves access to safe and affordable abortion care.

If you have questions about your legal rights to provide or support abortion care, or if you have been threatened with arrest, prosecution, or other legal action related to abortion, please contact us.

We can connect you with values-aligned attorneys and with organizations that provide funding to cover attorney's fees, bail and bond fees, and other legal expenses.

If you **provide abortion care, help people obtain abortion care, or want to do one of those things,** please click here and we will be in touch.

Get in touch with us

If you **recently had an abortion or are seeking abortion care,** please click here and you will be connected to the Repro Legal Helpline operated by If/When/How.

Take me to the Repro Legal Helpline

abortiondefensenetwork.org

For abortion patients and seekers:

If/When/How

repro
legal
helpline

reprolegalhelpline.org
844.868.2812

CRIMINALIZATION



UNDERSTANDING CRIMINALIZATION

It's Discriminatory

- Race
- Poverty
- Gender
- Disability
- Participating in informal economies

It's Discretionary

- Statutes
- Constitution
- Local police
- Prosecutorial discretion
- Social workers

It's Circumstantial

- Gestational duration
- Medical emergencies
- Medical providers
- Other participants

STIGMA FURTHERS CRIMINALIZATION

LEVELS OF ABORTION STIGMA



COMMON LAW &
CONSTITUTIONAL LAW:
SMA IS (usually) NOT A
CRIME FOR THE
ABORTION-SEEKER

LAWS USED TO CRIMINALIZE PEOPLE

ABORTION LAWS

PRE-*ROE* LAWS BANNING SELF-MANAGED ABORTION

PRE-*ROE* LAWS CRIMINALIZING ABORTION GENERALLY

DRUG LAWS

FETAL HARM LAWS

THE KITCHEN SINK





HEALTH CARE PROVIDERS & SMA CRIMINALIZATION

ETHICAL ISSUES IN MANDATORY REPORTING

- State law or policy
- Required or permissive



Information v. Advice

- Legal information v. legal advice
- Medical information v. medical advice



image by new voices / flickr

LAWS USED TO CRIMINALIZE PEOPLE

ABORTION LAWS

PRE-*ROE* LAWS BANNING SELF-MANAGED ABORTION

PRE-*ROE* LAWS CRIMINALIZING ABORTION GENERALLY

DRUG LAWS

FETAL HARM LAWS

THE KITCHEN SINK



Why does HIPAA matter?

- Protects patient privacy
 - Enhances practitioner-patient relationship
 - Reflects healthcare practitioners' confidentiality duties to patients
- Significant penalties (updated as of 3-17-22, includes inflation adjustments for 2022):

Penalty Tier	Culpability	Minimum penalty per violation	Maximum penalty per violation	Annual penalty cap*
Tier 1	Lack of knowledge	\$127	\$31,987	\$31,987
Tier 2	Reasonable cause	\$1,280	\$63,973	\$127,974
Tier 3	Willful neglect	\$12,794	\$63,973	\$319,865
Tier 4	Willful neglect, not corrected within 30 days	\$63,973	\$63,973	\$1,919,173

*Based on OCR's 2019 Notice of Enforcement Discretion that applies to the annual maximums.

HIPAA Updates

- Limitations on patient privacy protection
- Interoperability poses a risk, even though beneficial generally
- New rule proposed - do not expect final before next year

No matter where someone is on their reproductive journey, the Repro Legal Helpline's legal services are available.



Free and confidential services in any language for abortion, pregnancy loss, and birth

Keep it handy and share it widely: 844-868-2812

The logo consists of a square with a vertical gradient from teal at the top to purple at the bottom. The left edge of the square is irregular and torn. The text "REPRO LEGAL DEFENSE FUND" is written in white, bold, sans-serif capital letters, stacked vertically in the center of the square.

REPRO LEGAL DEFENSE FUND

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reprolegaldefensefund.org

Emergency Medical Treatment & Active Labor Act (EMTALA)

- EMTALA was enacted in 1986 with bipartisan support to ensure that no person suffering a medical emergency is turned away from receiving the care they need.
- EMTALA requires Medicare-participating hospitals to provide all patients who come to the emergency department with a medical screening for **emergency medical conditions** and **stabilizing treatment** or, if the hospital does not have the capability, an **appropriate transfer** to a facility capable of providing the necessary care.
- A patient may refuse examination, treatment, or transfer, but the hospital must take reasonable steps to obtain written informed consent.

What is an “emergency medical condition” under EMTALA?

- An emergency medical condition is defined as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health [or the health of an unborn child] in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of bodily organs."
 - For a pregnant person, this can include having contraction without adequate time to effect safe transfer to another hospital before delivery.
-

What is “stabilizing treatment”?

- “Stabilizing treatment” is defined as “such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual.”
- Transfer cannot be made unless a physician determines based on the information available that the medical benefits from the provision of appropriate medical treatment that could be provided at another facility outweigh the risks to the individual, and in the case of a pregnant person the risks to the fetus as well, from effectuating a transfer.

What is an “appropriate transfer”?

In order to make an appropriate transfer, the transferring hospital must first provide all medical treatment within its capacity to minimize the risks to the individual's health and, in the case of a pregnant person, risks to the health of the fetus. The transferring hospital also must send to the receiving hospital all medical records.


For a transfer to be appropriate, the receiving facility must be confirmed to (1) have space available and qualified personnel for the treatment of the individual and (2) have agreed to accept the transfer of the individual and provide appropriate care.

Written consent must be obtained from the individual or a legally responsible person.


When does EMTALA apply?



The hospital must participate in Medicare.



The patient must seek treatment at an emergency department.



EMTALA applies regardless of a hospital's religious affiliation, a physician's personal beliefs, or a contradictory state law.

Consequences of Violating EMTALA

If a physician, including emergency medicine physicians and on-call consultants, fails to provide required stabilizing care under EMTALA, they can be personally liable for fines up to \$50,000. This is in addition to fines levied on the hospital.

EMTALA also provides crucial protections for whistleblowers: A Medicare-participating hospital may not penalize or take adverse action against a physician because the physician refused to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports an EMTALA violation.

EMTALA and *Dobbs*

Shortly after *Dobbs*, the Biden Administration issued guidance to ensure that hospitals took the proper steps to protect patients in need of life- or health-saving abortion care in emergency situations, including clarifying physicians' responsibilities and protections under EMTALA.

Specifically, the guidance says,

“If a physician believes that a pregnant patient presenting at an emergency department 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. When a state law prohibits abortion and does not include an exception for the life of the pregnant person — or draws the exception more narrowly than EMTALA’s emergency medical condition definition — that state law is preempted.”

EMTALA and *Dobbs*

The post-*Dobbs* EMTALA guidance sought to clarify three things:

The guidance identified several pregnancy related **emergency medical conditions** that trigger EMTALA, including but not limited to, “ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.”

The guidance clarified that **stabilizing treatment** for patients experiencing emergency pregnancy complications may include medical and/or surgical abortion care.

The guidance further made clear that if state law prohibits abortion and does not include an exception for the health or life of the pregnant person, that state law is **preempted** by EMTALA.

Case Study: Mylissa Farmer



May 1, 2023 CMS Announcement

Both hospitals—Freeman Hospital West in Joplin, MO, and the University of Kansas Health System in Kansas City, KS—violated EMTALA.

Mylissa's medical condition—preterm premature rupture of membranes (PPROM) at nearly 18 weeks of pregnancy—was deemed **an emergency medical condition**—even though her vitals were stable at both hospitals.

A surgical abortion was deemed the **stabilizing treatment** that Mylissa needed because it would have ensured that Mylissa would not have developed an infection, hemorrhaged, lost her uterus, or potentially died.

Both hospitals have publicly announced their intent to change their policies to come into compliance with EMTALA and ensure that they provide patient care in similar scenarios going forward.

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