



Navigating Legal Landscapes in Reproductive Health

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1. Opening Remarks and Introductions
2. HIPAA Privacy Rule
3. The 2024 Supreme Court and Health Care
4. What Trends are We Watching?
5. Q&A

Agenda



This Presentation Is Not Legal Advice

Today's discussion provides a high-level overview only and should not be considered direct legal advice.

Please consult your attorney about your specific matter.

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Who is Lawyers for Good Government?

Lawyers for Good Government (L4GG) is an advocacy and policy nonprofit fighting to preserve and protect our most basic civil and human rights. We do this by strategically combining the expertise of our in-house staff with the strength and scale of our nationwide network of 125,000 + lawyers and advocates. We believe that every attorney, advocate and person is capable of fighting for these rights, and we have trained and mobilized thousands of attorneys and other stakeholders across the country to provide life-changing advocacy and direct legal services.

Our primary focus areas are:

- Reproductive Justice & Health Equity
- Immigrant Rights (Project Corazon)
- Climate Change and Environmental Justice



HIPAA & Reproductive Health





Quick HIPAA Overview

- HIPAA:** HIPAA generally prohibits disclosure of “protected health information” (PHI) in order to safeguard patient information being shared without their permission or consent
- PHI: Generally speaking, PHI is information that identifies or could be used to identify a person (such as their name, date of birth, address or social security number) and relates to data about that person’s past, present or future health, the provision of health care to the individual, or information about the past, present, or future payment for the provision of health care.
 - Although PHI is generally protected, there are exceptions for things like
 - public health activities
 - judicial and administrative proceedings
 - Research
 - Certain law enforcement purposes.
 - There is a common misconception among patients and those outside of the medical field that HIPAA is a blanket protection for any information related to the provision or receipt of healthcare





HIPAA Privacy Rule to Support Reproductive Health Care

Summary–What, Why and When:

- **What:** On April 26, 2024, the Biden Administration promulgated the HIPAA Privacy Rule to Support Reproductive Health Care – the goal of this **new rule** is to strengthen privacy protections for reproductive health care information post-*Dobbs*
- **Why:** After *Dobbs* overturned the federal right to abortion, a patchwork of state-level abortion laws and bans popped up, many of which have harsh, civil, criminal and professional consequences attached.
 - Several states are seeking to criminalize interstate travel for abortion
 - States have enacted or tried to enact harsher reporting requirements for abortion and abortion-related procedures
 - There is concern about a rise in fetal personhood laws, which could lead to increased criminalization of miscarriages, abortion and conduct while pregnant
 - Project 2025 calls for heightened pregnancy surveillance at the federal level
 - The need for patients to leave their home state to obtain care increases concerns about the sharing of healthcare information between states and between hospitals and clinics
- **When:** Covered individuals and entities must comply with the new rule by **December 23, 2024.**



New Reproductive Health Rule: Overview

In sum, the Rule does three key things:

1. Prohibition on Disclosure: The main feature of the Rule is its clarification that HIPAA's Privacy Rule prohibits use or disclosure of PHI for the **purpose of investigating or imposing liability** on any person for **seeking, obtaining, providing, or facilitating lawful reproductive health care or to identify a person for such an investigation**.
2. Attestation: Regulated providers, health plans, or clearinghouses must obtain a signed attestation that any requests for reproductive health-related PHI are not being sought or used for the prohibited purposes described above; and
3. Notice of Privacy Practices: Covered entities must modify their Notice of Privacy Practices to support reproductive health care privacy.





Reproductive Health Rule: Prohibition on Disclosure

Prohibition on Disclosure: Prohibits use or disclosure of PHI for the **purpose of investigating or imposing liability** on any person for **seeking, obtaining, providing, or facilitating lawful reproductive health care or to identify a person for such an investigation.**

- a. This prohibition on disclosure applies to criminal, civil or administrative investigations or proceedings;
- b. HHS describes “seeking, obtaining, providing, or facilitating” broadly, giving the following examples: covered activity could include, but not be limited to activities such as: expressing interest in, inducing, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same.
- c. Note: The new Rule does not create a blanket prohibition against disclosure of certain **types** of PHI—instead, it protects reproductive health care information from disclosure for certain **purposes**.



Reproductive Health Rule: Prohibition on Disclosure Contd...

Prohibition on Disclosure: Prohibits use or disclosure of PHI for the **purpose of investigating or imposing liability** on any person for **seeking, obtaining, providing, or facilitating lawful reproductive health care or to identify a person for such an investigation.**

- The Rule Only Applies to **lawful** healthcare—that is, services that are legal in the state where the patient obtained them or that are federally protected. It does not protect information related to unlawful care, nor does it override state abortion bans or create any substantive right to health care.
- **Presumption of lawfulness:** The Rule creates a presumption of lawfulness, meaning that when a covered entity is presented with a request for PHI, the reproductive health care at issue is presumed to be lawful, and the provider may accept the information given to them by the patient, unless:
 - i. The covered entity has actual knowledge that the care was not lawful; or
 - ii. The covered entity is presented with factual information that demonstrates a substantial factual basis that the health care was not lawful under the circumstances.
- The prohibition covers not only the provider who performed the abortion, but to any covered health care entity with access to records—so a person's primary care physician in their home state would not be permitted to share PHI regarding a patient's out of state abortion for purposes of imposing liability



Prohibition on Disclosure in Operation:

Examples of times when PHI is likely protected from disclosure:

- **Interstate travel:** A person travels from their home state where abortion is banned to obtain care in a state where it is legal. The patient's home state then requests information about that care. If the covered entity provided the care and knows it to be lawful, they cannot disclose the patient's information - this is true regardless of whether the covered entity provided the care or not
- **Federally protected care:** If a person accesses reproductive health care that is authorized under federal law, regardless of the state that where the health care was provided. An example of this would be accessing contraception.
- **Lawful care in state:** If a person obtains reproductive health care in a state where that care is lawful, then PHI cannot be disclosed for purposes of further investigating the circumstances of that care.
- **Where a case falls within an exception:** If a person obtains an abortion in a restrictive state, and that abortion falls within an exception, the clinician may presume lawfulness
- **Discussing lawful abortion care** - the rule includes a prohibition against PHI related to "seeking" reproductive health care, this is likely broad enough to cover discussions about obtaining care
- **When the Presumption of Lawfulness Applies:** If the provider in question has no reason to believe that the care in question was unlawful



Prohibition on Disclosure in Operation:

Examples of times when PHI may not be protected:

- **Unlawful Care:** Disclosure is not prohibited if the covered entity has actual facts demonstrating that the care was not lawful
- **Purpose Unrelated to Liability:** if the request for PHI is not for the purpose of investigating a person for reproductive health care-related reasons, then the care is not protected. For example the prohibition would likely not apply in the following examples:
 - i. Law enforcement investigations into unlawful activity such as sexual assault or human trafficking;
 - ii. A request for disclosure to a health oversight agency conducting health oversight activities such as whether reproductive health care was provided and appropriately billed;
 - iii. Investigations into substandard medical care or allegations of patient abuse or neglect;
 - 1. Note: disclosure is not permitted if the basis for abuse or neglect is solely the provision or facilitation of reproductive healthcare
 - iv. Investigations into whether a person submitted a false claim for reproductive health care for payment by the government;
 - v. Requests for PHI to investigate alleged violations of Federal nondiscrimination laws or other abusive conduct.
 - vi. Public health activities, if those activities are not for the purpose of reproductive healthcare-related liability



Prohibition on Disclosure in Operation:

Considerations for telehealth:

- Telehealth has its own considerations in cases where the patient is physically located in a restrictive state, and receiving care from a provider in a state with a shield law that allows the provider to prescribe medication across state lines.
 - i. All states with abortion bans in place consider the patient's location to be the location where the abortion took place and would therefore argue that the abortion was unlawful if, a Texas resident obtained mifepristone via telehealth and took it at home in Texas.
 - ii. Although states with shield laws may refuse to comply with a subpoena related to care that they provided lawfully, that same refusal may not apply to other healthcare providers in a person's home state, if that state is an abortion restrictive state.
 - 1. For example: New York's shield law allows telehealth across state lines, so if Patient A is located in Texas and obtains medication for an abortion via telehealth, and they complete that abortion in Texas, then the New York provider can refuse to provide records based on the shield law, but a Texas provider who performs follow up care may not be protected from disclosure.
 - iii. Providers need to be cautious about how they document abortions in these cases



New Reproductive Health Rule: Attestation and Notice of Privacy Practices

1. Attestation: Regulated providers, health plans, or clearinghouses must obtain a signed attestation that any requests for reproductive health-related PHI are not being sought or used for the prohibited purposes described above; and
 - a. This requirement would apply where the requester is making the request for any of the following reasons:
 - i. disclosures for health oversight activities;
 - ii. disclosures for judicial and administrative proceedings;
 - iii. disclosures for law enforcement purposes; or
 - iv. disclosures about decedents to coroners and medical examiners.
2. Notice of Privacy Practices: Covered entities must modify their Notice of Privacy Practices to support reproductive health care privacy.
 - a. The NPP must describe the ways in which the covered entity may use and disclose PHI for treatment, payment, or healthcare operations, as well as each of the other purposes for which the covered entity is permitted or required to use or disclose PHI without the individual's written authorization.



US Supreme Court Wrap Up

What Happened This Term





Reproductive Rights

Medication Abortion: *Alliance for Hippocratic Medicine v. FDA*

- **What Happened?**

- The Plaintiffs, Alliance for Hippocratic Medicine, a group of anti-abortion doctors and provider groups challenged the FDA's approval of mifepristone, one of two drugs used in a standard medication abortion
- The Supreme Court rejected the case on standing grounds, finding that the plaintiffs could not show that they were harmed by FDA's actions

- **Why it Matters?**

- Access to medication abortion is critical—it accounts for over 60% of all abortions today
- Although SCOTUS ultimately came to the right conclusion—the case should **never** have been allowed to move forward
- The Supreme Court did not rule on the merits question of whether the FDA acted improperly; the case will likely be continued by future litigants, including Kansas, Missouri and Idaho

- **How to Move Forward?**

- Mifepristone remains available for now, but an anti-choice administration could change that with or without Congressional approval
- Mifepristone continues to be unavailable in many states, depriving people of access
- SCOTUS' decision overturning Chevron deference necessarily undermines FDA's authority



Reproductive Rights

Emergency Medicine: *Moyle v. United States* & *Idaho v. United States*

- **What Happened?**

- Idaho enacted a total abortion ban, with an exception only to save the pregnant person's life—not their health. The Emergency Medical Treatment and Active Labor Act (EMTALA) requires all hospitals that receive medicare funding to provide stabilizing treatment to preserve someone's life **and** health. Because the two laws conflict, the Biden Administration sued Idaho, arguing that federal EMTALA obligations preempt Idaho's ban to the extent that it doesn't allow health-preserving abortions
- The lower courts blocked the part of Idaho's ban that prohibited health-saving abortions
- In January, the Supreme Court agreed to hear the case **and** stayed the lower courts' orders—meaning that Idaho was free to fully enforce its ban once more.
- After full briefing and oral argument in the case, the Court 1) dismissed the case as improvidently granted; and 2) lifted its stay on the lower courts' orders



Reproductive Rights

Emergency Medicine: *Moyle v. United States & Idaho v. United States*

● **Why it Matters?**

- The Court's dismissal of the case as improvidently granted is an abdication of judicial duty
 - The Court's decision is **not** a vindication of pregnant people's rights; despite the Court having full briefing, full argument and many amicus opinions, it decided to return the case to the lower court without issuing a ruling on the merits
 - Pregnant people have been harmed while the Court deliberated
- This case, like the mifepristone case, should never have been allowed to move forward; it turns on basic supremacy clause and federal preemption principles
- Although emergency abortions are safe for now, the Supreme Court failed to make clear that this is a minimum standard required by federal law, furthering uncertainty for providers and patients

● **How to Move Forward?**

- The case will go back to the 9th Circuit for now, but it is all but certain to end up before the Supreme Court at some point in the future, through this case or a similar one out of Texas
- Justice Jackson put it better than I can—in her partial concurrence she stated: “Today’s decision is not a victory for pregnant patients in Idaho. It is a delay. While this court dawdles and the country waits, pregnant people experiencing emergency medical conditions remain in a precarious position, as their doctors are kept in the dark about what the law requires.”



What Comes Next? Comstock, Fetal Personhood and Ballot Initiatives

- **The Comstock Act:** In its modern form, the Comstock Act refers to a series of provisions that prohibit the use of the U.S. Postal Service to send obscene materials or materials used to produce abortions
 - The abortion-related provisions have gone unused for decades, but some lawmakers and activists argue that it should be revived as a method to federally ban abortion
 - The Biden Administration has indicated that Comstock only applies to unlawful abortions and cannot be applied to prohibit the sending of materials for the purpose of lawful abortions
- If implemented federally, the Comstock Act could result in a federal ban on the mailing of mifepristone and misoprostol as well as materials needed to perform procedural abortions



What Are We Watching? Comstock, Fetal Personhood and Ballot Initiatives

- **Fetal Personhood:** Fetal personhood laws seek to give fetuses and embryos the same rights as a person; they are on the books in over a third of U.S. states
 - They may not arise in laws explicitly relating to abortion—instead, they are often in things like the family code, tax code, or criminal code—or even statements about the scope of the constitution.
 - Fetal personhood arguments are what led to outcomes like the Alabama Supreme court ruling that the destruction of frozen embryos constituted the wrongful death of a child, leading IVF clinics in the state to shut down
 - These laws would have extreme consequences for medicine and the law:
 - How to prioritize the life of the fetus vs. the mother if both are in danger but they have equal rights
 - Increased criminalization and surveillance of miscarriages, as they are treated like the death of a born person
 - Increased criminalization and surveillance of conduct during pregnancy, as potential harm or neglect inflicted on a child
 - Severe limitations on access to abortion, fertility treatment and even certain forms of contraception



What Are We Watching? Comstock, Fetal Personhood and Ballot Initiatives

- **Ballot Initiatives:**

- A number of states are seeking to place questions related to abortion directly on their states ballots; these would enshrine the right to abortion and other reproductive health care into the state's constitution
 - Some states, like Colorado, Florida, Maryland and Nevada have already succeeded in having their questions placed on the ballot
 - Other states are still in the process of trying to get their measure placed; many are facing opposition.
- Abortion has succeeded every time it has been placed on the ballot thus far
- Wins on these ballot initiatives could fundamentally shift the reproductive healthcare landscape



What Can You Do?

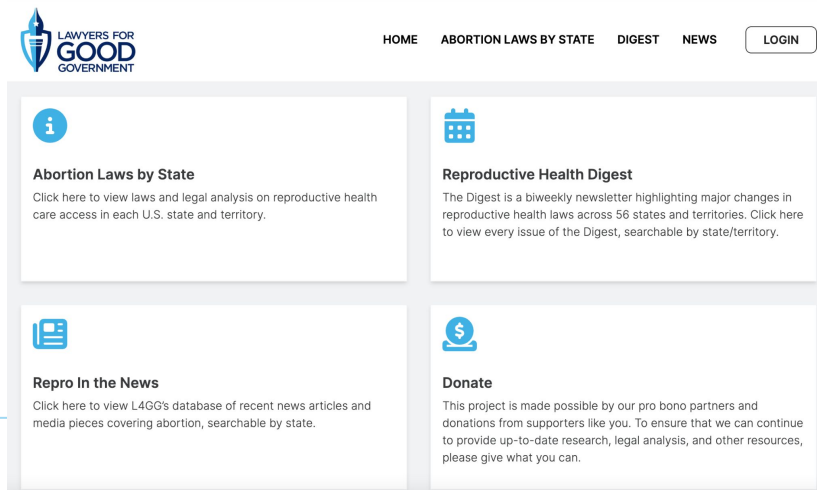
- **Own Your Expertise:** As providers, you are experts on how to care for your patients, and you are experts on how restrictive laws interfere with that care. We are in a situation where lawmakers, judges and justices are substituting expert medical judgment with their own often ideologically motivated determinations. As providers, you are in a powerful position to push back.
- **Partner with Advocacy Groups:** Groups working for equitable healthcare need medical voices in their midst. Reach out in whatever capacity fits with your skills, your time and your passions.
- **Educate Yourself and Others:** Educate yourself and others about what the law does and does not require, so that you can be an effective advocate for your patients and yourself. Where you are unsure, reach out to groups like Lawyers for Good Government—we are literally here to help.
- **Talk About Voting as a Health Equity Issue:** Voting and healthcare are deeply linked, and it's critical that we talk about them as two sides of the same coin. The next administration will impact health care on the federal, state and local levels, and it is important that we encourage voters to make decisions with this in mind.



Want More Information on Reproductive Health Law and Policy?

- Sign up for our Policy Resource Hub for Reproductive Rights (the “Hub”)--available at L4GG.org/Repro
 - It contains:
 - the state of abortion law in every U.S. state and territory, updated every single business day
 - Our archive of Repro Health Digests
 - Our collection of reproductive health related media pieces

- Contact us at:
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Q&A