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# THE *DOBBS* DECISION: POST-*ROE* CONSIDERATIONS FOR HEALTHCARE PROVIDERS

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On June 24, 2022, the Supreme Court issued a much-anticipated decision in *Dobbs v. Jackson Women's Health*. The decision overturned the Court's decisions in *Roe v. Wade*, the 1973 landmark legal decision case, which held that a woman had a constitutional right to an abortion, and *Casey v. Planned Parenthood*, a 1992 decision that upheld *Roe* and altered the standard for analyzing restrictions on that right.[1] *Dobbs* makes clear that abortion is not a constitutional right, and that abortion regulation is now left to the states. As a result, abortion is likely to be banned in most situations in 26 states, with 13 states having "trigger laws" in place that already prohibit abortion or will do so in the coming weeks. Some states have pre-*Roe* laws that have been dormant but now could go into effect with *Roe* overturned. Sixteen states and the District of Columbia guarantee the right to an abortion through laws or constitutional amendments.

The laws of virtually every state differ on abortion prerequisites, exceptions, authorized providers, restrictions, waiting periods, implications for minor patients, and penalties for illegal abortions. With severe penalties directed primarily at healthcare providers, the overturning of *Roe* raises significant regulatory and compliance issues for healthcare providers and health systems. Important questions in interpretation and implementation of the state laws remain and merit watching closely.

## OVERVIEW: *DOBBS v. JACKSON WOMEN'S HEALTH*

In *Dobbs*, the nation's highest court was asked to evaluate the constitutionality of Mississippi's Gestational Age Act, which provides, in part:

> Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.

Miss. Code § 41-41-191(4)(b). Jackson Women's Health Organization (an abortion clinic) and one of its doctors challenged the Act in federal district court, alleging that the state statute violated *Roe* and *Casey.* The district court granted summary judgment in favor of the clinic and permanently enjoined enforcement of the Act, reasoning the statute violated the Supreme Court's cases forbidding states to ban abortion pre-viability. The Fifth Circuit affirmed. Upon petition by the Mississippi Department of Health, where the petitioners argued that *Roe* and *Casey* were wrongly decided and that the Act was constitutional because it satisfies rational basis review, the Supreme Court granted review.

In a detailed and lengthy opinion, the Supreme Court held that the Constitution does not grant a right to abortion; that *Roe* and *Casey* are overruled; and that the authority to regulate abortion is returned to the people and their elected representatives at the state level.[2] The Court reasoned that the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the due process clause of the Fourteenth Amendment, upon which supporters of *Roe* and *Casey* relied. The Court recognized that the due process clause has been held to guarantee that some rights are not mentioned in the Constitution, but that any such rights must be “deeply rooted in the Nation’s history and tradition” and an “essential component of ordered liberty.” The Court explained that a right to abortion does not fall in either category.

The Court explained that because there was no constitutional right to abortion, it was without authority to regulate abortion in the United States and that the power to do so must rest with the states and the people’s elected representatives. The Court acknowledged that states will interpret this differently – that in some states voters may believe the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. And that in others, states may wish to impose tight restrictions based on a belief that abortion destroys a potential fetal life or an “unborn human being,” referring to the Mississippi Act. The Mississippi statute was upheld as the Court found it satisfied a rational basis review, as the Mississippi state legislature had made specific findings, which included the state’s asserted interest in “protecting the life of the unborn.”[3]

The decision was supported by six justices, with the remaining three writing a detailed dissent. The dissent advocated that the decision forcefully curtails women’s rights and their status as free and equal citizens. The dissent concluded “[w]ith sorrow – for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection – we dissent.”[4]

The essential implication of *Dobbs* is that authority to regulate abortions will now be governed by the states, which creates an opportunity for widely varying state statutes, penalties, exceptions, circumstances, and a variety of other consequences across the country.

## IMPLICATIONS FOR HEATLHCARE PROVIDERS

### Who can be punished for illegal abortions?

In many states banning abortion, any person who performs or attempts to perform an abortion can be prosecuted or fined. Generally, statutes focus on the healthcare providers performing an abortion, not the women seeking them. In Arkansas, performing or attempting to perform an illegal abortion is a felony punishable by up to 10 years in prison and a fine of up to $100,000. In Texas, private citizens will be able to sue abortion providers and anyone who assists a person obtain an abortion. A group of more than 80 elected prosecutors issued a joint statement[5] indicating they did not plan to prosecute individuals who seek or provide abortion care. Other prosecutors have vowed to “strictly enforce” new bans. Texas Attorney General Ken Paxton issued an advisory[6] on Texas law noting that abortion will soon be illegal in Texas and promising to “assist any local prosecutor who pursues criminal charges” under the ban.

### Will state health regulatory boards take action against providers performing abortions?

Updates to state licensing board regulations and guidance documents specific to the new abortion laws are likely forthcoming. In some states, in addition to any other penalty, the appropriate licensing authority is specifically directed to revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion.

### When should health systems consider updating their policies and procedures surrounding abortion?

Policies and procedures relating to reproductive health should be reviewed immediately to assess compliance with state law. For health systems with multiple locations, it may not be possible to make policies fully consistent across state lines. In many states, laws are anticipated to change frequently in the coming months, and policy review and revision is likely to be an ongoing process.

### Can a provider counsel a patient on abortion options in a state where abortion is illegal?

There is no clearcut answer at this time but in many states, this could be risky. Some believe a provider can provide information that is medically necessary to ensure the health and safety of a patient. Others believe providing any information about abortion to a patient could be considered “aiding and abetting” an abortion, which is criminal conduct in some states. Providing counseling to patients will be a complex area going forward.

### What is the legal impact of the *Dobbs* decision on pharmacies?

The potential implications of the *Dobbs* decision on pharmacies are vast given that medical abortion (a two-drug regimen of mifepristone and misoprostol) is estimated to have accounted for over half of all abortions in 2020.[7] The trigger laws and other post-*Dobbs* legislation will broaden the field of those against whom abortion restrictions can be enforced, including those that aid and abet or otherwise facilitate an abortion. The post-*Dobbs* landscape will evolve rapidly for pharmacy providers.

### What is the legal impact of the *Dobbs* decision on telehealth?

In December 2021, the FDA permanently lifted the in-person requirement to obtain medical abortion, a two-drug regimen approved by the FDA to terminate a pregnancy before 10 weeks of gestation. The medical abortion pills can now be mailed directly to eligible patients. Telemedicine, specifically telemedical abortion, had become a target of anti-abortion states following the FDA’s lifting of the in-person requirement to obtain abortion pills. To date, at least 19 states have banned telemedicine visits for abortion while other states have passed legislation to curtail access to abortion medication. The post-*Dobbs* landscape for telemedical abortion will continue to change rapidly.

### What should a health care entity’s ethics committee expect post-*Dobbs*?

In an amicus brief filed in the *Dobbs* case, the American Medical Association and American College of Obstetricians and Gynecologists, as well as numerous other medical groups, addressed the ethical dilemma physicians would face if the Court overturned *Roe v. Wade*. This includes placing the physician in the position of choosing between providing care consistent with the physician’s medical judgment, scientific evidence, and ethical obligations to the patient and the risk of

civil, criminal, or administrative enforcement. A health care entity's ethics committee should expect and be prepared for increased requests for guidance post-*Dobbs*.

### Should hospitals consider changing privileging and credentialing for their providers?

There are exceptions to virtually all of the abortion bans – typically relating to the life or safety of the mother. In some states, the only permissible location for an abortion to save the life of a mother would be a hospital. In most situations, providers should remain credentialed to perform abortions within the scope of the exception.

### How can a physician prove she performed an abortion to prevent a serious health risk to the mother?

Abortions will be scrutinized and thorough documentation about the rationale for an abortion to protect the mother from a serious health risk will be essential to prove an abortion fit within the parameters of a state's law. In Ohio, a practitioner is only permitted to present an "affirmative defense" after being charged with an offense that the patient's life was at risk at the time of the abortion. The defense is only available if the abortion took place at a hospital and does not allow for risks to mental health.

### Can a patient living in a state that has banned abortion travel to a state where abortion is legal to have an abortion?

There is currently no prohibition on traveling to another state for an abortion and some believe such a ban would be unconstitutional based on the right to interstate travel. However, some states are considering bans on "travel abortions," and there is a possibility that someone who assists a woman obtain an out-of-state abortion could be prosecuted under a state's law prohibiting aiding a woman in obtaining an abortion. This area of law is likely to evolve rapidly.

### Does the *Dobbs* decision change access to contraception laws?

The *Dobbs* decision did not change the law on contraception access, although some states are considering further regulation to emergency contraception and birth control.

### How will the *Dobbs* decision impact OB/GYN residency training programs?

According to the requirements set by the Accreditation Council for Graduate Medical Education, every resident in an accredited OB/GYN program must have access to abortion training. With fewer legal abortions being performed in many states, residency programs will need to closely monitor the content of training programs to ensure they are both comprehensive and compliant with relevant state law.

### What does Dobbs mean for healthcare providers as employers?

All employers will need to understand the legal environment in the states in which they operate, as well surrounding states. Relevant states will include those where employees may live or travel to or from for desired health services, including abortion. Employers should review their health plans and evaluate whether they want to (or can) provide coverage for abortions and related health services. Many employers are considering offering reimbursement for costs associated with traveling to a state where procedures will be permitted if the relevant states now ban abortion.

Social media, dress code, and uniform rules should be reviewed given the likelihood that employees may wish to express their support for or opposition to recent federal and state developments. Employer policies that provide for termination or other disciplinary action due to criminal conduct also should be reviewed. These policies will be particularly relevant for healthcare provider employers considering that many state criminal statutes currently are directed at criminalizing the actions of a performing clinician.

Issues relevant to employers are expected to continue developing rapidly, and employers should closely monitor developments to be prepared to respond to employee and community concerns.

## NEXT STEPS FOR HEALTHCARE SYSTEMS AND PROVIDERS

The *Dobbs* decision will have immediate and far-reaching impacts in virtually every state. State laws are expected to change quickly in the coming weeks and months, and our team is monitoring developments nationwide. Healthcare providers will face ongoing complex ethical and legal situations. Please contact us if we can assist with any specific next steps for your organization.

Hancock Daniel recognizes some situations do not arise during normal business hours and we always have an after-hours hotline available to answer questions and provide advice in critical situations. In addition to our normal hotline, we have created a special partner-level response team specifically to take calls and questions on issues regarding the *Dobbs* decision. This team includes Sandi Douglas, Annie Howard, and Ashley Calkins. You can reach any of them through the contact information on their profiles or by calling us at 804-967-9604 (also the number for the 24/7 hotline).

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[1] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[2] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. ___ (2022), p. 69, available at: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.
[3] *Dobbs,* p. 78 (citing Miss. Code § 41-41-191(2)(b)(i)).
[4] *Dobbs,* p. 60.
[5] FJP-Post-Dobbs-Abortion-Joint-Statement.pdf (fairandjustprosecution.org).
[6] Post-Roe Advisory.pdf (texasattorneygeneral.gov).
[7] https://www.webmd.com/sex-relationships/news/20220225/more-than-half-us-abortions-done-pills.