

EMTALA QUESTIONS LOOM FOLLOWING THE *DOBBS* DECISION OVERTURNING *ROE*

July 13, 2022

On July 8, 2022, an [Executive Order on Protecting Access to Reproductive Healthcare Services](#) was issued by President Biden in an effort to advance his Administration's defense of reproductive rights in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overturning *Roe v. Wade*.¹ The Executive Order was followed on July 11, 2022, by [a letter to healthcare providers from HHS Secretary Xavier Becerra](#) and CMS guidance as set forth in [QSO-22-22](#).

These publications have placed a spotlight on the possibility of state abortion statutes conflicting with the requirements under the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"). Under EMTALA, individuals (including pregnant women) presenting to an emergency room are entitled to have a medical screening examination to determine whether an "emergency medical condition" exists. The patient with an emergency medical condition is entitled to stabilizing treatment within the capacity and capability of the hospital. EMTALA is a federal statute with preemptive power. These new publications reiterate that EMTALA will preempt state abortion laws and aim to provide comfort to emergency department physicians, obstetricians, and gynecologists by underscoring that as required by EMTALA, any stabilizing treatment provided to a pregnant patient in order to treat an emergency medical condition will be protected under the principle of federal preemption.

While the Executive Order and CMS guidance reiterate EMTALA obligations for hospitals and physicians, they do not substantively change EMTALA law. The central EMTALA question raised post-*Dobbs* is whether a physician's stabilizing treatment might trigger state abortion law prohibitions, including potentially exposing the treating physician to criminal liability.

The practical answer to this question likely lies in the distinction between abortions subject to state law exceptions and those that are not, which vary significantly across state lines. While some state abortion laws include near-total bans, even those laws generally do create exceptions for abortions performed to save the life of the pregnant patient or otherwise prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant patient. While the specific state laws differ on how those exceptions are determined, physicians will want to focus on the state statutes regarding how abortions are defined; the exceptions to any abortion limitations or prohibitions; and how to carefully document their clinical conclusions regarding the presence of an emergency medical condition and the stabilizing treatment provided under an applicable exception. Ideally, this will allow hospitals and physician to comply with both the obligations under EMTALA as well as state abortion laws.

A number of professional associations such as the [American Medical Association](#), [American College of Emergency Physicians](#) and the [American College of Obstetricians and Gynecologists](#) have issued position statements regarding the post-*Dobbs* situation for healthcare professionals. These associations also explain and advocate that providers' obligations under EMTALA do not change and will preempt state law where a conflict arises. There is much yet to be

¹ For more information on the *Dobbs* decision and implications for healthcare providers, please see our June 27, 2022, client advisory: [The *Dobbs* Decision: Post-Roe Considerations for Healthcare Providers](#).

determined in the days to come as to whether a procedure performed in a hospital ED as stabilizing treatment in compliance with EMTALA law might conflict with a state law, and whether any resulting state law violation will be pursued through legal action.

In the meantime, hospitals and physicians are encouraged to work together to develop protocols and documentation guidelines that are aimed at continuing to comply with EMTALA duties when treating pregnant patients in the ED while also complying with state abortion laws by documenting how that stabilizing treatment falls within an exception or otherwise is consistent with state law.

For questions regarding the interplay between EMTALA and state abortion laws, please contact any of the following Hancock, Daniel & Johnson attorneys: [Ashley Calkins](#), [Annie Howard](#), [Sandi Douglas](#) or [Mary Malone](#). Hancock Daniel recognizes some situations do not arise during normal business hours, and an after-hours hotline is available 24/7 to answer questions and provide advice in critical situations. The hotline can be reached at 804-967-9604.

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