

THE *DOBBS* DECISION: TWO MONTHS LATER

August 24, 2022

Two months ago today, the Supreme Court issued its decision in *Dobbs v. Jackson Women's Health*. As [previously described](#), this opinion held that abortion is not a constitutional right, leaving abortion regulation to the states. Since the issuance of this opinion, we have seen a flurry of activity at both the state and federal levels with some states moving to protect, and even expand, access to abortions, while in other states abortion bans continue to go into effect. At the same time, the federal government has both instigated and been the subject of lawsuits surrounding abortion regulation.

NEW TRIGGER BANS: TEXAS, TENNESSEE, AND IDAHO

Since the issuance of the *Dobbs* decision, new abortion bans have gone into effect in many states, some of which were effective immediately when the decision was entered and others that became effective in the weeks following the decision. Thursday, August 25 marks thirty (30) days from the issuance of the *Dobbs* judgment, when additional trigger bans are scheduled to go into effect, including in Texas, Tennessee, and Idaho.

Texas's [Human Life Protection Act](#) makes it a second-degree felony to perform, induce, or attempt to perform an abortion after conception. An exception applies if the abortion is performed by a licensed physician who determines in the exercise of reasonable medical judgment that failing to perform the abortion places the mother at risk of death or poses a serious risk of substantial impairment of a major bodily function. If the exception applies, the abortion must be performed in a way that provides the child the best opportunity for the unborn child to survive, unless doing so would pose a greater risk to the woman. The penalty increases to a first-degree if the "unborn child" dies. The Texas Attorney general may also bring an action to impose a civil penalty of not less than \$100,000 for each violation, and the appropriate licensing authority is to revoke the provider's license.

Likewise, Tennessee's [Human Life Protection Act](#) makes it a Class C felony for a person to perform or attempt to perform an abortion after conception. The Act does not provide for any exceptions, but instead provides for an "affirmative defense" if the abortion is performed or attempted by a licensed physician who determined, in the exercise of reasonable medical judgment, that the abortion was necessary to prevent death or serious risk of substantial and irreversible impairment of a major bodily function of the woman, and the physician performs the abortion in a manner that provides the best opportunity for the unborn child to survive, unless doing so would pose a greater risk to the woman.

Under Idaho's [criminal abortion law](#), it is a felony, punishable by imprisonment of between two (2) to five (5) years, to perform or attempt to perform an abortion. Additionally, the license of a health care professional will be suspended for a

minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense. Similar to Tennessee, this statute does not include any formal exceptions, but allows for an affirmative defense if the abortion is performed or attempted by a licensed physician who determined, in the exercise of reasonable medical judgment, that the abortion was necessary to prevent death or serious risk of substantial and irreversible impairment of a major bodily function of the woman, and the physician performs the abortion in a manner that provides the best opportunity for the unborn child to survive, unless doing so would pose a greater risk to the woman.

LAWS CURRENTLY BLOCKED BY COURTS

While many abortion bans have gone into effect, others remained blocked by courts while litigation is pending. Notable injunctions include:

- **Arizona:** On July 12, 2022, a federal judge granted a [preliminary injunction](#) of Arizona's 2021 state "personhood" law that gives legal rights to unborn children. A state court is also currently considering how to [harmonize](#) the state's abortion laws, which include a fifteen-week ban and a pre-statehood ban on abortion.
- **Michigan:** On August 17, 2022, a state court ordered a [preliminary injunction](#) on the state's [1931 abortion ban](#).
- **North Dakota:** The state's trigger ban that would ban most abortions, with exceptions for rape, incest, or to protect the pregnant woman's life, was put under a [temporary restraining order](#) by a state judge on July 27, 2022. On August 19, 2022, the court heard arguments regarding whether to grant a [preliminary injunction](#).
- **South Carolina:** On August 17, 2022, the South Carolina Supreme Court granted an [injunction](#) of [S.C. Code § 44-41-680](#) reasoning that the status quo pre-*Dobbs* should be maintained while further litigation on the statute goes forward.
- **Utah:** The state's trigger law [S.B. 174](#), which would ban nearly all abortion, has been [enjoined](#) by a state judge since June 27, 2022.
- **West Virginia:** A pre-*Roe v. Wade* [abortion ban](#) that was never repealed went into effect on June 24, 2022, but an [injunction](#) was granted on July 18, 2022, and remains in place.
- **Wyoming:** [2022 WY H.B. 92](#) went into effect on July 27, 2022, but remains subject to a [preliminary injunction](#) granted on August 10, 2022.

EMTALA GUIDANCE AND LITIGATION

As discussed in a [previous advisory](#), new state abortion statutes raise the possibility of a potential conflict between these state statutes and the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"). Under EMTALA, individuals (including pregnant women) who present to an emergency room are entitled to have a medical screening examination to determine whether an "emergency medical condition" exists. A patient with an emergency medical condition is entitled to stabilizing treatment within the capacity and capability of the hospital. On July 8, 2022, President Biden issued an [Executive Order on Protecting Access to Reproductive Healthcare Services](#) defending reproductive rights. And on July 11, 2022, Health & Human Services ("HHS") Secretary Xavier Becerra issued a [letter](#) to healthcare providers and the Centers for Medicare and Medicaid Services ("CMS") issued guidance in [QSO-22-22](#), which both advocate that EMTALA preempts any conflicting state abortion laws.

Texas Federal Litigation

In July 2022, the Texas Attorney General, Ken Paxton, filed a [Complaint](#) against the Secretary of HHS, CMS, and others in response to the executive order, letter, and guidance. Two prolife physician groups, the American Association of Prolife Obstetricians and Gynecologists and the Christian Medical and Dental Association, joined the case as intervenor plaintiffs. The Complaint asks the Court to find the guidance unlawful, unconstitutional, and unenforceable and to issue an injunction prohibiting their enforcement. On August 16, 2022, twenty (20) states filed an [amicus brief](#) in support of the Defendants and in opposition to the State of Texas's motion for a preliminary injunction. A preliminary injunction was [granted](#) on August 23, 2022, holding that HHS may not enforce the Guidance and Letter's interpretation that Texas abortion laws are preempted by EMTALA; and that the Guidance and Letter may not be enforced in Texas or against any AAPLOG or CMDA member. This is not a nationwide injunction, but additional litigation in other states is expected.

Idaho Federal Litigation

On August 2, 2022, the Justice Department filed a [lawsuit](#) in the District Court of Idaho challenging the new criminal statute stating that it violates the Constitution and is preempted by federal law to the extent it conflicts with EMTALA. The new criminal statute was set to go in effect on August 25. On August 24, the court granted the preliminary injunction and enjoined the state from initiating any criminal prosecution against, attempting to suspend/revoke the license of, or seeking to impose any other form of liability on any medical provider or hospital based on their performance of conduct that is defined as an abortion under Idaho law but is necessary to avoid (i) "placing the health" of a pregnant patient "in serious jeopardy; (ii) a "serious impairment to bodily functions" of the pregnant patient; or (iii) a "serious dysfunction of any bodily organ or part" of the pregnant patient. In essence, the court has blocked enforcement of the Act to the extent it conflicts with EMTALA.

STATE REFERENDUMS

On August 2, 2022, Kansas voters rejected a [proposed](#) state constitutional amendment that would have stated there is no constitutional right to an abortion in the state. Following this result, a statewide recount was sought. However, Kansas requires that those seeking the recount post a bond to cover the cost. Because of the bond requirement, the recount was conducted in only nine (9) counties. At the conclusion of the recount less than one hundred (100) votes changed. Kansas is not the only state with abortion related ballot measures to be considered this year. Ballot measures have already been certified for November 2022 in [California](#) (right to reproductive freedom), [Kentucky](#) (no right to abortion in constitution), [Montana](#) (medical care requirements for born-alive infants), and [Vermont](#) (right to personal reproductive autonomy). Another ballot measure supporting abortion rights is currently pending review by the Michigan Board of State Canvassers for addition to the November 2022 ballot. This ballot measure is facing [challenges](#) that the number of errors in the proposed amendment should disqualify it from the November ballot. In South Dakota, voters have proposed a [2024 ballot measure](#) that would include the right to an abortion in the South Dakota Constitution.

Our team is continuing to monitor post-Dobbs developments on all fronts. For questions regarding state abortion laws or 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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