



51ST ANNIVERSARY OF *ROE V. WADE*: THE BIDEN ADMINISTRATION ANNOUNCES NEW ABORTION PROTECTIONS

January 26, 2024

On Monday, January 22, 2024, the fifty-first (51st) anniversary of *Roe v. Wade*, the Biden Administration [announced](#) new protections for reproductive care, including expanding access to contraceptive coverage and doubling down on emergency care pursuant to the Emergency Medical Treatment and Active Labor Act (“EMTALA”), which requires hospitals with an emergency department to provide an examination to any individual who comes to the emergency department and prohibits emergency departments from refusing to examine or treat individuals with an emergency medical condition.

CONTRACEPTIVE COVERAGE

In conjunction with the Administration’s announcement, Health and Human Services (“HHS”), together with the U.S. Departments of Labor and the Treasury (the “Departments”), issued a new [Frequently Asked Questions \(FAQs\)](#) detailing how plans and issuers can comply with the contraceptive coverage requirements of the Affordable Care Act (“ACA”). Specifically, the FAQs lay out a new pathway for plans and issuers to ensure compliance with the requirement to cover the full-range of FDA-approved contraceptive drugs and drug-led devices without cost sharing. The FAQs come in response to “reports that plans and issuers continue to impose widespread barriers to contraceptive coverage, causing individuals to experience difficulty accessing the coverage without cost that they are entitled to” despite repeated clarification from the Departments.

HHS also [updated](#) the Medicare Part D formulary clinical review process for plan year 2024 to include additional types of birth control, such as intramuscular long-acting contraceptives, and to include intrauterine devices (“IUDs”) for subsequent plan years. These updates are intended to ensure that individuals with Medicare coverage can access more covered types of birth control.

HHS Secretary Xavier Becerra also sent a [letter](#) to Medicare Plans, Private Insurance Plans, and State Medicaid and CHIP Programs, reaffirming that access to reproductive healthcare is a priority of HHS and reminding the parties “of the critical need to comply with existing standards of access to comprehensive, quality contraception—including through Medicaid, Medicare, and under the [ACA].”

EMTALA

Background

Since the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* in the summer of 2022, which overturned *Roe v. Wade*, numerous states have enacted laws restricting abortion access. Many believe the state restrictions pose conflicts with EMTALA, which requires hospitals to provide stabilizing treatment to any individual presenting with an emergency medical condition.

Following the Court's decision in *Dobbs*, HHS issued [guidance](#) clarifying that EMTALA obligations to treat patients experiencing medical emergencies preempt such state abortion restrictions. In 2022, this guidance was [challenged](#) in federal district court in Texas by the state of Texas, the Association of Pro-Life Obstetricians and Gynecologists, and the Christian Medical and Dental Associations (the "Plaintiffs"). The District Court granted the Plaintiffs a preliminary injunction holding that the guidance exceeded the text of EMTALA and that notice-and-comment was required for such guidance. On January 2, 2024, a panel of the Fifth Circuit Court of Appeals [affirmed](#) the District Court's opinion and upheld the preliminary injunction, in part reasoning that EMTALA's stabilization obligations also extend to an unborn child. HHS may not currently [enforce](#) the July 11, 2022, guidance (or corresponding letter sent the same day by HHS Secretary Becerra) within the state of Texas.

Meanwhile, Idaho's abortion ban, which was triggered by the Supreme Court's overturning of *Roe* and initially criminalized all abortions leaving providers with only affirmative defenses, was challenged by the United States on the ground that it conflicted with EMTALA. In August 2022, a district court in Idaho granted a [preliminary injunction](#), preventing Idaho's abortion ban from going into effect. However, on January 5, 2024, the Supreme Court [stayed](#) this injunction, allowing the law to go into effect while the case waits to be heard by the Supreme Court.

Announced Actions

In the meantime, HHS has [announced](#) that, together with the Centers for Medicare & Medicaid Services ("CMS"), it will provide resources to educate the public about their rights to emergency medical care and to support the efforts of hospitals to meet their obligations under EMTALA. Specifically, HHS intends to:

- Publish new informational resources on CMS's website to help individuals understand their rights under EMTALA and the process for submitting a complaint if they are denied emergency medical care;
- Partner with hospital and provider associations to disseminate training materials on providers' obligations under EMTALA;
- Convene hospital and provider associations to discuss best practices and challenges in ensuring compliance with EMTALA; and
- Establish a dedicated team of HHS experts who will increase its capacity to support hospitals in complying with federal requirements under EMTALA.

CONCLUSION

While the Supreme Court is expected to issue an opinion regarding abortion care under EMTALA later this year, we recommend plans, insurers, and healthcare providers familiarize themselves with HHS's new guidance regarding contraceptive coverage and EMTALA to ensure compliance with current law and guidance.

Our team is continuing to monitor post-*Dobbs* developments on all fronts, including any changes in emergency care requirements, and will provide updates as they emerge. For questions regarding any post-*Dobbs* issues, please contact any of the following Hancock, Daniel & Johnson attorneys: [Ashley Calkins](#), [Annie Howard](#), [Sandi Douglas](#), or [Mary Malone](#).

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