

# Assessing The Criminal Implications Of State Abortion Bans

By **Tracy Cole and Rachel Hooper** (August 26, 2022)

By returning abortion regulation to the states, the U.S. Supreme Court's June decision in *Dobbs v. Jackson Women's Health Organization* has created uncertainty and a web of seemingly conflicting laws.

One key concern is that several states have acted to criminalize reproductive and abortion-related health care.

Many companies and employee benefit plans have provided health care benefits related to abortion to their employees or members. To the extent such employees or members are located in a state that criminalizes abortion, it is important to consider the potential impact of state criminal laws.

For entities operating in certain states, provision of services or benefits related to abortion now carries the level of risk reserved for high-profile, highly regulated and potentially criminal conduct.

Laws vary dramatically among states, and between states and the federal government. Moreover, individual states may have multiple relevant laws, including laws that predate *Dobbs*, those that followed *Dobbs*, and those that predate the Supreme Court's 1973 *Roe v. Wade* decision. Legal challenges to many of these statutes are pending in state courts.

Assessing the likely impact of state criminal laws requires analyzing the specific statutes, potential defenses and practical considerations.

## Focus on Texas

Much of the current focus is on Texas, for two reasons: (1) Texas's pre-*Roe* statute criminalizes "furnishing the means" of procuring an abortion, and (2) Texas authorizes private civil enforcement lawsuits.

These laws, and laws with similar "aiding and abetting" wording, could affect coverage of abortion-related services and subsidies or other benefits that cover travel and lodging costs for medical care, including abortion services, that require out-of-state travel. No Texas Penal Code charges can be brought against a woman who submits to or performs her abortion.[1]

Documents or information obtained through civil discovery or a civil investigative demand may be shared with local prosecutors willing to use the pre-*Roe* statute as a basis for prosecution.

For example, a pre-suit deposition may reveal that an organization, entity or person provided the financial means to abortion access in violation of the Texas Heartbeat Act, which outlawed abortions after a fetal heartbeat is detected.

If a civil litigant shares that information with a prosecutor, grand jury subpoenas could be issued and criminal charges could be brought against that organization, entity or person for



Tracy Cole



Rachel Hooper

furnishing the means to obtain an abortion.

The Texas attorney general has offered to assist any local prosecutor who pursues criminal charges, and explicitly stated that "local prosecutors may choose to immediately pursue criminal prosecutions based on violations of Texas abortion prohibitions predating Roe." [2]

Texas' expansive law is useful for assessing the risks in this area. Importantly, the Texas Attorney General's Office — the same office advocating for criminal prosecution under the pre-Roe statutes — has the statutory authority to issue civil investigative demands for consumer protection and investigate and initiate legal actions against charitable organizations. [3]

In Texas, abortion includes surgical and nonsurgical means to "cause the death of an unborn child of a woman known to be pregnant." [4] Abortion does not include birth control devices, oral contraceptives, miscarriage care, ectopic pregnancy care, or medical care intended to "save the life or preserve the health of an unborn child." [5]

Although no criminal charges have yet been filed under the pre-Roe statutes since the Dobbs decision came down, most abortion providers and funding groups have shut down or paused operations, or moved out of state.

Anti-abortion advocates are seeking pre-suit depositions in at least four Texas counties based on Texas Health & Safety Code Section 171.08, which permits civil liability for aiding or abetting the performance or inducement of an abortion.

Petitioners assert that criminal prohibitions extend to drug-induced abortions if any part of the regimen is ingested in Texas, even if an out-of-state provider dispensed the drugs.

Especially with regard to abortion benefits, organizations should consider the legal risks involved, including criminal and civil implications and employee privacy. It is possible that organizations offering abortion benefits could be sued or prosecuted. We are entering uncharted territory, so a risk assessment including a possibility versus probability analysis is required.

It is clear that Texas is front and center on this issue. In this analysis, state crimes and procedure are the focus because, at least in the current political climate, federal prosecutors do not appear poised to prosecute abortion-related offenses.

It must be noted that, in Texas and other states, criminal prosecution may include adjacent proceedings like asset forfeiture.

### ***Texas High Court Considering Viability of Pre-Roe Statutes***

A pre-Roe Texas law imposes felony criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." [6]

After a Harris County District Court issued a limited injunction that called into question the viability of the pre-Roe statutes, the Texas attorney general filed an emergency motion with the Texas Supreme Court. [7]

The Texas Supreme Court granted in part the motion in July, which stayed the temporary restraining order as to the relators, allowing the pre-Roe law to go into effect, but also letting the court of appeals and district court proceedings continue.

The court sought briefing on a threshold jurisdictional issue, meaning a substantive determination could be delayed.

### ***Texas Heartbeat Act Establishes Private Right of Action***

In 2021, the Texas Legislature enacted the Texas Heartbeat Act, establishing a private right of action authorizing individuals to sue anyone who violates the statute.[8]

These private civil enforcement lawsuits may be brought against anyone who (1) "performs or induces" a post-heartbeat abortion; (2) "knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of" the Heartbeat Act; or (3) intends to perform or aid or abet a post-heartbeat abortion in Texas.[9]

### ***Texas Trigger Law Takes Effect***

On Aug. 25, Texas began prohibiting abortion except when reasonable medical judgment determines that the pregnant person

has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.[10]

Under this law, abortions must be performed "in a manner that ... provides the best opportunity for the unborn child to survive unless" that manner would increase the pregnant person's statutorily recognized risks.[11]

The Texas attorney general may pursue civil penalties. Additionally, licensing authorities "shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion" in violation of the trigger law.[12]

Texas prosecutors may pursue criminal charges under the trigger law.

### **Variation in Laws and Potential Defenses**

#### ***EMTALA Preemption***

State laws within and among states vary regarding the definitions of "abortion" and "unborn child," the circumstances under which abortion is permissible, the parties who may be prosecuted, and the consequences of a violation.

Entities should also consider federal law. The Biden administration has committed to protecting abortion access and interprets various federal laws to impose requirements on health care providers, hospitals and pharmacies regardless of state laws.[13]

For those considering the risk of criminal liability, one key question is whether there may be a defense that conflicting federal law preempts the relevant state law.

Litigation is pending between the federal government and certain state governments over

whether, and to what extent, the federal Emergency Medical Treatment and Active Labor Act preempts state laws prohibiting certain abortions performed for the pregnant person's health, including insulating a hospital or provider from state criminal liability.

On July 11, the U.S. Department of Health and Human Services stated EMTALA requires the provision of stabilizing treatment, including abortion services, to pregnant patients with an emergency medical condition under EMTALA,[14] defined as one that risks placing a patient's health in "serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." [15]

To the extent a provider concludes EMTALA requires abortion services, the HHS guidance indicates that a state law or mandate prohibiting such services is preempted.

HHS further notes that a hospital's violation of EMTALA could terminate its Medicare provider agreement and cause it to incur civil monetary penalties, and suggests that an individual physician could use EMTALA preemption as a defense against state enforcement.[16]

On July 14, the Texas attorney general filed Texas v. Becerra in the U.S. District Court for the Northern District of Texas seeking a declaratory judgment to set the HHS guidance aside, arguing it unlawfully exceeds federal authority.[17] On Aug. 24, the court granted Texas' bid for a preliminary injunction, temporarily blocking the HHS guidance.

Meanwhile, on Aug. 2, the U.S. Department of Justice affirmatively sued to block an Idaho abortion law as facially violating EMTALA.[18] The Idaho statute provides no exceptions to its criminal ban on abortion but offers affirmative defenses, including the physician's belief that the abortion was "necessary to prevent the death of the pregnant woman." [19]

According to the DOJ, the Idaho statute constitutes a "near-absolute ban on abortion" that "would make it a criminal offense for doctors to comply with EMTALA's requirement to provide stabilizing treatment." [20]

Moreover, the DOJ complaint highlights that by defining affirmative defenses instead of exceptions, a provider of even a statutorily defensible abortion is subject to criminal prosecution and will have to prove the defense.[21]

On Aug. 24, the U.S. District Court for the District of Idaho granted the DOJ's motion for a preliminary injunction, temporarily enjoining enforcement of the law to the extent it conflicts with EMTALA.

### ***ERISA Preemption***

The Employee Retirement Income Security Act largely preempts state laws that relate to benefit, health and pension plans operated by private employees or entities such as unions.[22] However, as to criminal liability, ERISA's preemptive scope does not include generally applicable criminal law.[23]

The question facing plan administrators and employers is therefore whether abortion laws are generally applicable.

Depending on the statute and the surrounding circumstances, it may be arguable that the criminal statute is not generally applicable, but directly targeted toward employee benefit

plans by mandating what health benefits or services a plan may offer.

### ***Other Potential Limitations on State Law***

Other potential limitations on state law may include rights under the U.S. Constitution or state constitutions or potentially preemptive federal statutes enforcing federal rights related to freedom of religion, freedom of speech, due process and equal protection. These issues will likely lead to extensive litigation.

For example, on July 13, the HHS' Office of Civil Rights issued guidance to the nation's 60,000 retail pharmacies that refusing to dispense a prescribed medication, or making a determination on the suitability of that medication, on the basis of the patient's sex, pregnancy or pregnancy-related conditions is a violation of federal law.[24]

There is precedent for Congress' authority to regulate a "national market for abortion-related services," as articulated by the U.S. Court of Appeals for the Third Circuit in its 2000 U.S. v. Gregg decision, under litigation brought under the Freedom of Access to Clinic Entrances Act.[25]

Additionally, in June, a Jewish congregation in Florida sued the state and others in Generation to Generation Inc. v. Florida in the Second Judicial Circuit Court, seeking a declaratory judgment that the state's post-Dobbs abortion law violates Florida's constitutional rights to privacy, freedom of religion, due process and equal protection.[26]

Finally, as noted by Justice Brett Kavanaugh in his concurrence to Dobbs, the Dobbs decision also raises the issue of a pregnant person's constitutional right to interstate travel.[27]

### **Practical Risk Assessment and Guidelines**

Entities operating in states that criminalize abortion must carefully assess their risks before taking action that could implicate these laws.

The risks depend on many factors, including the precise conduct the relevant statute prohibits, the validity of the state's purported exercise of jurisdiction, and the impact of potentially countervailing laws and rights.

For example, the risk of "aiding and abetting" liability will depend in part on whether furnishing the means of an abortion is itself defined as a crime. Entities operating in this area should properly assess the risks that lie within these battlefields.

Companies should pay particular attention to privacy issues. Entities housing information about their employees' and members' health care and benefits may receive document demands or subpoenas from state prosecutors or regulatory authorities, and companies generally do not have a Fifth Amendment "act of production" privilege permitting them to refuse to produce documents.

Documents should be created and maintained with disclosure issues in mind. If an entity receives a subpoena or other document demand, it should consider federal and state limitations on disclosure, and explore scope, privilege or other bases that may affect the scope of the demand.

For example, on June 29, HHS' Office of Civil Rights issued guidance on when entities

covered by the Health Insurance Portability and Accountability Act are permitted to share protected health information without a patient's authorization.[28]

Statements about policies or actions that may implicate criminal abortion laws will be subject to review by parties seeking to establish intent.

## **Conclusion**

Courts, commentators and regulators recognize the profound uncertainty created by the Dobbs decision and the competing state and federal agendas left in its wake.

Although any ultimate resolution appears far off, the volume of legislative activity, litigation and agency guidance suggests that these issues will remain a priority at both the state and federal levels.

---

*Tracy Cole is a partner at BakerHostetler. She formerly served as a prosecutor in the New York County District Attorney's Office*

*Rachel Hooper is a partner at the firm. She formerly served as a prosecutor in the Harris County District Attorney's Office.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Willingham v. State, 25 S.W. 424 (Tex. Crim. App. 1894); Crissman v. State, 245 S.W. 438, 438 (Tex. Crim. App. 1922); Easter v. State, 536 S.W.2d 223, 229 n.7 (Tex. Crim. App. 1976).

[2] [https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20\(07.27.2022\).pdf](https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20(07.27.2022).pdf).

[3] Tex. Bus. & Com. Code § 17.61, et seq.; Tex. Prop. Code Chapter 123.

[4] Tex. Health & Safety Code § 245.002(1). See also West's Texas Civil Statutes, article 4512.1 (1974).

[5] Id.

[6] West's Texas Civil Statutes, article 4512.2 (1974).

[7] In re Ken Paxton, et al., No. 22-0527 (Tex., June 29, 2022).

[8] See Tex. Health & Safety Code § 171.208.

[9] Tex. Health & Safety Code § 171.208(a).

[10] Tex. Health & Safety Code § 170A.002(b)(2).

[11] Tex. Health & Safety Code § 170A.002(b)(3)(A)-(B).

[12] Tex. Health & Safety Code § 170A.007.

[13] See HHS, HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care (2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html>; HHS Office for Civil Rights, Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services (2022), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html>.

[14] HHS Secretary Xavier Becerra Letter to Healthcare Providers on Emergency Medical Care (July 11, 2022), <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf>.

[15] 42 U.S.C. §§ 1395dd(e)(1)(a)(i)-(iii).

[16] HHS Secretary Xavier Becerra Letter to Healthcare Providers on Emergency Medical Care (July 11, 2022), <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf>.

[17] Complaint at 7, *State of Texas v. Becerra, et al.*, No. 5:22-CV-185 (N.D. Tex. July 14, 2022).

[18] *United States v. State of Idaho*, No. 1:22-CV-329 (S.D. Idaho Aug. 2, 2022), Complaint at 2.

[19] Idaho Code § 18-622(b)(3)(a)(ii). The other defenses are that the abortion was performed as the best opportunity to allow the fetus to survive, the pregnant woman is a minor, and the physician was provided with a police report that the pregnant woman reported rape or incest. *Id.* at §§ 18-622(b)(3)(a)(iii)-(b)(iv).

[20] *United States v. State of Idaho*, No. 1:22-CV-329 (S.D. Idaho Aug. 2, 2022), Complaint at ¶ 3.

[21] *Id.* at 10.

[22] 29 U.S.C. § 1144(a).

[23] 29 U.S.C. § 1144(b)(4).

[24] Specifically, Section 1567 of the Affordable Care Act and its implementing regulations and Section 504 of the Rehabilitation Act of 1973. See HHS Office for Civil Rights, Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Law to Ensure Access to Comprehensive Reproductive Services, July 13, 2022, <https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf>.

[25] See, e.g., *U.S. v. Gregg*, 226 F.3d 253, 263 (3d Cir. 2000).

[26] *Generation to Generation, Inc. v. The State of Florida et al.*, No. 37 2022 CA 000980 (Fla. Leon Cnty. Ct. June 10, 2022), Complaint at 1-4.

[27] Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

[28] HHS, HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, June 29, 2022, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html>.