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Idaho Abortion Laws: Frequently Asked Questions

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If you are struggling to understand Idaho abortion law in the wake of the *Dobbs v. Jackson Women's Health Organization*, you are not alone. For years, the Idaho legislature has enacted a patchwork of overlapping and sometimes conflicting statutes in response to or in anticipation of federal abortion cases. *Dobbs* has suddenly given those statutes life, forcing healthcare providers (and their attorneys) to sort through how they interact and their net effect on Idahoans. To complicate matters, two of the most potent criminal and civil statutes are subject to pending lawsuits before the Idaho Supreme Court. While we anxiously await the Court's decisions as well as future guidance or legislation resolving the confusion, we hope these FAQs give Idaho healthcare providers some direction. But stay tuned...

1. What is the status of Idaho's abortion laws?

Idaho has several overlapping abortion statutes that were enacted over years in response to or in anticipation of judicial challenges. Some of those statutes were determined to be unconstitutional and unenforceable based on *Roe v. Wade* or its progeny, but the statutes were never repealed. In the wake of the United States Supreme Court's decision in *Dobbs*, those statutes appear to have suddenly become enforceable, thereby resulting in a confusing and sometimes conflicting statutory scheme. In addition, Idaho's new criminal abortion ban is triggered 30 days after *Dobbs* is certified.¹ Planned Parenthood filed lawsuits to block the triggered criminal statute as well as Idaho's fetal heartbeat statute that would, among other things, permit civil lawsuits by family members.² The Idaho Supreme Court has stayed the fetal heartbeat statute pending further proceedings. The Court has scheduled a hearing in both cases for August 3, 2022.

2. What is an “abortion” in Idaho?

Idaho has two laws in effect which define “abortion” differently. For most purposes, Idaho defines “abortion” as:

the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child...³

However, Idaho's 20-week abortion ban, I.C. § 18-501 et seq., defines “abortion” as:

the use or prescription of any instrument, medicine, drug or other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or

health of the child after live birth or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma, or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.⁴

“Unborn child” means “an individual organism of the species *Homo sapiens* from fertilization until live birth.”⁵

3. What are the current limits on abortions in Idaho?

- a. Idaho Code §§ 18-505, 18-605, and 18-606 provide overlapping and sometimes conflicting standards, but the current rules appear to be as follows unless and until Idaho's triggered law (I.C. § 18-622) takes effect and/or the Idaho Supreme Court removes the stay on the fetal heartbeat law (I.C. §§ 18-8801 *et seq.*):
 - i. During the first 13 weeks of pregnancy,⁶ an abortion may be performed by a physician in a hospital or properly staffed and equipped physician office or clinic, which office or clinic must have a satisfactory arrangement with a local hospital to cover emergencies.⁷
 - ii. From 13 weeks to 20 weeks post-fertilization,⁸ an abortion may be performed by a physician in a hospital.⁹ “Post-fertilization” generally means the time from the fertilization of the human ovum.¹⁰
 - iii. Beginning 20 weeks post-fertilization, an abortion may only be performed if (i) it is performed by a physician in a hospital; and (ii) the attending physician and a consulting physician both concur that the abortion (a) is necessary to preserve the life of the mother, or (b) if not performed, such pregnancy would terminate in birth or delivery of a fetus unable to survive.¹¹
- b. Partial-birth abortions are prohibited unless necessary to save the life of the pregnant woman.¹²
- c. Only licensed physicians and those licensed or registered healthcare providers acting under the direct supervision or on the order of a physician may advertise items or services to induce an abortion; others who do so are guilty of a felony.¹³

4. What are the limits on abortions under Idaho's triggered abortion ban if and when it takes effect?

Effective 30 days after the United States Supreme Court's decision in *Dobbs* is certified, I.C. § 18-622 will prohibit all abortions of a clinically diagnoseable pregnancy¹⁴ **unless** the abortion is performed by a physician and:

- a. The physician determines the abortion is necessary to prevent the death of the pregnant woman and the physician performed the

abortion in a manner that provided the best opportunity for the unborn child to survive;¹⁵ or

- b. In the case of rape or incest, the woman reported the rape or incest to law enforcement and provided a copy of the report to the physician prior to the abortion; or
- c. In the case of rape or incest of a woman who is a minor or subject to guardianship, the woman, her parent, or her guardian reported the rape or incest to law enforcement and provided a copy of the report the physician prior to the abortion.¹⁶

5. Does Idaho law permit private lawsuits against persons who perform prohibited abortions?

- a. Currently, Idaho statutes allow the following civil lawsuits against abortion providers (in addition to malpractice or other such common law actions):
 - i. If an abortion is performed after 20 weeks post-fertilization in violation of the statute, the mother or father of the unborn child may sue the person who intentionally or recklessly performed the abortion.¹⁷ In addition, a woman on whom such a prohibited abortion was attempted may sue the person for actual damages.¹⁸ No cause of action exists if the abortion was necessary to (i) save the mother's life, (ii) avert serious risk of substantial and irreversible physical impairment of major bodily function to the mother; or (iii) preserve the life of an unborn child (e.g., a twin in utero).¹⁹
 - ii. If a chemical abortion is attempted or performed, the mother, father (if married to the mother), or maternal grandparent (if the mother is deceased) of an unborn child may sue a person who knowingly or recklessly violated the statute relating to chemical abortions for actual damages, potentially punitive damages, and injunctive relief.²⁰
 - iii. If a partial-birth abortion is performed in violation of the statute, the mother, father (if married to the mother), or maternal grandparent (if the mother is deceased) of an unborn child may sue the physician for money damages for mental and physical injuries and three times the cost of the abortion.²¹
- b. If the Idaho Supreme Court lifts the stay on I.C. § 18-8801 *et seq.*, a preborn child's mother, father, grandparent, sibling, aunt, or uncle may sue a provider who knowingly or recklessly attempts or performs an abortion after a fetal heartbeat has been detected for damages, statutory damages of at least \$20,000, costs and attorneys' fees²² **unless**:
 - i. There is a medical emergency, *i.e.*, "a condition that ... so complicates the medical condition of a pregnant woman as

to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function”;²³ or

- ii. In the case of rape or incest, the woman reported the rape or incest to law enforcement and provided a copy of the report to the physician prior to the abortion;²⁴ or
- iii. In the case of rape or incest of a woman who is a minor or subject to guardianship, the woman, her parent, or her guardian reported the rape or incest to law enforcement and provided a copy of the report to the physician prior to the abortion;²⁵ or
- iv. The person bringing the lawsuit impregnated the mother through rape or incest.²⁶

6. Who may perform an abortion?

Only physicians may lawfully perform an abortion.²⁷

7. Are non-physicians who assist in or fill prescriptions for prohibited abortions subject to liability?

Non-physicians who advertise, perform, or act as an accomplice or accessory to an illegal abortion commit a felony and may be liable for violations.²⁸ However, persons who act in good faith on the order or under the direction of a licensed physician are generally protected from liability for illegal abortions. For example, no hospital, nurse, or other healthcare personnel are deemed to act as an accomplice or accessory to an illegal abortion if they provide services in good faith in reliance on the directions or order of a physician.²⁹

8. Where may abortions be performed?

- a. During the first 13 weeks of pregnancy, abortions may be performed (i) in a hospital or (ii) in a physician's regular office or a clinic, which office or clinic is properly staffed and equipped and has a satisfactory arrangement with a local hospital to render emergency care if needed.³⁰
- b. After 13 weeks of pregnancy, abortions must be performed in hospitals.³¹

9. What limits apply to abortifacients?

- a. Under Idaho law, “abortifacients” are defined to include mifepristone, misoprostol, and/or other chemical or drug used to cause an abortion. However, the term does not apply to the use of such drugs to treat ectopic pregnancy.³²
- b. Persons may not sell or advertise abortifacients unless (i) the sale, offer, or display is to a physician or druggist or their intermediary; or

- (ii) the sale is made upon prescription or order of a physician.³³
- c. No physician may give, sell, dispense, administer, prescribe, or provide an abortifacient to effect a chemical abortion unless the physician (i) may assess the duration of the pregnancy accurately; (ii) has determined, if clinically feasible, that the unborn child is within the uterus and not ectopic; (iii) can surgically intervene in cases of incomplete abortion or severe bleeding, or, if the physician does not have admitting privileges at a local hospital, has made a documented plan and arrangements with other physicians to provide emergency care; (iv) provides required information as described more fully below; and (v) makes reasonable efforts to ensure that the patient returns for a follow-up visit to confirm that the pregnancy has been terminated and to assess the patient's medical condition.³⁴

10. What physical, mental, or emotional conditions of the mother will permit abortions?

- a. Under current law:
 - i. Prior to 20 weeks post-fertilization, an abortion may be performed for any reason with appropriate informed consent.³⁵
 - ii. After 20 weeks, an abortion may be performed if the attending physician and a consulting physician concur that the abortion is necessary to preserve the life of the pregnant woman.³⁶
 - iii. Partial-birth abortions may be performed if necessary to save the life of the mother.³⁷
- b. When I.C. § 18-622 is triggered and if permitted to take effect, an abortion may be performed to save the life of the pregnant woman.³⁸ This does **not** include situations in which the pregnant woman may or will take action to harm herself.³⁹
- c. As discussed below, the Department of Health and Human Services (HHS) takes the position that the Emergency Medical Treatment and Labor Act (EMTALA) preempts contrary state law and authorizes abortions if necessary to stabilize the mother's emergency medical condition.⁴⁰ EMTALA is triggered if a woman comes to the hospital seeking emergency care and is determined to have an emergency medical condition, *i.e.*,

a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

- (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the

- woman or her unborn child) in serious jeopardy,
- (ii) serious impairment to bodily functions, or
- (iii) serious dysfunction of any bodily organ or part....⁴¹

According to HHS, “[e]mergency medical conditions involving pregnant patients may include, but are not limited to, ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.”⁴²

11. May an abortion be performed if the fetus has conditions that make viability improbable or that may result in severe birth defects?

- a. Under current law, an abortion may be performed before 20 weeks post-fertilization because of such concerns. After 20 weeks, an abortion may be performed if the pregnancy would otherwise “terminate in birth or delivery of a fetus unable to survive.”⁴³
- b. If and when I.C. § 18-622 takes effect, there is no exception that allows an abortion based on the condition of the fetus.⁴⁴

12. What procedures must be followed before performing an abortion?

Under current law, physicians, hospitals, and other facilities performing an abortion must do the following:

- a. Except in the case of a medical emergency, determine the probable post-fertilization age of the unborn child through appropriate tests, examinations, and inquiries of the pregnant woman.⁴⁵
- b. Obtain informed consent from the pregnant woman.⁴⁶ A physician, hospital, or other facility may refuse to perform an abortion if the pregnant woman refuses regardless of her age or competence.⁴⁷
- c. Except in the case of a medical emergency, at least 24 hours before the abortion is performed, the physician, hospital, or other facility must comply with the following:
 - i. Provide to the patient information published by the Idaho Department of Health and Welfare (DHW) concerning abortions. The information is available at <https://healthandwelfare.idaho.gov/services-programs/children-families/about-pregnancy-abortion-and-adoption-resources>. The attending physician or his/her agent must certify that the information was timely provided as required.⁴⁸
 - ii. The attending physician or her/his agent must inform the patient by telephone or in person that (i) ultrasound imaging and heartbeat monitoring are available so that the woman may view the unborn child; and (ii) the DHW information

and website described above list facilities that offer such services at no cost. If the woman contacts the abortion facility by e-mail, the facility must inform the woman of the foregoing information in a larger font than the rest of the e-mail.⁴⁹

- d. Do not collect a fee for an abortion until after providing the required information to the pregnant woman.⁵⁰
- e. If an ultrasound is used to perform an abortion, prior to the abortion the physician or her/his agent must (i) inform the woman that she has the right to view the ultrasound image of her unborn child before an abortion is performed; (ii) if requested, allow the woman to view the ultrasound; (iii) offer a physical picture of the ultrasound image; and (iv) provide such other information which in the attending physician's judgment is relevant to the woman's decision concerning the abortion.⁵¹
- f. For chemical abortions, the physician must satisfy the following: (i) if the physician does not have admitting privileges at a local hospital, the physician must have a documented plan to provide emergency care through other qualified physicians; (ii) have a written agreement with such other physicians to provide emergency care if required; (iii) inform the pregnant woman that she may need access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary; and (iv) if the appropriate medical facility is other than a local hospital emergency room, the physician must provide the patient with the name, address and telephone number of such facility in writing.⁵²

13. May an unemancipated minor consent to their own abortion in Idaho?

- a. Under Idaho law, the attending physician must generally secure written consent to perform an abortion on an unemancipated minor from one of the following: (i) one of the minor's parents or the minor's guardian or conservator;⁵³ or (ii) a district court judge after an appropriate hearing.⁵⁴
- b. The attending physician is not required to obtain parental or judicial consent if either: (i) the pregnant minor certifies that the pregnancy resulted from rape or sexual conduct with the minor's parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian, or foster parent; or (ii) a medical emergency exists, and the attending physician documents the emergency in the minor's medical record.⁵⁵
- c. Physicians performing an abortion on an unemancipated minor are protected from criminal or administrative liability if (i) prior to performing the abortion, the physician obtains either positive identification or other documentary evidence from which a reasonable person would have concluded that the woman seeking the abortion was either an emancipated minor or was not then a

minor, and (ii) the physician retained a legible photocopy of such evidence.⁵⁶

14. What are the reporting requirements for abortions?

- a. Within 15 days after an induced abortion, the attending physician must complete, file, and submit the induced abortion reporting form to the Bureau of Vital Statistics.⁵⁷ See <https://healthandwelfare.idaho.gov/providers/vital-records/vital-records>.
- b. If the physician performed an abortion without providing the required DHW and ultrasound information described above to the patient, within 30 days after the abortion the attending physician or his/her agent must deliver to DHW a report signed by the attending physician denoting the medical emergency that excused compliance with the requirement to provide the information. The report should preserve the anonymity of the patient.⁵⁸

15. What are the penalties for performing a prohibited abortion?

- a. Currently, persons who knowingly provide, supply, or administer any medicine, drug, or substance or otherwise performs an illegal abortion commit a felony and (i) shall be fined at least \$5,000, and/or (ii) imprisoned for two (2) to five (5) years.⁵⁹ In addition, licensed healthcare professionals who perform an illegal abortion are subject to the following administrative penalties: (i) for a first offense, professional discipline and a fine of at least \$1,000; (ii) for a second offense, suspension of their license for at least six (6) months and a fine of at least \$2,500; and (iii) for subsequent violations, revocation of their license and a fine of at least \$5,000.⁶⁰
- b. Persons who act as an accomplice or accessory to an abortion commit a felony and (i) shall be fined up to \$5,000, and (ii) imprisoned from one (1) to five (5) years.⁶¹
- c. Women who knowingly submit to or solicit an illegal abortion are guilty of a felony and (i) shall be fined up to \$5,000, and (ii) imprisoned from one (1) to five (5) years.⁶²
- d. If and when it takes effect, a violation of Idaho's triggered abortion ban, I.C. § 18-622, is a felony punishable by two (2) to five (5) years in prison.⁶³ In addition, the license of a healthcare professional who performs or assists in the performance of an illegal abortion shall be suspended for a minimum of six (6) months for a first offense, and permanently revoked for a subsequent offense.⁶⁴
- e. If and when it takes effect, Idaho's fetal heartbeat law, I.C. § 18-8807, would generally allow the mother, father, grandparent, sibling, aunt, or uncle of a preborn child to sue the provider who knowingly or recklessly attempted or performed a prohibited abortion for (i) damages, (ii) statutory damages of at least \$20,000,

and (iii) costs and fees.⁶⁵ A court may not award costs and fees to the defendant unless the defendant can prove that the defendant (i) conducted an appropriate test to determine if there is a fetal heartbeat before the abortion was performed,⁶⁶ (ii) recorded the information about the test in the woman's medical record,⁶⁷ and (iii) otherwise complied with the requirements for an appropriate abortion.⁶⁸

16. What are the penalties for failing to comply with the procedures or reporting requirements for abortions?

An attending physician who performs an abortion but knowingly fails to provide the required information, offer an ultrasound, or report the abortion as described above (i) may be subject to professional discipline; (ii) shall be fined \$100 for each month of noncompliance; and (iii) may be subject to civil contempt sanctions.⁶⁹ In addition, physicians who fail to timely submit the report containing information concerning post-fertilization age may be subject to a \$500 fine for each 30-day period the report is late.⁷⁰

17. Are physicians, hospitals, or other facilities required to perform abortions?

Under Idaho law, no healthcare professional shall be required to render any healthcare service that violates his or her conscience,⁷¹ provided that (i) the professional may not engage in illegal discrimination;⁷² and (ii) in a life-threatening situation, the professional must provide treatment and care until an alternate healthcare professional capable of treating the emergency is found.⁷³ Similarly, hospitals may generally elect not to furnish facilities or admit patients for abortion,⁷⁴ but they may still be obligated to comply with laws such as EMTALA that require appropriate emergency care or treatment of patients who have been admitted.

18. Does EMTALA preempt Idaho abortion law?

As discussed above, HHS takes the position that, when EMTALA applies, EMTALA preempts contrary state laws such as Idaho's abortion statute. As discussed above, EMTALA generally requires hospitals to provide stabilizing treatment to patients with an emergency medical condition who come to the hospital seeking emergency care.⁷⁵ If a pregnant woman has an emergency medical condition (i.e., one that requires immediate medical attention to avoid placing the health of the woman in serious jeopardy, serious impairment to bodily function, or serious dysfunction of any bodily organ or part⁷⁶), the hospital must provide stabilizing treatment or an appropriate transfer. Stabilizing treatment is that which is necessary to ensure that “no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility....”⁷⁷ According to HHS, “[s]tabilizing treatment could include medical and/or surgical interventions (e.g., abortion, removal of one or both fallopian tubes, anti-hypertensive therapy, methotrexate therapy, etc.), irrespective of any state laws or mandates that apply to specific procedures.”⁷⁸

¹I.C. § 18-622.

²I.C. § 18-8801 *et seq.*

³I.C. § 18-604(1). Planned Parenthood has two lawsuits pending before the Idaho Supreme Court arguing that “clinically diagnosable pregnancy” is unconstitutionally vague.

⁴I.C. § 18-502(1).

⁵I.C. §§ 18-502(9) and 18-604(5).

⁶I.C. § 18-604(6).

⁷I.C. § 18-608(1). In *McCormack v. Herzog*, the Ninth Circuit held that the reference to “properly” staffed clinics with “satisfactory” transfer arrangements to local hospitals are unconstitutionally vague. 788 F.3d 1017, 1030 (9th Cir. 2015).

⁸I.C. § 18-505.

⁹ I.C. § 18-608(2). In *McCormack*, the Ninth Circuit held that the requirement to perform second trimester abortions in hospitals is unconstitutional, but that holding appears to have been nullified by *Dobbs*.

¹⁰I.C. § 18-502(6).

¹¹I.C. § 18-608(3). I.C. § 18-505 would also permit abortions to avert a serious risk to the mother or save the life of another unborn child, but § 18-505 appears to be preempted by the standards in § 18-608(3).

¹²I.C. § 18-613. “Partial-birth abortion” means “(i) Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the physician knows will kill the partially delivered living fetus; and (ii) Performs the overt act, other than completion of delivery, that kills the partially delivered living fetus. *Id.* at § 18-613(2)(b).

¹³I.C. § 18-603.

¹⁴I.C. § 18-604(1).

¹⁵I.C. § 18-622(3)(a).

¹⁶I.C. § 18-622(3)(b).

¹⁷I.C. § 18-508(1).

¹⁸I.C. § 18-508(1).

¹⁹I.C. § 18-505.

²⁰I.C. § 18-618(1).

²¹I.C. § 18-613(3).

²²I.C. § 18-8807(1).

²³I.C. § 18-8801(5).

²⁴I.C. § 18-8804(b).

²⁵I.C. § 18-8804(a).

²⁶I.C. § 18-8807(3).

²⁷I.C. § 18-608A.

²⁸I.C. § 18-606(1); *see also* I.C. § 18-603.

²⁹I.C. § 18-606; *see also* I.C. § 18-603.

³⁰I.C. § 18-608(1). In *McCormack*, the Ninth Circuit held that the requirements that the clinic be “properly” staffed and equipped and have “satisfactory” transfer agreements with hospitals is unconstitutionally vague and unenforceable in a criminal action. 788 F.3d at 1030-31.

³¹I.C. § 18-608(2)-(3).

³²I.C. § 18-617(a).

³³I.C. § 18-607.

³⁴I.C. § 18-617(2)-(3).

³⁵I.C. §§ 18-505 and 18-608(1)-(2).

³⁶I.C. § 18-608(3).

³⁷I.C. § 18-613(1).

³⁸I.C. § 18-622(3).

³⁹I.C. § 18-622(3)(a)(ii).

⁴⁰Letter from Xavier Becerra to Health Care Providers dated 7/11/22, available at <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf>

⁴¹42 U.S.C. § 1395dd(e)(1)(A).

⁴²Becerra Letter at <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf>.

⁴³I.C. § 18-608(3).

⁴⁴See I.C. § 18-622.

⁴⁵I.C. § 18-504(1).

⁴⁶I.C. § 18-609(1).

⁴⁷I.C. § 18-610.

⁴⁸I.C. § 18-609(4).

⁴⁹I.C. § 18-609(5).

⁵⁰I.C. § 18-609(5).

⁵¹I.C. § 18-609(6).

⁵²I.C. § 18-617(c)-(d).

⁵³I.C. § 18-609A(1).

⁵⁴I.C. § 18-609A(2).

⁵⁵I.C. § 18-609A(7).

⁵⁶I.C. § 18-614.

⁵⁷I.C. § 39-261(a).

⁵⁸I.C. § 18-609(7).

⁵⁹I.C. § 18-608(1), (3).

⁶⁰I.C. § 18-605(2).

⁶¹I.C. § 18-606.

⁶²I.C. § 18-606(2).

⁶³I.C. § 18-622(2).

⁶⁴I.C. § 18-622(2).

⁶⁵I.C. § 18-8807(1).

⁶⁶I.C. § 18-8803.

⁶⁷I.C. § 18-8803.

⁶⁸I.C. § 18-8804.

⁶⁹I.C. §§ 18-506(3) and 18-609(9).

⁷⁰I.C. § 18-506(3).

⁷¹I.C. § 18-611(2).

⁷²I.C. § 18-611(5).

⁷³I.C. § 18-611(6).

⁷⁴I.C. § 18-612.

⁷⁵42 U.S.C. § 1395dd(c).

⁷⁶42 U.S.C. § 1395dd(e)(1)(A).

⁷⁷42 U.S.C. § 1395dd(e)(3)(B).

⁷⁸Becerra Letter at <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf>.