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Idaho Abortion Laws: New Law and EMTALA Exception Now Effective

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Idaho's total abortion ban is now in effect. Effective August 25, 2022, anyone who performs an abortion of a clinically diagnosable pregnancy is guilty of a felony unless the abortion is necessary to save the life of the pregnant woman or in the case of rape or incest.¹ On August 24, 2022, the United States District Court of Idaho confirmed another important exception (at least for the time being): the Court entered a preliminary injunction blocking enforcement of the total abortion ban in cases in which the Emergency Medical Transport and Active Labor Act (“EMTALA”) would require hospital-affiliated providers to perform an abortion to protect the health of the mother.² Given these developments, we have updated our answers to common questions concerning Idaho's abortion laws.

1. What is an “abortion” in Idaho?

Idaho generally 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

“Unborn child” means “an individual organism of the species Homo sapiens from fertilization until live birth.”⁴ “Clinically diagnosable pregnancy” is not defined.

2. Does termination of an ectopic pregnancy constitute an “abortion” under Idaho law?

It is not entirely clear whether termination of an ectopic pregnancy constitutes an “abortion” under Idaho law or whether such would be prosecuted. Interestingly, in the pending federal lawsuit that created the EMTALA exception, the Idaho legislature argued that the total abortion ban, I.C. § 18-622, does not and was not intended to apply to ectopic pregnancies.⁵ This would appear to be consistent with I.C. § 18-617, which is structured so that the prohibition on chemical abortions does not apply to treatment of ectopic pregnancies.⁶ In the EMTALA lawsuit, however, the federal District Court rejected the legislature's argument and concluded that text of the total abortion ban encompasses ectopic pregnancies.⁷

Given these circumstances, we think it very unlikely that a prosecutor would apply the total abortion ban to treatment of ectopic pregnancies, but we cannot rule out the possibility given the District Court's analysis or conclusion.⁸

3. Under what circumstances may an abortion be performed in Idaho?

a. Effective August 25, 2022, abortions of a clinically diagnoseable pregnancy are illegal unless the abortion is performed by a physician and:

1. The physician determines the abortion is necessary to prevent the death of the pregnant woman and the physician performs the abortion in a manner that provides the best opportunity for the unborn child to survive; or
2. In the case of rape or incest, the woman reported the rape or incest to law enforcement and provides a copy of the report to the physician prior to the abortion; or
3. 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 provides a copy of the report the physician prior to the abortion.⁹

b. In addition, given the federal District Court's preliminary injunction, abortions may be performed to the extent required by EMTALA, *i.e.*,

1. A pregnant woman comes to a hospital or hospital-based urgent care center seeking emergency care;¹⁰
2. Practitioners at the hospital determine that abortion is necessary to avoid (a) placing the health of the pregnant woman in serious jeopardy; (b) a serious impairment to bodily functions of the pregnant woman; or (c) a serious dysfunction of any bodily organ or part of the pregnant woman;¹¹ and
3. The pregnant woman has not been admitted as an inpatient at the hospital.¹²

c. Partial-birth abortions are prohibited unless necessary to save the life of the pregnant woman.¹³ The federal District Court did not address partial-birth abortions in the EMTALA lawsuit.

d. Chemical abortions are likely prohibited unless necessary to save the life of the mother, or in the case of rape or incest, or perhaps to treat ectopic pregnancies.¹⁴ As discussed above, § 18-617 permits chemical abortions of ectopic pregnancies, but it is not entirely clear whether the total abortion ban in § 18-622 would supersede the ectopic pregnancy exception in § 18-617. The federal District Court did not address chemical abortions in the EMTALA lawsuit, nor did it discuss the interaction between § 18-617 and § 18-622. Given the language in § 18-617 and the legislature's position in the EMTALA lawsuit, a fairly strong argument may be made that chemical abortions may be performed in the case of ectopic pregnancies.

4. What are the penalties for attempting, performing, or assisting in

an illegal abortion?

a. Any person who performs or attempts to perform an illegal abortion commits a felony punishable by: (i) between two (2) and five (5) years in prison; and (ii) suspension of his/her professional license for at least six (6) months for a first offense, and permanent revocation for subsequent violations.¹⁵

b. Persons who assist in an illegal abortion are subject to suspension of his/her professional license for at least six (6) months for a first offense, and permanent revocation for subsequent violations.¹⁶ Section 18-622 does not define what constitutes “assisting” in the abortion, but it likely refers to healthcare professionals who actually assist in the clinical aspects of the abortion given the context in which “assist” is used in other abortion statutes¹⁷ as well as the fact that the penalty is limited to adverse professional licensure actions, which indicates that only licensed healthcare professionals may be liable for “assisting” in the illegal abortion. Section 18-622 does not impose any penalty against other non-licensed persons for assisting in an abortion.

c. It is not entirely clear to what extent a person who acts as an accomplice or accessory or who aids and abets an abortion in Idaho may be criminally liable.

1. 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.¹⁸
2. Idaho Code § 18-606 states that a person who acts as an accomplice or accessory “to any violation of section 18-605” commits a felony and (i) shall be fined up to \$5,000, and (ii) imprisoned from one (1) to five (5) years.¹⁹ Idaho’s new total abortion ban, § 18-622, effectively supersedes § 18-605, but makes no reference to § 18-606. Instead, § 18-622 states that those who assist in an illegal abortion shall be subject to suspension or revocation of his/her professional license,²⁰ but it does not extend criminal liability to those who assist. Accordingly, it appears that the legislature intended to put in place a new penalty structure through § 18-622 that supersedes § 18-606 and § 18-606 is no longer enforceable.
3. Idaho’s general criminal statutes states that “[a]ll persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission ... are principals in any crime so committed.”²¹ “To ‘aid and abet’ means to assist, facilitate, promote, encourage, counsel, solicit or incite the commission of a crime.”²² It is possible that a prosecutor might rely on the general “aiding and abetting” statute to prosecute those who facilitate an illegal abortion; however, as discussed above, by failing to modify § 18-606 to refer

to § 18-622 and/or establishing a separate, specific penalty for those who “assist” in an abortion in § 18-622, the legislature arguably intended to foreclose “aiding and abetting” claims against those who are not performing or actually “assisting” in the abortion.

5. May a pregnant woman be prosecuted for obtaining an abortion?

It is not entirely clear whether women who receive an abortion are subject to criminal penalties. Idaho's total abortion ban, § 18-622, states that “nothing in this section” shall be construed to subject a woman to criminal liability for an abortion.²³ However, a different section, § 18-606(2), states that a woman who knowingly submits to or solicits an illegal abortion for herself is guilty of a felony and (i) shall be fined up to \$5,000, and (ii) imprisoned from one (1) to five (5) years.²⁴ Given the limiting language in § 18-622, it would appear that § 18-606(2) remains in effect and women may be prosecuted for receiving or soliciting an illegal abortion.

6. May providers be sued for performing an abortion?

a. If an abortion is attempted, induced, or performed after a fetal heartbeat is or should have been detected,²⁵ the mother, father, grandparent, sibling, aunt, or uncle of the preborn child may sue medical professionals who knowingly or recklessly attempted or performed the abortion²⁶ unless:

1. 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”;²⁷ or
2. 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;²⁸ or
3. 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;²⁹
4. The person bringing the lawsuit impregnated the mother through rape or incest;³⁰ or
5. Presumably, the provider performed the abortion consistent with and pursuant to her/his obligations under EMTALA.

b. The plaintiffs in a successful lawsuit may recover (i) damages, (ii) statutory damages of at least \$20,000, and (iii) costs and fees.³¹

c. 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, (ii) recorded the information about the test in the woman's medical record, and (iii) otherwise complied with the requirements for an appropriate abortion.^{32 33}

7. Who may perform an abortion?

- a. Under Idaho law, only physicians may lawfully perform an abortion.³⁴ It may be that other practitioners may perform the abortion if necessary to comply with EMTALA.
- b. 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.³⁵

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.³⁶
- b. After 13 weeks of pregnancy, abortions must be performed in hospitals.³⁷

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.³⁸
- 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.³⁹
- 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.⁴⁰
- d. As discussed above, the limits on the use of abortifacients do not apply to ectopic pregnancies.⁴¹

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

- a. Abortions may be performed to save the life of the pregnant woman.⁴² This does not include situations in which the pregnant woman may or will take action to harm herself.⁴³
- b. As discussed above, it appears that chemical abortions may be performed to treat ectopic pregnancies,⁴⁴ although the broad language in §

18-622 along with the federal District Court's conclusions may raise some doubt.

c. As discussed above, if EMTALA applies, abortions may be performed if necessary to avoid (a) placing the health of the pregnant woman in serious jeopardy; (b) a serious impairment to bodily functions of the pregnant woman; or (c) a serious dysfunction of any bodily organ or part of the pregnant patient woman.⁴⁵ 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.”⁴⁶

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

There is no exception that allows an abortion based on the condition of the fetus.⁴⁷

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

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.⁴⁸ However, this requirement is part of Idaho's 20-week abortion ban, I.C. § 18-501 *et seq.* That ban along with the requirement to determine the post-fertilization age of the unborn child would appear to be moot given the total abortion ban.
- b. Obtain informed consent from the pregnant woman.⁴⁹ A physician, hospital, or other facility may refuse to perform an abortion if the pregnant woman refuses regardless of her age or competence.⁵⁰
- 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:
 1. Provide to the patient information published by the Idaho Department of Health and Welfare (“DHW”) concerning abortions. The information is available here. The attending physician or his/her agent must certify that the information was timely provided as required.⁵¹
 2. 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.⁵²
- d. Do not collect a fee for an abortion until after providing the required

information to the pregnant woman.⁵³

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.⁵⁴

f. For chemical abortions, the physician must satisfy the following: (i) have the ability to assess the duration of the pregnancy; (ii) determine, if clinically feasible, that the unborn child to be aborted is within the uterus and not ectopic; (iii) have the ability to provide surgical intervention if needed or, 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; (iv) have a written agreement with such other physicians to provide emergency care if required; (v) inform the pregnant woman that she may need access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary; (vi) 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; and (vii) make reasonable efforts to ensure the patient returns for a follow-up visit to confirm that the pregnancy has been terminated and to assess the patient's condition.⁵⁵

g. Except in the case of a medical emergency, before performing or inducing an abortion, determine whether there is a fetal heartbeat, and record in the pregnant woman's record whether or not the heartbeat is present, the estimated gestational age of the preborn child, the testing method, and the date and time of the test.⁵⁶ This requirement is intended to implement Idaho's fetal heartbeat law, the criminal portions of which were superseded by Idaho's total ban on abortions.⁵⁷ It is, however, relevant to any defense of a civil lawsuit, especially if the healthcare professional seeks to recover costs and fees.⁵⁸

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,⁵⁹ or (ii) a district court judge after an appropriate hearing.⁶⁰

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.⁶¹

c. Physicians performing an abortion on an unemancipated minor are

protected from criminal or administrative liability based on the failure to obtain informed consent 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.⁶²

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.⁶³ See here.

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.⁶⁴

15. 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.⁶⁵ 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.⁶⁶

16. 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,⁶⁷ provided that (i) the professional may not engage in illegal discrimination;⁶⁸ 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.⁶⁹ Similarly, hospitals may generally elect not to furnish facilities or admit patients for abortion,⁷⁰ 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.

¹I.C. § 18-622.

²Memorandum Decision and Order (8/24/22), *United States v. State of Idaho*, Case No. 1:22-cv-00329-BLW (hereafter “Memorandum and Order”).

³I.C. § 18-604(1). In their pending lawsuits, Planned Parenthood argues that “clinically diagnosable pregnancy” is unconstitutionally vague.

⁴I.C. §§ 18-502(9) and 18-604(5).

⁵See Idaho Legislature's Reply in Support of the Legislature's Motion to Intervene at p.2-3 (8/11/22); Idaho Legislature's Brief in Opposition to Motion for Preliminary Injunction (8/16/22) at p.3, 6-7.

⁶Idaho Code § 18-617 generally prohibits the use of abortifacients to effect a chemical abortion, but expressly states that “abortifacient” does not apply “when used to treat ectopic pregnancy.” I.C. § 18-617(1)(1). Section 18-617(2) requires physicians performing a chemical abortion to first determine “that the unborn child to be aborted is within the uterus and not ectopic.” I.C. § 18-617(2)(b).

⁷Memorandum and Order at p.22-23.

⁸In the EMTALA lawsuit, the Idaho Attorney General argued that treatment of an ectopic pregnancy would likely fit within the exception that allows abortions to save the life of a mother. State of Idaho's Response to Motion for Preliminary Injunction (8/16/22) at p.17.

⁹I.C. § 18-622(3). The statute is structured so that the exceptions constitute an affirmative defense to the crime of criminal abortion, presumably placing the burden on the defendant to establish the defense. *Id.*

¹⁰EMTALA applies if a patient comes to a Medicare-participating hospital or certain hospital-based entities seeking emergency care. 42 U.S.C. § 1395dd(a); 42 C.F.R. § 489.24(a). For more information about the apparent scope of the Court's decision, see our article [here](#).

¹¹Memorandum and Order at p.39.

¹²According to EMTALA regulations, a hospital's EMTALA obligations end once a patient has been admitted as an inpatient. 42 C.F.R. § 489.24(a)(1)(ii).

¹³I.C. § 18-613(1). “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).

¹⁴See I.C. §§ 18-617 and 622. “Chemical abortions” means “the exclusive use of an abortifacient or combination of abortifacients to effect an abortion.” I.C. § 18-617(1)(b).

¹⁵I.C. § 18-622(2). A separate statute also subjects healthcare professionals to a fine of at least \$1,000 for a first offense; at least \$2,500

for a second offense; and (iii) at least \$5,000 for a third offense (I.C. § 18-605(2)). Although it is not entirely clear, these fines are likely superseded by the remedial scheme established in § 18-622(2).

¹⁶I.C. § 18-622(2).

¹⁷See, e.g., I.C. §§ 18-603 and 18-612.

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

¹⁹I.C. § 18-606(1), emphasis added.

²⁰I.C. § 18-622(2).

²¹I.C. § 18-204.

²²*State v. Wilson*, 165 Idaho 64, 67, 438 P.3d 302, 305 (2019) (quoting *State v. Smith*, 161 Idaho 782, 787, 391 P.3d 1252, 1257 (2017); see also Idaho Crim. Jury Instr. 311 and 312.

²³I.C. § 18-622(5), emphasis added.

²⁴I.C. § 18-606(2).

²⁵Idaho Code § 18-8803 requires that the person performing the abortion must first attempt to determine whether a fetal heartbeat is present and record such determination in the woman's medical record along with the gestational age of the preborn child, the method used to test for the fetal heartbeat, the date and time of the test, and the results of the test.

²⁶I.C. § 18-8807(1).

²⁷I.C. § 18-8801(5).

²⁸I.C. § 18-8804(b).

²⁹I.C. § 18-8804(a).

³⁰I.C. § 18-8807(3).

³¹I.C. § 18-8807(1)(a)-(c).

³²I.C. § 18-8807(4).

³³In addition to the fetal heartbeat law, other Idaho statutes allow for civil lawsuits in the case of certain abortions, including those performed in violation of the 20-week abortion ban, partial-birth statute, or chemical abortion statutes. (See, e.g., I.C. §§ 18-508; 18-613(3), and 18-618(1). It is not clear whether or to what extent the fetal heartbeat statute supersedes the other statutes allowing civil lawsuits.

³⁴I.C. § 18-608A.

³⁵I.C. § 18-603.

³⁶I.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.

³⁷I.C. § 18-608(2)-(3).

³⁸I.C. § 18-617(a).

³⁹I.C. § 18-607.

⁴⁰I.C. § 18-617(2)-(3).

⁴¹I.C. § 18-617(1)(a).

⁴²I.C. § 18-622(3).

⁴³I.C. § 18-622(3)(a)(ii).

⁴⁴I.C. § 18-617(1)(a).

⁴⁵Memorandum and Order at p.39.

⁴⁶(CMS QSO-22-22-Hospitals (7/1/2022 as rev'd 8/25/22) at p.4, available [here](#).)

⁴⁷See I.C. § 18-622.

⁴⁸I.C. § 18-504(1).

⁴⁹I.C. § 18-609(1).

⁵⁰I.C. § 18-610.

⁵¹I.C. § 18-609(4).

⁵²I.C. § 18-609(5).

⁵³I.C. § 18-609(5).

⁵⁴I.C. § 18-609(6).

⁵⁵I.C. § 18-617(c)-(d).

⁵⁶I.C. § 18-8803.

⁵⁷I.C. § 18-8805(4).

⁵⁸I.C. § 18-8807(4).

⁵⁹I.C. § 18-609A(1).

⁶⁰I.C. § 18-609A(2).

⁶¹I.C. § 18-609A(7).

⁶²I.C. § 18-614.

⁶³I.C. § 39-261(a).

⁶⁴I.C. § 18-609(7).

⁶⁵I.C. §§ 18-506(3) and 18-609(9).

⁶⁶I.C. § 18-506(3).

⁶⁷I.C. § 18-611(2).

⁶⁸I.C. § 18-611(5).

⁶⁹I.C. § 18-611(6).

⁷⁰I.C. § 18-612.

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