



# Idaho Abortion Law Update: Recent Legislation and Pending Litigation

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# Written Resources

- Idaho Code 18-601 *et seq.*, <https://legislature.idaho.gov/wp-content/uploads/statutesrules/idstat/Title18/T18CH6.pdf>
- Idaho Code 18-8801 *et seq.*, <https://legislature.idaho.gov/wp-content/uploads/statutesrules/idstat/Title18/T18CH88.pdf>
- *Planned Parenthood v. Idaho*, Nos. 49615, 49817, 49899 (Idaho 1/5/23) (“SCt Opinion”), <https://isc.idaho.gov/opinions/49615xxx.pdf>
- *Planned Parenthood v. Labrador*, No. 1:23-cv-00142-BLW (D. Idaho 7/31/23), [https://www.hollandhart.com/webfiles/Memorandum\\_Decision\\_and\\_Order\\_123-cv-00142-BLW.pdf](https://www.hollandhart.com/webfiles/Memorandum_Decision_and_Order_123-cv-00142-BLW.pdf)

# Written Resources

- Stanger, *Idaho's Amended Abortion Laws: Summary and Updated FAQs*, <https://www.hollandhart.com/idahos-amended-abortion-laws-summary-and-updated-faqs>
- Stanger, *Idaho Abortion Laws: Idaho Supreme Court Upholds Laws but Offers Important Clarifications*, <https://www.hollandhart.com/idaho-abortion-laws-idaho-supreme-court-upholds-laws-but-offers-important-clarifications>
- Stanger, *Referrals for Out-of-State Abortions: New Idaho Decision*, <https://www.hollandhart.com/referrals-for-out-of-state-abortions-new-idaho-decision>
- Stanger, *No More EMTALA Exception for Idaho Abortions*, <https://www.hollandhart.com/no-more-emptala-exception-to-idahos-total-abortion-ban#:~:text=The%20Ninth%20Circuit%20Court%20of%20Appeals%20has%20ended,preempted%20the%20total%20abortion%20ban%20in%20emergency%20cases.>

# Status of Idaho Abortion Laws



# Status of Idaho Abortion Laws

- Idaho has always limited abortions.
  - Laws dating back to territorial days make most abortions a crime.
- 1973: *Roe v. Wade*, 410 U.S. 113 (1973)
  - U.S. Constitution contains a fundamental right to privacy which protects a woman's right to an abortion during the first and potentially second trimester.
  - States may not regulate abortions in a manner inconsistent with the U.S. Constitution.

# Status of Idaho Abortion Laws

Over years, Idaho enacted different abortion statutes in response.

- 1973: Abortions limited per trimester (IC 18-605, -608)
- 1998: Partial birth abortion ban (IC 18-613)
- 2011: 20-week “pain capable” abortion ban (IC 18-505)
- 2015: Chemical abortion ban (IC 18-617)
  - Authorized private cause of action (IC 18-618)
- **2020: Total abortion ban (IC 18-622)**
  - Triggered if Supreme Court overturns *Roe v. Wade*
- **2021: Fetal heartbeat (6-week) ban (IC 18-8804)**
  - Triggered if federal court upholds similar law.
- **2022: Fetal heartbeat ban (IC 18-8804) amended:**
  - **Authorized Texas-style private cause of action for family (IC 18-8807)**
  - Criminal penalties superseded if total abortion ban takes effect.

*Portions held to be unconstitutional, some laws conflict or overlap, or had different triggering statutes, but laws were not repealed.*

# Status of Idaho Abortion Laws

- *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_\_ (2022)
  - U.S. Constitution does not confer a right to abortion.
  - States may regulate abortion.
- In Idaho, suddenly, dormant and overlapping laws became effective, and laws that were previously unconstitutional but still on the books sprang back to life:
  - Total abortion ban (18-622).
  - Fetal heartbeat (6-week) ban (18-8801 et seq.):
    - Criminal penalties (18-8805) to the extent not preempted by total abortion ban.
    - Civil liability law (18-8807).
  - Pain capable (20-week) ban (18-501 et seq.)?
  - Abortion requirements (18-601 et seq.)?
  - Partial birth abortions ban (18-613)?
  - Chemical abortion ban (18-617 and 18-618)?

*Probably effective to the extent consistent with IC 18-622 and 18-8807.*



# Status of Idaho Abortion Laws

- *United States v. Idaho*, No. 1:22-CV-00329 (D. Idaho 8/24/22)
  - District Court preliminarily enjoined total abortion ban in EMTALA cases (8/22)
  - Ninth Circuit overruled District Court; total abortion ban applies in EMTALA (9/23)
  - DOJ has requested en banc review; case is still pending.
- *Planned Parenthood v. Idaho*, No. 49615 (Idaho 1/5/23) (“SCt Opinion”).
  - Upholds total abortion ban, fetal heartbeat (6-week) ban, and civil liability law; did not address other related laws.
- 2023 legislature
  - Amended total abortion ban, IC 18-622.
  - Did not amend fetal heartbeat ban, IC 18-8801 et seq.
  - Enacted abortion trafficking law, IC 18-623.

# Total Abortion Ban (IC 18-622)



# Total Abortion Ban

## PROHIBITS

- Abortion of **clinically diagnoseable pregnancy** by any person unless
- Assisting in performing abortion.
- Exceptions if abortion performed by physician and:
  - **Necessary to prevent death of mother** + perform in manner to give fetus best chance to survive unless doing so would increase risk to mother.
  - **Rape or incest** + physician receives copy of police report.

(IC 18-622(2)-(3))

## PENALTIES

- Performing or attempting abortion:
  - Felony
  - 2 to 5 years in prison
- Performing, attempting or assisting abortion:
  - 1st offense: suspension of license for at least 6 months
  - Subsequent offense: permanent revocation of license.

# Total Abortion Ban “Abortion”

- “Abortion” means “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.”
- Does not include
  - Use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization or the implantation of a fertilized ovum within the uterus.
  - Removal of an ectopic or molar pregnancy.
  - Removal of a dead unborn child.

(IC 18-604(1))

# Total Abortion Ban: “Clinically Diagnosable Pregnancy”

- “Pregnancy” means “the reproductive condition of having a **developing fetus** in the body and commences with fertilization.”  
(IC 18-604(11), emphasis added)
- “For purposes of the Total Abortion Ban, the only type of ‘pregnancy’ that counts for purposes of prohibited ‘abortions’ are those where the fetus is ‘developing[.]’... In the case of ectopic pregnancies ... (when the fallopian tube, ovary, or abdominal cavity it implanted in necessarily cannot support its growth) ... we conclude a ‘developing fetus’ under the definition of ‘pregnancy’ in § 18-604(11), does not contemplate ectopic pregnancies....
- “In addition, because a fetus must be ‘developing’ to fall under the definition of ‘pregnancy’ in § 18-604(11), non-viable pregnancies (i.e., where the unborn child is no longer developing) are plainly not within the definition of ‘abortion’ as criminalized by the Total Abortion Ban (I.C. § 18-622(2)).”

(SCt Opinion at p.88; *contra* DCt Order at p.22-23)

# Total Abortion Ban: “Necessary to Prevent Death” Defense

- “Necessary to prevent death” depends on physician’s subjective good faith medical judgment.
- The statute “leaves wide room for the physician’s ‘good faith medical judgment’ on whether the abortion was ‘necessary to prevent the death of the pregnant woman’ based on those facts known to the physician at that time. This is clearly a subjective standard, focusing on the particular physician’s judgment. [T]he statute does not require objective certainty, or a particular level of immediacy, before the abortion can be ‘necessary’ to save the woman’s life. Instead, the statute uses broad language to allow for the ‘clinical judgment that physicians are routinely called upon to make for proper treatment of their patients.’”

(SCt Opinion at p.89-90)

# Total Abortion Ban: “Best Opportunity for Unborn Child to Survive”

- “Best opportunity for unborn child to survive” also depends on physician’s subjective good faith medical judgment.
- “[T]his means that if a woman is to have an unborn child removed from her body based on the preservation of her life ... —when the unborn child is viable outside of her womb—the physician must remove that unborn child in a manner that provides the best opportunity for survival (e.g., vaginal delivery or cesarean delivery) and cannot remove the child using a method which will necessarily end its life (e.g., dilation and extraction, or partial-birth abortions). The exception to this is when, in the physician’s ‘good faith medical judgment,’ a method that would save the unborn child’s life poses a ‘greater risk of the death of the pregnant woman.’”

(SCt Opinion at p.92)

# Fetal Heartbeat (6-Week) Ban (IC 18-8801 *et seq.*)





# Fetal Heartbeat (6-Week) Ban

- Any person who intends to perform or induce an **abortion** must determine if there is any **fetal heartbeat** except in a medical emergency.

(IC 18-8803)

- "Abortion" means "the use of any means to intentionally terminate the **clinically diagnosable pregnancy** of a woman with knowledge that the termination ... will, with reasonable likelihood, cause the death of the preborn child."
  - Does not include the use of an IUD or birth control pill to inhibit or prevent ovulations, fertilization, or the implantation of a fertilized ovum.
  - *Definition differs from "abortion" in the total abortion ban.*
- "Fetal heartbeat" means "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."

(IC 18-8802)

# Fetal Heartbeat (6-Week) Ban

- Person may not perform an abortion when a fetal heartbeat has been detected except if:
  - “**Medical emergency**”, *i.e.*, abortion necessary to avert
    - **Death of pregnant woman**, or
    - **Substantial and irreversible impairment** of a major bodily function of pregnant woman; or
  - **Rape or incest** and prior to performance of abortion, the woman or parent/guardian:
    - **Reported the act of rape or incest** to law enforcement or child protective services, and
    - **Provided a copy of the report to the physician** who is to perform the abortion.

(IC 18-8804)

# Fetal Heartbeat (6-Week) Ban

## CRIMINAL PENALTIES

- Performs or induces abortion:
  - Felony
  - 2-5 years in prison
- Performing, including or assisting in abortion:
  - 1st offense: suspension of license for at least 6 months
  - Subsequent offense: permanent revocation of license.
- **Criminal penalties superseded by total abortion ban if total abortion ban is effective.**

(IC 18-8805)

## CIVIL LAWSUIT

- Mother, father, sibling, grandparent, or aunt/uncle of child may sue provider for:
  - \$20,000 statutory damages;
  - Actual damages; and
  - Costs and attorney fees.

(IC 18-8807(1))

- \$20,000 statutory damages is the minimum for compensatory damages, not additional penalty.

(SCt Opinion at p.98-99)

# Fetal Heartbeat (6-Week) Ban: “Medical Emergency”

- “**Medical emergency**” means a condition that, in reasonable medical judgment, 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**.

(IC 18-8801(5))

- Objective standard, *i.e.*, what a reasonable physician would do.
- “This standard ... requires the physician to exercise ‘reasonable medical judgment’ when determining whether the medical condition of the pregnant mother necessitates an abortion ‘to avert’ her death or avoid a ‘serious risk of substantial and irreversible impairment of a major bodily function.’”

(SCt Opinion at p.96)

# Fetal Heartbeat (6-Week) Ban: Ectopic or Non-Viable Pregnancies

- Termination of ectopic and non-viable pregnancies likely fall within the “medical emergency” exception under the fetal heartbeat (6-week) ban.
- According to the Idaho Supreme Court
  - Unlike the total abortion ban, the fetal heartbeat (6-week) ban’s definition of “abortion” includes ectopic or non-viable pregnancies.
  - Nevertheless, “we conclude that ectopic, and non-viable pregnancies plainly fall within the “medical emergency” exception under the 6-Week Ban and Civil Liability Law (an exception the Total Abortion Ban does not contain).”

(SCt Opinion at p.88-89)

# Other Civil Liability Statutes

- Other Idaho statutes allow for civil lawsuits arising from abortion, including violations of:
  - 20-week abortion ban (IC 18-508),
  - Partial birth abortion ban (IC 18-618(3)), and
  - Chemical abortion statute (IC 18-618(1))
- It is not clear whether the civil liability statute in IC 18-8807 supersedes all of these or whether they may still apply.

# Aiding, Abetting, or Assisting in Abortion



# Assisting, Aiding or Abetting an Abortion

## TOTAL ABORTION BAN (IC 18-622)

- Licensed professional who assists in prohibited abortion:
  - 1<sup>st</sup> offense: license suspended for 6 months
  - Subsequent offense: licensed permanently revoked.

(IC 18-622(2))

- *Limited to licensed professionals.*
- *No criminal penalties identified.*

## ACCOMPLICE OR ACCESSORY (IC 18-606(1))

- Accomplice or accessory who aids in abortion in violation of 18-605:
  - Felony
  - Prison 1 to 5 years.

(IC 18-606(1))

- *But 18-605 superseded by 18-622; 18-606 does not mention 18-622.*
- *18-622 likely supersedes 18-606?*



# Idaho Abortion Law: Assisting an Abortion

- In March 2023, AG Labrador wrote a letter in which he concluded, “[a]n Idaho health care professional who refers a woman across state lines to an abortion provider or who prescribes abortion pills for the woman across state lines has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute.” (<https://www.courthousenews.com/wp-content/uploads/2023/04/labrador-idaho-opinion-letter.pdf>).
- In July 2023, the federal district court entered preliminary injunction blocking the AG from enforcing that interpretation. (*Planned Parenthood v. Labrador*, Case No. 1:23-cv-00142(BLW), Memorandum Decision at p.55, available here).
- Case is still pending.

# Assisting, Aiding or Abetting an Abortion

## AIDING AND ABETTING

- “All 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 ... have advised and encouraged its commission ... are principals in [the] crime ....”  
(IC 18-204)
- “Aid and abet” means to “assist, facilitate, promote, encourage, counsel, solicit or incite the commission of a crime.”  
(IC 18-240)
- *Arguably, legislature intended to limit liability for aiding and abetting by restricting 18-622 to licensed professionals who assist in the surgery.*

# Assisting, Aiding or Abetting an Abortion

- “[N]o hospital, nurse, or other health care personnel shall be deemed in violation of [18-606] if in good faith providing services in reliance upon the directions of a physician or upon the hospital admission of a patient for [an abortion] on the authority of a physician.”

(IC 18-606(2))

- *But not clear if this is still effective given:*
  - *It refers to a violation of 18-605, which was superseded by 18-622.*
  - *18-622 subjects licensed professionals to adverse licensure action for assisting an abortion.*

# Assisting, Aiding, or Abetting an Abortion

Unlikely a provider would be prosecuted for:

- Advising patient of care options, including possibility of obtaining an abortion in other state where abortion is legal.
- Counseling, transferring, or providing records to facilitate a lawful abortion in other state where abortion is legal.
- *But no guarantees...*

## Rationale

- *Idaho requires informed consent, including info re treatment options. (See IC 18-604(8) and 39-4506)*
- *Provider is not aiding or abetting a crime if abortion is legal where it is performed, e.g., in state where abortion is legal.*
- *Prosecuting a person for actions performed in another state where actions are legal raises constitutional concerns.*

# Assisting, Aiding or Abetting an Abortion

Provider's permissible talking points:

- Any info relevant to informed consent, including care options, alternatives, risks and benefits.
- “Idaho law prohibits most abortions. However, you may be able to obtain an abortion in another state where abortions are legal.”
- “If you want to transfer your care elsewhere (including to a provider who may perform a lawful abortion), we will take appropriate steps to help facilitate your care, including transferring records, responding to questions, and/or facilitating an appropriate transport.”
- “For more info about treatment options, including lawful abortions, you might contact [name and contact info].”

# Idaho Abortion Trafficking Law



# Idaho Abortion Trafficking Law

- Prohibits recruiting, harboring or transporting a pregnant minor within Idaho to obtain an abortion (including an abortion out-of-state) with the intent to conceal the abortion from the parent or guardian.
- Affirmative defenses:
  - Parental or guardian consent
  - Not the fact that the abortion provider is in another state.
- Penalties:
  - 2 to 5 years in prison.

(IC 18-623)

# Requirements for Permissible Abortions





# Requirements for Permissible Abortions

- Only a physician may perform an abortion.  
(IC 18-608A, 18-622(3))
- During the first 13 weeks of pregnancy, lawful abortions may be performed in:
  - A hospital; or
  - In a physician’s regular office or a clinic if properly staffed, equipped, and with satisfactory arrangement with local hospital to render emergency care if required.  
(IC 18-608)
- After 13 weeks of pregnancy, abortions must be performed in hospitals. (IC 18-608)
- Foregoing rules likely do not apply to termination of ectopic or non-viable pregnancy because they are outside the relevant definition of “abortions.”  
(IC 18-604(1); SCt Opinion at p.88)

# Requirements for Permissible Abortions

- Except in medical emergency, provider must determine probable post-fertilization age of the unborn child through appropriate tests, examination and inquiries of the pregnant woman. (IC 18-504(1))
  - *But this is part of 20-week ban which predated and would seem to be moot given the total abortion ban.*
- Obtain informed consent from pregnant woman. (IC 18-609(1))
  - Comply with specific rules for minors. (IC 18-609A)
- Except in medical emergency, at least 24 hours before abortion, provide required DHW info to patient, advise patient of right to obtain ultrasound, etc. (IC 18-609(4)-(5))
- If ultrasound used for abortion, allow the patient to view the ultrasound image. (IC 18-609(6))

# Requirements for Permissible Abortions

- Except in medical emergency, before performing abortion, determine if there is fetal heartbeat and report in record the test results, the estimated age of the child, testing method, and date/time of the test.

(IC 18-8803)

- *This seems irrelevant under the total abortion ban.*
- *This is required under the fetal heartbeat ban to avoid liability under civil liability law.*
- *Not clear whether or to what extent this would be enforced.*

# Requirements for Permissible Chemical Abortions

- Idaho has specific requirements for the use of abortifacients to effect a chemical abortion.

(IC 18-617)

- “Abortifacients” are defined to include mifepristone, misoprostol, and/or other chemical or drug used to cause an abortion.
- Does not apply to the use of such drugs to treat ectopic pregnancy.

(IC 18-603)

- *Not clear how whether or to what extent 18-622 supersedes 18-317.*

# Requirements for Permissible Chemical Abortions

- No physician may give, sell, dispense, administer, prescribe, or provide an abortifacient to effect a chemical abortion unless the physician
  - May assess the duration of the pregnancy accurately;
  - Has determined, if clinically feasible, that the unborn child is within the uterus and not ectopic;
  - 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;
  - Provides required information as described more fully below; and
  - 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.

(IC 18-617(2)-(3))

# Requirements for Permissible Abortions

- Comply with reporting requirements, e.g.,
  - 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. See <https://healthandwelfare.idaho.gov/providers/vital-records/vital-records>. (IC 39-261(a))
  - If the physician performed an abortion without providing to the patient the required DHW and ultrasound information, 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. (IC 18-609(7))

# Liability of Pregnant Woman



# Liability of Pregnant Woman

## TOTAL ABORTION BAN (IC 18-622)

- “Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.”  
(IC 18-622(5), emphasis added)
- “The Total Abortion Ban, 6-Week Ban, and Civil Liability Law impose no criminal or civil penalties against the mother who submits to an abortion.”  
(SCt Opinion at p.82)

## GENERAL ABORTION LAW (IC 18-606)

- “Every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony and shall be fined not to exceed five thousand dollars (\$5,000) and/or imprisoned in the state prison for not less than one (1) and not more than five (5) years.”  
(IC 18-606(2))



# Liability of Pregnant Woman

- Arguably, the language in the total abortion ban which confirms the pregnant woman is not liable manifests the legislature's most recent intent that the pregnant woman is not liable.
- But the language is not entirely clear....

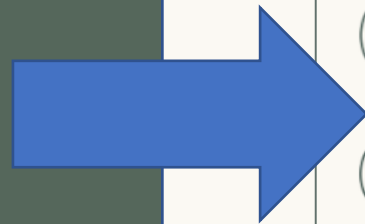
# ADDITIONAL RESOURCES



# HTTPS://WWW.HOLLANDHART.COM/ HEALTHCARE

## Free content:

- Recorded webinars
- Client alerts
- White papers
- Other



The screenshot shows the Holland & Hart website's Healthcare section. At the top, the navigation bar includes the firm's logo, 'People Capabilities', and a search bar. The main heading is 'Healthcare', with sub-navigation for 'Overview', 'Expertise', 'People', and 'News and Insights'. Below this is an 'Areas of Focus' section with buttons for 'Business Litigation', 'Corporate', 'Employment and Labor', 'Mergers and Acquisitions', and 'Real Estate'. A central text block states: 'Healthcare is a massive industry that needs specialized legal advice.' To the right is a 'Primary Contacts' section featuring a photo of Kim Stanger. On the left, three circular icons with text links are visible: 'WEBINAR RECORDINGS' (with a video camera icon), 'PUBLICATIONS' (with a book icon), and 'IDAHO PATIENT ACT TIMELINE' (with a caduceus icon). The Holland & Hart logo is at the bottom right.

# Questions?

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