



Reproductive Rights:

THE STATUS OF FEDERAL AND INTERMOUNTAIN STATE LAWS

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MIFEPRISTONE: DUELING CASES

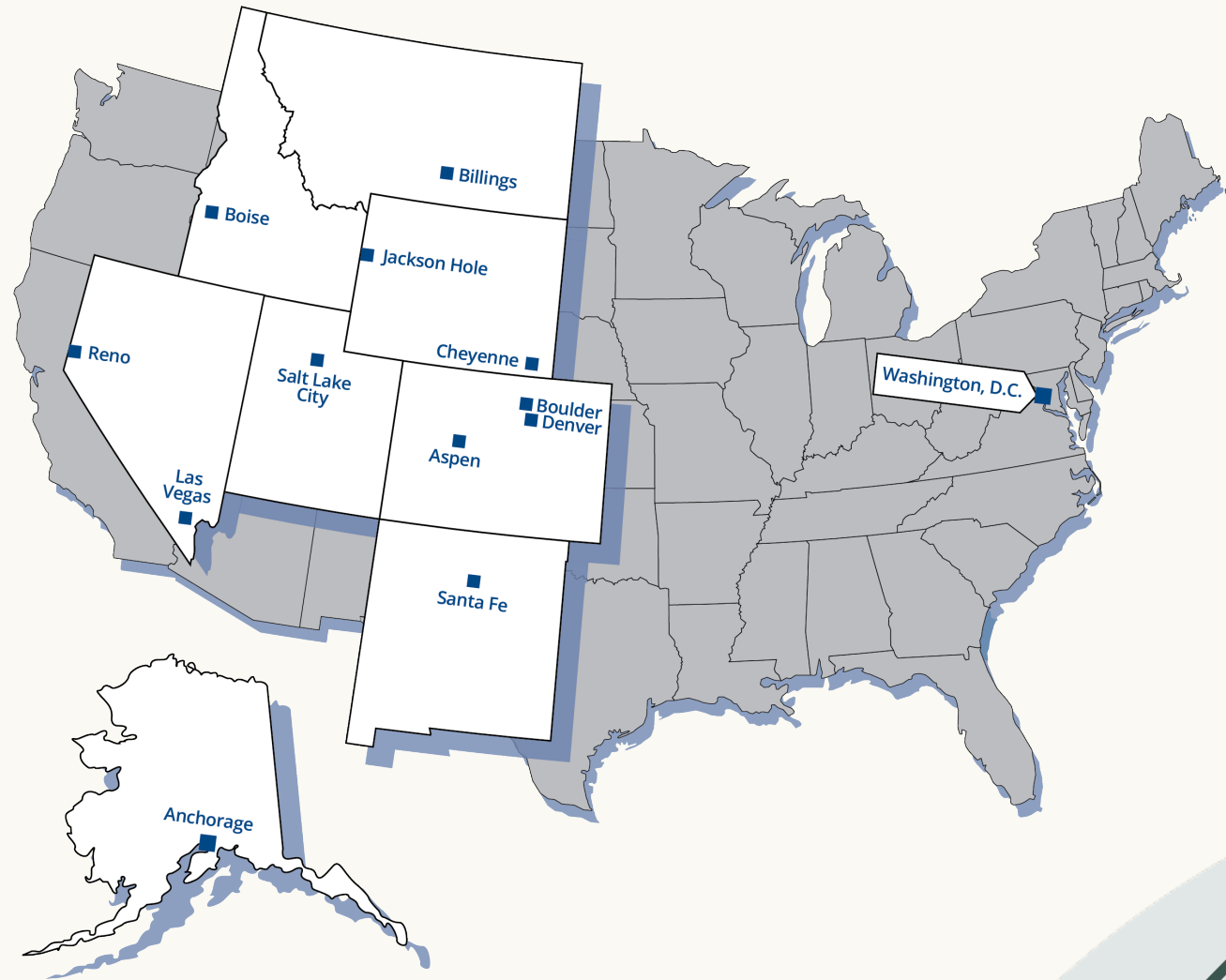
- Mifepristone is a drug that blocks a hormone called progesterone, which is needed for a pregnancy to continue. When it is used in combination with another drug called misopristol, it can end a pregnancy within the first ten weeks of gestation.
- A case filed by anti-abortion doctors in Texas (*Alliance for Hippocratic Medicine v. FDA*) seeks to ban mifepristone nationwide, alleging mifepristone is dangerous and that the FDA approved it unlawfully in 2000.
- Last month, U.S. District Judge Matthew Kacsmaryk in Amarillo, Texas sided with the plaintiffs, finding they were likely to win, and suspended mifepristone's approval while the lawsuit goes forward.
 - The U.S. Supreme Court put that order on hold, meaning that mifepristone remains available while the case is appealed.
- Next week, a 5th Circuit panel of three deeply conservative judge hostile to abortion rights, will hear the case.

SECOND MIFEPRISTONE CASE

- GenBioPro, a company that makes the generic version of mifepristone, sought to block the FDA from complying if the courts ultimately order mifepristone off the market.
- The case (*GenBioPro, Inc. v. FDA*) was filed in the U.S. District Court of Maryland.
- The GenBioPro lawsuit claims that the FDA has repeatedly failed to stipulate that it would follow a regulatory process established by Congress and afford the drug company due process rights guaranteed by the Constitution if the FDA is ordered to suspend or revoke its approval of GenBioPro's product.
 - Essentially, the lawsuit argues that the FDA has "left GenBioPro at risk of severe civil and criminal penalties if it does not cease shipments of mifepristone" because the FDA might immediately obey such a court order that is similar to those issued in the Texas case.

TITLE X CLINICS AND FAMILY PLANNING

- For decades, precedent has held that clinics funded by Title X can provide basic health care, including birth control, to minors without parental consent.
- In December, in the case *Deanda v. Becerra*, Judge Matthew Kacsmark, in Amarillo Texas, ruled that it violates Texas state law and the U.S. Constitution for minors to get their birth control through the Title X program without parental consent.
- In February, the U.S. Department of Justice appealed the ruling.



STATES WITH RESTRICTIVE ABORTION LAWS

Utah: Currently permits abortions until 18 weeks LMP. U.C.A. § 76-7-302.5

Trigger Law passed in 2020 is below, but currently enjoined. U.C.A. § 76-7a-201.

State	Liability Type	Status (as 5/11/23)	Abortion Defined	Pregnancy Defined	Exceptions
UT	Felony and licensure risk (anyone performing abortion and abortion clinic)	Currently enjoined.	Intentional termination or attempted termination of human pregnancy <u>after implantation of a fertilized ovum</u> through a medical procedure carried out by a physician or through a substance used under the direction of a physician. Excludes removal of a dead unborn child or ectopic pregnancy.	Not defined but infer that it is after implantation.	Avert death or serious physical risk of substantial impairment of a major bodily function of the woman; Two physicians who practice maternal fetal medicine concur, in writing, that the fetus has a fetal abnormality that in the physicians' reasonable medical judgment is incompatible with life Rape or incest. If pregnant female is under age 14, physician must verify rape/incest reported to law enforcement and reported child abuse, where applicable.

STATES WITH RESTRICTIVE ABORTION LAWS

Utah:

- **March 15, 2023:** Utah governor signs legislation (enacting new law) that generally requires abortions be performed in hospitals, prohibits future licensing of abortion clinics, and increases restrictions on abortion availability. H.R. 467, 2023 Gen. Sess.
- Planned Parenthood sues (*Planned Parenthood Ass'n of Utah v. State*, No. 220903886 (Utah 3d Jud. Dist. Ct. Apr. 3, 2023)) and law is currently enjoined.

STATES WITH RESTRICTIVE ABORTION LAWS

Idaho: Abortion is prohibited from the time of conception due to Idaho's trigger ban (Idaho Code Ann. § 18-622), which went into effect in August, 2022.

- As amended effective July 1, 2023, the total abortion ban does not apply to ectopic or molar pregnancies.
- Instead of characterizing them as affirmative defenses, the total abortion ban now excludes abortions that (i) are necessary to save the life of the mother or (ii) follow reported rape or incest. This will shift the burden of proof relating to the exceptions from the defendant to the prosecutors.
- The rape and incest exception only applies if the abortion is performed during the first trimester of pregnancy.

STATES WITH RESTRICTIVE ABORTION LAWS

Idaho has also enacted a civil liability law that allows certain individuals, including "[a]ny female upon whom an abortion has been attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child" to maintain a civil action against "the medical professionals who knowingly or recklessly attempted, performed, or induced the abortion in violation" of Idaho state law. Idaho Code § 18-8807.

STATES WITH RESTRICTIVE ABORTION LAWS

The Idaho legislature also passed a new “abortion trafficking” law that, effective May 5, 2023, makes it a crime for an adult to recruit, harbor or transport a pregnant minor within Idaho to obtain an abortion (including an abortion out-of-state) without the consent of the parent or guardian. Parental or guardian consent is an affirmative defense, but the fact that the abortion provider is in another state is not. Violations will result in prison of two to five years.

Idaho Code Ann. § 18-623(1).

Planned Parenthood has vowed to challenge the abortion trafficking statute.

- [Holland & Hart Client Alert Idaho Abortion Law Update](#)

STATES WITH RESTRICTIVE ABORTION LAWS

- Wyoming: Wyoming currently permits abortions until viability.
- Trigger law is as shown below but is currently enjoined.

State	Liability Type	Status (as 5/11/23)	Abortion Defined	Pregnancy Defined	Exceptions
WY	Felony (anyone who performs an abortion)	Enjoined	Act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the <u>intent to terminate the clinically diagnosable pregnancy</u> of a woman, including the elimination of one (1) or more unborn babies in a multifetal pregnancy, with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn baby.	Begins upon fertilization (vs. implantation)	Avoid death or substantial and irreversible impairment to mother, not including psychological or emotional conditions. Incest and sexual assault, provided that such acts have been reported to law enforcement and a copy of the report has been provided to the physician prior to the abortion. Lethal fetal anomaly.

STATES WITH RESTRICTIVE ABORTION LAWS

- **March 17, 2023:** Wyoming legislature enacts Life is a Human Right Act, Wyo. Stat. Ann. §§ 35-6-120 through 35-6-128, which removes abortion from the definition of healthcare, prohibits abortions except in cases of rape, incest, fetal anomaly, or to save the life of the mother, and criminalizes providers who perform abortions.
 - This Act also makes it unlawful (i.e., a felony) to prescribe, dispense, distribute, sell, or use any drug for the purpose of procuring or performing an abortion on any person.
 - **Effective July 1, 2023**
- **March 22, 2023:** Wyoming district court grants TRO that prevents the Life is a Human Right Act from taking effect.

MONTANA

- Montana: Currently permits abortions until viability and a law attempting to change that has been enjoined.

State	Liability Type	Status (as 5/11/23)	Abortion Defined	Pregnancy Defined	Exceptions
MT	Felony (anyone knowingly performing or attempting to perform an abortion)	The Montana Abortion Control Act (Mont. Code Ann. § 50-20-603), which permits abortions only until 22 weeks after the woman's last menstrual period, has been enjoined.	The use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the pregnancy of a woman <u>known</u> to be pregnant, with an intention <u>other than</u> 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 fetus.	<u>Fertilization</u> , which the enacted law defines as "the fusion of a human spermatozoon with a human ovum."	Avert death or serious physical risk of substantial impairment of a major bodily function of the woman, not including psychological or emotional conditions Remove an ectopic pregnancy Rape or incest

MONTANA

- **April 22, 2021:** Montana enacted legislation that permitted abortion only until 22 weeks after a woman's last menstrual period.
- **August 8, 2022:** Montana Supreme Court affirmed a Montana lower court's order granting preliminary injunction that enjoined the state's 22-week abortion law.
- **April 7, 2023:** Montana legislature passed House Bill 721, prohibiting performing an abortion using the dilation and evacuation (D&E) procedure, which is the most common procedure used 15 weeks after a woman's last menstrual period.
- **April 10, 2023:** Planned Parenthood and individual healthcare providers filed for a TRO to block enforcement of that bill, but Montana's First Judicial District Court denied Planned Parenthood's request for the TRO blocking House Bill 721 because it found that Planned Parenthood's request for relief was premature since the bill has not yet been enacted.

STATES PROTECTING ABORTION

- **Nevada**—The Nevada Senate approved a bill on April 19th that would strengthen existing protections for abortion patients coming into Nevada from out-of-state and would protect in-state providers from outside prosecution and penalties. It has not yet been enacted.
- **Colorado**—Colorado enacted a law in April protecting out-of-state patients seeking an abortion by ensuring they have access to an abortion without fear of prosecution. The law further bars state agencies from cooperating with out-of-state investigations into any person's reproductive healthcare.
- **New Mexico**— New Mexico enacted a law in March protecting out-of-state patients seeking an abortion, permitting such patients to receive an abortion, and preventing extradition of such patients and in-state abortion providers.

OTHER DEVELOPMENTS

FDA Advisers Endorse Making Birth Control Pill Available Without Prescription

- On May 10, 2023, advisers to the Food and Drug Administration unanimously endorsed making birth control pills available without a prescription, overriding concerns raised by the agency about whether the medication could be used in a safe and effective manner without physician oversight.
- If the FDA follows the nonbinding recommendation, the medication, called Opill (norgestrel tablets), would become the first contraceptive pill to be provided without a prescription, on store shelves.

FEDERAL ADMINISTRATIVE GUIDANCE

EMTALA preemption

- [HHS EMTALA Guidance](#)
 - The U.S. District Court for the Northern District of Texas issued an injunction prohibiting certain applications of the EMTALA Guidance issued on July 11, 2022 and Secretary Becerra’s accompanying July 11, 2022 letter. *Texas v. Becerra*, No.5:22-cv-185H (N.D. Tex.).
- On May 1, 2023, CMS announced two investigations of hospitals that were alleged to have not offered necessary stabilizing care to an individual experiencing an emergency medical condition and requiring abortion services, in violation of EMTALA. In response, HHS Secretary Xavier Becerra released a statement reminding hospitals and providers of their professional and legal requirements to provide care for patients who need emergency care, including abortion care, under EMTALA. Secretary Becerra also sent a letter to hospital and provider associations reminding them of their obligations under EMTALA. More information on this announcement can be found here. [May 1, 2023 CMS Statement](#)

FEDERAL ADMINISTRATIVE GUIDANCE

- Federal Guidance
 - EMTALA preemption
 - [July 11, 2022 HHS Letter to Providers](#)
 - Retail Pharmacies' Obligations
 - <https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf>
 - Patient Rights under ACA
 - <https://www.hhs.gov/about/news/2022/06/25/know-your-rights-reproductive-health-care.html>

HIPAA AND REPRODUCTIVE PHI

- Generally prohibits healthcare providers from disclosing protected health information pursuant to subpoenas and other government demands unless certain conditions are satisfied.
- HHS recently issued guidance.
 - <https://www.hhs.gov/about/news/2022/06/29/hhs-issues-guidance-to-protect-patient-privacy-in-wake-of-supreme-court-decision-on-roe.html>
- **Court Order, Warrant, Subpoena Signed by a Judge or Magistrate, or Grand Jury Subpoena.**
 - Failure to comply can result in fines or penalties.

OTHER HELPFUL RESOURCES

- [Holland & Hart Client Alert Idaho Abortion Law Update](#)
- <https://www.hollandhart.com/hipaa-disclosures-to-law-enforcement>
- https://www.hollandhart.com/hipaa-responding-to-subpoenas-orders_and-administrative-demands

ADDITIONAL RESOURCES

- Holland & Hart
 - [Healthcare](#)
 - [Health Law Blog](#)
- Abortion Law Trackers
 - [New York Times: State Tracker](#)
 - [Guttmacher Institute: State Policies on Abortion](#)