Dobbs, Trigger Laws and Injunctions: The Changing Landscape of Reproductive Health Care for Providers

Article
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Since the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, in which the Court determined that the authority to regulate abortion rests with the political branches, i.e. legislatures, and not the courts, health care providers have been confronted with a shifting landscape of abortion regulation. The newest addition to this climate is the Executive Order Protecting Access to Reproductive Health Care Services ("E.O.") signed by President Biden On July 8.

The E.O. defines "reproductive health care services" as "medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." The E.O. attempts to provide some guidance for health care providers. Specifically, it directs the Department of Health and Human Services ("HHS") to clarify that physician responsibilities and protections under the Emergency Medical Treatment and Labor Act (EMTALA) preempt any directly conflicting state law or mandate that might otherwise prohibit or prevent such treatment. EMTALA requires that a hospital provide an appropriate medical screening examination to determine whether an emergency medical condition (EMC) exists or whether an individual is in active labor if the individual comes to the emergency department and requests an examination or treatment. If an EMC is found to exist, the hospital must provide either stabilizing treatment or an appropriate transfer to another hospital that has the capabilities to provide stabilizing treatment.

The E.O. also seeks to protect access to the full range of reproductive health services, including emergency contraception and long-acting reversible contraception (e.g. IUDs), and provide greater protection to reproductive health information. HHS has already issued guidance addressing how the HIPAA Privacy Rule applies to protected health information related to reproductive health care.

In addition, the E.O. directs the Attorney General and the Secretary of Homeland Security to consider actions to protect the safety of patients, providers, and third parties and the security of clinics (including mobile clinics), pharmacies, and

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Suzannah Wilson Overholt
Partner

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other entities providing, dispensing, or delivering reproductive and related health care services.

The Hyde Amendment limits the ability of the federal government to fund abortion services because it prohibits the use of federal funds for any health benefits coverage that includes abortion except for cases of rape, incest, or to protect the life of the mother. Although the Hyde Amendment is not a permanent law, it has been attached as a temporary "rider" to the Congressional appropriations bill for HHS since 1976 and has been renewed annually by Congress.

The E.O. does not have any significant impact on the patchwork of abortion regulations that is emerging across the country and does not resolve the questions confronting providers at this time. For example, providers who are considering providing medication abortion services to patients in another state need to be aware of the other state's licensing, abortion and telemedicine regulations. A state may prohibit providing medication abortion via telemedicine (e.g. Indiana), limit who can administer abortion medications, and require a provider to be licensed in the state where the patient is located. Providers who provide any type of abortion services to patients who reside in another state will also need to consider whether patients will be able to access follow up care in their states of residence and how limitations on that care impact the services that should be provided.

In interpreting exceptions based on the health and life of the pregnant person, health care providers need to think about how long they need to wait to determine whether the abortion is necessary or how at risk the patient's life must be to invoke the exception. A specific area of concern is ectopic pregnancies, where a non-viable fetus implants outside the uterus and presents a threat to the person carrying it.

In addition, there are questions about the impact that new abortion regulations will have on in vitro fertilization ("IVF"), in which an egg is fertilized in a laboratory setting and then implanted into a uterus. Embryos are often frozen for future implantation and there are questions regarding whether stored embryos must remain stored, whether they can be used for research and whether removing a nonviable embryo after it has been implanted is considered an abortion. This issue does not appear to have been clarified in any legislation.

The abortion regulations that currently exist in the Midwest create varying levels of uncertainty for health care providers treating pregnant patients, and they are changing on an almost daily basis. For example, Illinois and Minnesota have few restrictions on abortion. An abortion may be performed in Illinois for any reason up to viability and after viability if the patient's life or health is endangered. In Minnesota, abortion is protected by the state's constitution and is legal up to the point of viability, which is generally thought to begin at about 24 weeks, when the fetus can survive outside the womb. Abortions after the point of fetal viability are

allowed only to preserve the life or health of the mother. Minnesota has counseling, waiting period and parental consent requirements similar to those discussed below.

Currently, the strictest regulations regarding abortion in the Midwest are in Ohio, Missouri, and Wisconsin due to either laws that automatically took effect after *Dobbs* or the existence of prior abortion bans that were not repealed after *Roe v. Wade*.

Ohio: Abortion is now banned after cardiac activity is detected, which is generally at six weeks of pregnancy, except in cases of life endangerment or severely compromised physical health. The state prohibits abortions performed in response to genetic anomaly. There are a 24 hour waiting period and consent requirements. The provider must test for a fetal heartbeat. For more details, visit the Ohio Legislative Service Commission.

Missouri: Missouri now criminalizes providing an abortion outside of medical emergencies. A provider who violates the law is guilty of a Class B felony and risks having his/her professional license suspended or revoked. The law defines a medical emergency as a condition that requires an abortion "to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman" based on "reasonable medical judgment."

Wisconsin: The state reverted to laws from the mid-1800s which prohibit abortion except in cases where the physician performing the procedure determines that the procedure is necessary or is advised by two other physicians that the procedure is necessary to save the life of the mother and the procedure is performed in a licensed maternity hospital, unless an emergency prevents it from being performed in such a facility. A violation is a felony.

In Indiana, Iowa, Kentucky and Michigan, the abortion regulations that existed prior to *Dobbs* are still generally in effect.

Indiana: For now, an abortion may technically be performed for any reason up to 20 or more weeks postfertilization (22 weeks after the last menstrual period), at which time an abortion may only be performed in cases of life or severely compromised physical health. However, on July 7, Federal Judge Sarah Evans Barker lifted her injunction against a state law prohibiting doctors from performing dilation and evacuation abortions unless to prevent serious health risk or save the life of the mother. The impact of the law is to severely limit the methods of abortion that may be used after the first trimester. Violation of the law constitutes a felony, punishable by up to six years in prison. The Indiana General Assembly is holding a special session on July 25, at which time it is expected to pass a ban or near ban on all abortion procedures in the state. There is an 18 hour waiting period, counseling, parental consent and ultrasound requirements. Telemedicine may not be used for medication abortion, which is

not permitted after 10 weeks of pregnancy.

Iowa: Currently, an abortion may be performed up to 20 weeks and after 20 weeks postfertilization (22 weeks after the last menstrual period) only in cases of life or severely compromised physical health. Requirements regarding counseling, a 24 hour waiting period and parental consent are also in place. The state has a law that prohibits abortion after the detection of a heartbeat that was enjoined. The state is seeking to have the injunction lifted.

Kentucky: On June 30, a court enjoined enforcement of Kentucky's abortion trigger law, which banned abortion unless a physician deemed it necessary to prevent the death or permanent injury of the mother. Therefore, abortions may be performed for any reason up to viability and after viability if necessary to preserve the woman's life or health. The attending physician must take all reasonable steps consistent with reasonable medical practices to preserve the life and health of the fetus.

Michigan: Currently, an abortion may be performed up to viability for any reason and at or after viability only if the patient's life is endangered. Restrictions similar to those in Indiana apply in Michigan, except the waiting period is 24 hours. There is no ultrasound requirement. In May a state court enjoined a 1931 law which makes almost all abortions a felony with a possible penalty of up to four years in prison. The injunction is under appeal. Under the law, both doctors who assist in abortions and pregnant people who use medication for self-abortions could be charged. Selling drugs designed to induce an abortion is a misdemeanor.

While health care providers do not usually need to seek legal counsel before determining what care to provide a patient, providers in states that are changing their abortion regulations are wise to consult legal counsel to make sure they understand the current state of the law and the implications for their practice.