



# NAVIGATING NEW STATE ABORTION BANS IN THE INTERMOUNTAIN WEST

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# CONTACT INFORMATION



Kristy Kimball – Partner  
Healthcare

[KMKimball@hollandhart.com](mailto:KMKimball@hollandhart.com)

[View Bio](#)



Beth Nedrow – Partner  
Employee Benefits

[ENedrow@hollandhart.com](mailto:ENedrow@hollandhart.com)

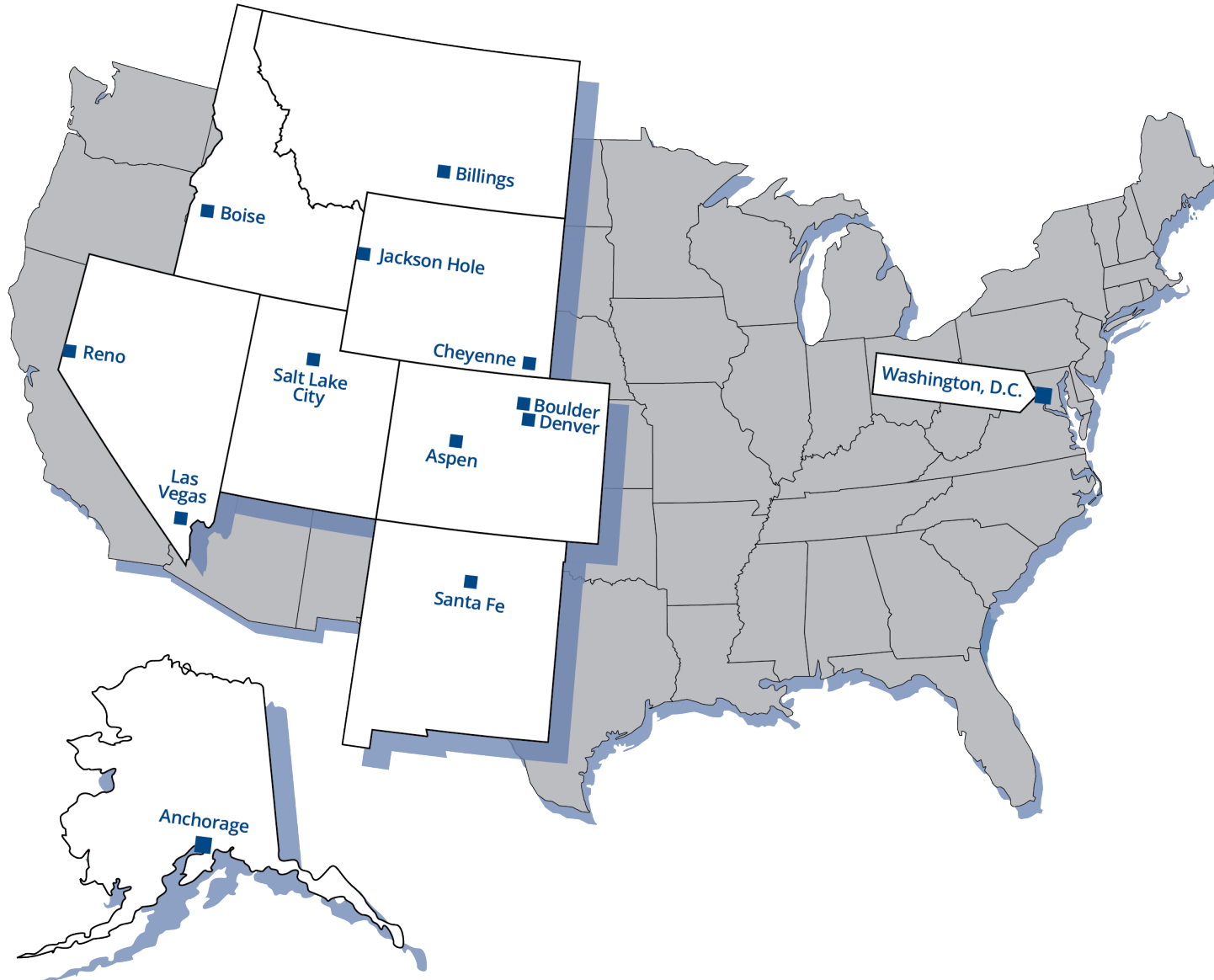
[View Bio](#)



Camila Moreno – Associate  
Labor & Employment

[CVMoreno@hollandhart.com](mailto:CVMoreno@hollandhart.com)

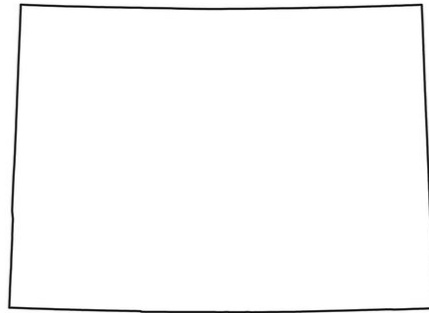
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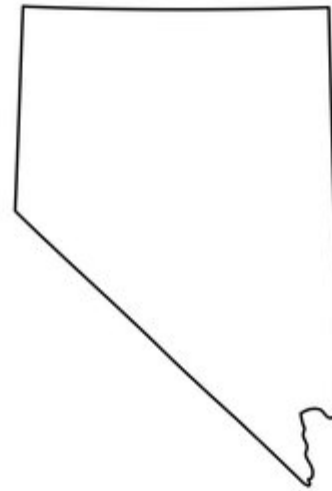
# LEGAL AND LIKELY TO REMAIN PROTECTED



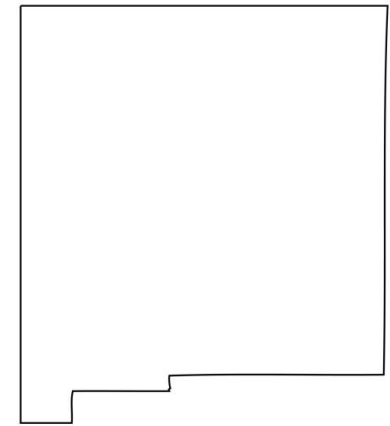
ALASKA



COLORADO

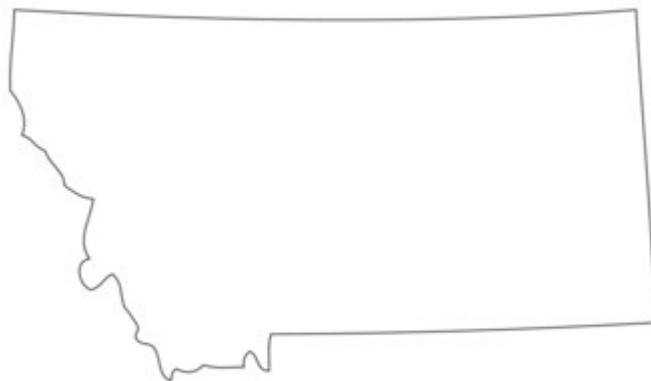


NEVADA



NEW MEXICO

# LEGAL FOR NOW AND/OR UNCERTAIN

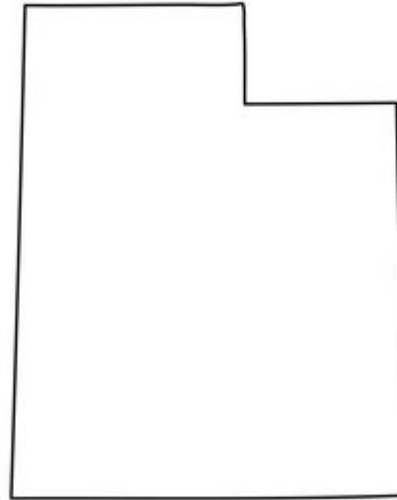


**MONTANA**

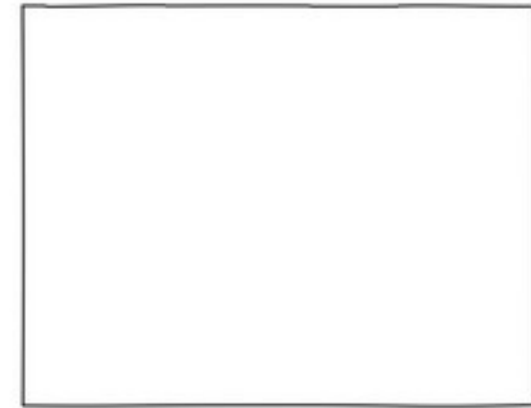
# TRIGGER LAW BANNING NEARLY ALL ABORTIONS SET TO TAKE EFFECT



IDAHO



UTAH



WYOMING

State	Liability Type	Status (as of 7/28/22)	Abortion Defined	Pregnancy Defined	Exceptions
ID	<b>Civil</b> Damages; \$20,000 statutory damages; costs and fees (anyone)	<b>Civil:</b> Stayed by Idaho SCt; hearing on 8/3	Use of any means to intentionally terminate the <u>clinically diagnosable pregnancy</u> of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the preborn child.	Commences with fertilization	<b>Civil:</b> <ul style="list-style-type: none"> <li>Medical emergency to save life of or avert impairment to mother.</li> <li>Rape or incest if reported to law enforcement and copy of report provided to physician prior to abortion.</li> </ul>
	<b>Criminal:</b> felony; 2-5 years prison; licensure suspension (anyone)	<b>Criminal:</b> Effective 8/25 unless stayed by Idaho SCt; hearing on 8/3	Excepts out 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.		<b>Criminal:</b> <ul style="list-style-type: none"> <li>Prevent death of mother + performed in manner to give child best chance.</li> <li>Rape or incest if reported to law enforcement and copy of report provided to physician prior to abortion</li> </ul>
UT	<b>Felony</b> and licensure risk (anyone performing abortion and abortion clinic)	Preliminary Injunction issued by trial court.	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.	<ul style="list-style-type: none"> <li>Avert death or serious risk or substantial and irreversible impairment of a major bodily function of the mother.</li> <li>Fetus has defect that is uniformly diagnosable and lethal, or there is a severe brain abnormality.</li> <li>Rape or incest, if reported to law enforcement and verified by physician prior to abortion.</li> </ul>
WY	<b>Felony</b> (anyone performing abortion)	TRO issued 7/27. Prelim injunction hearing next week.	Act, procedure, device or prescription administered to or prescribed for a pregnant woman by any person <u>with knowledge of the pregnancy</u> , including the pregnant woman herself, with <u>intent</u> of producing the premature expulsion, removal or termination of a human embryo or fetus.	Begins upon fertilization (vs. implantation)	<ul style="list-style-type: none"> <li>Avoid death or substantial and irreversible impairment to mother, not including psychological or emotional conditions.</li> <li>Incest and sexual assault.</li> </ul>



# FEDERAL VERSUS STATE

- HIPAA
- FDA LAW
- EMTALA
- ACA

# 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.

# FEDERAL ADMINISTRATIVE GUIDANCE

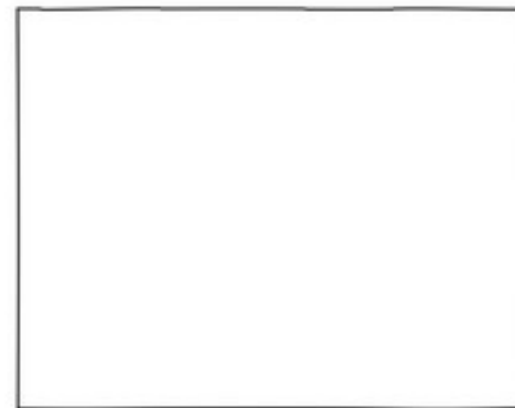
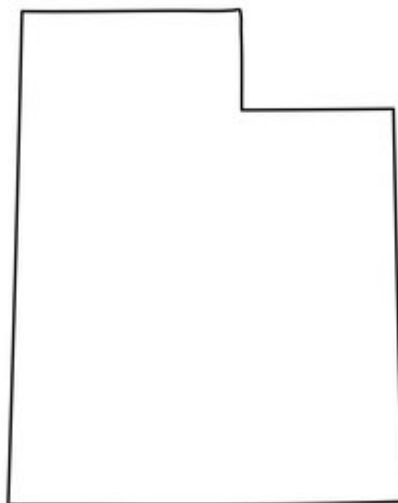
- Federal Guidance
  - EMTALA preemption
    - <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf>
  - Retail Pharmacies' Obligations
    - <https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf>
  - Patient Rights under ACA
    - <https://www.hhs.gov/about/news/2022/06/25/know-your-rights-reproductive-health-care.html>

# OTHER HELPFUL RESOURCES

- <https://www.hollandhart.com/idaho-complete-abortion-ban-set-to-take-effect>
- <https://www.hollandhart.com/idaho-abortion-laws-frequently-asked-questions>
- <https://www.hollandhart.com/hipaa-disclosures-to-law-enforcement>
- [https://www.hollandhart.com/hipaa-responding-to-subpoenas-orders\\_and-administrative-demands](https://www.hollandhart.com/hipaa-responding-to-subpoenas-orders_and-administrative-demands)

# EMPLOYEE PRIVACY CONSIDERATIONS

- In Idaho, Utah, and Wyoming third-parties may be held in contempt for failing to respond to a criminal subpoena.





# OTHER EMPLOYER CONSIDERATIONS

- Title VII Anti-Discrimination Protections
- Job-Protected Leave
  - Americans with Disabilities Act
  - Pregnancy Discrimination Act
  - Family Medical Leave Act

# EMPLOYER HEALTH PLAN CONSIDERATIONS

# EMPLOYER HEALTH PLANS

- Insured
- Self-funded

# INSURED EMPLOYER HEALTH PLANS

- Subject to state regulation
- Employer has little flexibility in benefit design

*Know what your plan says!*

# SELF-FUNDED EMPLOYER HEALTH PLANS

- ERISA pre-empts—not subject to state insurance laws dictating benefits
- Employer has significant flexibility in benefit design

*Know what your plan says!*



# DOES ERISA PRE-EMPTION SHIELD THE PLAN FROM STATE LAWS?

- ERISA Section 514: “Except as provided in [the savings clause], the provisions of [ERISA Title I] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”
  - That exception is what allows state laws to dictate terms and restrictions of insured plans.
- Will state laws prevent self funded plans from covering legal abortions obtained out of state, or from reimbursing travel expenses?
  - Most think the answer should be “No,” but most also think it will be litigated.
  - And pre-emption is less clear if state law is criminal!

# BASIC TAX PRINCIPLE

- Reimbursement of medical expenses under plan is nontaxable if “medical care” as that term is defined under Internal Revenue Code Section 213(d).
- IRS regulations specifically exclude from the definition of “medical care” any amounts expended for illegal operations or treatments.
  - Generally, the IRS will look at the locality where an item or service was obtained to determine whether it was legal.
- IRS Revenue Rulings (from 1973) provide that services for abortions, in a State where it is legal, are considered medical care under Code Section 213(d).

# AFFORDABLE CARE ACT

- No requirement to cover abortions
- Except must cover birth control
  - Includes emergency contraception, IUDs and other methods of birth control that could fall under state restrictions?
- Grandfathered plans are exempt
- Religious exemptions

# PREGNANCY DISCRIMINATION ACT

- Statute & Regulation state that abortion coverage is not required “except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion.”

# RISK OF DOING MORE / LESS

- Exclude all abortions
  - Risk violation of Pregnancy Discrimination Act, ACA
- Cover abortion above and beyond PDA (e.g., rape or incest)
  - (Increased) Risk of violation of state law
- Cover travel expenses for abortion
  - (Increased) Risk of violation of state law

*All of these factors will require increased administrative attention.  
What will claims administrators say when they get queries  
from participants?*



# DOES HIPAA PROTECT PARTICIPANTS' PRIVACY?

- Employer health plan is a “covered entity” so must not use or disclose PHI unless permitted
- A determined state prosecutor will be able to obtain the info by subpoena, etc.

*Think about what data your plan is collecting.  
For example, if you provide travel benefits, might not be necessary to document where the expenses were incurred.*

# ADDITIONAL RESOURCES

- Holland & Hart
  - Healthcare
  - Health Law Blog
  - Employment Law Updates
  - Employee Benefits Blog
  - Employers' Lawyers Blog
- Abortion Law Trackers
  - New York Times: State Tracker
  - Guttmacher Institute: State Policies on Abortion