

IDAHO ABORTION LAWS

PRACTICAL GUIDANCE FOR PHYSICIANS
AND OTHER HEALTHCARE PROVIDERS

IDAHO ACADEMY OF FAMILY PHYSICIANS
IDAHO MEDICAL ASSOCIATION
IDAHO HOSPITAL ASSOCIATION

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 Holland & Hart

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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>
- *United States v. Idaho*, No. 1:22-CV-0329-BLW, 2022 WL 3692618 (D. Idaho 8/24/22) (“DCt Order”), [https://f.datasrvr.com/fr1/822/74681/Winmill-abortion-injunction-decision_\(003\).pdf](https://f.datasrvr.com/fr1/822/74681/Winmill-abortion-injunction-decision_(003).pdf)

Written Resources

- Stanger, *Idaho Abortion Guidance*, <https://www.hollandhart.com/webfiles/Memo-to-Medical-Staff-re-Idaho-Abortion-Laws.pdf>
- 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, *Idaho Abortion Laws: Updated FAQs*, <https://www.hollandhart.com/idaho-abortion-laws-updated-faqs>
- Stanger, *Idaho Abortion Law: The Limited EMTALA Exception*, <https://www.hollandhart.com/idaho-abortion-law-the-limited-emtala-exception>

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) (“DCt Memo”)
 - **Preliminarily enjoins total abortion ban in EMTALA cases.**
 - 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.**
 - Under our republican government—
 - Voters ratify Constitution and elect legislators.
 - Legislators make the law and determine policy.
 - Court evaluates whether law violates Constitution and, if not, interprets and applies the law as written by legislature.
 - In this case:
 - Idaho Constitution does not guarantee a right to an abortion; accordingly, the Idaho legislature may regulate abortion.
 - If the voters want to change the law, they can either amend the Constitution or elect new legislators.

Total Abortion Ban (IC 18-622)



Total Abortion Ban

PROHIBITS

- Abortion of clinically diagnoseable pregnancy by any person.
- Assisting in performing abortion.
- Affirmative defenses:
 - Necessary to save life of mother + perform in manner to give fetus best chance to survive.
 - 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” 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.”

(IC 18-604(1))

- Does not include “ectopic and non-viable pregnancies.”

(SCT Opinion at p.10, 88).

Total Abortion Ban

According to the Idaho Supreme Court—

- “Clinically diagnoseable pregnancy” has been the abortion reporting standard for nearly 20 years (*see* IC 39-261); physicians have consistently reported using the standard.
- “Petitioners’ protest that § 18-604(1) does not specify *how* to clinically diagnose a pregnancy misses the point. The term ‘clinically diagnosable pregnancy’ has a ‘core of circumstances’ that a person of ordinary intelligence could unquestionably understand, *e.g.*, by confirming a gestational sac or heartbeat using an ultrasound or detecting a fetal heartbeat with a fetoscope or handheld Doppler. Moreover, the definition of ‘abortion’ uses the term ‘clinically diagnosable pregnancy’—it does not include the term ‘*chemically*’ diagnosable pregnancy.... Thus, Petitioners’ concerns over the methods of diagnosing a pregnancy through chemical means, *e.g.*, by elevated hormones or home pregnancy tests, are also irrelevant under a facial challenge.”

(Sct Opinion at p.87-88)

Total Abortion Ban: Affirmative Defenses

- Affirmative defense if:
 - **Abortion is necessary to prevent the death of the pregnant woman.**
 - **Rape or incest.**

(IC 18-622(3)(a))

- Affirmative Defenses \neq Exceptions
 - Exception: ban does not apply to excepted conduct.
 - Prosecutor must prove that conduct is outside the exception or the exception does not apply.
 - Affirmative defense: ban applies, but provider has an excuse.
 - Provider must prove that the affirmative defense applies.

Total Abortion Ban: Affirmative Defenses

- “[A] physician who performed an ‘abortion’ as defined in § 18-604(1) and prohibited by § 18-622(2), could be charged, arrested, and confined until trial even if the physician initially claims they did it to preserve the life of the mother, or based on reported rape or incest. Only later, at trial, would the physician be able to raise the affirmative defenses available in the Total Abortion Ban (I.C. § 18-622(3)) to argue it was a justifiable abortion that warrants acquittal and release.”

(SCt Opinion at p.78)

- “An affirmative defense is an excuse, not an exception.... The affirmative defense admits that the physician committed a crime but asserts that the crime was justified and is therefore legally blameless. And it can only be raised after the physician has already faced indictment, arrest, pretrial detention, and trial for every abortion they perform. ... So even though accused healthcare workers might avoid a conviction, the statute still makes it impossible to provide an abortion without also committing a crime.”

(DCt Order at p.20)

Total Abortion Ban: “Necessary to Prevent Death” of Mom

- “The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the **abortion was necessary to prevent the death of the pregnant woman**. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and
- “The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, **provided the best opportunity for the unborn child to survive**, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself.”

(IC 18-622(3)(a)(ii)-(iii))

Total Abortion Ban: “Necessary to Prevent Death” of Mom

- “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: Rape or Incest

- **In case of rape or incest.**
- 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.
- The abortion is performed in the manner that, in the physician's good faith medical judgment and based on the facts known to the physician at the time, **“provided the best opportunity for the unborn child to survive**, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman.”

(IC 18-622(3)(b))

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, having been raped, or the victim of incest...—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.’”

(S.Ct Opinion at p.92)

Total Abortion Ban: Ectopic and Non-Viable Pregnancies

- Total abortion ban does not apply to ectopic and non-viable pregnancies.
 - “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. Thus, treating an ectopic pregnancy, by removing the fetus is plainly not within the definition of ‘abortion’ as criminally prohibited by the Total Abortion Ban (I.C. § 18-622(2))
 - “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: EMTALA Exception



Total Abortion Ban: EMTALA Exception

- EMTALA preempts Idaho abortion laws to the extent there is a conflict.
- Preliminary injunction prohibits enforcement of Idaho's total abortion ban to the extent EMTALA applies, *i.e.*,
 1. Pregnant woman comes to hospital or hospital-based urgent care center seeking emergency care.
 2. Woman or child has an emergency medical condition.
 3. Abortion is necessary to stabilize the emergency medical condition.
 4. Pregnant woman is not or has not been admitted as inpatient or begun outpatient course of treatment.

(DCt Order; 42 USC 1395dd; 42 CFR 489.24; CMS, State Operations Manual Appendix V – Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases (Rev. 7/19/19))

Total Abortion Ban: EMTALA Exception

- “Emergency medical condition” = a medical condition ... such that the absence of immediate medical attention could reasonably be expected to result in—
 - Placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
 - Serious impairment to bodily functions, or
 - Serious dysfunction of any bodily organ or part.

(42 USC 1395dd(e)(1); 42 CFR 489.24(b))

➤ *Clearly document emergent nature of patient's condition.*

Total Abortion Ban: EMTALA Exception

- “Emergency medical condition”
 - HHS: emergency medical conditions “may include, but are not limited to: ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.”
(CMS QSO-22-22-Hospitals (7/1/2022 as rev’d 8/25/22))
 - District Court: emergency conditions triggering EMTALA obligations might include: ectopic pregnancy; preeclampsia and eclampsia; infection following rupture of the amniotic sac; elevated blood pressure or blood clot; or bleeding from placental abruption.

(DCt Order at p.7-9)

Total Abortion Ban: EMTALA Exception

Clearly document this in record!

- As defined by the federal District Court, abortion must be “**necessary to avoid**”
 - “(i) ‘**placing the health of**’ a pregnant patient ‘**in serious jeopardy**’;
 - “(ii) a ‘**serious impairment to bodily functions**’ of the pregnant patient; or
 - “(iii) a ‘**serious dysfunction of any bodily organ or part**’ of the pregnant patient...”

(DCt Order at p.39; see also 42 CFR 489.24(b))

- HHS: “[t]he course of treatment necessary to stabilize [an] emergency medical conditions is also under the purview of the physician or other qualified medical personnel. Stabilizing treatment could include medical and/or surgical interventions (e.g., methotrexate therapy, dilation and curettage (D&C), removal of one or both fallopian tubes, anti-hypertensive therapy, etc.).”

(CMS QSO-22-22 at p.4)

Total Abortion Ban: EMTALA Exception

- Receiving hospital responsibilities under EMTALA:
 - If a participating hospital has specialized capabilities, EMTALA requires that it accept the transfer of an emergency patient from a sending hospital so long as the patient was not admitted as an inpatient at the sending hospital.
- (42 CFR 489.24(f))
- Receiving hospital obligated to provide required stabilizing treatment within its capabilities, which may include abortion in appropriate cases.

Total Abortion Ban: EMTALA Exception

- EMTALA ends (*i.e.*, the EMTALA exception no longer applies) once the patient is:
 - Admitted as an inpatient, or
 - The emergency medical condition is stabilized.
- (42 CFR 489.24(a)(1)(ii); CMS QSO-22-22-Hospitals (7/1/2022 as rev'd 8/25/22) at p.5)
- Generally, may not rely on EMTALA exception to perform an abortion on an inpatient.

Total Abortion Ban: EMTALA Exception

- District Court's injunction is preliminary, not final.
 - Case still being litigated.
 - Final decision may modify the EMTALA exception; continue to monitor the case.
- District Court's injunction does not apply to:
 - Non-EMTALA cases.
 - The fetal heartbeat (6-week) ban, including:
 - Criminal penalties (IC 18-8805); or
 - Civil liability (IC 18-8807).

Total Abortion Ban: EMTALA Exception

- *Clearly document factors confirming application of the EMTALA exception in the medical record, i.e.,*
 1. Woman came to hospital seeking emergency care.
 2. Woman has an emergency medical condition.
 - *Specific conditions make jeopardize life or health of woman.*
 3. Abortion is necessary to stabilize or resolve the emergency medical condition.
 - *Patient's condition was not stabilized before abortion.*
 - *Abortion necessary to prevent death or serious harm to woman.*
 - *Woman's informed consent or direction.*
 4. Pregnant woman was not and has not been admitted as an inpatient, nor did emergent condition emerge while she was undergoing outpatient care.

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: Criminal Penalties

According to Idaho Supreme Court:

- Fetal heartbeat ban's criminal penalties do not apply if total abortion ban is effective.
- Fetal heartbeat ban's criminal penalties do apply if total abortion ban is not effective.
 - District court's decision makes total abortion ban ineffective in EMTALA cases.
 - District court did not enjoin fetal heartbeat ban.
 - Thus, fetal heartbeat ban still applies in EMTALA cases.
- But “medical emergency” exception applies to fetal heartbeat ban and mirrors EMTALA.
- Practical effect: providers who perform abortion to save life of or avoid serious impairment to pregnant woman in EMTALA cases are protected by “medical emergency” exception under fetal heartbeat ban.

(SCT Opinion at p.19)

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

FETAL HEARTBEAT BAN

Abortion necessary to avert:

- Death of pregnant woman, or
- Substantial and irreversible impairment of a major bodily function.

(IC 18-8801(5))

EMTALA

Abortion necessary to avoid

- placing the health of a pregnant patient in serious jeopardy;
- a serious impairment to bodily functions of the pregnant patient; or
- a serious dysfunction of any bodily organ or part of the pregnant patient.

(DCt Order at p.39)

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)

Fetal Heartbeat (6-Week) Ban: Rape or Incest

- **In case of rape or incest.**
- 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(1))

- Unlike total abortion ban, no requirement to perform abortion in manner to optimize survival of unborn child.

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:
 - 1st 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?*

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—
 - At hospital under EMTALA exception; or
 - In other state where abortion is legal.
- Counseling, transferring, or providing records to facilitate a lawful abortion—
 - At a hospital per EMTALA; or
 - 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 hospital under EMTALA; or*
 - *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,
 - “If you have an emergency medical condition and go to the hospital, the hospital may perform an abortion as necessary to stabilize your emergency condition.
 - “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].”

Requirements for Permissible Abortions



Requirements for Permissible Abortions

- Only a physician may perform an abortion unless EMTALA applies. (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.” (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, including:*
 - *To comply with statute to extent EMTALA applies and total abortion ban does not, and*
 - *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.”
- “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.”

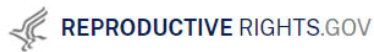
(IC 18-606(2))

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....

Federal Response

- <https://reproductiverights.gov/>



Your Rights Emergency Care English ▼

Know Your Rights: Reproductive Health Care

Reproductive health care, including access to birth control and safe and legal abortion care, is an essential part of your health and well-being. While Roe v. Wade was overturned, abortion remains legal in many states, and other reproductive health care services remain protected by law. The U.S. Department of Health and Human Services (HHS) is committed to providing you with accurate and up-to-date information about access to and coverage of reproductive health care and resources. Our goal is to make sure you have appropriate information and support.

Federal Response

- OCR reminds providers that HIPAA limits their ability to disclose protected health info concerning reproductive health unless HIPAA or another law requires the disclosure.
<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html>
- OCR prohibits pharmacies from refusing to stock or to fill prescriptions for drugs (e.g., mifepristone and misoprostol) that may be used for lawful purposes just because they may also cause an abortion. <https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf>
- DOJ opines that mailing mifepristone and misoprostol does not violate federal law where the sender does not know that the recipient will use the drugs unlawfully.
<https://www.justice.gov/olc/opinion/file/1560596/download>
- FDA relaxes requirements such that mifepristone may be dispensed by mail.
https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifepristone_2023_01_03_REMS_Document.pdf.

But none of these authorize illegal abortions in Idaho.

Further Action



Future Action

- “[O]ur role is to remain faithful to the fixed rule of law this Court has been following for over 130 years. To do otherwise usurps the policy-making role of the legislature and violates our obligation to maintain the separation of powers that forms the basis of our government. If the people of Idaho are dissatisfied with the policy choices the legislature has made or wish to enshrine a fundamental right to abortion in the Idaho Constitution, they can make these choices for themselves through the ballot box.”

(SCt Opinion at p.76)

Further Action

- Efforts at legislature?

QUESTIONS?

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