

After the Fall of *Roe v. Wade*: Privacy of Reproductive Health Data Across State Borders

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2023 ANNUAL MEETING

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Overview

- Evolution of Supreme Court Decisions
- Status of State Laws Across the Country
- Federal Response to the *Dobbs* Decision
- Opportunities for Data Sharing Across State Lines

Evolution of Supreme Court Decisions

How did we get to *Dobbs*?



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1973

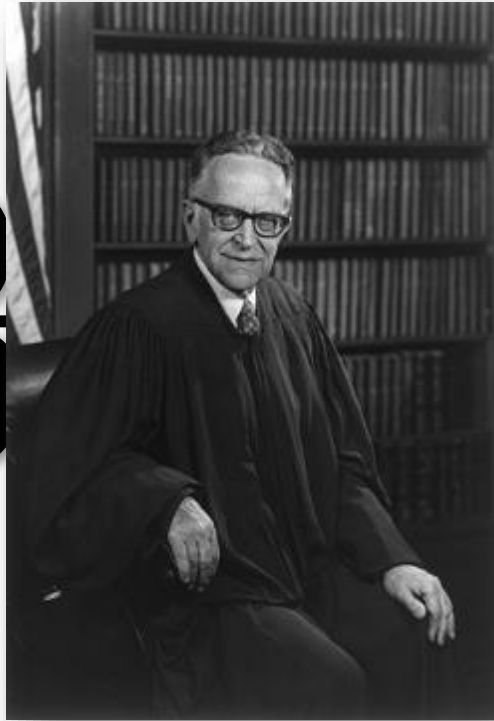


Image Source: Robert S. Oakes/
Library of Congress

Roe v. Wade

Before the “compelling point,” the **attending physician**, in consultation with his patient, is free to determine, without regulation by the state, that, in his **medical judgment**, the patient’s pregnancy should be terminated.

1992



Image Source: The Philadelphia Inquirer

Planned Parenthood v. Casey

Establishes the “undue burden” test to accommodate the State’s interest in potential life: cannot place a substantial obstacle in the path of a **woman’s choice**.

2007



Image Source: Capital News
Service/Abby Zimmardi

Gonzales v. Carhart

Upheld the Partial-Birth Abortion Ban Act of 2003 despite not containing a health of the mother exception, but did not overrule *Roe* or *Casey*.

2022



Image Source: Fred Schilling

Dobbs v. Jackson's Women's Health Organization

Constitution does not “require the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed.”

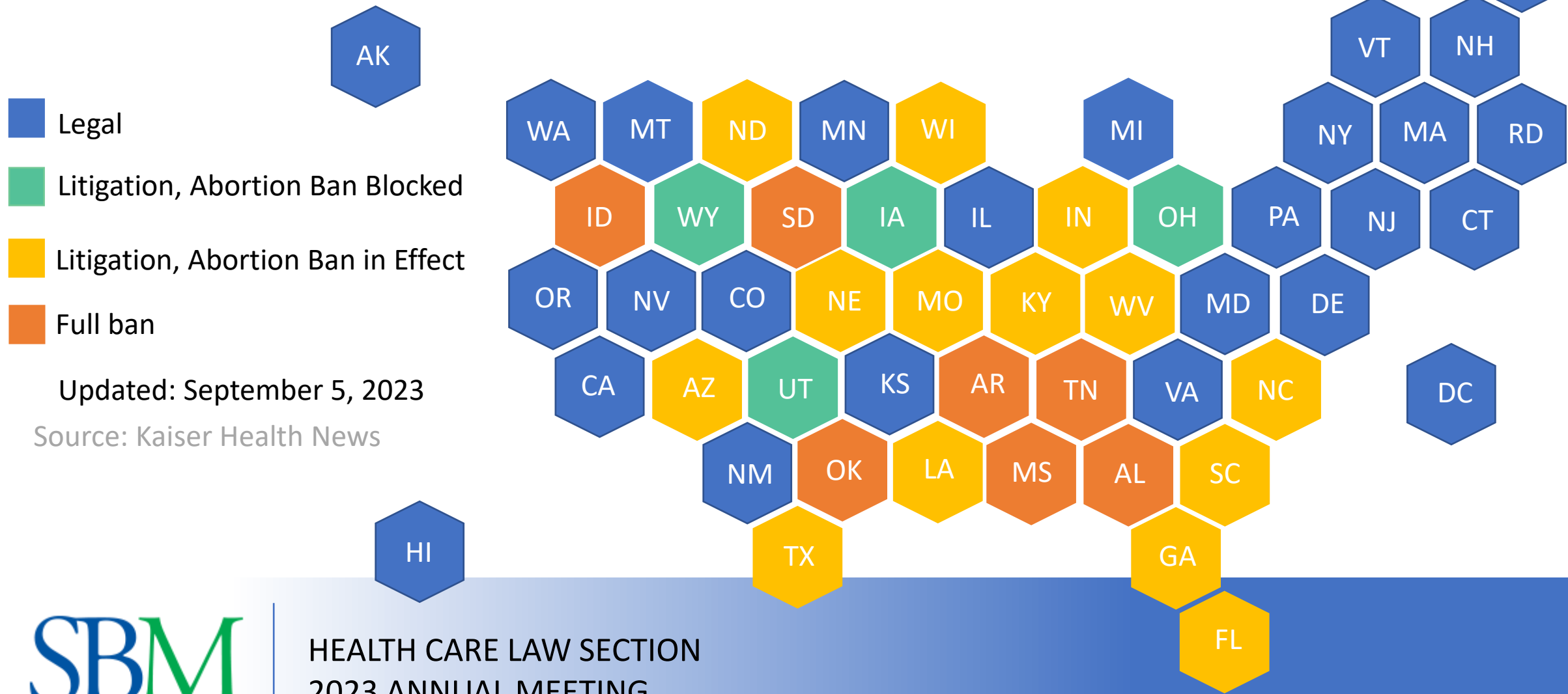
Current Landscape of State Abortion Laws and Litigation

Where State Abortion Laws Stand Without *Roe*



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Status of State Laws Across the Country



Federal Response to *Dobbs*



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Executive Order 14076

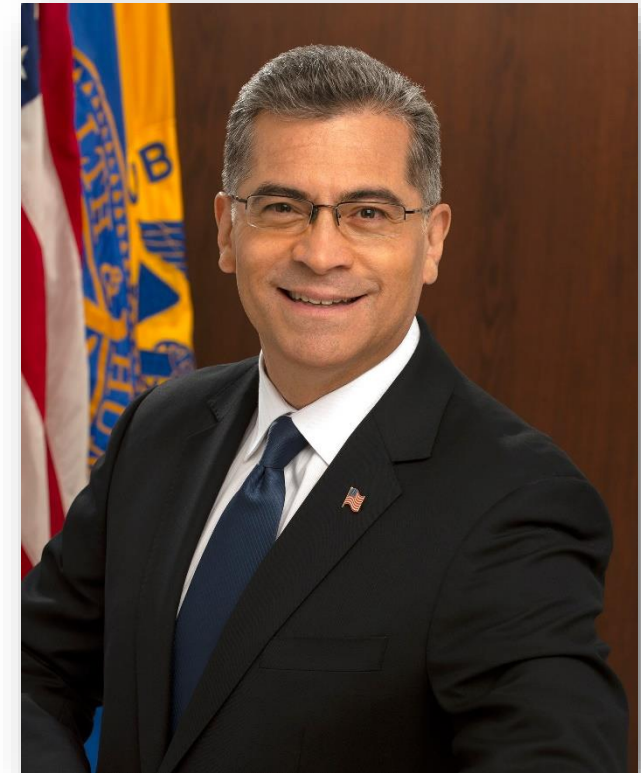


Source: Kevin Lamarque/Reuters

- Directed federal agencies to take various actions to protect patent privacy related to reproductive health care services, including the FTC and HHS.
- HHS to provide additional HIPAA guidance.
- HHS to consider actions to educate consumers.
- HHS to consider options to address deceptive or fraudulent practices, in consultation with the Attorney General and FTC.

EMTALA Guidance

- CMS issued clarifying guidance on EMTALA and reaffirmed If a physician believes that abortion is the stabilizing treatment necessary to resolve an emergency medical condition, the physician must provide that treatment.
- Secretary Xavier Becerra additionally, in a letter to providers, made clear that “[a]ny state laws or mandates that employ a more restrictive definition of an emergency medical condition are preempted by the EMTALA statute.”



U.S. v. Idaho

- DOJ sued the state of Idaho, alleging the state's near-total abortion ban violated EMTALA. The judge found that the ban was incompatible with EMTALA and was therefore preempted by the federal legislation.
- A federal judge denied Idaho Attorney General's request to reconsider the order barring the state from prosecuting emergency room physicians for providing abortion care to stabilize a patient.

Texas v. Barcera

- In Texas, the Secretary of State sued HHS, challenging federal guidance that EMTALA requires abortion care.
- Texas court held that HHS was required to go through notice-and-comment procedures prior to issuing guidance to hospitals requiring them to perform abortion in certain circumstances regardless of state law and that the guidance itself exceeded EMTALA's text.
- HHS currently is appealing that ruling.

Defensive Medicine

Providers who are unsure about what they can or cannot do will likely engage in “defensive medicine” to balance legal risks.

“

The challenge is that the treatment for an abortion and the treatment for a miscarriage are exactly the same.

Dr. Sarah Prager
University of Washington

”

Source: NPR/Charlotte Huff

July 11, 2022 FTC Announcement

- FTC will continue to “vigorously enforce the law” related to misuse of individuals’ location, health, and other sensitive data.
- Intends to bring enforcement actions where it believes an organization has made false or misleading statements about privacy or data security procedures.
 - i.e., claims about “anonymized” data that can actually be re-identified.
- Health Breach Notification Rule
 - 2023 saw the first enforcement action under this rule against the telehealth and prescription drug discount provider GoodRx Holdings Inc.

FTC Rulemaking and Enforcement Actions

- On May 18, 2023, the FTC proposed amendments to strengthen and modernize the Health Breach Notification Rule specifically clarifying that it is applicable to health apps and similar technologies which are not covered by HIPAA.
- On May 17, 2023, the FTC settled an enforcement action against the Premom ovulation tracker app. FTC also finalized a settlement with Flo Health, Inc. in 2021 over data-sharing concerns.
- FTC sued Kochava, a location data broker, for selling data that tracks people at reproductive health clinics, but lawsuit was dismissed.

Office for Civil Rights (OCR) Guidance

Re-emphasized related HIPAA rules and when disclosure of PHI is *required* versus *permitted*.

Required by Law

Hospital workforce member suspects individual of having taken medication to end their pregnancy. If state law does not **expressly require reporting**, Privacy Rule would **not** permit a disclosure to law enforcement.

Law Enforcement Purposes

Law enforcement official presents court order requiring clinic to produce PHI about an individual who has obtained an abortion. Privacy Rule would permit **but not require** clinic to disclose PHI.

Threat to Health or Safety

A pregnant individual in a state that bans abortion informs their provider they intend to seek an abortion in another state where abortion is legal. Privacy Rule would **not** permit report to law enforcement by provider to prevent abortion.

HIPAA Privacy Rule Notice of Proposed Rulemaking to Support Reproductive Health Care

- On April 17, 2023, OCR issued a notice of proposed rulemaking (NPRM) that would modify the Privacy Rule under HIPAA to strengthen reproductive health care privacy.
- New attestation requirements for certain requests for information potentially related to reproductive health care.
- Prohibition on using or disclosing PHI for proceedings related to reproductive health care if such services were lawfully provided under state law or protected, required, or authorized by federal law.

Opportunities for Data Sharing Across State Lines



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HIPAA

HIPAA protects PHI controlled by a Covered Entity against disclosure without the patient's authorization, however, it contains important exceptions, such as:

- reporting child abuse or neglect to an “appropriate government authority;”
 - Depending on the state, mandatory reporting laws for child abuse might be construed to cover abortions.
- responding to a court order, subpoena, or discovery request for information relating to a lawsuit; and
- giving information to law enforcement officials “as required by law.”

Out-of-State Subpoenas

- All 50 states and the District of Columbia have passed the Uniform Interstate Depositions and Discovery Act (UIDDA), which establishes the necessary processes to “domesticate” out-of-state subpoenas.
- Some states have enacted safe-harbor laws prohibiting courts in the state from issuing subpoenas in response to out-of-state law enforcement requests for assistance with abortion-related investigations where the alleged abortion-related conduct would be legal within their state.

TENNESSEE | LOOKOUT

Patients sue Vanderbilt for releasing transgender clinic records to Tennessee

AG

BY: ANITA WADHWANI - JULY 26, 2023 6:00 AM

- “The Tennessee Attorney General has legal authority in an investigation to require that VUMC provide complete copies of patient medical records that are relevant to its investigation. VUMC was obligated to comply and did so.”
- Covered entities could have to challenge such civil investigative demands.

Health Information Exchanges (HIEs)

- The legitimate ability of one provider to access the data of another provider to use against a patient still exists.
 - Unclear what would currently require provider to disclose medical record to law enforcement.
- Consider recommending opting out of all HIEs if a patient is concerned about abortion information being shared across state lines.
- NOTE: opting out of HIEs would not prevent outside providers from requesting and obtaining records. It would only prevents those records from being automatically imported into an out-of-state facility's medical records via the HIE.

MD House Bill 812

- HB 812 regulates the disclosure of specific health information tied to legally protected healthcare of public records, HIEs, and electronic health networks (EHNs).
 - Intention: to provide extra protection for reproductive health information in HIEs and to ensure state government protects personal information of patients and providers that may be stored in state databases.
- HIEs located outside the state would be significantly limited from receiving protected information.
- Technological limitations



Websites and apps that are not HIPAA-regulated, such as period tracking apps that collect information on timing of menstruation and sexual activity, could collect reproductive health information that could be shared more freely with law enforcement.

Hospitals and health systems should be aware of their *non-HIPAA* covered entities and the data they collect, store, and share, their privacy policies, and whether FTC or other protections apply.



OCR issued separate guidance on the privacy and security of an individual's health information on their personal devices and included suggestions on how to keep medical information more secure.

However, it did not address smart watches or fitness trackers, nor did it address email.

Other educational resources are available, from organizations like the Digital Defense Fund or Electronic Frontier Foundation.

State “Safe Haven” Laws

- California AB 1242
 - Prevents the arrest of individuals or the disclosure by law enforcement of information in an investigation related to any abortion legal in California.
 - Requires out-of-state law enforcement agencies seeking records from California-based corporations to confirm the records won't be used to prosecute an abortion that's legal in California.
- Law enforcement access to app data may depend on where the app developer is headquartered, where users' data is stored, and whether the data is sold to/shared with any third parties.

Registries and Other Data Sharing Arrangements

- Law enforcement could attempt to request information from third-party entities with which HIPAA covered entities or their business associates share information.
 - Could add specific language in business associate agreements or other data-sharing contracts to require notification of requests and/or guidance on how to respond.
- Do any data registries collect reproductive health information and/or enable queries done by CPT codes in electronic health records for reproductive health procedures?
 - Do these agreements permit the selling or sharing of data?

Medication Abortion

- Various state laws restrict the use of medication abortions in several ways:
 - Outright ban on the prescription of abortion-inducing medications
 - Prohibit or restrict out-of-state providers from writing prescriptions
 - Prohibit or restrict pharmacies from dispensing prescriptions written by out-of-state prescribers
 - Prohibit or restrict mail-order pharmacies from sending medications into the state
- 5th Circuit ruled that the abortion pill, including the generic version, should remain on the market but found the FDA improperly lifted prescribing restrictions.
 - Supreme Court issued stay in April; abortion pill remains available and not subject to prescribing restrictions until the appeals process plays out.

Telehealth and Interstate Practice

- States may limit use of telemedicine for out-of-state patients.
- Telemedicine services are deemed provided in the state where the *patient* is located.
 - Must be licensed in the state in which the patient is physically located at the time the services are provided in order to provide telehealth services.
 - Being licensed in the state requires provider to follow the laws of that state when providing all telemedicine services, including rules regarding whether minors can consent to their own care without the presence of a parent or guardian.

State Open Records and Freedom of Information Laws

- Use of an institutional email address or server could provide direct access to information and communications, which could be used to search for violations.
- State public record laws could also grant citizens access to reports or records related to abortions performed by hospitals and clinics from Departments of health, medical board panels or other state agencies.
 - While exceptions exist for information that would invade an individual's privacy, public records requests could sweep in documents regarding the provision of abortion care generally.

Mandatory Reporting

- Most states require facilities to send detailed data on the volume and nature of abortion services provided.
- Some states require the reason for providing abortions or whether the fetus was viable.
- Although patients' names are removed, many potentially identifying characteristics remain. This information, too, can be useful for law enforcement purposes.
- Provider name is *not* a protected identifier under HIPAA.

Applicable State Medical Record Laws and Patient-Physician Privilege

- Disclosure of medical records may also be governed by state statutes.
 - Should consider whether applicable state medical records laws impose more restrictions on the sharing of patient records than HIPAA does, since HIPAA does not preempt state laws that provide more stringent protection of PHI.
- Statutory protections of confidential communications or other information created within a patient-physician relationship affording privilege and therefore inadmissible in legal proceedings.
 - This privilege is not absolute. Its scope varies greatly across states.

Questions?



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