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Dobbs v. Jackson Women’s Health Organization

The New Legal Landscape

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Adapted from slides originally developed by Jennifer L. Piatt, J.D., Deputy Director
The Game Plan:

(1) The *Dobbs* Decision and Its Impacts

(2) The Emerging Reproductive Health Legal Landscape
Roe v. Wade (1973)

Written by Justice Blackmun, Roe guaranteed the individual right to abortion as a fundamental privacy right, preventing states from fully banning pre-viability abortions.

Planned Parenthood v. Casey (1992)

Written by Justices O’Connor, Kennedy, and Souter, Casey clarified that states can regulate pre-viability abortions, but cannot impose an undue burden on the right to abortion.
Mississippi enacts law banning abortion after 15 weeks except in narrow cases of medical emergency or “severe fetal abnormality.”

On June 24, 2022, the Court issued its decision, fully overturning Roe v. Wade and Planned Parenthood v. Casey.

After district court and 5th Circuit find Mississippi law unconstitutional (per Roe v. Wade), U.S. Supreme Court agrees to hear the case.
The Dobbs Court concluded that abortion is not mentioned in the Constitution’s text nor is it deeply rooted in the nation’s history and traditions – it is not a fundamental right.

The right to regulate abortion is returned to the states.
Dobbs: Dismissing Roe

1. Dobbs Court finds abortions are traditionally “unplanned,” not implicating traditional reliance

2. Dobbs Court argues Roe wrongly removed abortion from democratic processes

3. Dobbs Court calls Roe “egregiously wrong,” more legislative than judicial

4. Dobbs Court finds Casey’s standard too malleable

5. Dobbs Court finds abortion case impacts on other constitutional issues

Rejection of Precedent

Nature of the Error

Quality of the Reasoning

Workability of the Rules

Disruptive Effect on Other Areas of Law

Absence of Concrete Reliance
Dobbs: A New Standard

Legitimate Government Interests

“Respect for and preservation of prenatal life”

“Elimination of particularly gruesome or barbaric medical procedures”

“Preservation of the integrity of the medical profession”

“Protection of maternal health and safety”

“Mitigation of fetal pain”

“Prevention of discrimination”

Rational Basis Review

Strict Scrutiny

Intermediate Scrutiny

Roe

Dobbs
Abortion is not a fundamental right under the Constitution, requiring only rational basis review in future challenges:

Law must be rationally related to a legitimate government interest.

*Dobbs* further announced that “legitimate interests include
• respect for and preservation of prenatal life at all stages of development, . . . ;
• the protection of maternal health and safety;
• the elimination of particularly gruesome or barbaric medical procedures;
• the preservation of the integrity of the medical profession;
• the mitigation of fetal pain; and
• the prevention of discrimination on the basis of race, sex, or disability.”
Dobbs: Other Opinions

**Concurrence**
- Substantive due process (SDP) should be abandoned & all SDP jurisprudence overruled
- Constitution is neutral about abortion so the Court should be too

**Concurrence in Judgment**
- Judicial restraint – Court need only decide whether the viability line should be upheld

**Dissent**
- Dobbs threatens privacy and undermines the Court’s legitimacy by overruling 50+ year precedent
**Majority:**
“[W]e emphasize that our decision concerns the **constitutional right to abortion and no other right.** Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”

**Justice Thomas Concurrence:**
“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”

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**The *Dobbs* Decision: Potential Impacts**

- **Marriage Equality**
- **Sexual Intimacy**
- **Contraception**

**PRIVACY**
Abortion Post-Dobbs

Source: CENTER for REPRODUCTIVE RIGHTS
Legal Abortions Fell Around 6 Percent In Two Months After End of Roe

By The New York Times | Source: WeCount

New York Times (Oct. 30, 2022)
# Requests for Self-managed Medication Abortion Before and After *Dobbs*, JAMA (Nov. 1, 2022)

## Table. Requestors' Stated Reasons for Requesting Self-managed Medication Abortion by State Abortion Policy Category at Baseline and After the Formal *Dobbs v Jackson Women's Health Organization* Decision

<table>
<thead>
<tr>
<th>Reason for request, by state's abortion policy after <em>Dobbs</em> decision</th>
<th>Baseline (September 1, 2021, to May 1, 2022), %</th>
<th>After decision (June 24 to August 31, 2022), %</th>
<th>Difference, after decision – baseline, % (95% CI)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No ban likely</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current legal restrictions</td>
<td>3.2</td>
<td>9.2</td>
<td>6.0 (–1.6 to 13.6)</td>
</tr>
<tr>
<td>Possible future restrictions</td>
<td>11.5</td>
<td>14.9</td>
<td>3.4 (–6.5 to 13.3)</td>
</tr>
<tr>
<td>6-Week abortion ban</td>
<td>0.6</td>
<td>4.6</td>
<td>4.0 (–1.5 to 9.4)</td>
</tr>
<tr>
<td><strong>Likely or possible ban</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current legal restrictions</td>
<td>8.6</td>
<td>25.5</td>
<td>16.9 (15.2 to 18.7)</td>
</tr>
<tr>
<td>Possible future restrictions</td>
<td>12.5</td>
<td>35.5</td>
<td>23.0 (21.1 to 25.0)</td>
</tr>
<tr>
<td>6-Week abortion ban</td>
<td>2.3</td>
<td>4</td>
<td>1.7 (0.1 to 2.5)</td>
</tr>
<tr>
<td><strong>6-Week ban</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current legal restrictions</td>
<td>10.7</td>
<td>46.6</td>
<td>35.9 (33.8 to 38.0)</td>
</tr>
<tr>
<td>Possible future restrictions</td>
<td>14</td>
<td>35.9</td>
<td>21.9 (19.8 to 24.0)</td>
</tr>
<tr>
<td>6-Week abortion ban</td>
<td>3.9</td>
<td>28.9</td>
<td>25.0 (23.3 to 26.8)</td>
</tr>
<tr>
<td><strong>Total ban</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current legal restrictions</td>
<td>31.4</td>
<td>62.4</td>
<td>31.0 (29.7 to 32.4)</td>
</tr>
<tr>
<td>Possible future restrictions</td>
<td>22.8</td>
<td>33.2</td>
<td>10.4 (9.1 to 11.7)</td>
</tr>
<tr>
<td>6-Week abortion ban</td>
<td>26.6</td>
<td>20.5</td>
<td>–6.1 (–7.4 to –5.0)</td>
</tr>
</tbody>
</table>
“Putting both studies together, there were about 2,000 fewer abortions per month, compared with April, when abortion was legal in every state.”

*New York Times (Nov. 1, 2022)*
The Game Plan:

(1) The *Dobbs* Decision and Its Impacts

(2) The Emerging Reproductive Health Legal Landscape
In light of the overturning of *Roe v. Wade* by the U.S. Supreme Court in *Dobbs v. Jackson Women’s Health Organization* on June 24, 2022, this Memo examines current state-based abortion protections via (1) state statutory and constitutional language, (2) state Supreme Court decisions, (3) state constitutional amendment proposals, and (4) litigation addressing state-based constitutional abortion rights. Monthly updates are posted by the first Friday of each month.

State Constitutional Efforts

- Efforts are being undertaken in at least 7 states to explicitly amend state constitutions with language protecting reproductive liberties.

- Efforts are also underway in several states to eliminate abortion from state constitutional protection.

- 9 state supreme courts have found abortion rights in state constitutional language.
New Jersey Constitution  
art. 1, sec. 1

“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

Alaska Constitution  
art. 1, sec. 22

“The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.” [Amended 1972]
New Jersey Supreme Court


“The right to choose whether to have an abortion, however, is a **fundamental right** of all pregnant women….”


Reaffirming that women have a fundamental right to choose whether to have an abortion.

Alaska Supreme Court

*Valley Hospice Association Inc. v. Mat-Su Coalition for Choice* (1997)

“[W]e are of the view that reproductive rights are **fundamental**, and that they are **encompassed within the right to privacy** expressed in article I, section 22 of the Alaska Constitution.”


Reaffirming that the right to reproductive choice is a fundamental right.
Emerging Litigation Themes

ABORTION ACCESS: POST-DOBBS LITIGATION THEMES
NOVEMBER 4, 2022

On June 24, 2022, the U.S. Supreme Court ruled in Dobbs v. Jackson Women’s Health Organization that there is no federal constitutional right to abortion, reversing its prior decisions in Roe v. Wade (1973) and Planned Parenthood v. Casey (1992).

Following the Court’s decision in Dobbs, some states have sought to provide greater or enhanced protections for abortion access. Other states, however, have initiated a series of measures to greatly limit or inhibit abortions. These actions include (a) implementation of pre-existing “trigger” laws banning procedures the moment abortion was no longer a federal constitutional right; (b) enforcement of decades-old “zombie” laws banning abortion that were never repealed (following the Supreme Court’s initial decision affirming a right to abortion in Roe); and (c) the passage of new statutes restricting abortions.

1. “Trigger” laws
2. Pre-Roe laws
3. Laws violating Roe and/or Casey

Federal laws are **supreme** over state laws and are said to **overtake, or preempt**, conflicting state laws.

In **Texas**, the Secretary of State sued the Dept. of Health and Human Services, challenging federal guidance that EMTALA requires abortion care. The Texas court found that HHS did exceed its statutory authority by issuing the guidance.

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.
Constitutional principles disallow enforcement of laws that are arbitrary, capricious, or so “vague” as to *obfuscate their enforcement or fail to give fair notice* of prohibited actions.

**Louisiana:** abortion providers sued to block the state’s trigger ban, which provided an exception for fatal fetal abnormalities. The Judge agreed that the exceptions to the ban were unclear and the penalties outlined could lead to arbitrary enforcement. However, after an appeal by the Attorney General, the ban is back in effect.

**Arizona:** a federal judge blocked a state statutory interpretation provision attempting to extend statutory rights to fetuses. The language of the provision provided no meaningful guidance or clarity on the scope of the law.
Florida’s Supreme Court has *already previously determined that the state Constitution protects abortion rights*, but current litigation aimed at reaching the state’s newly-constituted Supreme Court seems poised to imitate the *Dobbs* decision at the state level.

**Florida argues 15-week abortion case belongs on fast track to state Supreme Court**

In September, an Ohio judge temporarily blocked the state’s 6-week abortion ban, *reasoning that Ohio’s Constitution protects the right to abortion*.

**What a High-Risk Pregnancy Looks Like After Dobbs**

Source: *NY Times*

*Photographs by Stephanie Sinclair  Text by Jaime Lowe*
Michigan possesses a 1931 ban on abortion which could have gone back into effect post-Roe; however, in August, a Michigan judge blocked the law pending additional litigation.

Michigan’s Supreme Court also greenlit the appearance on the 2022 ballot of a voter initiative proposing to amend the state Constitution with language expressly protecting reproductive liberties.

Michigan Voters Will Decide Abortion Rights Question, Court Says

A state board had previously said the issue could not appear on the ballot because of word spacing problems on the petitions.

Source: NY Times
State Constitution-Based Challenges: 2022 Midterms

**Approved** ballot initiative to create constitutional amendment creating a right to "reproductive freedom"

**Approved** ballot initiative adding constitutional amendment protecting “an individual’s right to personal reproductive autonomy”

**Rejected** ballot initiative editing state constitutional to add “nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”

**Approved** ballot initiative to create constitutional amendment affirming "fundamental right to choose to have an abortion"
Post-Dobbs Abortion Access Routes: A Primer

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Source: https://www.networkforphl.org/resources/post-dobbs-abortion-access-routes-a-primer/
Post-Dobbs Abortion Access: Open Doors

- FDA Preemption
- Enforcement Discretion
- Expanded Medication Access
- Gubernatorial Pardons
- Medicaid Waivers
- Pharmacies’ Nondiscrimination Obligations
- Telehealth
- EMTALA
- Mobile Clinics
- Active Military Access
- International Access
- EUA/PREP Declaration
- Minor Access Opportunities
- Employer Travel Benefits
- VA Beneficiaries
- Emergency Contraception
PATHWAY:

President Biden & the Department of Health & Human Services have expressly encouraged states interested in expanding or protecting abortion access to apply for Section 1115 waivers of Medicaid requirements to potentially receive federal funding for programs designed to help cover travel-related costs for Medicaid recipients seeking abortions across state lines.

COVERAGE:

Medicaid recipients seeking abortions across state lines.

CAVEATS:

No state has yet applied for a waiver, possibly due to the complex application process. The Hyde Amendment bans the use of federal funds to pay directly for abortions, so individuals still need additional funding to pay for the procedure.
PATHWAY:
Telehealth is a safe, available avenue to access medication abortion (mifepristone & misoprostol) enabling physicians to prescribe drugs & provide follow-up care via telehealth consultation. In abortion-hostile states, patients may be able to obtain a prescription using telehealth services which is then filled at an out-of-state pharmacy mailed to or picked up by the patient in an abortion-protective state.

COVERAGE:
Pregnant individuals up to 10 weeks gestation, with some providers prescribing through 12 weeks.

CAVEATS:
FDA previously limited dispensation of mifepristone to use under physician supervision, though FDA recently moved to modify this stringent control. Drugs are only available in states legalizing abortion, subject to litigation. Pharmacies dispensing mifepristone must be certified.
**PATHWAY:**

The [Under Secretary of Defense released a memo](#) on June 28, 2022, stating that service members, dependents, other beneficiaries & Department of Defense civilian employees [may continue to access “covered abortions”](#) (e.g., if the life of the mother would be endangered if the fetus were carried to term, or if the pregnancy is the result of rape or incest). On October 20, 2022, the [Secretary of Defense released a memo](#) stating the Department would cover travel costs for active-duty service members who may travel to receive abortion care, not limited to covered abortions.

**COVERAGE:**

Service members seeking “covered” abortions or traveling for abortions.

**CAVEATS:**

The military installation may not have a medical facility [capable of performing abortion services](#). Service members must seek leave to travel for abortions not covered under federal law or where the installation is incapable of providing an abortion. [Obtaining leave can be difficult](#), and TRICARE is only available for covered abortions. Thus, even if granted leave and travel funds, there are still great [financial barriers in abortion service expenses](#).
The Next Anti-Abortion Tactic: Attacking the Spread of Information

Dec. 3, 2022  5 MIN READ  The New York Times

With the dismantling of Roe v. Wade has come a push to crack down on speech and information about reproductive rights.

Now that abortion has been banned in more than a dozen states, abortion opponents want to stoke confusion about the legality of not just having an abortion, but even of discussing the procedure. The ultimate goal seems to be ensuring that women are unclear about their options to obtain an abortion or contraception, in their home state or elsewhere.

Source: https://www.nytimes.com/2022/12/03/opinion/abortion-first-amendment-free-speech.html
Doctors worry that online misinformation will push abortion-seekers toward ineffective, dangerous methods

By Naomi Thomas, CNN
Published 2:57 PM EDT, Wed July 13, 2022

Latinas have long been targeted by abortion misinformation. It's getting worse, experts say.

The Latino community has been targeted by false information that’s meant to discourage abortions. Ahead of midterm elections, experts are raising the alarm.

Why Freedom of Speech Is the Next Abortion Fight

A legal battle in Mississippi will test whether states can criminalize those who merely provide information.

By Yascha Mounk
AUGUST 22, 2022

The Atlantic
Questions, Thoughts, Comments

Thank you!

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After *Dobbs*: Data Privacy & Reproductive Health Records

**Stephen Murphy**, Senior Attorney, Network for Public Health Law – Mid-States Office

Reproductive Health and Data in a Post Roe World  December 7, 2022
Overview

• Privacy of Reproductive Health Records Post Dobbs
  • Federal actions
  • State actions
  • Local actions
Doctor says she shouldn’t have to turn over patients’ abortion records

By Kim Belware
November 19, 2022 at 9:27 p.m. EST

Judge denies emergency motion to block Indiana AG from accessing medical records in investigation of abortion services provided to 10-year-old

By Artemis Mohtaghian, CNN
Updated 10:54 PM EST, Sun December 4, 2022
Texas

After pursuing an indictment, Starr County district attorney drops murder charge over self-induced abortion

- Nurse reports woman to law enforcement
- April 2022 woman charged with murder, held on $500,000 bond
- District attorney later dismissed the case

Source: https://www.texastribune.org/2022/07/25/abortion-prosecution-data-health-care/
Federal Actions

• HHS Sec Becerra remarks June 28, 2022
  o directing OCR to ensure patient privacy and nondiscrimination for patients seeking abortion

• OCR guidance documents June 29, 2022
  o HIPAA and law enforcement requests for abortion records
  o Digital privacy guidance
Federal Actions

- OCR guidance on HIPAA and law enforcement requests for abortion records June 29, 2022
  - “Privacy Rule permissions for disclosing PHI without an individual’s authorization for purposes not related to health care, such as disclosures to law enforcement officials, are narrowly tailored to protect the individual’s privacy and support their access to health services”
Federal Actions

- **OCR guidance on HIPAA and law enforcement requests for abortion records June 29, 2022**
  - **Disclosure Required by Law** (45 CFR 164.512(a))
    - Limited to “mandate contained in law that compels… disclosure”
  - **Disclosures to Law Enforcement** (45 CFR 164.512(f))
    - Permits, does not require, disclosure
      - Pursuant to process
        - “Provided that all of the conditions… are met”
    - Doesn’t address several other permitted disclosures to law enforcement
      - Victims of a crime, crime on the premises, death caused by criminal conduct, suspect/fugitive/material witness, missing person
Federal Actions

- [OCR guidance on HIPAA and law enforcement requests for abortion records June 29, 2022](#)
  - Disclosures to Avert Serious Threat to Health or Safety (45 CFR 164.512(j))
    - Permits disclosures, where permitted by law and professional ethics, to disclose where necessary to prevent or lessen serious and imminent threat to health/safety
      - *Not* consistent with professional ethics to make a disclosure to law enforcement or other person “regarding an individual’s interest, intent, or prior experience with reproductive health care”
Federal Actions

- **OCR digital privacy guidance** June 29, 2022
  - HIPAA generally does not protect data collected by mobile devices and apps.
    - search histories, data voluntarily shared on the internet, and location data
    - data on an individual’s devices or apps may be seen by, or sold to, third parties
  - advises consumers to
    - avoid downloading needless apps,
    - deny unnecessary app requests to access location data, and
    - disable location services on devices.
NEWS

Medibank: Hackers release abortion data after stealing Australian medical records

© 10 November
Federal Actions

- Network for Public Health Law Analysis of HIPAA and Abortion Records
Federal Actions

- Biden’s executive order July 8, 2022 (EO 14076)
  - Directs AG, Homeland Security, FTC, HHS to enhance privacy, safety, security around abortion
- HHS Secretary Report Health Care Under Attack (Report Required by EO 14076) Aug 26, 2022
  - Cites HHS HIPAA and Digital Guidance from June 29
  - Information blocking
    - “Already provide for protection of patient privacy and choice when it comes to sharing electronic health information”
    - Will hold public meetings with health care system about how patients can make informed choices about sharing their data
Federal Actions

- Proposed Legislation
  - My Body, My Data Act
  - Stop Anti-Abortion Disinformation Act
  - Health and Location Data Protection Act
  - American Data Privacy and Protection Act
  - Fourth Amendment is Not for Sale Act
State Action

- California, Oregon, Washington Commitment
- Executive Orders
- Legislative
State Action

- California, Oregon, Washington Commitment Multi-state Commitment to Reproductive Freedom
  - Protect against
    - Judicial and local law enforcement cooperation with out of state investigations
    - Misuse of medical records and other personal and sensitive health information
- Executive Orders (No assistance from executive agencies)
  - California (N-12-22), Colorado (D 2022 032), Maine (4), Massachusetts (600), Michigan (2022-5), Minnesota (22-16), Nevada (2022-8), North Carolina (263), Pennsylvania (2022-1), Rhode Island (22-28)
California AB 2091 Disclosure of information: reproductive health and foreign penal civil actions (approved by governor)

(b) Provider…, health care service plan… shall not release medical information that would identify an individual or that is related to an individual seeking or obtaining an abortion to law enforcement for either of the following purposes, unless that release is pursuant to a subpoena not otherwise prohibited:

1. Enforcement of another state’s law that would interfere with a person’s rights [to an abortion under CA law]
2. Enforcement of a foreign penal civil action
State Action - Legislative

• Connecticut (Connecticut Public Act No. 22-19 (2022)).

  • Health care providers may not disclose any communication or information received from a patient, or from physical exam, relating to reproductive health care services permitted under the laws of Conn. in any proceeding (civil, probate, legislative, admin) without a patient’s written consent

• Contains exceptions
State Action - Legislative

- N.Y. C.P.L.R. 3119 (McKinney)

  (g) No court or county clerk shall issue a subpoena under this section in connection with an out-of-state proceeding relating to any abortion services or procedures which were legally performed in this state, unless [the out of court proceeding is brought by patient]
State Action - Legislative

- N.Y. Exec. Law § 837-w (McKinney)
  - No state or local law enforcement agency shall cooperate with or provide information to any individual or out-of-state agency or department regarding the provision of a lawful abortion performed in this state.
  - …no information relating to any medical procedure performed on a specific individual may be shared with an out-of-state agency or any other individual. Nothing in this section shall prohibit compliance with a valid, court-issued subpoena or warrant.
State Action - Legislative

- N.Y. C.P.L.R. 3102 (McKinney)
  - (e) Supreme court shall issue no order in aid of a deposition [as part of an action pending in another jurisdiction] in connection with an out-of-state proceeding relating to any abortion services or procedures which were legally performed in this state....
Pennsylvania House Bill 2574 Protecting Pregnant Person Privacy

- Limited services pregnancy center may not disclose nonpublic personal health information about an individual unless an authorization is obtained.

- Exceptions

  - if disclosure is required to comply with laws, a civil, criminal or regulatory inquiry, investigation, subpoena or summons or to cooperate with law enforcement concerning conduct the service provider reasonably believes may violate Federal, State or local laws.
State Action - Legislative

- New Jersey A-3975/S-2633
  - NJ public entity or employee shall not provide any information or expend resources in furtherance of any interstate investigation or proceeding seeking to impose civil or criminal liability upon a person or entity for:
    - (1) the provision, receipt, or seeking of, reproductive health care services that are legal in this State; or
    - (2) assisting, advising any person or entity providing, receiving, or inquiring about, reproductive health care services
State Action - Legislative

States Press Apple To Protect Reproductive Health Data

Ten attorneys general are raising concerns about information privacy in the wake of the Supreme Court decision overturning Roe v. Wade.

- CA, CT, DC, IL, MA, NC, OR, VT, WA

- Nov. 21, 2022 AG letter concerning reproductive health data on Apple’s App Store: deleting data, providing notices, and compliance with Apple’s Privacy Standards
Local Action

Athens-Clarke County, GA (Resolution 8/2/22);
Atlanta, GA (22-R-3711);
Boise, ID (Res-385-22);
New Orleans, LA (R-22-310)
Austin, TX (20220721-02);
Dallas, TX (Resolution No. 22-1140);
Denton, TX (ID-22-1275);
San Antonio, TX (Resolution, 7/26/22);
Travis County, TX (Medical Access Resolution)

Prohibiting city/county funds from being used to:
- Store or catalogue reports on abortion...
- **Provide information to any other govt body or agency about an abortion, unless defending rights of patient or health care provider**
- Conducting surveillance or collecting information to determine whether abortion has occurred

Local Action

September 21, 2022
City Council Passes Bodily Autonomy Ordinance in an Effort to Protect Those Seeking Reproductive Healthcare

Philadelphia, PA – Reproductive Freedom Package (three bills approved in committee Nov. 11, 2022)
  • Would bar health care providers from sharing reproductive healthcare information if they know or should know the info will be used for litigation

Chicago, IL – Bodily autonomy ordinance (Sept. 21, 2022), Mayor’s executive order
  • No cooperation with investigations by another jurisdiction

Sources: City Council Committee Passes Abortion Protection Package, The Philadelphia Tribune
Conclusion

- Post Dobbs, risk of harm from sharing of personal reproductive health data ever present
- Federal guidance around HIPAA and digital privacy
- HIPAA is not iron clad
- Several states have taken action toward barring handing over reproductive health information to out-of-state prosecutors and law enforcement
- The picture continues to develop
After *Dobbs*:

Data Sharing & Reproductive Health Records

Carrie Waggoner, Deputy Director, Network for Public Health Law, Mid-States Office
Overview

- HIPAA Post-<i>Dobbs</i>
- Abortion Reporting Laws
- Data Sharing Analysis Post-<i>Dobbs</i>
HIPAA Post-*Dobbs*: Business as Usual?

- Generally, yes.
  - HIPAA applies to covered entities that *use or disclose* protected health information (45 CFR § 160.103)
  - **Written authorization** is required to use or disclose PHI (45 CFR §§ 164.502, 164.508), with certain exceptions:
    - *Treatment, Payment, & Healthcare Operations (TPO)* – (45 CFR § 164.506)
    - *As required by law* – (45 CFR §164.512(a))
    - *Public Health Activities* – (45 CFR § 164.512(b))

- Unless state law provides greater protection, HIPAA applies to abortion and sexual health-related PHI in the same way it did before the *Dobbs* decision
Abortion Reporting Laws

- 46 States and DC require hospitals, healthcare facilities, and physicians providing abortions to make reports to the state*

  - Variety of reporting requirements such as method of payment, post-abortion complications, reason for seeking an abortion, whether fetus was viable, etc.

- HIPAA's required by law and/or public health exception likely apply to disclosure of PHI to the state (45 CFR § 164.512(a), (b))

*Source: Abortion Reporting Requirements | Guttmacher Institute
What is the data sharing analysis post-Dobbs?

- Gather information to assess:
  - **Who, what, why, how much?**

- What laws apply?
  - HIPAA? State abortion reporting laws? State privacy laws? Other laws?

- Analyze law(s) with the facts (and your legal counsel) to assess whether information can be shared

- If data can be shared, what protections are in place?
What is the data sharing analysis post-Dobbs?

- **Facts:** A researcher with a state university wants access to abortion-related data held by state department of health and human services for the purpose of assessing abortion outcomes across communities. DHHS is a HIPAA hybrid entity, and HIPAA applies to the data requested. While the data requested does not contain direct identifiers (e.g., name, DOB) it is PHI.

- **Law:**
  - HIPAA applies; look to *research exception* (45 CFR § 164.512(i))
  
  - State law – look to any *abortion-related, health care, and general privacy laws*

  - Other laws – *Common Rule may apply if this is human subjects' research* (45 CFR 46)
Wrapping up…

- HIPAA applies as it did before the Dobbs decision
- Most states require some reporting on abortions
- Need to analyze facts, determine applicable laws to assess data sharing*
- Outside of law enforcement context – legal landscape on data sharing is largely the same
- Just because you can share data does not mean you have to share data

*Resource: Checklist of Information Needed to Address Proposed Data Collection, Access and Sharing - Network for Public Health Law (networkforphl.org)
Thank you!!

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I ❤️ LAWYERS