



HEALTH INFORMATION AND DATA SHARING Fact Sheet

Federal, State and Local Efforts to Protect the Privacy of Abortion Health Records.


Introduction

In the aftermath of the [Dobbs v. Jackson Women's Health Organization decision](#), which overturned *Roe v. Wade* and fifty years of legal precedent protecting the right to an abortion, one abortion case garnered national attention. The case involved a 10-year-old rape victim who traveled to Indiana to terminate a pregnancy. The attorney general (AG) in that state accused the treating physician of disclosing the child's health information to the media and the AG's office itself doggedly sought access to the minor's abortion records as of part of its licensing action against the physician. The physician denies any unauthorized disclosure of protected health information (PHI) and the licensing and civil litigation against the physician is ongoing. The case illustrates how, in the legal tug of war over abortion, health information may be weaponized against providers and individuals seeking or obtaining reproductive health services. However, since the *Dobbs* decision, lawmakers in several parts of the country have taken steps to bolster the privacy of reproductive health records and data. This fact sheet explores actions taken at all levels of government to enhance protections of abortion-related health records and data.

Proposed Modifications to HIPAA

Following its release of [two guidance documents addressing abortion privacy](#) and an [executive order](#) last summer, the Biden Administration published [proposed modifications to the Health Insurance Portability and Accountability Act \(HIPAA\) to support reproductive health privacy](#) on April 17, 2023. The changes would expressly prohibit any use or disclosure of PHI "where the use or disclosure is for a criminal, civil, or administrative investigation into or proceeding against any person in connection with seeking, obtaining, providing, or facilitating reproductive health care." The modifications would also prohibit use or disclosure of PHI to identify any person for the purpose of initiating such investigations or proceedings.

The modifications would further require an attestation prior to any use or disclosure of PHI that could potentially relate to reproductive health care where the use or disclosure is for health care oversight, judicial or



administrative proceedings, or law enforcement, or to a coroner or medical examiner about a decedent. The attestation would verify that the use or disclosure is not a prohibited use or disclosure of PHI relating to reproductive health care. The changes would further require that notices of privacy practices include an example of prohibited disclosures of PHI relating to reproductive health care and an example of a disclosure of PHI requiring an attestation.


The proposed modifications would be the most significant changes to HIPAA in a decade and would add use or disclosure of PHI for an investigation into or proceeding against any person in connection with reproductive health care to a very short list of generally prohibited disclosures (alongside only genetic information for underwriting purposes and sale of PHI). It would further create a whole new category of disclosures—those requiring an “attestation.” Public comments on the proposed modifications are due 60 days after their publication in the Federal Register.

State Legislatures and the District of Columbia

On the state level, California has taken a number of steps to safeguard abortion-related health information. In 2022, California passed [Assembly Bill 2091](#), prohibiting providers from releasing abortion-related identifiable health information to law enforcement officials enforcing the laws of another state that would infringe on an individual’s right to an abortion under California law. California also passed [Assembly Bill 1242](#), barring magistrates from entering *ex parte* orders authorizing interception of electronic communications in investigations relating to abortions lawfully obtained in California. A.B. 1242 also prohibits California electronic communication services corporations from producing identifiable customer records in response to an out-of-state warrant which it knows relates to an abortion obtained lawfully in California. In January 2023, a package of bills were introduced to further bolster protections for abortion rights. Among them, [Assembly Bill 254](#) would amend California’s Confidentiality of Medical Information Act (CMIA) to apply the law’s privacy protections to reproductive or sexual health app data and require businesses offering reproductive or sexual health digital services to consumers to comply with CMIA. [Assembly Bill 352](#) would bar health care providers, health care service plans, and others from transmitting identifiable abortion-related health information through a health information exchange to entities outside the State of California unless authorized by existing law.

Connecticut was another front runner in state efforts to protect the privacy of abortion-related health records. [Connecticut Public Act No. 22-19](#), signed in May 2022, one month before *Dobbs*, prohibits providers from disclosing any communication or information received from a patient or obtained during a physical exam that relates to reproductive health services for use in any civil action or legislative or administrative proceeding, without a patient’s written consent. The law contains certain exceptions permitting disclosures, such as when the proceeding involved is a lawsuit for damages brought by the patient. The Connecticut law is similar to a [Delaware law](#) passed in June of last year, and a [New Jersey law](#) enacted in July of last year, that, with limited exceptions, generally prohibit health care providers from disclosing patient communications relating to reproductive health and information obtained during a physical examination relating to reproductive health care in any civil action or proceeding.

The District of Columbia’s [Human Rights Sanctuary Amendment Act of 2022](#), signed on November 21, 2022, prohibits District officers and employees from expending any resources in relation to an interstate criminal or civil investigation or proceeding targeting any person for receiving or seeking an abortion, performing an abortion, or assisting with any of these activities.



Illinois—[a state protective of abortion rights but bordered by no fewer than five states with restrictive abortion laws](#) (Indiana, Kentucky, Missouri, Iowa and Wisconsin)—passed [House Bill 4664](#) in January 2023, amending the state’s laws relating to reproductive health rights. The amendments prohibit court clerks from issuing subpoenas based on a subpoena from outside Illinois that (1) requests information relating to abortions lawfully carried out in Illinois or (2) relates to enforcement of another jurisdiction’s laws that would infringe upon an individual’s right to abortion under Illinois law. The law further clarifies that Illinois law requiring crime-related injury reporting by health care facilities, physicians, and nurses does *not* require reporting lawfully-obtained reproductive health care to law enforcement, even where the care violates a neighboring state’s law.

Massachusetts passed [House Bill 5090](#) in July of last year. Amongst other abortion protections offered by the law, it prohibits in-state law enforcement agencies from providing information to federal agencies, law enforcement agencies from outside the state, and any private citizen in relation to reproductive health services provided legally in Massachusetts.

On April 5, 2023, New Mexico enacted [Senate Bill 13](#), which aims to protect providers and individuals who seek or obtain reproductive health care. As seen in other states, the law bars state agencies and employees from releasing information or using public resources to assist an out-of-state investigation or proceeding relating to legal reproductive health care in New Mexico. And similar to other states, the law bars submission of out-of-state subpoenas in connection with interstate investigations or proceedings relating to legal reproductive health care delivered in New Mexico unless the request is accompanied by an attestation, signed under penalty of perjury, that the proceeding is based on a claim that would also be recognized under New Mexico law. The law further prohibits any person from requesting from a third party information relating to an individual’s reproductive health care with the intent to harass or intimidate the individual, and prohibits third parties from transmitting such data for such purposes.

New York passed a package of bills in 2022 designed to bolster protections of reproductive health information. As in several other jurisdictions, [N.Y. C.P.L.R. 3119](#) generally bars courts and county clerks from issuing subpoenas in connection with an out-of-state proceeding relating to abortion services legally obtained in New York. [N.Y. Exec. Law § 837-w](#) prohibits state and law enforcement agencies from cooperating with, or providing information to, such out-of-state proceedings. And [N.Y. C.P.L.R. 3102](#) bars state and county courts from issuing any order in aid of taking a deposition connected to an out-of-state proceeding relating to any abortion services legally performed in New York, with certain exceptions.

Finally, on April 27, 2023, Governor Jay Inslee of the State of Washington signed [Engrossed Substitute House Bill 1155](#), known as the My Health, My Data Act. The new law recognizes that privacy protections offered by HIPAA do not apply to data maintained by many apps and Web sites and seeks to close that privacy gap. The law bars regulated entities from sharing consumer health data, including reproductive health information, without the consent of the consumer, except where the disclosure is necessary to provide the services requested by the consumer. The bill would further require regulated entities to maintain appropriate privacy policies that disclose the types of third parties to whom the entity shares consumer health data. It would also provide consumers with certain rights, such as a right to confirm whether a regulated entity is collecting their health data and a right to have their data deleted.



State Executive Actions

Upon the release of the *Dobbs* decision on June 24, 2022, California Governor Gavin Newsom, Oregon Governor Kate Brown and Washington Governor Jay Inslee entered a [west-coast commitment](#) to protect reproductive rights. In part, the commitment prioritizes non-cooperation of judicial and local law enforcement with out-of-state investigations, and protects against the misuse of abortion information.

Protecting abortion-related health information from out-of-state proceedings has also been the subject of a host of executive orders, from governors in California ([Executive Order N-12-22](#)), Colorado ([Executive Order D-2022-032](#)), Maine ([Executive Order 4](#)), Massachusetts ([Executive Order 600](#)), Michigan ([Executive Order 2022-5](#)), Minnesota ([Executive Order 22-16](#)), Nevada ([Executive Order 2022-8](#)), North Carolina ([Executive Order 263](#)), Pennsylvania ([Executive Order 2022-1](#)), and Rhode Island ([Executive 22-28](#)). These orders generally bar state agencies and employees from cooperating with, and providing information for, out-of-state civil, criminal, and administrative proceedings stemming from the provision of reproductive health services. In Michigan, Governor Gretchen Whitmer's [Executive Order 2022-5](#) also expressly requires state agencies to "safeguard the privacy of individuals seeking health care, including the privacy of their health data."


Local Government Action

Cities and counties in several parts of the country, including some in states with restrictive abortion laws, have taken steps to bolster privacy protections around abortion-related information. Several local jurisdictions passed similar resolutions barring the use of public funds to record, investigate, or provide information to any government body or agency about, an abortion, unless the activity is in defense of the rights of the patient or health care provider. These jurisdictions include Athens-Clarke County ([Resolution](#), August 2, 2022) and Atlanta ([22-R-3711](#)), Georgia; Boise, Idaho ([Res-385-22](#)); New Orleans, Louisiana ([R-22-310](#)); and Austin ([Guarding the Right to Abortion Care for Everyone \(GRACE\) Act](#)) and Dallas ([Resolution No. 22-1140](#)), Texas, for example.

The City Council of Chicago, Illinois, passed a [Bodily Autonomy Ordinance](#) in November 2022, intended to protect the right of individuals to make decisions about reproductive health care. Illinois, as mentioned above, is bordered by five states with restrictive abortion laws, and Chicago itself shares a border with Indiana. The new ordinance requires all City agencies to decline a request to assist with an investigation stemming from any law that restricts an individual's bodily autonomy in a manner contrary to Illinois law.

Effectiveness of Privacy Protection Yet to be Seen

The impact of state and local efforts to shield abortion health records, particularly from overzealous investigators and prosecutors in states adverse to abortion, has yet to be seen. Associate Professor Carleen M. Zubrzycki, at the University of Connecticut School of Law, in a recent [Yale Law Journal Forum piece](#), opined that the push towards *interoperability*—intended to improve exchange of health data across systems and providers—may have a profoundly negative impact on state legislative efforts to protect reproductive health records. She argues that the flow of health information to health care providers in states adverse to abortion—"if weaponized by antiabortion litigants"—would swallow the protections the legislation purports to offer."



Time will tell whether and to what extent interoperability undermines these state and local efforts to safeguard abortion health records. In the meantime, forward-looking legislative efforts like California's [Assembly Bill 352](#), which, as discussed above, would limit exchange of abortion information through health information exchanges, may hold a key to closing the loophole. Similarly, the changes to HIPAA proposed by the Biden Administration, which would bar use or disclosure of PHI for an investigation into or proceeding against any person seeking or obtaining reproductive health care, would have broad application to covered entities and their business associates across the country. However, the rulemaking process requires an opportunity for public comment on the proposed changes before the Administration may issue a final rule, and thus the exact contours of any final modifications are, as yet, unknown.

This document was developed by Stephen Murphy, Deputy Director, Network for Public Health Law Mid-States Region Office. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.

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