

Telemedicine Abortion Post Dobbs

Insights

10.28.22

Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* ("Dobbs"), individual states and their elected representatives have the authority to regulate abortion. Since Dobbs, several states have enacted, or are seeking to enact, abortion restrictions. Additionally, state laws restricting abortion that pre-dated Dobbs, but were unenforceable under the now-overturned *Roe v. Wade*, are potentially enforceable now.

An understanding of, and compliance with, varying state laws governing abortion is essential for providers of abortions and abortion-related services. The obligation to understand and comply with state abortion laws is particularly important for telehealth providers, who generally must be licensed to practice in the state in which the patient is located, unless an exception applies, and must abide by the laws of that state at the time of treating the patient. Moreover, many of the abortion restrictions that have been enacted since Dobbs seek to limit the provision of abortion services via telehealth in particular.

Medication Abortion and FDA Regulation

Medication abortion is an FDA-approved two-medication regimen that involves the use of prescription drugs mifepristone and misoprostol to end a pregnancy through 70 days of gestation. It is the most common form of abortion in the U.S. In December 2021, the FDA removed the in-person dispensing requirement and replaced it with a requirement that dispensing pharmacies be certified, thereby allowing dispensing of the mifepristone and misoprostol regimen via certified pharmacies and the mail. As a result, certified health care providers may use telehealth to prescribe medication abortion, and the prescriptions may be dispensed via certified pharmacy or mail via certified prescribers or pharmacies – except where prohibited or limited by state law.

State Laws Governing Access to Abortion Services via Telehealth

There are a variety of ways in which states approach regulating the modalities that health care providers can use to prescribe medication abortions, up to and including explicitly banning the use of telehealth for abortion services. Many state laws restricting the provision of abortion services specifically limit the provision of medication abortions via telehealth. Some states explicitly ban the use of telehealth for abortion services. For example, in Arizona, it is unprofessional conduct to "knowingly" provide an abortion using telehealth, and any health care provider who does so is subject to license suspension or revocation.^[i] Short of an outright ban on telehealth abortions, nearly half of states effectively make it impossible to provide a medication abortion via telehealth by requiring the prescriber and patient to be physically present with each other.^[ii] Other states impose different in-person requirements. For example, in Wisconsin, informed consent must be obtained in-person.^[iii] Additionally, the provision of abortion services via telehealth raises issues regarding scope of practice and prescribing authority. More than

PROFESSIONAL



ANDREA FREY
Partner
San Francisco
San Diego



ERIN R. SCLAR
Associate
San Francisco

half of states allow only physicians to provide medication abortions.[iv] This may be a particularly complex point for non-physician telehealth providers who may otherwise have authority to prescribe via telehealth in a state. Another complication is that some states limit prescribing by out-of-state providers. For example, in Kansas, pharmacists may fill prescriptions from out-of-state providers only when the prescription meets Kansas's prescription requirements.[v]

Conversely, other states, like California, New York, Massachusetts, and Washington have instituted "shield laws" that seek to protect providers from penalties in other states, though these laws remain untested and may be subject to constitutional challenge. California's law protects providers of abortion services and individuals who seek or receive abortions from state laws authorizing civil actions against them.[vi] In California, state courts may not apply such out-of-state laws and California may not enforce a civil judgment under such an out-of-state law.[vii] Similarly, part of New York's provider protections include shielding providers from extradition for performing abortions in states where it is legal.[viii] In Washington, the state cannot penalize, prosecute, or take adverse action against individuals aiding or assisting a pregnant person in obtaining an abortion.[ix] Massachusetts has passed the most comprehensive shield law, by protecting providers of abortion services from either criminal or civil actions brought under the law of another state – even where the patient is physically located in that state at the time the provider rendered care.[x] The law also blocks the governor from extraditing anyone charged in another state for engaging in a "legally-protected health care activity," which is defined to include reproductive health care services and gender-affirming care that is legal in the state.[xi]

Some states have also limited the ability of out-of-state law enforcement to investigate alleged abortion-related crimes. For example, out-of-state law enforcement may not use California laws to execute search warrants on California companies that provide electronic communication services or remote computing service to enforce or investigate anti-abortion crimes.[xii]

Another legal strategy adopted by states for shielding providers is to limit the ability of licensing boards to take action against providers for providing abortion services. For example, the California Medical Board, Osteopathic Medical Board, Board of Registered Nursing, and Physician Assistant Board are all statutorily precluded from taking disciplinary action, including denying application for licensure, based on a provider performing an abortion in conformity with standards of care, the respective practice act, and the Reproductive Privacy Act.[xiii] These licensing boards also may not take disciplinary action against a provider based on disciplinary action taken by another state solely for performing an abortion.[xiv]

Conclusion and Takeaways

While telemedicine remains a safe and effective means by which pregnant individuals may receive a medication abortion, the impact of state laws both limiting the provision of abortion services and protecting providers who provide abortion services is unclear. For one, many laws are facing legal challenges in the courts. And, many laws directly conflict with each other, raising questions of how state laws interact and whether they are even enforceable. Given the far-reaching implications of the Dobbs decision, and the evolving impacts and resulting uncertainty, telehealth providers must carefully review and understand the legal boundaries to ensure compliance in the state or states where they are treating patients when providing abortion services via telemedicine in a post-Dobbs landscape.

HLB's [Digital Health Practice](#) and [Reproductive Health Practice](#) actively monitor digital health regulatory developments concerning access to reproductive health services at both the federal and state levels. If you have any questions, please contact [Andrea Frey](#) or [Erin Sclar](#) in San Francisco, or any other member of our Hooper, Lundy & Bookman team.

[i] Ariz. Rev. Stat. § 36-3604.

[ii] "[Medication Abortion](#)," Guttmacher Institute, August 1, 2022.

[iii] Wis. Stat. § 253.10.

[iv] "[State Requirements for the Provision of Medication Abortion](#)," Kaiser Family Foundation, July 11, 2022.

[v] Kansas Board of Pharmacy, "[Frequently Asked Questions](#)," accessed September 18, 2022.

[vi] Cal. Health & Saf. Code § 123467.5.

[vii] Ibid.

[viii] N.Y. Crim. Proc. Law § 570.17.

[ix] Wash. Rev. Code § 9.02.120.

[x] 2022 Mass. Legis. Serv. Ch. 127 (H.B. 5090).

[xi] Ibid.

[xii] Cal. Penal Code § 1524.2.

[xiii] Cal. Bus. & Prof. Code §§ 2253, 2746.6, 2761.1, 3502.4.

[xiv] Ibid.

RELATED CAPABILITIES

[Digital Health](#)

[Reproductive Health](#)