# Update: Justice Department Sues Idaho Over Abortion Prohibition in Medical Emergencies

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**UPDATED:** After filing this lawsuit, the DOJ filed a motion for a preliminary injunction, seeking to enjoin enforcement of the Idaho statute as applied to EMTALA-mandated care. The DOJ argued that EMTALA preempts Idaho's statute because (1) the law "prohibits…medical care that EMTALA requires"; (2) the law's "affirmative defense" poses an obstacle to EMTALA "because exposure to criminal prosecution will render physicians less inclined or entirely unwilling to risk providing treatment"; and, (3) the law threatens the licenses of medical professionals who perform or assist in providing an abortion, "[t]hus, the Idaho law penalizes and deters medical professionals from participating in medically necessary abortions, contrary to EMTALA's 'overarching purpose of ensuring that patients . . . receive adequate emergency medical care.'" Idaho filed an opposition, arguing, in part, that its law would allow for any appropriate exceptions under EMTALA, so no injunction is necessary. The Idaho Legislature sought to intervene as defendants in the case; although the court denied the motion to the extent the Legislature sought to intervene as of right, it granted permissive intervention on a limited basis to allow the Legislature to present argument and evidence in opposition to the DOJ's motion for preliminary injunction.

A hearing on the motion was held on August 22, 2022, and the court ruled in the DOJ's favor, issuing a preliminary injunction on August 24, 2022. Under the court's order, Idaho is enjoined from enforcing Idaho Code section 18-622 to the extent that the statute conflicts with EMTALA-mandated care.

Hooper, Lundy & Bookman's Reproductive Health Practice Group is monitoring developments in this case closely and will continue to share updates.

**August 4, 2022:** The United States Department of Justice (DOJ) has sued the State of Idaho, claiming that the state's near-total ban on abortion is preempted, at least in part, by EMTALA. In relevant part, EMTALA requires Medicare-participating hospitals with an emergency department to provide each patient determined to have an emergency medical condition with stabilizing treatment within the hospital's capability and capacity. Idaho's law, which is set to take effect


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later this month, would ban abortions in nearly all circumstances. The DOJ lawsuit seeks to prevent the law from taking effect in certain circumstances, arguing it would conflict with hospitals' obligation under EMTALA to provide treatment that is medically necessary to stabilize an emergency medical condition. If the Department prevails, Idaho's law would be invalid to the extent that it conflicts with EMTALA; however, the law could still potentially apply to other clinical settings.

The statute, Idaho Code section 18-622, is what is commonly referred to as a "trigger" law that was drafted to take effect in the event that the U.S. Supreme Court overturned *Roe v. Wade*, the 1973 decision that established the Constitutional right to an abortion. That happened last month when the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization* reversing *Roe*. If the Idaho law takes effect on August 25, 2022, it will make termination of a clinically diagnosable pregnancy a criminal offense, and the statutory affirmative defenses are limited to circumstances where an abortion is "necessary to prevent the death of the pregnant woman" for reasons other than the risk of suicide or where there is a documented report of rape or incest. The law stops short of providing a general exception where abortion is necessary to preserve the health of the pregnant patient.

The DOJ's complaint asserts that Idaho's trigger law is invalid under the Constitution's Supremacy Clause, declaring that it "directly conflicts" with EMTALA by "prevent[ing] doctors from performing abortions even when a doctor determines that abortion is the medically necessary treatment to prevent severe risk to the patient's health and even in cases where denial of care will likely result in death for the pregnant patient." For example, where a pregnant patient arrives at a hospital's emergency department and is determined to have an emergency medical condition—here, a complication that could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part (*e.g.*, complications threatening septic infection), EMTALA requires the hospital to provide stabilizing treatment within the hospital's capability and capacity. The DOJ's complaint stressed that EMTALA's definition of an emergency medical condition "is broader than just those circumstances where treatment is 'necessary to prevent…death' under Idaho law." In some cases, necessary stabilizing treatment may involve termination of the pregnancy, thereby subjecting the treating providers to potential criminal prosecution under Idaho law.

The DOJ's Complaint also stated that compliance with Idaho's law would force Medicare-participating hospitals with emergency departments to violate their Medicare provider agreements, which could result in termination of the agreements, "because Idaho criminalizes the provision of stabilizing medical services required by EMTALA."

Yesterday, unrelated to the DOJ's complaint, the Idaho Supreme Court held a hearing on whether Idaho's trigger law should be stayed while separate state court actions that Planned Parenthood has brought to challenge the law are decided. The state's Supreme Court has not yet ruled on the matter.

This is the first lawsuit brought by the Biden administration to protect the rights of patients to access clinically necessary emergency abortion care services post- *Dobbs*. It also follows guidance released by the U.S. Department of Health and Human Services on July 11 reminding hospitals of their federal obligations under EMTALA as well as HIPAA's privacy rule with respect to pregnant patients; the EMTALA guidance is the subject of a lawsuit brought by Texas's Attorney General.

HLB's Reproductive Health Practice Group will be monitoring the suit closely to understand its effect in Idaho and other states where abortion prohibitions are taking effect. Please reach out to any member of the Reproductive Health Practice Group with any questions.

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