

# Evolving Laws and Litigation Post-Dobbs: The State of Reproductive Rights as of January 2023

A Practical Guidance® by Sharon Masling and Pierce Blue, Morgan Lewis & Bockius, LLP



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The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* set off a series of changes in reproductive health law across the country. As we transition to a new year and a new Congress, we provide a summary of where the law stands now and what employers can expect in 2023.

Justice Samuel Alito's majority opinion in *Dobbs* asserted that overturning *Roe* and *Casey* would simplify the law around abortion by removing federal oversight and placing it entirely in the hands of the states. Instead, the immediate practical result of the decision has been increased uncertainty.

The web of state and local laws regulating abortion coupled with extensive litigation created a confusing legal environment that even experts have difficulty tracking. Employers have had to grapple with this uncertainty while also responding to demands from employers and consumers to take action in this area. There is little reason to expect things to improve in 2023, as the law remains in flux and there are plenty of opportunities for further disruption.

## State of the Law

### Laws Restricting Reproductive Rights

Twenty-five states have laws in place that restrict access to abortion beyond the limits created by *Roe* and *Casey* (i.e., earlier than fetal viability). The scope and enforceability of many of those laws remain in question, though, owing to ongoing litigation.

As of this writing, there are 12 states with criminal laws in force that restrict nearly all forms of abortion. Several of those laws are subject to ongoing legal challenges. Another four states have similar criminal prohibitions against nearly all abortion, but those statutes are currently subject to temporary injunctions pending the resolution of legal challenges to their constitutionality under state law.

Three states have criminal laws prohibiting abortion after the detection of a fetal heartbeat, which is roughly six weeks post-fertilization. All three are subject to ongoing litigation and two are currently enjoined from enforcement.

Two states have criminal laws prohibiting abortion after 15 weeks. In one of those states, Arizona, there was also a campaign to revive the state's pre-*Roe* criminal law that banned nearly all forms of abortion. The Arizona Court of Appeals, however, ruled in December 2022 that the 15-week law effectively created an exception to the old ban and therefore the state could not use it to prosecute persons who complied with the terms of the new law. In addition, Arizona's recently elected attorney general pledged in her campaign to not enforce the pre-*Roe* law.

Four states have criminal laws prohibiting abortion after 20 weeks. Three of those laws are currently in force while one, Montana, is subject to a temporary injunction.

Several of these states have multiple criminal laws in place. Kentucky has both a near-total ban and a six-week ban. Arizona has a 15-week ban and a pre-Roe law against nearly all abortion. North Carolina and Wisconsin have 20-week bans and pre-Roe laws that criminalize nearly all forms of abortion. Whether and how these varying bans will be enforced will depend on litigation outcomes and, in some cases, the political inclinations of prosecutors at the state and local levels.

Oklahoma and Texas remain the only two states with civil enforcement laws. The Oklahoma law applies to nearly all forms of abortion. The Texas law applies to abortion after the detection of a fetal heartbeat. These also are the only laws that explicitly classify employer reimbursement of abortion expenses as unlawful aiding and abetting of an abortion.

Litigation brought under both laws has been limited to date. Most activity has occurred in Texas and has been directed against abortion providers. A recent decision holding that the Texas Constitution requires a direct connection between an individual filing suit under the law and the challenged abortion may dampen efforts to file lawsuits there, although we expect that decision to be appealed.

### **Laws Protecting Reproductive Rights**

Eighteen states have active laws or constitutional protections that guarantee a right to abortion at some stage of pregnancy. Twelve of those states protect access through statutes. Three states have binding high court precedent finding there is a right to abortion in state constitutions. Three states—California, Michigan, and Vermont—have constitutional amendments that enshrine the right to reproductive freedom, including abortion. The scope of the protections provided in these states varies but all permit abortion until at least 24 weeks post-fertilization, the “viability” limit recognized by Casey.

Seventeen states have also enacted laws or promulgated executive orders designed to “shield” residents and persons who enter these states to receive reproductive health services from extraterritorial laws prohibiting abortion. Nearly all of these laws and orders prohibit state agencies and courts from cooperating with out-of-state investigations into the receipt or provision of reproductive health services, enforcing subpoenas or summonses from out-of-state courts or grand juries related to the receipt of reproductive health services, and honoring requests for extradition when the charge involves the receipt of lawful reproductive health services.

California also recently enacted a law that prohibits California corporations or corporations whose principal executive offices are in California from providing records and data in response to out-of-state subpoenas or court orders relating to the investigation or enforcement of laws prohibiting reproductive health services that are lawful in California.

### **Federal Actions**

The administration of President Joseph R. Biden took a number of steps to enhance access to reproductive healthcare under federal law post-Dobbs. For example, in July 2022 the US Department of Health and Human Services (HHS) released guidance for retail pharmacies stating that federal law requires them to stock and fill lawful prescriptions for medications used in abortion, even in states that restrict access to abortifacients. HHS’s Office of Civil Rights also released guidance documents explaining how HIPAA’s privacy protections relate to state investigations into abortion and reiterating the obligations federal antidiscrimination laws place on medical providers related to abortion access.

In addition, the U.S. Department of Justice (DOJ) filed a lawsuit against Idaho in August 2022 arguing that the state’s near-total ban on abortion violates rights protected by the Emergency Medical Treatment and Labor Act (EMTALA). Specifically, the DOJ said EMTALA’s requirement that hospitals provide emergency stabilizing care to prevent serious jeopardy to a patient’s health encompasses abortion services beyond that permitted by Idaho law. A federal district judge granted the DOJ’s request for an injunction that prohibits Idaho from enforcing its law in a manner that violates EMTALA.

Most recently, the US Food and Drug Administration (FDA) modified its rules on dispensing certain abortion medication. The changes announced on January 3, 2023, permit retail pharmacies to dispense abortion medication and remove a prior requirement that patients pick up the medication in person. We expect there will be extensive litigation relating to this change going forward, especially around whether the FDA rules preempt the contrary state requirements.

There were also efforts in Congress by supporters of abortion rights to enact legislation that would create a statutory right to abortion services, as well as efforts by abortion opponents to prohibit all abortion after 15 weeks. Neither had sufficient support to pass.

# What's Next?

## State Legislative Sessions

The majority of state legislatures were adjourned when Dobbs was released. Three states—Indiana, South Carolina, and West Virginia—called special sessions after Dobbs was decided to consider new abortion restrictions. Indiana and West Virginia were able to enact new laws that ban nearly all forms of abortion. The special sessions were marked by heated debate, including among supporters of abortion restrictions. The South Carolina Legislature failed to pass a new law due to a split among Republican lawmakers over including an exemption for cases of rape or incest.

Forty-four state legislatures will convene for legislative sessions in January 2023. Two—California and Maine—have already started. The remaining four state legislatures will gather in February or March 2023.

Abortion and reproductive healthcare will be prominent topics in each session. Legislative leaders in Florida, Nebraska, Ohio, North Carolina, and Virginia have signaled that they will consider restrictions on abortion access ranging from near-total bans to 12- and 15-week prohibitions. Their counterparts in Michigan and Pennsylvania have said they plan to pass enhanced protections for reproductive health. In addition, lawmakers in Texas and Arkansas have introduced bills aimed at punishing employers that have adopted travel benefit programs for employees who are unable to access reproductive health services in their home states.

## State and Federal Litigation

The Supreme Court of South Carolina recently held that the state's prohibition on abortion upon detection of a fetal heartbeat violated the right to privacy protected by the state constitution. State supreme courts in Idaho, Indiana, and Kentucky have heard or will soon hear oral arguments in cases making similar allegations under their constitutions. Cases raising these issues will also likely reach state supreme courts in Georgia, Ohio, Montana, and Wyoming in 2023.

At the federal level, a class action case in Texas could provide much needed clarity regarding the authority of states to enforce their abortion laws beyond their borders. The case, filed by reproductive rights organizations and abortion support funds in Texas, seeks a declaratory judgment stating that Texas is unable to enforce its abortion laws against individuals who receive out-of-state abortions or persons who provide financial or other support to individuals who travel out of state to receive abortions.

In addition, the DOJ will likely continue to look for opportunities to file litigation under EMTALA against the most restrictive state abortion laws. The US FDA may also try to take action against states that r limit access to abortion medication beyond the restrictions imposed by the FDA under the theory that FDA's approval preempts state regulatory authority.

## State Referenda

Three states—Kansas, Kentucky, and Montana—held referenda in 2022 on measures that would restrict abortion access. Voters in all three states rejected the proposals. Another three states—California, Michigan, and Vermont—held referenda on state constitutional amendments protecting abortion access and all three passed by large margins.

The success of the reproductive rights amendment in Michigan and the defeat of restrictive amendments in typically conservative states like Kansas, Kentucky, and Montana convinced reproductive health advocates to press for referenda in other states, such as Ohio, Oklahoma, and Pennsylvania. We expect to see further efforts in this area.

*Morgan Lewis partners Sage Fattahian and Jonathan Zimmerman contributed to this article.*

## Related Content

### Resource Kits

- [Dobbs v. Jackson Women's Health Organization Resource Kit](#)

### State Law Surveys & Regulatory Trackers

- [State Abortion Laws Tracker After Dobbs v. Jackson Women's Health Organization](#)

### Cases

- Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)
- Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791 (1992)
- Roe v. Wade, 410 U.S. 113 (1973)
- Planned Parenthood Ariz., Inc. v. Brnovich, No. 2 CA-CV 2022-0116, 2022 Ariz. App. LEXIS 390 (Ct. App. Dec. 30, 2022)

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Sharon Perley Masling, a leader of Morgan Lewis's Workplace Culture Consulting and Training Practice, helps companies and organizations create safe, respectful, diverse, and inclusive workplaces. Sharon also leads the firm's Reproductive Rights Task Force and developed and led the firm's COVID-19 Task Force. Having previously served as chief of staff and senior counsel to a commissioner at the Equal Employment Opportunity Commission (EEOC), Sharon provides insight on the enforcement of all employment civil rights laws and advises employers on employment discrimination issues.

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