ABORTION DEFENSE NETWORK

Know Your State's Abortion Laws

A Guide for Medical Professionals

TEXAS

Since *Roe v. Wade* was overturned in June 2022, medical providers across the country have struggled to understand their state's abortion laws, which contain undefined terms and non-medical language.

Fear and confusion throughout the medical community has led some hospitals to adopt policies that are overly strict or burdensome, causing patients to be denied care in emergencies. While the law remains in flux and some questions have no clear answers, this document aims to provide clarification, where possible, of what conduct is still permitted in your state. Know what your state's law does and does not require, so you can advocate for yourself and your patients.

Last updated July 2024

Key Takeaways

Providing contraception, including emergency contraception, is legal.

Providing medical care for ectopic pregnancies and pregnancies with no cardiac activity is legal.

Providing information about how to obtain a legal abortion in another state is legal.

Abortion is prohibited under Texas law unless the patient has a “medical emergency,” meaning the patient has a “life-threatening physical condition” that places the patient “at risk of death” or that poses a “serious risk of substantial impairment of a major bodily function.” Imminence of the threat is not required.

The Texas Supreme Court has said that diagnosis of PPROM, without waiting for signs of infection, is an example of a condition that meets this definition.

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Definition of Abortion & Contraception

ABORTION

Texas law defines abortion to include only certain induced abortions, specifically: "'Abortion' means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant."[1]

The following are explicitly *excluded* from Texas law's definition of abortion: (1) removing "an ectopic pregnancy," defined as "the implantation of a fertilized egg or embryo outside of the uterus"[2]; and (2) removing "a dead, unborn child whose death was caused by spontaneous abortion."[3] While undefined, it is generally understood that in the context of Texas's definition of abortion, "dead" means that there is no cardiac activity present in the embryo or fetus.[4] This means that treatment for ectopic pregnancy (including use of methotrexate and surgical removal) and treatment for miscarriage where there is no cardiac activity (including medications, D&C, D&E, labor induction) are *not* abortions under Texas law and are thus permitted in Texas.

Miscarriage care is legal, so long as there is no cardiac activity. With respect to self-managed abortion, it is legal for providers to give medical care during or after a self-managed abortion provided there is no cardiac activity, or if the patient is experiencing a complication that would qualify as a medical emergency (see below). There is no specific crime of self-managed abortion in Texas law, and Texas's criminal abortion bans explicitly exempt pregnant people from liability, so a pregnant person cannot be convicted of a violation of Texas's abortion bans for self-managing their abortion.

CONTRACEPTION

Contraception is not illegal in any state in the country. Texas's legal definition of abortion explicitly states that it "does not include birth control devices or oral contraceptives."[5]

Abortion Bans

Texas has three different abortion bans with penalties that are either criminal (prison time) and/or civil (loss of medical license and/or fines).

Trigger Ban: Texas's most restrictive abortion ban is the so-called "trigger ban" which took effect on August 25, 2022. This ban states that "[a] person may not knowingly perform, induce, or attempt an abortion," where abortion is defined using Texas's above definition.[6] The penalties for violating the ban are: (1) criminal: a person can be charged with a first or second degree felony, which is punishable by imprisonment for life, or between 5-99 years for first degree offenses, or between 2 and 20 years for second degree offenses;[7] (2) professional: the Texas Medical Board "shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation" of the trigger ban;[8] and (3) civil: the Attorney General "shall file an action to recover a civil penalty" of "not less than $100,000 for each violation" of the trigger ban and may also recover attorney's fees and costs.[9]

Senate Bill 8: This law took effect in September 2021 and prohibits abortions when an embryo or fetus has detectable cardiac activity, which is typically around 6 weeks LMP..[10] Violations of S.B. 8 are not punishable as crimes. Rather, alleged violations are enforced by a civil bounty-hunting enforcement scheme that purports to allow anyone to bring a civil lawsuit against a provider for "statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed" and "injunctive relief

sufficient to prevent the defendant from violating" S.B. 8 in the future.[11] To date, despite pervasive fear in the medical community, there have not been any successful cases for violations of S.B. 8. In fact, only three cases have even been filed–all against a single physician's public admission he had performed an abortion in violation of S.B. 8 in September 2021–and those cases have not led to liability for the provider..[12] Two of the lawsuits were dropped or not prosecuted. The third was dismissed by a trial court and that opinion was affirmed on appeal.[13]

Pre-Roe Ban: Statements by some Texas politicians[14] have created confusion regarding the law that was struck down by *Roe v. Wade* and whether it has now sprung back into effect. Enacted in 1925, the pre-*Roe* ban stated: "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years."[15] After it was struck down in 1973, the pre-*Roe* ban was removed from the Texas code, replaced by a complex set of laws allowing abortion, and a federal appeals court held that it had been impliedly repealed. On June 24, 2022, however, the text of the pre-*Roe* ban was placed on the Texas Legislature's website for the first time, though with a note that the relevant statutes were "held to have been impliedly repealed."[16] Litigation is ongoing, but in February 2023, a federal court agreed that the pre-*Roe* ban was "impliedly repealed" and it is therefore not in effect.[17]

EMTALA

A federal law called the Emergency Medical Treatment & Labor Act (EMTALA) requires emergency abortion care in some cases. EMTALA requires Medicare-participating hospitals with emergency departments (which is most hospitals), to provide medical screening[18] and stabilizing medical treatment to individuals experiencing an emergency medical condition,[19] including people in labor or with emergency pregnancy complications.[20] Under the EMTALA statute, "to stabilize" means to provide medical treatment "as may be necessary" to ensure, "within reasonable medical probability, that no material deterioration of the condition is likely."[21] A person experiencing an emergency medical condition can only be transferred to a different hospital once they are stable or if certain conditions are met such as the medical benefits of transfer outweigh the increased risks to the person experiencing the medical emergency.[22] Even where a hospital is permitted to transfer such a person without first stabilizing them, the hospital still must provide "the medical treatment within its capacity which minimizes the risks to the individual's health . . . ."[23] EMTALA defines medical emergency to include "acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part."[24] The stabilizing treatment required by EMTALA can include abortion care in certain circumstances.

HHS reaffirmed these requirements in guidance issued after *Roe v. Wade* was overturned. That guidance emphasizes that stabilizing treatment required by EMTALA could include abortion care if the examining physician or other qualified medical personnel determines that such treatment is required to stabilize a patient experiencing an emergency medical condition, including a condition that is "likely or certain to become emergent without stabilizing treatment."[25] The guidance made clear those conditions might include, but are not limited to: "ectopic pregnancy, complications of pregnancy

loss, or emergent hypertensive disorders, such as preeclampsia with severe features."[26] The guidance reiterates that if EMTALA requires the provision of abortion care, then EMTALA expressly preempts any state law prohibiting or restricting access to abortion.[27] Indeed, HHS has recently cited hospitals in Kansas, Missouri and Florida for violating EMTALA by failing to provide abortion care to a patient with preterm premature rupture of membranes ("PPROM").[28]

Notwithstanding EMTALA's clear requirements with respect to emergency abortion, there is ongoing litigation relating to attempts by state officials in Idaho and Texas to restrict hospitals from complying with their federal legal obligations. In 2022, a federal district court in Idaho issued a preliminary injunction ensuring that Idaho's abortion ban could not be enforced to prohibit health-saving emergency abortions required under EMTALA. While that injunction was temporarily stayed by the U.S. Supreme Court, that stay was lifted in June 2024 and the preliminary injunction restored while the case continues in the lower courts.[29] In July 2024, following that order, HHS issued a statement reiterating that EMTALA requires hospitals to provide emergency abortion care when it is necessary stabilizing treatment.[30] Meanwhile, HHS has asked the U.S. Supreme Court to review a Fifth Circuit decision that affirmed a lower court decision temporarily blocking federal enforcement of HHS' guidance in Texas. HHS has petitioned the Supreme Court to reverse the preliminary injunction.[31] The government's petition will be considered by the Supreme Court in the next term.

"Medical Emergency" Exception to Abortion Bans

There is an exception to both the trigger ban and S.B. 8 for "medical emergencies," that does *not* require that an emergency be imminent or that the threat to the patient's health be irreversible. Texas does not have exceptions for rape or incest.

Language of Exception: Texas's "medical emergency" exception applies where "a licensed physician" "in the exercise of reasonable medical judgment" determines that "the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced."[32] "Reasonable medical judgment" is defined as "a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical condition involved."[33] The Texas Medical Board has adopted the definition of "major bodily function" from the Texas Labor Code, which defines the term to include, but not be limited to "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[34] The only health condition that is explicitly excluded from the exception is a risk to health that arises from self-harm (e.g. suicide).[35] To the extent the pre-*Roe* ban is still in effect, it has an exception for abortions "by medical advice for the purpose of saving the life of the mother."[36]

As of September 1, 2023, Texas has passed a new law that creates a limited justification[37] to criminal liability, and a limited affirmative defense[38] to professional and civil liability under the trigger ban for two specific pregnancy complications: 1) "ectopic pregnancy at any location" which would likely include c-scar ectopics and 2) "previable premature rupture of membranes." This means that for patients with these complications, a physician who was arrested or was being investigated by the medical board for violating the abortion bans could defend themselves by arguing the patient had one of these complications. The law does not create new

exceptions to the bans, nor does it appear to address liability under S.B. 8.[39]

Interpretation of Exception: The exception does not require a life-threatening health risk to be immediate or irreversible. Regulations from the Texas Medical Board state that "[i]mminence of the threat to life or impairment of a major bodily function is not required."[40] Accordingly, physicians should be able to legally provide abortions to patients with emergent health conditions that create risks of infection, hemorrhage, seizure, etc. that could lead to loss of fertility, damage to other organs, or death, even if the patient does not yet have signs of infection or other emergency health risks. While further guidance is scant, health care professionals should also look to statements from the Texas Supreme Court.

The Texas Supreme Court issued decisions on the meaning of the exception in two cases brought by Texas OB/GYNs and women delayed or denied abortions despite obstetrical complications.[41] While the Texas Supreme Court declined to provide the practical guidance sought by the plaintiffs, the Court's opinions in those cases contain some additional detail about the exception's requirements:

In *Zurawski v. Texas*, the Texas Supreme Court describes the exception as requiring a physician to perform a two-part inquiry. First, "[d]oes the patient have a physical condition aggravated by, caused by, or arising from her pregnancy that could lead to her death?" Second, "[i]f so, does the condition pose a risk of death or serious risk of substantial impairment of a major bodily function unless an abortion is performed?"

As to the first step, the Court emphasized that the condition need only be "capable" of causing death or be "potentially" fatal. The condition does not need to be "actively injuring the patient"; the condition need only have "the potential to kill the patient." "The law does not require the life-threatening physical condition to have already caused damage before a physician can act to preserve the mother's life or major bodily function."

Once a patient is diagnosed with a physical condition that is capable of leading to the patient's death, the second step applies. For the second step, in a concurring, non-binding opinion, two Justices further explained that either of the specified risks is enough: an abortion can be provided if it will mitigate *either* a risk of death *or* a "serious risk of substantial impairment of one of her major bodily functions posed by a condition that satisfies the first step."[42]

The Texas Supreme Court in *Zurawski* also clarified that diagnosis of PPROM is "a risk that satisfies the law's inquiry," so physicians can provide abortions to PPROM patients upon diagnosis, without waiting for signs of infection.

As to patients with fatal fetal diagnoses, the Court stated that Texas law allows an abortion if the patient also has "a life-threatening physical condition and that an abortion is indicated to avert her death or serious physical impairment." Accordingly, Kate Cox—a woman diagnosed with a fatal fetal condition (full Trisomy 18), who had two prior Cesarean surgeries and an elevated risk for gestational hypertension and diabetes, and had visited the emergency room four times with severe cramping and diarrhea and leaking of fluid (without diagnosis of PPROM or another complication)—did not qualify for the exception.

The Texas Supreme Court made several additional statements in *Zurawski v. Texas* and *Cox v. Texas* that medical professionals may find instructive:

> *"The law does not require that a woman's death be imminent or that she first suffer physical impairment."*

> *"The law entrusts physicians with the profound weight of the recommendation to end the life of a child to preserve the life of the mother, a decision made in light of the specific circumstances of the mother and the pregnancy."*
>
> *"The exception does not hold a doctor to medical certainty, nor does it cover only adverse results that will happen immediately absent an abortion, nor does it ask the doctor to wait until the mother is within an inch of death or her bodily impairment is fully manifest or practically irreversible."*

The Texas Supreme Court further explained that not every doctor need reach the same conclusions regarding a patient's health condition for their judgment to be "reasonable." It is enough that a doctor is within a zone of reasonable medical judgment such that at least some doctors would agree the doctor's judgment was reasonable. The Court stated:

> *"Reasonable medical judgment…does not mean that every doctor would reach the same conclusion."*
>
> *"The exception does not mandate that a doctor in a true emergency await consultation with other doctors who may not be available."*
>
> *"The burden is on the state to prove that no reasonable physician would have concluded that the mother had a life-threatening physical condition that placed her at risk of death or of substantial impairment of a major bodily function unless the abortion was performed."*

A non-binding concurrence in *Zurawski* from one Justice further states that "one other physician's opinion that the performing doctor used 'reasonable medical judgment' is sufficient corroboration to support the performing doctor's action."[43]

It is also noteworthy that the legislative sponsor of S.B. 8 wrote a letter to the Texas Medical Board stating that conditions involving risk of infection and/or bleeding are included under the exception—specifically citing PPROM, ectopic pregnancy, preeclampsia, hemorrhaging, strain on the patient's heart, and peripartum cardiomyopathy as non-exhaustive examples.[44]

Legal Requirements in Emergencies: If a physician has determined that the medical emergency exception applies, the physician does not need to comply with Texas's other abortion restrictions that also do not apply in medical emergencies. Specifically: the physician does not need to comply with Texas's informed consent counseling and 24-hour waiting period;[45] for young people under 18, a physician does not need to notify their parent if "there is insufficient time" to provide notice;[46] and the physician does not need to comply with the ban on D&E abortions, meaning the physician can perform a D&E without first confirming fetal demise.[47]

Other Federal Laws & Professional Guidelines

In addition to EMTALA, hospitals and/or medical providers are required to abide by the following:

Conditions of Participation in Medicare and Medicaid (COP): The federal COP regulations require hospitals that participate in Medicare and Medicaid to inform patients of their rights in advance of furnishing or discontinuing care which include: the right to be informed of their health status, be involved in care planning and treatment, and participate in the development of their plan of care.[48]

Protection Against Discrimination in Employment: The federal law known as the Church Amendments prohibits hospitals that receive certain federal funds from discriminating against health care providers who participate or are willing to participate in abortion care or sterilization procedures.[49]

Medical Malpractice: While this document does

not detail state-specific medical malpractice law, medical providers should be aware that they risk liability under state medical malpractice law for failing to provide pregnant patients with the standard of care.[50]

Resident Training: The Accreditation Council for Graduate Medical Education (ACGME) requires that accredited programs provide access to training in the provision of abortion.[51] The federal law known as the Coats-Snowe Amendment both protects medical professionals in learning to provide abortion, and limits the government's ability to penalize programs or institutions that fail to comply with ACGME requirements.[52]

Documentation & Reporting

Generally, state law does not require documentation of irrelevant or non-medical information in patient charts. Nor does it explicitly require reporting to law enforcement patients who receive abortions out of state or self-manage their own abortion.[53] The only abortion-specific documentation and reporting requirements are:

Documentation: Texas law requires that when a physician performs an abortion under the "medical emergency" exception, the physician must "execute a written document" and comply with the following steps: (1) "certify[y] the abortion is necessary due to a medical emergency;" (2) "specif[y] the medical condition the abortion is asserted to address;" (3) "provide[] the medical rationale for the physician's conclusion that the abortion is necessary to address the medical condition;" (4) "place the document . . . in the pregnant woman's medical record;" (5) and "maintain a copy of the document . . . in the physician's practice records."[54] Quoting the language of the statute when documenting a patient case—e.g. "the patient's condition places them at risk of death or poses a serious risk of substantial impairment of a major bodily function"—may be helpful.

The Texas Medical Board issued regulations in June 2024 that created additional documentation requirements for abortions performed under the exception that are similar but not identical to those above. Physicians must follow both sets of documentation requirements. Under the regulations, within 7 days of performing an abortion, the physician must document in the patient's chart the following: (1) that the abortion is performed in response to a medical emergency that either places the patient at risk of death *or* a serious risk of substantial impairment of a major bodily function; (2) the major bodily function(s) at risk; (3) what placed the patient in danger; (4) how the danger was determined; (5) if applicable, that the abortion was performed in a manner that provides the best opportunity for the embryo/fetus to survive unless that manner would create a greater risk of the patient's death or serious risk of substantial impairment of a major bodily function; and (6) if applicable, that abortion was necessary to treat an ectopic pregnancy at any location or PPROM.[55]

Some hospitals may impose additional documentation requirements for abortions performed as medical emergencies, including attestations by multiple physicians and/or approvals by an ethical review board. While intended to insulate the hospital from liability, these are not legal requirements.

Abortion Reporting: Texas law also requires that the physician report abortions performed as medical emergencies on a monthly basis to the state through the Induced Termination of Pregnancy (ITOP) reporting system.[56]

Complication Reporting: Complications from abortion must also be reported to the state, and Senate Bill 4, which took effect in December of 2021, expanded the list of reportable complications and reporters. Physicians have expressed concern with the breadth of conditions that must be

reported, but the state has not provided any guidance or clarification.[57] Now, both physicians (within 3 business days after the complication is diagnosed or treated) and hospitals (within 30 calendar days after the complication is diagnosed or treated) must report to the state any of the following complications or adverse events from the abortion, to the extent they are known at the time: shock; uterine perforation; cervical laceration; hemorrhage; aspiration or allergic response; infection; sepsis; death of the patient; incomplete abortion; damage to the uterus; an infant born alive after the abortion; blood clots resulting in pulmonary embolism or deep vein thrombosis; failure to actually terminate the pregnancy; pelvic inflammatory disease; endometritis; missed ectopic pregnancy; cardiac arrest; respiratory arrest; renal failure; metabolic disorder; embolism; coma; placenta previa in subsequent pregnancies; preterm delivery in subsequent pregnancies; fluid accumulation in the abdomen; hemolytic reaction resulting from the administration of ABO-incompatible blood or blood products; adverse reactions to anesthesia or other drugs; or any other adverse event as defined by the United States Food and Drug Administration's criteria provided by the MedWatch Reporting System.[58] Note that "incomplete abortion" is now explicitly a reportable complication.

Fetal Death Reporting: Texas law requires a "fetal death certificate" for all stillbirths/fetal deaths to be filed with the local registrar within 10 days of death.[59] A "stillbirth" or "fetal death" for which a death certificate is required by Texas law is defined as "any fetus weighing 350 grams or more, or if the weight is unknown, a fetus aged 20 weeks or more as calculated from the start date of the last normal menstrual period to the date of delivery."[60]

Other Mandatory Reporting: All other general mandatory reporting to the Department of Family and Protective Services, local law enforcement, etc., also applies for abortion patients.[61] This includes reporting of sexual abuse of young people, child abuse, and vulnerable adult abuse.[62]

Electronic Medical Records: Many electronic medical record systems (EMRs) allow healthcare providers to securely share patient records across healthcare institutions.[63] While EMRs have settings that allow patients to choose how and when their records are shared, hospital systems often instead use their EMR's default settings that widely share patient records. Though often done for continuity of care purposes, these settings may put abortion providers and patients (or patients obtaining other sensitive care) at risk, and many patients do not know their records are shared in this way.[64]

The federal government has taken steps to address this concern by issuing a new HIPAA rule, effective June 25, 2024.[65] The rule prohibits the use or disclosure of protected health information (PHI) if sought to conduct a criminal, civil, or administrative investigation into or impose liability on any person for the mere act of seeking, obtaining, providing, or facilitating lawful reproductive healthcare, or identifying any person for these purposes.[66] A provider who receives a request for disclosure of PHI potentially related to reproductive care must obtain a signed attestation from the requestor that the request is not for a prohibited purpose.[67] The attestation is required when the request is for: law enforcement purposes, disclosures to coroners and medical examiners, judicial and administrative proceedings, and health oversight activities.[68] If the abortion care—self-managed or otherwise—was provided by someone else, a provider is allowed to assume the care was provided lawfully unless 1) the patient tells them otherwise or 2) the attestation provides evidence of unlawfully provided care.[69]

The new rule only applies to healthcare providers who are subject to HIPAA. Separate from HIPAA, interoperability rules may apply when a healthcare provider uses EMRs.[70] Because of this, we

encourage you to discuss alternative EMR settings and information blocking exceptions with your institution's compliance officers, counsel, and/or technology officers, who may be able to offer customized solutions.[71]

Counseling & Referral

Speech about abortion is legal in Texas. Medical professionals in Texas can thus (1) provide accurate options counseling, including about abortion; and (2) refer patients to medical providers in states where abortion is legal.

There is a Texas specific note of caution, however, as a provision of the pre-*Roe* ban prohibits "furnish[ing] the means for procuring an abortion."[72] No one has suggested, however, that options counseling or referrals by medical professionals would qualify as "furnishing the means." A federal court recently concluded that the pre-*Roe* ban likely does not prohibit helping patients get out of state abortion care and, in any event, the pre-*Roe* ban has been impliedly repealed.[73] Specifically, after *Roe v. Wade* was overturned, various abortion funds and other practical support organizations in Texas stopped providing direct funding and logistical support for patients traveling out of state for abortion due to concern that their work was "furnishing the means." The funds filed a lawsuit, a federal judge determined that the pre-*Roe* ban did not reach such conduct, and Texas abortion funds have since resumed their services.

Medication Abortion

Texas has additional rules that apply specifically to "abortion-inducing drugs." Practically speaking, now that abortion is largely prohibited in Texas, these rules only apply to abortions performed in "medical emergencies." Texas law defines "abortion-inducing drug" to include "the Mifeprex regimen, misoprostol (Cytotec), and methotrexate" when used to perform an abortion, using the definition of abortion described above.[74] That means that when these drugs are used for medical care other than the legal definition of abortion, the rules do not apply. In other words, when these drugs are used to treat patients with ectopic pregnancies, or for miscarriage care where no cardiac activity is present, or for cervical dilation, the rules for abortion-inducing drugs do not apply.

The following rules apply to the use of abortion-inducing drugs for patients needing abortions in medical emergencies where cardiac activity is present. A physician must provide the drug(s) to the patient and also do the following: examine the patient in person; determine and document if the pregnancy is intrauterine or ectopic; determine and document the patient's blood type and offer Rh immunoglobin if the patient is Rh negative; provide a copy of the Mifeprex label; schedule a follow-up visit not later than 14 days after the drug is administered where the physician must confirm pregnancy termination and assess any continued blood loss; and make reasonable efforts to ensure the patient returns for the follow-up visit. Further, the physician may not provide abortion-inducing drugs if the gestational age of the patient's pregnancy is more than 49 days.[75] Following the enactment of Senate Bill 4 in 2021, these requirements are subject to both civil and criminal penalties.[76]

Disposition of Fetal Tissue Remains

Texas's requirements regarding disposition of embryonic and fetal tissue remains is the only law that applies to both miscarriage procedures where there is no cardiac activity and abortion procedures. As of July 2022 (when a court order blocking the law was lifted), all embryonic and fetal tissue remains removed from a patient's body by a medical professional must be disposed either by interment/burial or scattering of ashes (following cremation or incineration).[77] This requirement does

not apply to vitro fertilization, medication abortion, or any process where the patient passes the pregnancy tissue outside of a medical facility, nor does it put any requirements on patients. Medical facilities are responsible for enforcing the law and violations are subject to civil penalties.[78]

Need legal advice?

This document should not be construed as legal advice. If you need individualized legal advice, please contact the Abortion Defense Network, where you will be matched with a pro bono attorney.

The Abortion Defense Network is managed by the Lawyering Project in partnership with the American Civil Liberties Union, Center for Reproductive Rights (CRR), If/When/How: Lawyering for Reproductive Justice, National Women's Law Center (NWLC), and Resources for Abortion Delivery (RAD).

References

[1] Tex. Health & Safety Code § 245.002(1).
[2] Tex. Health & Safety Code § 245.002(4-a).
[3] Tex. Health & Safety Code § 245.002(1).
[4] *See* Tex. Health & Safety Code §§ 171.201, 171.202, 171.203 (citing importance of a "fetal heartbeat" or "cardiac activity" to "unborn life").
[5] Tex. Health & Safety Code § 245.002(1).
[6] Tex. Health & Safety Code §§ 170A.001(a), 170A.002(a).
[7] Tex. Penal Code §§ 12.32, 12.33.
[8] Tex. Health & Safety Code § 170A.007.
[9] Tex. Health & Safety Code § 170A.005.
[10] Tex. Health & Safety Code §§ 171.201 171.203, 171.204; Texas Health & Human Services, GL:21-2001-A: Health Facility Compliance Guidance Letter (Nov. 30, 2022).
[11] Tex. Health & Safety Code §§ 171.207, 171.208, 171.210, 171.211. "Damages" refers to financial penalties, while "injunction" refers to a court order prohibiting certain conduct.
[12] Alan Braid, Opinion: Why I Violated Texas's Extreme Abortion Ban, Washington Post (Sept. 18 2021).
[13] Order, *Gomez v. Braid*, Civil Cause No. 2022CI08302 (Bexar Cty. Dist. Ct. Dec. 12, 2022), *aff'd*, No. 04-22-00829-CV (4th Ct. of Appeals Feb. 21, 2024).
[14] Press Release, Briscoe Cain, State Representative Briscoe Cain Sends Cease-And-Desist Letters to Abortion Funds in Texas (Mar. 18, 2022).
[15] 1925 Tex. Crim. Stat. 1191.
[16] VERNON'S TEX. CIV. STATS. ch. 6-1/2 (page 181).
[17] *Fund Tex. Choice v. Paxton*, No. 1:22-CV-859-RP (W.D. Tex. Feb. 24, 2023), ECF No. 120 ("[T]he Court finds that the pre-Roe laws have been repealed by implication . . . ."); *but see Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525, at *2 (N.D. Tex. Aug. 23, 2022) (treating the pre-*Roe* ban as enforceable but noting that the trigger ban "reflects a more

recent, more specific regulation of abortion and, normally, a more recent enactment governing the same subject supersedes prior enactments").
[18] EMTALA, 42 USC § 1395dd(c)(1)(A).
[19] EMTALA, 42 USC § 1395dd(b)(1)(A).
[20] EMTALA, 42 USC § 1395dd(e)(1).
[21] EMTALA, 42 U.S.C. § 1395dd(e)(3)(A).
[22] EMTALA, 42 USC § 1395dd(c)(2) (requiring hospital to use "qualified personnel and transportation equipment" when making a permitted transfer under EMTALA, among other requirements).
[23] EMTALA, 42 USC § 1395dd(c)(1)(B)-(c)(2)(A).
[24] EMTALA, 42 U.S.C. § 1395dd(e)(1).
[25] CMS, Reinforcement of EMTALA Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (updated July 2022).
[26] *Id.*
[27] *Id.*; *see also* EMTALA, 42 U.S.C. § 1395dd(f) ("The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.").
[28] CMS, Freeman Health System—Freeman West, Statement of Deficiencies and Plan of Correction (April 10, 2023); CMS, University of Kansas Hospital, Statement of Deficiencies and Plan of Correction (April 10, 2023); HHS Secretary Xavier Becerra Statement on EMTALA Enforcement (May 1, 2023).
[29] *Moyle v. United States*, No. 23-726, slip op. (U.S. June 27, 2024) (per curiam).
[30] Press Release, U.S. Dep't of Health and Human Servs., Biden-Harris Administration Reaffirms Commitment to EMTALA Enforcement (July 2, 2024), https://www.hhs.gov/about/news/2024/07/02/biden-harris-administration-reaffirms-commitment-emtala-enforcement.html.
[31] *Texas v. Becerra*, No. 23-10246, 2024 WL 20069 (5th Cir. Jan. 2, 2024), *petition for cert. filed* (U.S. Apr. 1, 2024) (No. 23-1076).
[32] Tex. Health & Safety Code §§ 170A.002(b); 171.002(3); 171.205. The exception also requires that "the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create: (A) a greater risk of the pregnant female's death; or (B) a serious risk of substantial impairment of a major bodily function of the pregnant female."
[33] Tex. Health & Safety Code § 170A.001(4).
[34] 22 Tex. Admin. Code § 165.7(4); Tex. Labor Code § 21.002(11-a); *see also* Americans with Disabilities Act, 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(i)(1)(ii).
[35] Tex. Health & Safety Code § 170A.002(c): "A physician may not" provide an abortion "if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by [the medical exception] arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function."
[36] 1925 Tex. Crim. Stat. 1196.
[37] A separate new provision of Texas law creates a justification or "ordinary defense" to criminal prosecution for PPROM and ectopic pregnancies: "A physician or health care provider is justified in exercising reasonable medical judgment in providing medical treatment to a pregnant woman as described by Section 74.552, Civil Practice and Remedies Code." Tex. Penal Code § 9.35.
[38] An "affirmative defense" is a defense that a defendant to a lawsuit can introduce into evidence and, if proven, defeats liability or conviction. So while it can help a defendant be acquitted, it does not stop an individual from being sued or arrested in the first place.
[39] H.B. 3058, to be codified at Tex. Civ. Prac. & Remedies Code §§ 74.551, 74.552, Tex. Occ. Code § 164.055(c), & Tex. Penal Code § 9.35.
[40] 22 Tex. Admin. Code § 165.8(d).
[41] *Texas v. Zurawski*, No. 23-0629 (Tex. May 31, 2024); *In re State of Texas*, No. 23-0994 (Tex. Dec. 11, 2023) (per curiam).
[42] Texas v. Zurawski, No. 23-0629 (Tex. May 31, 2024) (Busby, J., & Lehrmann, J., concurring).
[43] Texas v. Zurawski, No. 23-0629 (Tex. May 31, 2024) (Lehrmann, J., concurring).
[44] Letter from Bryan Hughes to Executive Director Brint Carlton (August 4, 2022).
[45] Tex. Health & Safety Code § 171.0124.

[46] Tex. Family Code §§ 33.002, 33.0022; Tex. Occ. Code § 164.052.
[47] Tex. Health & Safety Code § 171.152(a).
[48] 42 C.F.R. §§ 482.13(a)(1), (b)(1), (b)(2).
[49] Know Your Rights: Existing Laws May Protect Health Care Professional Who Provide or Support Abortion from Discrimination in Employment, NAT'L WOMEN'S LAW CTR. (Feb. 9, 2023), https://nwlc.org/resource/know-your-rights-existing-laws-may-protect-health-care-professionals-who-provide-or-support-abortion-from-discrimination-in-employment/.
[50] Tex. Civ. Practices & Remedies Code § 74.001 *et seq*.
[51] Accreditation Council for Graduate Med. Educ., *ACGME Program Requirements for Graduate Medical Education in Obstetrics and Gynecology*, ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC. (Sept. 17, 2022), https://www.acgme.org/globalassets/pfassets/programrequirements/220_obstetricsandgynecology_9-17-2022_tcc.pdf.
[52] 42 U.S.C. § 238n.
[53] There is no reason to report a self-managed abortion to the police. Fact sheets from If/When/How with additional detail, including some state-specific fact sheets, are available here. If/When/How adds state-specific fact sheets to their website as they are finalized.
[54] Tex. Health & Safety Code §§ 171.008, 171.205.
[55] 22 Tex. Admin. Code § 165.8(b).
[56] Tex. Health & Safety Code § 245.011(c)(10), (11); 25 Tex. Admin. Code § 139.4; 25 Tex. Admin. Code § 139.5; ITOP reporting form available at https://txhhs.force.com/c/itop_reporting.app?view=form&formType=iarf
[57] Jessica Valenti, *Texas is Fabricating Abortion Data*, Abortion Every Day (May 4, 2023).
[58] Tex. Health & Safety Code 171.006; 25 Tex. Admin. Code § 139.2; 25 Tex. Admin. Code § 139.5; Texas Health & Human Services, GL 21-2006-A: Health Facility Compliance Guidance (revised Nov. 30, 2022); U.S. Food & Drug Admin., Form FDA 3500; Complication reporting form available at https://txhhs.force.com/c/itop_reporting.app?view=form&formType=acr.
[59] Tex. Health & Safety Code §§ 193.002, .003.
[60] Tex. Health & Safety Code § 674.001(2); 25 Tex. Admin. Code § 181.7(a).
[61] Fact sheets from If/When/How with additional detail, including some state-specific fact sheets, are available here. If/When/How adds state-specific fact sheets to their website as they are finalized.
[62] Tex. Family Code §§ 33.008, 33.0085, 33.009.
[63] For example, one EMR, Epic, uses a tool called Care Everywhere to securely share information between health care institutions (e.g., from one hospital system to another) and allows robust sharing within a single institution (e.g., a Texas hospital treating a patient may be able to see the patient's records from an Illinois hospital within the same system).
[64] For example, if a patient travels from a ban state to an access state for abortion care, or obtains an abortion in the ban state under an exception, then later obtains any type of healthcare at a different provider that uses the same EMR, the patient's records may be automatically shared with the second provider. If the second provider believes that the care violated the state's abortion ban, they may report it to authorities.
[65] Although effective on June 25, 2024, compliance with this rule is not required until December 23, 2024, except for the applicable requirements for revising Notice of Policy Practices (as required by 45 CFR 164.520), which must be complied with by February 16, 2026.
[66] 42 U.S.C. § 164.502(a)(5)(iii). *See also HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html (content last reviewed April 22, 2024).
[67] 42 U.S.C. § 164.509. The U.S. Department of Health & Human Services (HHS) recently released a model attestation, available here: https://www.hhs.gov/sites/default/files/model-attestation.pdf.
[68] 42 U.S.C. §§ 164.509(a), 512(d)-(g)(1).
[69] 42 U.S.C. § 164.502(a)(5)(iii).
[70] 21st Century Cures Act: Interoperability, Information Blocking and the ONC Health IT Certification Program, 85 Fed. Reg. 25642 (May 1, 2020) (amending 45 C.F.R. §§ 170, 171), 21st Century Cures Act: Establishment of Disincentives for Health Care Providers That Have Committed Information Blocking, 89 Fed. Reg. 54662 (July 1, 2024) (amending 42 C.F.R. §§ 171 414, 425, 495). Not all healthcare providers are currently subject to the disincentives included in the 2024 rule. However, the Centers for Medicare & Medicaid Services (CMS) may apply disincentives to certain hospitals and merit-based incentive payment system (MIPS) eligible clinicians. The U.S. Department of Health and Human Services intends to expand disincentives to other groups of health care providers in future rulemaking.

[71] In the past year, states and the federal government have taken steps to address these vulnerabilities, specifically for abortion and gender-affirming care. Maryland and California have passed bills that restrict disclosure of abortion-related records and require EMRs to develop tools to limit or prohibit such disclosure. As these laws are implemented, the landscape for how electronic abortion records are handled may change.
[72] 1925 Tex. Crim. Stat. 1192.
[73] *Fund Tex. Choice v. Paxton*, No. 1:22-CV-859-RP (W.D. Tex. Feb. 24, 2023), ECF No. 120.
[74] Tex. Health & Safety Code § 171.061(2).
[75] Tex. Health & Safety Code § 171.063.
[76] Tex. Health & Safety Code §§ 171.064, 171.065.
[77] Tex. Health & Safety Code §§ 697.002, 697.003, 697.004.
[78] Tex. Health & Safety Code § 697.007, 697.008; 25 Tex. Admin. Code §§ 138.2; 138.3; 138.4; 138.5.