

State Abortion Laws v. EMTALA: Navigating Between a Rock and a Hard Place

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The Centers for Medicare & Medicaid Services (“CMS”) issued updated guidance on July 11, 2022, reinforcing the federal Emergency Medical Treatment and Labor Act (“EMTALA”) obligations specific to patients who come to a hospital emergency department and are pregnant or experiencing pregnancy loss.^[1] This article explores the current tensions created by the enforcement of EMTALA as compared to the enforcement of conflicting state abortion laws, and provides guidance for hospitals and providers to help navigate these difficult realities.

The CMS Guidance: The CMS press release and guidance did not revise existing EMTALA law, but it clearly reiterated CMS’s stance that “no matter where you live, women have the right to emergency care — including abortion care.”^[2] Specifically, CMS wrote to providers stating that:

The EMTALA statute requires that all patients receive an appropriate medical screening examination, stabilizing treatment, and transfer, if necessary, irrespective of any state laws or mandates that apply to specific procedures. It is critical that providers know that a physician or other qualified medical personnel’s professional and legal duty to provide stabilizing medical treatment to a patient who presents to the emergency department and is found to have an emergency medical condition preempts any directly conflicting state law or mandate that might otherwise prohibit such treatment.^[3]

CMS also specifically reminded hospitals and providers that “the determination of an emergency medical condition is the responsibility of the examining physician or other qualified medical personnel.”

An “emergency medical condition” involving a woman who is pregnant under EMTALA may include: “ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as

preeclampsia with severe features.”³ Moreover, stabilizing treatment might involve medical interventions such as “abortion, removal of one or both fallopian tubes, anti-hypertensive therapy, methotrexate therapy, etc.”

CMS reiterated that this stabilizing treatment is mandated “irrespective of any state laws or mandates that apply to specific procedures” and that the EMTALA law preempts conflicting state law.²

The Lack of Clarity Regarding What Constitutes an Emergency Medical Condition.

As reported in the Washington Post, “all abortion bans currently in effect permit providers to terminate a pregnancy to protect the life of the mother.”^[4] However, the current view is that exactly what constitutes a “life-threatening condition” under the various state laws or an “emergency medical condition” under EMTALA is unclear and complex.

As an example, a woman may be in the middle of an “incomplete” abortion, where there is still a heartbeat and the woman is bleeding and cramping. A clinician may think he or she has to wait until he or she gets additional medical or legal opinions because it is unclear whether the situation implicates EMTALA or violates state law.^[5]

American College of Obstetricians and Gynecologists CEO Dr. Maureen Philips describes the difficulties physicians face as follows: “It will leave physicians looking over our shoulders, wondering if a patient is in enough of a crisis to permit an exception to the law ... It leaves them fearing that the evidence-based care they are providing leaves them susceptible to discipline, punishment, lawsuits, loss of license and criminal penalty.”^[6]

EMTALA and State Enforcement.

CMS reiterated in its recent communications that that the Federal Government will continue to enforce EMTALA. As noted in a June 11, 2022 letter to providers, EMTALA is enforced through a complaint driven process, whereby an individual submits complaints to a state survey agency.³ If an EMTALA investigation results in findings that a hospital violated EMTALA, the hospital could be subject to not only civil monetary penalties, but it could be subject to termination from the Medicare program. Individual physicians may also face steep civil monetary penalties or exclusion from Medicare and state health care programs.

In addition, abortion laws and related penalties vary widely by state, but violation of some state laws can include significant fines, the suspension of medical licenses, and even criminal sanctions including imprisonment. For example, in Texas anyone who performs an abortion is guilty of a first-degree felony, punishable by up to life in prison and a \$10,000 fine.^[7]

Significantly, EMTALA does not prevent a hospital or physician from being sued or from being subject to various forms of state enforcement. As noted by CMS, state law may be preempted by the EMTALA law, but this preemption is a defense, not a bar, to state action or discipline. In addition, the state of Texas has already filed a lawsuit challenging EMTALA as a basis for the performance of abortions.^[8]

Compliance Actions for Hospitals and Providers to Consider.

While many of the conflicting issues arising from the EMTALA laws and state abortion laws will likely not clear up soon, there are actions hospitals and their providers can consider to help provide some clarity in the emergency room.

1. Seek Clarity on Your State's Abortion Law. Every state has different laws, with 12 states banning abortion, 2 states where the current ban has been blocked, 16 states where either a ban is expected or the right to an abortion is threatened, and 20 states plus DC allowing abortions.^[9] Thus, the most important first step for a hospital and its providers is to understand the current status of applicable state abortion laws, as well as ensuring there is a process in place for keeping track of the changing laws.

When assessing the application of EMTALA, one of the key aspects of abortion laws in your state will be the exceptions to the abortion law. As an example, South Carolina permits abortions up until embryonic or fetal cardiac activity is detected (around 6 six weeks). Thereafter, an abortion is only legally performed in the case of rape or incest if performed at less than 20 weeks, or is intended to prevent the death or the serious risk of a substantial and irreversible impairment of a major bodily function of a pregnant woman, or at any time if there is no fetal heartbeat^[10] (note that there are several lawsuits seeking to stop the abortion restrictions^[11]).

2. Review Hospital EMTALA Policies, Procedures, and Processes. Once you know the current status of the state abortion laws, the hospital and its physician staff should thoroughly review hospital EMTALA policies, procedures, and processes. This includes all aspects of EMTALA, so there is no question about the basics of EMTALA when a patient arrives at the emergency room.

3. Hold Training for Emergency Room, OB-GYN, and Other Impacted Staff and Departments. When the EMTALA policies, procedures, and processes are reviewed and updated as needed, holding training for the relevant staff and departments can help reduce confusion when an emergency presents.

4. Consider an Audit of Hospital EMTALA Compliance. In addition, if the hospital has not conducted a recent audit of its emergency room(s) and OB-GYN department(s) for compliance with EMTALA, it might be a very helpful step to conduct an audit or audits to identify improvements before questions arise during an emergency.

5. Actions by Providers. Providers including physicians are on the front line of the crisis, as "the determination of an emergency medical condition is the responsibility of the examining³ physician or other qualified medical personnel." It is therefore vital for providers to be proactive in understanding the EMTALA law and to fully participate in related training, education, and process improvement.

In addition, paying attention to what is best for the patient and then clearly documenting the medical record will help provide clarity and defenses when either EMTALA or state law is enforced. State law may also mandate specific documentation needed to support an exception to the state abortion law. As an example, South Carolina law requires physicians to make specific notations in the medical record related to the abortion performed, as well as a written declaration in the case of an abortion performed to prevent death or physical impairment, and requires this documentation be maintained in the woman's medical records and physician's

record for seven years.¹⁰

How the complex and overlapping issues involved in the convergence of federal EMTALA law and restrictive state abortion laws will resolve is unknown. However, it is clear hospitals and providers in states restricting abortion need to arm themselves with information and proactive steps to seek clarity before the inevitable emergency situations present in the emergency room.

Nexsen Pruet will be tracking changes in state law as a result of *Dobbs* that will impact health care providers. We will publish updates as the law evolves, and please let us know if Nexsen Pruet can assist you in navigating this changing regulatory landscape.

[1] Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (UPDATED JULY 2022) | CMS

[2] Following President Biden's Executive Order to Protect Access to Reproductive Health Care, HHS Announces Guidance to Clarify that Emergency Medical Care Includes Abortion Services | HHS.gov

[3] HHS Secretary Letter to Health Care Providers About Emergency Medical Care

[4] <https://www.washingtonpost.com/politics/2022/07/12/administration-clarifies-emergency-room-laws-around-abortion/>

[5] <https://ci.uky.edu/kentuckyhealthnews/2022/07/13/doctors-worry-about-vagueness-of-ky-abortion-bans-exception-for-cases-of-risk-to-womans-life-federal-officials-try-to-clarify-rules/>

[6] <https://www.koamnewsnow.com/i/ob-gyns-call-bans-on-abortion-devastating-for-womens-health/>

[7] <https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572>

[8] <https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-admin-over-its-efforts-force-abortions-texas>

[9] Tracking where abortion laws stand in every state | Roe v Wade | The Guardian

[10] https://www.scstatehouse.gov/sess124_2021-2022/bills/1.htm

[11] <https://news.bloomberglaw.com/health-law-and-business/south-carolinas-six-week-abortion-law-invalid-lawsuit-says>