3 Abortion Enforcement Takeaways 1 Year After Dobbs

By **Elena Quattrone and Sarah Hall** (June 14, 2023)

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Nearly one year ago, on June 24, 2022, the U.S. Supreme Court released its opinion in Dobbs v. Jackson Women's Health Organization, overturning Roe v. Wade — the 1973 landmark ruling that established the constitutional right to abortion.

Since the release of Dobbs, companies involved in reproductive health care and health care providers that operate in states where abortion is banned or restricted have faced a quagmire of laws and risks regarding enforcement, and with it, much uncertainty.

The risk landscape for health care providers, companies, employers seeking to provide access to services for their employees, and others affected by the Dobbs decision has not been static, but rather in flux.

Over the past year, the federal government — particularly the U.S. Department of Justice and the U.S. Department of Health and Human Services — and myriad states have introduced new legislation and issued guidance on a near-daily basis, contributing to the legal uncertainty stakeholders face in this space.

After Dobbs, state law has become the prevailing authority in setting abortion restrictions. Some states have rapidly enacted restrictive legislation and continue to contemplate their enforcement strategy, while other states have maintained their pre-Dobbs status quo, while still other states sought to enhance abortion access.

Indeed, as of June 14, there are 23 states with enforceable laws — whether trigger laws or newly enacted laws — that restrict abortion access more severely than Roe would have permitted, before the end of the second trimester.[1]

Of those 23 states, 15 states prohibit or severely restrict almost all forms of abortion with a six-week ban,[2] and nine states have bans more severe than Roe would have permitted, but still allow for abortion care if performed within the first trimester.[3]

Though most of the states that ban abortion do so via criminal laws, states such as Idaho, Oklahoma and Texas also have civil enforcement laws that can be enforced through a private right of action.

The uncertainty around abortion care enforcement has been compounded by the prosecutorial discretion enjoyed by state and local prosecutors, who may pursue bold enforcement theories motivated by elected officials, including attorneys general.

Over the past year, the legal community has watched to see what types of cases they would pursue, and the type of evidence that could be obtained to build cases against those allegedly involved in obtaining unlawful abortions.

As a result of the complex abortion care legal landscape that Dobbs triggered, stakeholders still face unprecedented uncertainty about potential enforcement risk in states that have

banned or severely restricted abortion.

With all the reactive state legislation that followed Dobbs, as well as the trigger laws that went into force when Dobbs became effective, it was initially expected that there would be an avalanche of state and local criminal enforcement activity.

And, while there has been some limited enforcement activity — and much discussion of what could be regarding state law enforcement, with threats of enforcement and litigious efforts percolating through state legislatures and the courts — we have observed three main takeaways related to abortion care enforcement one year post-Dobbs.

1. State criminal enforcement hasn't materialized as conflicting laws have deterred providers.

Since the release of the Dobbs opinion, though there has been litigation activity at the state level challenging the constitutionality of state laws that prohibit access to or delivery of abortion care, state enforcement generally has not been as active or developed as initially anticipated.

One reason for this muted enforcement against individuals, providers, and companies offering health care benefits that cover abortion care to their employees is the fact that many states' criminal statutes prohibiting or limiting abortion care are vague and overlapping, and often feature differing mens rea requirements, thus chilling and essentially stopping the regulated conduct cold.

Owing to the confusion in how to comply with these laws, deterrence has effectively been achieved. Medical providers are highly regulated as an industry and are generally risk-averse. The risk to a provider of getting swept into an investigation focused on whether their medical decision making ran afoul of the myriad anti-abortion laws is perhaps too great a risk to take.

A threat to a provider's license represents an existential threat. Hence, it should be considered that the post-Dobbs legal environment presents an unacceptable level of enforcement risk for providers, and as such, has had a chilling effect on providers themselves to the point of inaction.

For example, just recently, on May 16, North Carolina enacted S.B. 20, which bans surgical abortions after the 12th week of pregnancy, unless a limited exception applies.[4] This is in stark contrast to the state's previous ban of abortions after 20 weeks of pregnancy.

Contributing to the chilling effect on providers is that the North Carolina Legislature further mandated that providers who perform even lawful abortions under this new law must report when abortion medication is administered after 12 weeks of pregnancy, and also private information regarding the person who received the abortion, including the "woman's number of live births, previous pregnancies, and number of previous abortions," and the "woman's preexisting medical conditions, which could complicate her pregnancy."[5]

Such reporting requirements increase regulatory oversight and hence, enforcement risk. Effectively, this law is poised to chill a larger swath of legal conduct, and it is not hard to see how it might be successful.

Providers such as licensed physicians, when faced with a complex regulatory and legal scheme that criminalizes, in some cases, the practice of medicine, are unlikely to engage in

conduct that comes close to being prohibited conduct. And when the legal scheme is confusing and internally inconsistent, the least risky path is to avoid the conduct altogether — in this case, providing abortion care.

Thus, complex, confusing and often conflicting state laws regulating abortion care has deterred provider action, meaning there is little to enforce at this stage.

2. Enforcement has largely been federal, with the Biden administration leading efforts.

Although in the immediate aftermath of Dobbs, observers braced for a slew of state enforcement, it has been the federal government and the Biden administration that has stepped into the enforcement spotlight. The federal government has been the main player here, taking an aggressive approach to protecting abortion care through enforcement and other actions aimed at enhancing protections and access to reproductive health care.

For instance, in August 2022, the DOJ sued the state of Idaho[6] for declaratory and injunctive relief arguing that its near total ban on abortion[7] violated and was preempted by the federal Emergency Medical Treatment and Labor Act.

EMTALA requires that if a person with an emergency medical condition seeks treatment at a hospital emergency department that accepts Medicare funds, the hospital must provide medical treatment necessary to stabilize that condition before transferring or discharging the patient.[8]

The term "emergency medical conditions" under the statute includes patients with conditions that not only present risks to life, but that also place a patient's "health ... in serious jeopardy" or there is a risk of "serious impairment to bodily functions."

The DOJ's position in the litigation is that in some cases, the emergency stabilizing care that EMTALA requires emergency departments to provide may be considered an abortion under some state laws; however, the care must be provided, regardless of state prohibitions.

The U.S. District Court for the District of Idaho granted the DOJ's request for an injunction to prohibit the enforcement of the Idaho law to the extent it conflicts with EMTALA, pending the full litigation of the matter.[9]

In similar federal enforcement activity, HHS recently announced that the Centers for Medicare and Medicaid Services was investigating two Midwestern hospitals — Freeman Hospital West in Missouri, and the University of Kansas Health System.[10]

CMS alleges that the hospitals failed to provide a pregnant woman with necessary stabilizing care in violation of EMTALA when she presented with complications related to her pregnancy that caused her pregnancy to no longer be viable.

Though the patient faced the risk of death without treatment, the hospitals refused treatment because "the hospital policies prohibited treatment that could be considered an abortion."[11]

HHS Secretary Xavier Becerra issued a letter to hospital and provider associations in response to the incident, stressing that hospitals are "obligated to offer necessary stabilizing care to ... patients, and [HHS] will not hesitate to enforce [those] obligations under the law."[12]

Additionally, in April, HHS issued a notice of proposed rulemaking that would modify the Health Insurance Portability and Accountability Act Privacy Rule to strengthen reproductive health care privacy protections.[13]

The proposed rule would prohibit the use or disclosure of protected health information by a regulated entity for the purpose of a criminal, civil or administrative investigation. Such investigation would include the prosecution or initiating suit against an individual "seeking, obtaining, providing, or facilitating" abortion care,[14] including individuals who induce, use, perform, furnish, pay for, disseminate information about, arrange, insure, assist or otherwise take action to engage in reproductive health care.

If this proposed rule goes into effect, law enforcement, states and individuals — under various private rights of action contained in many state laws — who pursue abortion care-related enforcement activity would be extremely limited in the type of medical record evidence they could gather.

The Biden administration has demonstrated that protecting abortion care and access is a priority. However, depending on the results of the 2024 presidential election, these steps could be quickly reversed.

3. Geolocation data has emerged as a key evidentiary concern in enforcement activity.

As with any enforcement action, a case is only as strong as the evidence available to support and prove the alleged unlawful activity, and the same is true for abortion care enforcement. Accordingly, questions regarding the types of evidence that can be obtained to build a case against those allegedly involved with obtaining unlawful abortions has also garnered much attention and reaction post-Dobbs, particularly in the geolocation space.

Concerns that location data from cell phones, as well as data from individuals' health apps, internet search histories, email communications and text messages, could be obtained through search warrants and subpoenas to help prosecute unlawful abortion care are paramount and continue to raise serious alarm.

Recent activity has focused on geolocation data. In the immediate aftermath of the release of the Dobbs opinion, on July 1, 2022, Google LLC announced the various ways in which it would endeavor to protect user privacy, including implementing controls to auto-delete a user's location history after a user has visited "particularly personal" locations such as medical facilities, including abortion clinics and fertility centers.[15]

Google provided an update regarding its user privacy initiatives on May 12, restating its commitment to protect user privacy of location history. But despite these promises, various investigations by the news media and others revealed that Google has not been blacking out and deleting certain user locations consistently, and in fact, it still retains data for users who visit locations including abortion clinics.[16]

That Google has allegedly continued to track abortion-related user data in part prompted the filing of a proposed class action against Google in the U.S. District Court for the Northern District of California on May 12.[17]

The plaintiff in Doe v. Google claims that the company violated the California Invasion of Privacy Act, the California Confidentiality of Medical Information Act and the right to privacy

guaranteed by California's Constitution by deploying its tracking technology across medical providers' websites and tracking users' personal health information without authorization.

The plaintiff in the case, along with other proposed class members, used Planned Parenthood's website in 2018, which incorporated Google's tracking technology, to search for an abortion appointment. And even though the plaintiff expected the search to be confidential, the complaint alleges that Google, through its technology, unlawfully intercepted and collected sensitive information without the user's consent.

Although the activity at issue in Doe v. Google occurred in 2018, the plaintiff further asserts that Google has failed to sufficiently respond to concerns regarding the privacy of user data post-Dobbs.

This case will certainly not be the last to litigate how geolocation data may be used on the enforcement front related to abortion care. And this action demonstrates the types of evidence that may be relied on if and when future enforcement activity related to abortion care is pursued.

Conclusion

For the foreseeable future, health care providers, companies involved in reproductive health care, employers seeking to provide access to services for their employees, and others affected by the Dobbs decision will face a broad spectrum of enforcement risks that will continue to change.

Affected companies and providers will need to monitor the legal landscape consistently to assess the full scope of the currently prevailing enforcement risk.

Because many abortion-care related enforcement actions will likely present issues of first impression, intensive motion practice and appellate litigation are likely to follow.

With so many developments in this space over the last year since Dobbs, there is still seemingly just as much confusion and uncertainty regarding the future of abortion care-related enforcement as there was in the immediate aftermath of the Supreme Court's decision.

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[1] Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin* (all abortion care has stopped in Wisconsin while a case is pending in the Wisconsin Supreme Court).

[2] Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin.

[3] Arizona, Florida, Indiana (total ban enjoined), Iowa (6 week ban enjoined), Nebraska, North Carolina, Ohio (6 week ban enjoined), South Carolina (6 week ban enjoined), and Utah (total prohibition enjoined).

[4] https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S20v5.pdf.

[5] S.B. 20 § 90-21.93.

[6] https://www.justice.gov/opa/press-release/file/1523481/download.

[7] Idaho Code § 18-622.

[8] 42 U.S.C. § 1395dd.

[9] https://f.datasrvr.com/fr1/822/74681/Winmill-abortion-injunction-decision_(003).pdf.

[10] https://www.hhs.gov/about/news/2023/05/01/hhs-secretary-xavier-becerra-statement-on-emtala-enforcement.html, https://www.cnn.com/2023/05/01/health/emtala-hospital-investigation/index.html.

[11] Id.

[12] Id.

[13] https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/hipaa-reproductive-health-fact-sheet/index.html#:~:text=On%20April%2012%2C%202023%2C%20the,strengthen%20reproductive%20health%20care%20privacy.

[14] https://www.federalregister.gov/documents/2023/04/17/2023-07517/hipaa-privacy-rule-to-support-reproductive-health-care-privacy.

[15] https://blog.google/technology/safety-security/protecting-peoples-privacy-on-health-topics/.

[16] Geoffrey A. Fowler, Google Promised to Delete Sensitive Data. It Logged My Abortion Clinic Visit, WASH. POST (May 9, 2023, 11:23 AM), https://www.washingtonpost.com/technology/2023/05/09/google-privacy-abortion-data.

[17] Doe v. Google, LLC, U.S. Northern District of California, 5:23-cv-02343.