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Health Care Providers Face Uncertainty in Light of Federal District Court Split on EMTALA Preemption Regarding Emergency Abortions

By **Steven G. Pine** and **Gina L. Bertolini**

Executive Summary

After the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[1] numerous state laws restricting abortion have taken effect. Even those states with comparatively restrictive abortion laws, however, typically have exceptions allowing for abortions in certain emergency situations. The scope of these emergency exceptions vary by state, and questions have arisen as to whether more narrow state emergency exceptions are preempted by the federal requirements contained in the Emergency Medical Treatment and Labor Act (EMTALA).

The federal government, through the U.S. Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS), has laid out its position as to EMTALA preemption of state abortion laws in a 11 July 2022 memorandum issued to state survey directors (the EMTALA Memo).[2] The EMTALA Memo reinforced hospitals' obligations to provide stabilizing treatment for pregnant patients or patients experiencing pregnancy loss, and asserted that state laws purporting to limit abortion services more narrowly than provided under EMTALA are preempted.

The story does not end there, however. The scope of EMTALA's preemption of state abortion laws has been challenged in two U.S. District Courts (Idaho and the Northern District of Texas), and in preliminary injunction orders issued just a day apart from each other, the two courts reached markedly different conclusions. The immediate effect of these injunction orders is, for the time being, that the EMTALA Memo remains in effect for hospital providers in 49 states, with Texas being the sole exception.

This article summarizes the EMTALA Memo and the Texas and Idaho federal complaints, outlines each U.S. District Court decision and the current status of each case, and considers the impact on health care providers nationwide. Given the evolving judicial landscape, providers should remain vigilant in planning, documenting, and keeping track of state and federal developments. As discussed in this article, providers should consider engaging clinical teams to develop protocols for emergency abortions; review and revise applicable policies; provide education to providers, patients, and the community; and consider the benefits of establishing internal rapid response teams to address the legal, ethical, and compliance challenges that may arise.

[1] Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

[2] CMS Memo, QSO-22-22-Hospitals, Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss, (July 11, 2022, revised Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf. CMS had previously released a similar memo in September 2021, shortly after the Supreme Court denied a request for emergency injunctive relief to stay the enforcement of the Texas Heartbeat Act, which reminded hospitals of their obligations under EMTALA, irrespective of any state laws. However, it did not expressly characterize abortion as a potential stabilizing treatment, as the subsequent EMTALA Memo did. *See* CMS Memo, QSO-21-22-Hospitals, Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (Sept. 17, 2021, revised Oct. 3, 2022): https://www.cms.gov/files/document/qso-21-22-hospital-revised.pdf.

EMTALA Federal Guidance Is Issued After Dobbs

In the wake of the Supreme Court's decision in *Dobbs*, President Biden issued an executive order that, among other things, directed HHS to take action to ensure that all patients, including pregnant women and those experiencing pregnancy loss, have access to emergency medical care and further recommended HHS consider updates to current guidance regarding physician responsibilities under EMTALA.[3] Three days later, on 11 July 2022, CMS issued the EMTALA Memo, and HHS Secretary Xavier Becerra issued a letter to health care providers regarding HHS's enforcement of EMTALA in the wake of state laws that employ a more restrictive definition of "emergency medical condition" (EMC) than EMTALA.[4]

Background on EMTALA

EMTALA[5] requires hospitals to stabilize and treat any patient who "comes to an emergency department" with an "emergency medical condition," as those terms are defined in regulations implementing EMTALA, without any consideration by the hospital or its providers of the patient's ability to pay.[6] Often referred to as "reverse dumping," EMTALA requires a hospital to provide "an appropriate medical screening examination" within the hospital's capability, determine whether an EMC exists, and, if one does, either provide necessary treatment to stabilize the condition or an "appropriate transfer" to another medical facility.[7] Under EMTALA, an EMC exists when a patient's "health" is in "serious jeopardy" or the patient risks "*serious* impairment to *bodily functions*" or "*serious dysfunction* of *any* bodily organ or *part*."[8] EMTALA provides both a government enforcement mechanism and a private right of action.[9]

EMTALA and State Abortion Laws – Points of Conflict

State abortion laws that restrict or ban abortion can collide with EMTALA where, e.g., (1) they do not contain a medical emergency exception, or (2) they define medical emergency more narrowly than EMTALA. As just one example, a law previously proposed in South Carolina would have prohibited abortions after a fetal heartbeat is detected, but it contained an exception where an abortion is, by "any reasonable medical judgment," intended to prevent the death of the pregnant woman or "serious risk of a *substantial and irreversible* impairment of a *major* bodily function of the pregnant woman."[10]

The EMTALA Memo seeks to resolve this conflict by concluding that state law is preempted where it bans abortion and does not include an exception related to the life of the pregnant person or where it contains a more narrow exception than the definition of EMC under EMTALA. The EMTALA Memo reiterates that the assessment of whether an EMC exists is the responsibility of the examining physician or other

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[3] Exec. Order No. 14,076 (July 15, 2022).
[4] Letter from Secretary, U.S. Dep't of Health & Hum. Servs. (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf.
[5] 42 U.S.C. § 1395dd. EMTALA is enforced by HHS's Office of Inspector General. Enforcement mechanisms include the potential for civil monetary penalties against both a hospital and a physician (42 C.F.R. § 489.20(l)) and termination of a hospital's participation in the Medicare program (42 C.F.R. § 489.20(l)).
[6] 42 U.S.C. § 1395dd(e)(1).
[7] *Id.* § 1395dd(a),(b).
[8] *Id.* § 1395dd(e)(1)(A) (emphasis added).
[9] *Id.* § 1395dd(d).
[10] S.C. H.B. 539, One Hundred Twenty-Fourth Session General Assembly, 1st Special Session (S.C. 2022) (emphasis added). Although the South Carolina law was not enacted, other states have, or are considering, similar standards for the emergency exception to a ban on abortion.

qualified medical personnel, and a physician's professional and legal duty to provide stabilizing treatment preempts any directly conflicting state law that would otherwise prohibit such treatment. In other words, "if a physician believes that a pregnant patient presenting at an emergency department is experiencing an [EMC] as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician **must** provide that treatment."[11]

Litigation Brought in Texas and Idaho Federal District Courts Over EMTALA Preemption

Three days after CMS's release of the EMTALA Memo and HHS's issuance of the letter to health care providers, the Texas Attorney General filed a federal complaint in the Northern District of Texas (the Texas District Court) seeking a declaratory judgment that CMS and HHS were acting beyond their authority in enforcing the EMTALA Memo (the Texas Complaint).[12] The Texas Attorney General moved for preliminary and permanent injunction against enforcement of the EMTALA Memo nationwide.

Separately, approximately three weeks after the Texas Complaint was filed, the U.S. Department of Justice (DOJ) filed a motion for preliminary injunction in the District of Idaho (the Idaho District Court) seeking a prohibition on the enforcement of Idaho's abortion trigger law as applied to EMTALA-mandated care (the Idaho Complaint).[13] Idaho's abortion law, which would have become effective 25 August 2022, banned abortions and imposed criminal liability on physicians performing abortions, regardless of any medical exigencies necessitating such a procedure. A physician could avoid criminal liability by raising an affirmative defense, one of which would be that the abortion was "necessary to prevent the death of the pregnant woman."[14]

The two federal courts—one in the Northern District of Texas and the other in Idaho District Court—each ruled in favor of the plaintiff's motions, at least in part, resulting in very different outcomes regarding application of the EMTALA Memo.

First Federal District Court Ruling: The EMTALA Memo Is Enjoined in Texas

The Texas Complaint argues that the EMTALA Memo seeks to "override individual states' abortion laws under the authority of EMTALA."[15] The Texas Complaint alleges that HHS exceeded its authority and violated Texas' sovereign right to enforce its criminal laws and that the EMTALA Memo is an unconstitutional exercise of Congress's spending power, an unconstitutional delegation of legislative authority, and a violation of the Tenth Amendment.[16]

The Texas District Court recognized substantive differences between a health care provider's duty under EMTALA and the limited medical emergency exceptions under Texas law. For example, Texas law

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[11] See EMTALA Memo, *supra* note 2 (emphasis in original).
[12] Complaint, Texas v. Becerra, No. 5:22-CV-185-H (N.D. Tex. filed July 14, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/20220714_1-0_Original%20Complaint%20Biden%20Admin.pdf [hereinafter, Texas Complaint].
[13] Complaint, United States v. Idaho, No. 1:22-cv-00329-BLW (D. Idaho filed Aug. 2, 2022), https://www.justice.gov/opa/press-release/file/1523481/download.
[14] IDAHO CODE ANN. § 18-622(3)(a)(ii).
[15] Texas Complaint at 4. Two organizational plaintiffs also filed suit: (1) the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG); and (2) the Christian Medical and Dental Association (CMDA). *See* Memorandum Opinion and Order, *Texas v. Becerra*, No. 5:22-CV-185-H, 73 (N.D. Tex. Issued Aug. 23, 2022) [hereinafter Texas Order].
[16] *Id.* at 11-18.

requires an individual to currently have a "life-threatening physical condition" as a requirement of performing an abortion, whereas EMTALA considers an individual to have an EMC if lack of immediate medical attention could "reasonably be expected to result" in certain negative outcomes, i.e., the physical condition could be imminent but not necessarily immediately present.[17] In terms of severity, the Texas law requires the condition to be "life threatening," whereas EMTALA can extend to non-life-threatening situations such as "placing the health of the individual . . . in serious jeopardy," "serious impairment to bodily functions," or "serious dysfunction of any bodily organ or part."[18] In terms of likelihood, under Texas law there must be a "serious risk" of substantial impairment, whereas duties under EMTALA trigger if a negative outcome "could reasonably be expected" to occur.[19] Finally, Texas law is limited to threats to a person's "physical condition," whereas EMTALA extends to both physical and mental conditions.[20] Accordingly, the Texas District Court recognized that a health care provider's duties under EMTALA can trigger earlier, in less dire circumstances and with less certainty concerning outcome as compared to the Texas law.

Notwithstanding these distinctions, the Texas District Court identified what it saw as an internal inconsistency within the statutory language of EMTALA in situations of at-risk pregnancies. Specifically, the court noted that EMTALA's definition of EMC includes medical conditions that place an unborn child in serious jeopardy.[21] The court inferred, based on the regulatory language, an obligation of a provider to the health of the unborn child, reasoning that EMTALA contains "equal obligations" to both a pregnant woman and her unborn child. This, the court argued, creates "a potential conflict in duties that the statute does not resolve," as EMTALA "provides no instructions on what a physician is to do when there is a conflict between the health of the mother and the unborn child."[22] Accordingly, the Texas District Court found no direct conflict between EMTALA and the resolution of this issue under Texas state law and, thus, no preemption.

The Texas District Court granted Texas' request for a preliminary injunction, in part, on 23 August 2022 (the Texas Court Order). The Texas Court Order prohibits CMS from enforcing its position that EMTALA preempts Texas abortion laws and that EMTALA requires an abortion in certain circumstances.[23] The Texas District Court granted the injunction in relation to Texas law and the state of Texas, but it did not grant that portion of the state of Texas' motion that sought a nationwide injunction of the EMTALA Memo, with the exception that the injunction applies to the two named organizational plaintiffs, AAPLOG and CMDA.[24]

The Texas District Court subsequently issued an amended final judgment affirming the preliminary injunction,[25] setting the stage for the Federal Government to appeal the decision to the Fifth Circuit Court of Appeals. On March 10, 2023, the Federal Government filed its appeal of the amended final decision to the Fifth Circuit.[26]

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[17] TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2); 42 U.S.C. § 1395dd(c)(1)(A)(ii).
[18] TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2); 42 U.S.C. § 1395dd(e)(1)(A).
[19] TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2); 42 U.S.C. § 1395dd(e)(1)(A).
[20] TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2); 42 U.S.C. § 1395dd(e)(1)(A).
[21] *See* 42 C.F.R. § 489.24(b).
[22] Texas Order at 45.
[23] *Id.* at 66.
[24] *Id.* at 64–65.
[25] Amended Judgment, Texas v. Becerra, No. 5:22-CV-185-H (N.D. Tex. Issued Jan. 13, 2023).
[26] Notice of Appeal, Texas v. Becerra, No. 5:22-CV-185-H (N.D. Tex. Filed Mar. 10, 2023).

Second Federal District Court Ruling: Enforcement of Idaho's Abortion Trigger Law Is Enjoined

The Idaho Complaint arose from a complaint filed by the United States in Idaho District Court arguing that EMTALA preempts Idaho's abortion trigger law. On 24 August 2022, one day after the Texas Court Order was issued and one day before the Idaho trigger law was scheduled to go into effect, the Idaho District Court issued a preliminary injunction to prevent the Idaho law from going into effect (the Idaho Court Order).[27]

Because the Idaho Court Order assessed an Idaho state law and did not address the validity of the EMTALA Memo, the injunctions issued in Idaho and Texas arguably do not directly conflict with one another. However, the central issue before both courts concerns the scope of EMTALA preemption over state abortion laws, and the reasoning of the Idaho District Court in granting the injunction is substantially at odds with the reasoning of the Texas District Court.

The two orders start at the same place, which is that the state law at issue is in conflict with EMTALA's duty to the patient. Idaho's abortion trigger law provides, without exception, that "[e]very person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion."[28] Rather than granting exceptions, the Idaho law offers a limited affirmative defense that is available if a doctor can prove to a jury that, in the doctor's good faith medical judgment, an abortion was "necessary to prevent the death of the pregnant woman."[29]

The Idaho District Court noted that "when pregnant women come to a Medicare-funded hospital with an [EMC], EMTALA obligates the treating physician to provide stabilizing treatment, including abortion care. But regardless of the pregnant patient's condition, Idaho statutory law makes that treatment a crime."[30] The Idaho District Court found that Idaho's affirmative defense is insufficient because an affirmative defense is "an excuse, not an exception," and because "EMTALA requires abortions that the affirmative defense would not cover."[31] A physician in Idaho performing abortions during emergencies according to EMTALA standards would still be subject to "indictment, arrest, pretrial detention, and trial for every abortion they perform."[32] The Idaho District Court also concluded that the trigger law is a sufficient obstacle to the objectives of Congress in passing EMTALA by subjecting physicians to criminal investigations, indictments, arrest, and prosecution for performing abortions.

Accordingly, the Idaho District Court held that the Idaho abortion trigger law "directly conflicts" with EMTALA under the Ninth Circuit's standard of either impossibility preemption (impossible for a private party to comply with both state and federal law) or obstacle preemption (state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress).[33] Unlike the Texas District Court, the Idaho District Court did not recognize a gap in the EMTALA statute when the health of an unborn child and the patient are both at risk.

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[27] Memorandum Decision and Order, United States v. Idaho, No. 1:22-cv-00329-BLW, (D. Idaho issued Aug. 24, 2022): https://www.courthousenews.com/wp-content/uploads/2022/08/usa-vs-idaho-abortion-law-memorandum-decision-and-order.pdf [hereinafter Idaho Order].
[28] IDAHO CODE § 18-622(2).
[29] IDAHO CODE ANN. § 18-622(3)(a)(ii).
[30] *Id.* § 18-622.
[31] Idaho Order, *supra* note 25.
[32] *Id.*
[33] *Id.* (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000)).

The State of Idaho subsequently filed a Motion for Reconsideration[34] of the Idaho Court Order, citing, among other factors, the rationale expressed by the Texas District Court in its Order filed the day before the Idaho Court Order. As of the publication of this article, that Motion for Reconsideration remains outstanding. In addition, the Idaho Legislature has moved to intervene in the case.[35] The Idaho District Court denied[36] that intervention Motion, and the Idaho Legislature has filed an interlocutory appeal of that denial to the Ninth Circuit Court of Appeals.[37]

Impact on Health Care Providers

Given these federal court decisions, health care providers are faced with continued uncertainty. The U.S. government has appealed the Texas Court Order to the Fifth Circuit Court of Appeals, and it is likely that the state of Idaho will appeal the Idaho Court Order once the interlocutory intervention issues are resolved. It is certainly possible that tension between states and the United States will continue for some time, possibly leading to review by the U.S. Supreme Court.

For the United States' part, HHS continues to stand behind the EMTALA Memo, and one day after the Idaho Court Order, sent a letter to state governors (except Texas) reiterating its continued intent to enforce EMTALA in states with conflicting abortion laws.[38] HHS's letter noted that HHS has received "many reports of individuals who have had medically necessary care denied or delayed on the basis of state abortion restrictions," including possible violations of EMTALA. HHS stated that it would investigate reports or complaints regarding an EMTALA violation and "will not hesitate" to refer states attempting to prohibit providers from offering the emergency care consistent with EMTALA to the DOJ "to take appropriate legal action."[39]

For providers, a difficult path remains. A number of states have abortion laws now in effect that appear to conflict with EMTALA. Navigating this path requires careful attention to state and federal developments, advance planning, and vigilant documentation. We recommend that hospitals, health systems, and providers consider the following steps to ensure patient and provider safety and otherwise mitigate risk:

- While not every type of EMC can be projected in advance, engage appropriate clinical teams to consider what conditions constitute a medical emergency and outline clinical protocols and policies in advance. Note that the EMTALA Memo outlines various conditions involving pregnant persons that may constitute EMCs.
- Ensure systems are in place for timely and thorough documentation when exceptions apply.
- Create and revise policies that outline legal, reporting, notice, and other requirements under relevant state laws and EMTALA, including parameters related to exceptions, waiting periods, informed consent, and treatment of minors.
- Educate health care providers, patients, and the community, and consider developing educational materials in consultation with legal counsel, professional boards (e.g., Board of Medicine, Board

[34] Motion for Reconsideration, United States v. Idaho, No. 1:22-cv-00329-BLW (D. Idaho filed Sept. 7, 2022).
[35] Motion to Intervene, United States v. Idaho, No. 1:22-cv-00329-BLW (D. Idaho filed Oct. 4, 2022).
[36] Memorandum Decision and Order, United States v. Idaho, No. 1:22-cv-00329-BLW (D. Idaho issued Feb. 3, 2023).
[37] Notice of Appeal, United States v. Idaho, No. 23-35153 (9th Cir., filed Mar. 2, 2023).
[38] Letter from Xavier Becerra, Secretary, & Chiquita Brooks-LaSure, Administrator, CMS, to Governors (Aug. 26, 2022), https://www.hhs.gov/sites/default/files/hhs-letter-to-governors-reproductive-health-care.pdf.
[39] *Id.*

of Nursing), state attorneys general and governors' offices, and relevant community organizations.

- Consider legal, risk management, compliance, and ethics rapid-response teams; identify areas of patient and provider risk; and develop safety plans, clinical algorithms, and access-to-care pathways.

K&L Gates will continue to monitor state and federal laws regarding abortion services and their impact on EMTALA and will provide updates as this issue unfolds.