



U.S. Department of Justice
Civil Division

Office of the Assistant Attorney General

Washington, DC 20044

July 29, 2022

The Honorable Brad Little
Governor of Idaho
Office of the Governor
State Capitol
PO Box 83720
Boise, ID 83720

The Honorable Lawrence G. Wasden
Attorney General
Office of the Attorney General, Idaho
700 W. Jefferson Street
P.O. Box 83720
Boise, ID 83720-0010

Dear Governor Little and Attorney General Wasden:

Federal law requires hospitals that receive Medicare funds to provide stabilizing treatment to anyone who enters an emergency room suffering from a medical emergency. This critical health protection has assumed new urgency in light of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which dramatically curtailed women's access to reproductive care by eliminating the established federal constitutional right to abortion. Idaho's near-absolute ban on abortion directly conflicts with federal law.

Once it takes effect on August 25, 2022, Idaho Code § 18-622 will make it a felony to perform an abortion in all but extremely narrow circumstances. Under the new law, a prosecutor can subject a physician to indictment and arrest merely by showing that an abortion has been performed, without regard to the circumstances. The law then puts the burden of establishing an "affirmative defense" on the physician, and it narrowly circumscribes the defenses available. A physician can avoid criminal liability only by establishing that "the abortion was necessary to prevent the death of the pregnant woman" or that, prior to performing the abortion, the pregnant patient (or, in some circumstances, her parent or guardian) reported an "act of rape or incest" against the patient to a specified agency and provided a copy of the report to the physician. The law provides no health exception.

Idaho's abortion ban will thus prevent doctors from performing abortions even when a doctor determines that abortion is the medically necessary treatment to prevent a severe threat to the patient's health. This law, which will have severe consequences for pregnant individuals in Idaho, directly conflicts with federal law.

The Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, provides that, if a person seeks treatment at an emergency room associated with a hospital enrolled in Medicare, and the person has an “emergency medical condition,” then the hospital must provide medical treatment necessary to stabilize that condition before transferring or discharging the patient. The definition of “emergency medical condition” includes any condition that, absent immediate medical attention, could reasonably be expected to place the patient’s health in serious jeopardy. Accordingly, where a physician determines that the necessary stabilizing treatment is an abortion—such as where a woman is suffering from complications of an inevitable pregnancy loss or preeclampsia—EMTALA requires that the hospital, through its physicians, provide this care.¹ Because Idaho’s law would impose criminal liability on the providers in this circumstance, it directly conflicts with EMTALA and thus is preempted to the extent of that conflict.

The United States has a paramount interest in ensuring that individuals in need of critical reproductive care are able to access the services available under the federal Medicare program. Pursuant to §§ 1-10.100 and 4-6.240 of the Justice Manual, I hereby provide notice that the Department of Justice intends to initiate litigation against the State of Idaho and to seek declaratory and injunctive relief preventing your law from interfering with the operation of federal law. Should you wish to identify facts or issues relevant to whether the United States should file an action, please do so no later than August 1, 2022.

Sincerely,

Brian M. Boynton
Principal Deputy Assistant Attorney General

¹ See also Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (QSO-21-22-Hospitals-UPDATED JULY 2022), available at <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurvey/certificationgeninfo/policy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0>