



Idaho Abortion Law Update: Recent Legislation and Pending Litigation

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Written Resources

- Idaho Code 18-601 *et seq.*, <https://legislature.idaho.gov/wp-content/uploads/statutesrules/idstat/Title18/T18CH6.pdf>
- Idaho Code 18-8801 *et seq.*, <https://legislature.idaho.gov/wp-content/uploads/statutesrules/idstat/Title18/T18CH88.pdf>
- *Planned Parenthood v. Idaho*, Nos. 49615, 49817, 49899 (Idaho 1/5/23) (“SCt Opinion”), <https://isc.idaho.gov/opinions/49615xxx.pdf>
- *Planned Parenthood v. Labrador*, No. 1:23-cv-00142-BLW (D. Idaho 7/31/23), https://www.hollandhart.com/webfiles/Memorandum_Decision_and_Order_123-cv-00142-BLW.pdf

Written Resources

- Stanger, *Idaho's Amended Abortion Laws: Summary and Updated FAQs*, <https://www.hollandhart.com/idahos-amended-abortion-laws-summary-and-updated-faqs>
- Stanger, *Idaho Abortion Laws: Idaho Supreme Court Upholds Laws but Offers Important Clarifications*, <https://www.hollandhart.com/idaho-abortion-laws-idaho-supreme-court-upholds-laws-but-offers-important-clarifications>
- Stanger, *Referrals for Out-of-State Abortions: New Idaho Decision*, <https://www.hollandhart.com/referrals-for-out-of-state-abortions-new-idaho-decision>
- McCue, *EMTALA Exception to Idaho's Abortion Law Is in Effect for Now*, <https://www.hollandhart.com/emtala-exception-to-idahos-abortion-law-is-in-effect-for-now>

Status of Idaho Abortion Laws



Status of Idaho Abortion Laws

- Idaho has always limited abortions.
 - Laws dating back to territorial days make most abortions a crime.
- 1973: *Roe v. Wade*, 410 U.S. 113 (1973)
 - U.S. Constitution contains a fundamental right to privacy which protects a woman's right to an abortion during the first and potentially second trimester.
 - States may not regulate abortions in a manner inconsistent with the U.S. Constitution.

Status of Idaho Abortion Laws

Over years, Idaho enacted different abortion statutes in response to *Roe v. Wade*.

- 1973: Abortions limited per trimester (IC 18-605, -608)
- 1998: Partial birth abortion ban (IC 18-613)
- 2011: 20-week “pain capable” abortion ban (IC 18-505)
- 2015: Chemical abortion ban (IC 18-617)
 - Authorized private cause of action (IC 18-618)
- **2020: Total abortion ban (IC 18-622)**
 - Triggered if Supreme Court overturns *Roe v. Wade*
- **2021: Fetal heartbeat (6-week) ban (IC 18-8804)**
 - Triggered if federal court upholds similar law.
- **2022: Fetal heartbeat ban (IC 18-8804) amended:**
 - **Authorized Texas-style private cause of action for family (IC 18-8807)**
 - Criminal penalties superseded if total abortion ban takes effect.

Portions held to be unconstitutional, some laws conflict or overlap, or had different triggering statutes, but laws were not repealed.

Status of Idaho Abortion Laws

- *Dobbs v. Jackson Women's Health Organization*, 597 U.S. _____ (2022)
 - U.S. Constitution does not confer a right to abortion.
 - States may regulate abortion.
- In Idaho, dormant and overlapping laws became effective, and laws that were previously unconstitutional but still on the books sprang back to life:
 - Total abortion ban (18-622).
 - Fetal heartbeat (6-week) ban (18-8801 *et seq.*):
 - Criminal penalties (18-8805) to the extent not preempted by total abortion ban.
 - Civil liability law (18-8807).
 - Pain capable (20-week) ban (18-501 *et seq.*)?
 - Abortion requirements (18-601 *et seq.*)?
 - Partial birth abortions ban (18-613)?
 - Chemical abortion ban (18-617 and 18-618)?

Probably effective to the extent consistent with IC 18-622 and 18-8807.

Status of Idaho Abortion Laws

- *Planned Parenthood v. Idaho*, No. 49615 (Idaho 1/5/23) (“SCt Opinion”).
 - Upholds total abortion ban, fetal heartbeat (6-week) ban, and civil liability law.
 - Did not address other related laws.
- 2023 legislature
 - Amended total abortion ban, IC 18-622.
 - Did not amend fetal heartbeat ban, IC 18-8801 et seq.
 - Enacted abortion trafficking law, IC 18-623.

Total Abortion Ban (IC 18-622)



Total Abortion Ban

PROHIBITS

- Abortion of **clinically diagnoseable pregnancy** by any person unless
- Assisting in performing abortion.
- Exceptions if abortion performed by physician and:
 - **Necessary to prevent death of mother** + perform in manner to give fetus best chance to survive unless doing so would increase risk to mother.
 - **Rape or incest** + physician receives copy of police report.

(IC 18-622(2)-(3))

PENALTIES

- Performing or attempting abortion:
 - Felony
 - 2 to 5 years in prison
- Performing, attempting or assisting abortion:
 - 1st offense: suspension of license for at least 6 months
 - Subsequent offense: permanent revocation of license.

Total Abortion Ban “Abortion”

- “Abortion” means “use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child.”
- Does not include
 - Use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization or the implantation of a fertilized ovum within the uterus.
 - Removal of an ectopic or molar pregnancy.
 - Removal of a dead unborn child.

(IC 18-604(1))

Total Abortion Ban: “Clinically Diagnosable Pregnancy”

- “Pregnancy” means “the reproductive condition of having a **developing fetus** in the body and commences with fertilization.”

(IC 18-604(11), emphasis added)

- “For purposes of the Total Abortion Ban, the only type of ‘pregnancy’ that counts for purposes of prohibited ‘abortions’ are those where the fetus is ‘developing[.]’... [B]ecause a fetus must be ‘developing’ to fall under the definition of ‘pregnancy’ in § 18-604(11), non-viable pregnancies (i.e., where the unborn child is no longer developing) are plainly not within the definition of ‘abortion’ as criminalized by the Total Abortion Ban (I.C. § 18-622(2)).”

(SCt Opinion at p.88)

Total Abortion Ban: EMTALA Exception



Emergency Medical Treatment and Active Labor Act (EMTALA)

- If person comes to hospital with a dedicated emergency department seeking care, hospital must provide:
 - Emergency medical screening exam,
 - Stabilizing treatment for emergency conditions, and/or
 - Appropriate transfer of unstabilized person.
- Participating hospital with specialized capabilities must accept transfer of unstabilized person unless on diversionary status.
- Cannot delay exam or treatment to inquire about payment.

(42 USC 1395dd; 42 CFR 489.20(r) and 489.24)

EMTALA

If person comes to hospital seeking care, hospital must provide and appropriate medical screening exam. By qualified medical person,

- Within hospital capability, and
- Sufficient to determine if patient has emergency medical condition, i.e. (a) absence of care seriously jeopardizes health, or (b) pregnant woman in labor.

No emergency medical condition or admitted as inpatient

Yes emergency medical condition

EMTALA ends; hospital may transfer or discharge patient, but may still be liable for malpractice

Stabilizing treatment

- Transfer: emergency condition resolved
- Discharge: may receive care later with instructions

or

Appropriate transfer

- Consent or physician certifies benefits > risk; and
- Stabilizing treatment,
- Receiving facility accepts transfer,
- Use appropriate means to transfer, and
- Send records.

EMTALA

- “Emergency medical condition” = a medical condition ... such that the absence of immediate medical attention could reasonably be expected to result in—
 - 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,
 - Serious impairment to bodily functions, or
 - Serious dysfunction of any bodily organ or part.

(42 USC 1395dd(e)(1); 42 CFR 489.24(b))

- HHS: emergency medical conditions “may include, but are not limited to: ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.”

(CMS QSO-22-22-Hospitals (7/1/2022 as rev'd 8/25/22))

Total Abortion Ban: EMTALA Exception

- *United States v. Idaho*, No. 1:22-CV-00329 (D. Idaho 8/24/22)
 - EMTALA preempts Idaho abortion laws to the extent there is a conflict.
 - Preliminary injunction prohibits enforcement of Idaho’s total abortion ban to the extent EMTALA applies, *i.e.*,
 1. Pregnant woman comes to hospital or hospital-based urgent care center seeking emergency care.
 2. Woman or child has an emergency medical condition.
 3. Abortion is necessary to stabilize the emergency medical condition.
 4. Pregnant woman is not or has not been admitted as inpatient or begun outpatient course of treatment.

(DCt Order; 42 USC 1395dd; 42 CFR 489.24; CMS, State Operations Manual Appendix V – Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases (Rev. 7/19/19)

Total Abortion Ban: EMTALA Exception

- As defined by the District Court, abortion must be “**necessary to avoid**”
 - “(i) ‘**placing the health of**’ a pregnant patient ‘**in serious jeopardy**’;
 - “(ii) a ‘**serious impairment to bodily functions**’ of the pregnant patient; or
 - “(iii) a ‘**serious dysfunction of any bodily organ or part**’ of the pregnant patient....”

(DCt Order at p.39; *see also* 42 CFR 489.24(b))

- HHS: “[t]he course of treatment necessary to stabilize [an] emergency medical conditions is also under the purview of the physician or other qualified medical personnel. Stabilizing treatment could include medical and/or surgical interventions (e.g., methotrexate therapy, dilation and curettage (D&C), removal of one or both fallopian tubes, anti-hypertensive therapy, etc.)”

(CMS QSO-22-22 at p.4)

Clearly document this in record!

Total Abortion Ban: EMTALA Exception

- May 2023 – District Court denies State’s motion to reconsider preliminary injunction ruling
- September 28, 2023 – Ninth Circuit Panel grants Idaho Legislature’s motion to stay pending appeal
 - Finds EMTALA does *not* preempt Idaho Code 18-622
- October 10, 2023 – Ninth Circuit grants DOJ’s petition for en banc review and vacates panel decision
- November 20, 2023 – State of Idaho petitions U.S. Supreme Court for review

Total Abortion Ban: EMTALA Exception

- EMTALA ends (*i.e.*, the EMTALA exception no longer applies) once the patient is:
 - Admitted as an inpatient, or
 - The emergency medical condition is stabilized.

(42 CFR 489.24(a)(1)(ii); CMS QSO-22-22-Hospitals (7/1/2022 as rev'd 8/25/22) at p.5)

- Generally, may not rely on EMTALA exception to perform an abortion on an inpatient.
- District Court's injunction does not apply to:
 - Non-EMTALA cases.
 - The fetal heartbeat (6-week) ban, including:
 - Criminal penalties (IC 18-8805); or
 - Civil liability (IC 18-8807).

Fetal Heartbeat (6-Week) Ban (IC 18-8801 *et seq.*)



Fetal Heartbeat (6-Week) Ban

- Any person who intends to perform or induce an **abortion** must determine if there is any **fetal heartbeat** except in a medical emergency.

(IC 18-8803)

- "Abortion" means "the use of any means to intentionally terminate the **clinically diagnosable pregnancy** of a woman with knowledge that the termination ... will, with reasonable likelihood, cause the death of the preborn child."

- Does not include the use of an IUD or birth control pill to inhibit or prevent ovulations, fertilization, or the implantation of a fertilized ovum.

- *Definition differs from "abortion" in the total abortion ban.*

- "Fetal heartbeat" means "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."

(IC 18-8802)

Fetal Heartbeat (6-Week) Ban

- Person may not perform an abortion when a fetal heartbeat has been detected except if:
 - “**Medical emergency**”, *i.e.*, abortion necessary to avert
 - **Death of pregnant woman**, or
 - **Substantial and irreversible impairment** of a major bodily function of pregnant woman; or
 - **Rape or incest** and prior to performance of abortion, the woman or parent/guardian:
 - **Reported the act of rape or incest** to law enforcement or child protective services, and
 - **Provided a copy of the report to the physician** who is to perform the abortion.

(IC 18-8804)

Fetal Heartbeat (6-Week) Ban

CRIMINAL PENALTIES

- Performs or induces abortion:
 - Felony
 - 2-5 years in prison
- Performing, including or assisting in abortion:
 - 1st offense: suspension of license for at least 6 months
 - Subsequent offense: permanent revocation of license.
- Criminal penalties superseded by total abortion ban if total abortion ban is effective.

(IC 18-8805)

CIVIL LAWSUIT

- Mother, father, sibling, grandparent, or aunt/uncle of child may sue provider for:
 - \$20,000 statutory damages;
 - Actual damages; and
 - Costs and attorney fees.

(IC 18-8807(1))

- \$20,000 statutory damages is the minimum for compensatory damages, not additional penalty.

(SCt Opinion at p.98-99)

Fetal Heartbeat (6-Week) Ban: “Medical Emergency”

- "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy
 - To avert her death, or
 - For which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(IC 18-8801(5))

- Objective standard, *i.e.*, what a reasonable physician would do.
- “This standard ... requires the physician to exercise ‘reasonable medical judgment’ when determining whether the medical condition of the pregnant mother necessitates an abortion ‘to avert’ her death or avoid a ‘serious risk of substantial and irreversible impairment of a major bodily function.’”

(Sct Opinion at p.96)

Other Abortion Civil Liability Statutes

- Other Idaho statutes allow for civil lawsuits arising from abortion, including violations of:
 - 20-week abortion ban (IC 18-508),
 - Partial birth abortion ban (IC 18-618(3)), and
 - Chemical abortion statute (IC 18-618(1))
- It is not clear whether the civil liability statute in IC 18-8807 supersedes all of these or whether they may still apply.

Aiding, Abetting, or Assisting in Abortion



Assisting, Aiding or Abetting an Abortion

TOTAL ABORTION BAN (IC 18-622)

- Licensed professional who assists in prohibited abortion:
 - 1st offense: license suspended for 6 months
 - Subsequent offense: licensed permanently revoked.

(IC 18-622(2))

- *Limited to licensed professionals.*
- *No criminal penalties identified.*

ACCOMPLICE OR ACCESSORY (IC 18-606(1))

- Accomplice or accessory who aids in abortion in violation of 18-605:
 - Felony
 - Prison 1 to 5 years.

(IC 18-606(1))

- *But 18-605 superseded by 18-622; 18-606 does not mention 18-622.*
- *18-622 likely supersedes 18-606?*

Idaho Abortion Law: Assisting an Abortion

- In March 2023, AG Labrador wrote a letter in which he concluded, “[a]n Idaho health care professional who refers a woman across state lines to an abortion provider or who prescribes abortion pills for the woman across state lines has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute.” (<https://www.courthousenews.com/wp-content/uploads/2023/04/labrador-idaho-opinion-letter.pdf>).
- In July 2023, the federal district court entered preliminary injunction blocking the AG from enforcing that interpretation. (*Planned Parenthood v. Labrador*, Case No. 1:23-cv-00142(BLW), Memorandum Decision at p.55).
- August 15, 2023 – court declines to stay of preliminary injunction order pending appeal to the Ninth Circuit

Assisting, Aiding or Abetting an Abortion

AIDING AND ABETTING

- “All persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense or aid and abet in its commission, or ... have advised and encouraged its commission ... are principals in [the] crime”

(IC 18-204)

- “Aid and abet” means to “assist, facilitate, promote, encourage, counsel, solicit or incite the commission of a crime.”

(IC 18-240)

- *Arguably, legislature intended to limit liability for aiding and abetting by restricting 18-622 to licensed professionals who assist in the surgery.*

Assisting, Aiding or Abetting an Abortion

- “[N]o hospital, nurse, or other health care personnel shall be deemed in violation of [18-606] if in good faith providing services in reliance upon the directions of a physician or upon the hospital admission of a patient for [an abortion] on the authority of a physician.”

(IC 18-606(2))

- *But not clear if this is still effective given:*
 - *It refers to a violation of 18-605, which was superseded by 18-622.*
 - *18-622 subjects licensed professionals to adverse licensure action for assisting an abortion.*

Assisting, Aiding, or Abetting an Abortion

Unlikely a provider would be prosecuted for:

- Advising patient of care options, including possibility of obtaining an abortion in other state where abortion is legal.
- Counseling, transferring, or providing records to facilitate a lawful abortion in other state where abortion is legal.
- *But no guarantees...*

Rationale

- *Idaho requires informed consent, including info re treatment options. (See IC 18-604(8) and 39-4506)*
- *Provider is not aiding or abetting a crime if abortion is legal where it is performed, e.g., in state where abortion is legal.*
- *Prosecuting a person for actions performed in another state where actions are legal raises constitutional concerns.*

Idaho Abortion Trafficking Law



Idaho Abortion Trafficking Law

- Prohibits recruiting, harboring or transporting a pregnant minor within Idaho to obtain an abortion (including an abortion out-of-state) with the intent to conceal the abortion from the parent or guardian.
- Affirmative defenses:
 - Parental or guardian consent
 - Not the fact that the abortion provider is in another state.
- Penalties:
 - 2 to 5 years in prison.

(IC 18-623)

Abortion Trafficking

- *Matsumoto et al v. Labrador*, No. 1:23-CV-00323-DKG
 - July 11, 2023 – Plaintiffs sue AG Labrador under 42 U.S.C. 1983 raising four claims challenging Idaho Abortion Trafficking Law
 - November 8, 2023 – District Court grants Plaintiffs’ Motion for Preliminary Injunction
 - Enjoins AG Labrador from enforcing Trafficking Law
 - “Plaintiffs have shown a likelihood of success on the merits of their First Amendment claim” because Trafficking Law is **facially overbroad and not narrowly tailored to serve a compelling government interest.**
 - “Plaintiffs have shown a likelihood of success on their Fourteenth Amendment claim that the statute **fails to provide a reasonable person with fair notice of what conduct is forbidden and what activities are lawful, and allows for arbitrary enforcement.**”
 - November 22, 2023 – AG Labrador files Notice of Appeal

Questions?

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