



Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

Idaho Abortion Law: The Limited EMTALA Exception

Insight — August 26, 2022

UPDATE: On September 28, 2023, the Ninth Circuit Court of Appeals stayed the federal district court of Idaho's preliminary injunction that enjoined enforcement of Idaho's criminal abortion ban in EMTALA cases. The net effect is that Idaho's criminal abortion ban now applies even in EMTALA cases except (1) if the abortion is necessary to save the life of the mother or (2) in the case of rape or incest if certain conditions are met. See *United States v. Idaho*, No. 23-35440 (9th Cir. 2023), attached. Refer to our October 2 Health Law Update, "No More EMTALA Exception to Idaho's Total Abortion Ban," for additional information.

Idaho's total abortion ban took effect August 25, 2022. Under the statute, abortion of a clinically diagnoseable pregnancy is illegal unless necessary to save the life of the mother or in the case of rape or incest. (Idaho Code 18-622). On August 24, 2022, the Federal District Court of Idaho issued a preliminary injunction prohibiting enforcement of the total abortion ban to the extent it conflicts with the Emergency Treatment and Active Labor Act ("EMTALA"). (Memorandum Decision and Order, *United States v. State of Idaho*, Case No. 1:22-cv-00329-BLW, available [here](#)). The net effect is that, when EMTALA applies, a physician may perform an abortion if necessary to preserve the health of the pregnant woman, not just to save her life. With that said, it is important to understand the limited scope of the EMTALA exception.

Limits on the EMTALA Exception. EMTALA and the abortion ban exception only apply if the following circumstances are satisfied:

1. The pregnant woman comes to a hospital's emergency department seeking emergency care.¹ (42 USC 1395dd(a)). EMTALA regulations generally define the hospital's emergency department broadly to include a hospital's licensed emergency department, other hospital-owned facilities on the hospital campus, and a hospital's off-campus provider-based departments that offer emergency-type services, e.g., urgent care centers or perhaps labor and delivery centers.² EMTALA does not apply outside the hospital or hospital-based department setting and, accordingly, neither does the EMTALA exception to the total abortion ban. Consequently, the EMTALA exception would not apply to a physician performing an abortion in a clinic that is not part of a hospital or hospital-based.
2. The woman has an "emergency medical condition," i.e.,
 1. a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of

immediate medical attention could reasonably be expected to result in—

- a. 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,
 - b. serious impairment to bodily functions, or
 - c. serious dysfunction of any bodily organ or part; or
2. with respect to a pregnant woman who is having contractions—
- a. that there is inadequate time to effect a safe transfer to another hospital before delivery, or
 - b. that transfer may pose a threat to the health or safety of the woman or the unborn child.

(42 USC 1395dd(e)(1); 42 CFR 489.24(b)). According to HHS, “[e]mergency medical conditions involving pregnant patients 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) at p.4, available here).

3. The abortion is necessary to stabilize or resolve the emergency medical condition.³ As defined by the District Court of Idaho, the 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, pursuant to 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii).

(Memorandum Decision and Order at p.39). Physicians and hospitals relying on the EMTALA exception should clearly document in the medical record the facts that support such a determination.

4. The patient has not been admitted as an inpatient, at least according to EMTALA regulations. Under the regulations, “[i]f the hospital admits the individual as an inpatient⁴ for further treatment, the hospital's obligation under [EMTALA] ends....” (42 CFR 489.24(a)(1)(ii)).

Exception: Application to inpatients.

1. If a hospital has screened an individual ... and found the individual to have an emergency medical condition, and admits that individual as an inpatient in good faith in order to stabilize the emergency medical condition, the hospital has satisfied its special responsibilities under [EMTALA] with respect to that individual.
2. [EMTALA] is not applicable to an inpatient who was admitted for elective (nonemergency) diagnosis or treatment.
3. A hospital is required by the conditions of participation for hospitals under part 482 of this chapter to provide care to its inpatients in accordance with those conditions of participation.

(42 CFR 489.24(d)(2)). Assuming the regulatory interpretation applies to

the EMTALA exception, then EMTALA and the EMTALA exception end and the total abortion ban resumes once a hospital admits a pregnant woman in good faith as an inpatient. This would appear to be consistent with HHS's guidance to hospitals, which affirms that "[a] hospital's EMTALA obligation ends when ... the individual is stabilized or admitted to the hospital for further stabilizing treatment." (QSO-22-22-Hospitals at p.5). Furthermore, if applied consistent with the EMTALA regulations, the EMTALA exception would not apply if the emergency condition develops after the patient was admitted as an inpatient.⁵ (See 42 CFR 489.24(d)(2)(ii)). Also, EMTALA would end not only for the admitting hospital, but also all hospitals to which the patient is subsequently transferred: by admitting the patient, the sending hospital cuts off its own EMTALA obligations as well as any EMTALA obligations of any receiving facilities. (42 CFR 489.24(f)(2)). By extension, it is likely that the EMTALA exception to the total abortion ban would also not apply to hospitals that receive the transfer of an inpatient.

5. Hospitals Receiving Transfers. If a participating hospital has specialized capabilities, EMTALA requires that it accept the transfer of an emergency patient from a sending hospital so long as the patient was not admitted as an inpatient at the sending hospital. (42 CFR 489.24(f)). Accordingly, the EMTALA exception to the total transfer ban would apply to hospital physicians who receive the transfer of a pregnant woman with an emergency medical condition that has not been stabilized so long as the patient was not admitted as an inpatient at the sending hospital.

Further Proceedings. The Federal District Court of Idaho's injunction is preliminary: the Court may modify or terminate it depending on how the case proceeds in Idaho. In the meantime, a federal district court in Texas reached a contrary conclusion: on August 22, 2022, the Texas court enjoined HHS's enforcement of its guidance on EMTALA and abortions. (See Memorandum Opinion and Order, *State of Texas v. Becerra*, 5:22-CV-185-H (N. Dist. Tex. 2022), available [here](#)). Although the Texas decision is not binding in Idaho, it increases the chances that the scope of the EMTALA exception may ultimately be decided at the federal appellate court level. For now, however, hospital physicians in Idaho may perform abortions that are necessary to stabilize an emergency medical condition within the scope of the EMTALA exception.

For additional information regarding Idaho's abortion laws, please refer to our recent client alert, *Idaho Abortion Laws: New Law and EMTALA Exception Now Effective*. We will continue to monitor changes in Idaho's abortion laws and provide updates accordingly.

¹Under the EMTALA regulations,

Comes to the emergency department means, with respect to an individual who is not a patient (as defined in this section), the individual –

(1) Has presented at a hospital's dedicated emergency department,

as defined in this section, and requests examination or treatment for a medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs examination or treatment for a medical condition;

(2) Has presented on hospital property, as defined in this section, other than the dedicated emergency department, and requests examination or treatment for what may be an emergency medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs emergency examination or treatment;

(3) Is in a ground or air ambulance owned and operated by the hospital for purposes of examination and treatment for a medical condition at a hospital's dedicated emergency department, even if the ambulance is not on hospital grounds....; or

(4) Is in a ground or air nonhospital-owned ambulance on hospital property for presentation for examination and treatment for a medical condition at a hospital's dedicated emergency department....

(42 CFR 489.24(b)).

Hospital property means the entire main hospital campus as defined in § 413.65(b) of this chapter, including the parking lot, sidewalk, and driveway, but excluding other areas or structures of the hospital's main building that are not part of the hospital, such as physician offices, rural health centers, skilled nursing facilities, or other entities that participate separately under Medicare, or restaurants, shops, or other nonmedical facilities.

(*Id.*). EMTALA only applies to hospitals that participate in Medicare. (42 USC 1395cc(aa)(1)(I); 42 CFR 489).

²Under the EMTALA regulations, a hospital's emergency department generally includes:

any department or facility of the hospital, regardless of whether it is located on or off the main hospital campus, that meets at least one of the following requirements:

(1) It is licensed by the State in which it is located under applicable State law as an emergency room or emergency department;

(2) It is held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical

conditions on an urgent basis without requiring a previously scheduled appointment; or

(3) During the calendar year immediately preceding the calendar year in which a determination under this section is being made, based on a representative sample of patient visits that occurred during that calendar year, it provides at least one-third of all of its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.

(42 CFR 489.24(b)).

³If a patient has an emergency medical condition, EMTALA requires that the hospital provide either stabilizing treatment or an appropriate transfer. (42 USC 1395dd(b)(1)). Under EMTALA,

(A) The term “to stabilize” means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term “stabilized” means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(42 USC 1395dd(e)(3)). According to CMS's Interpretive Guidelines, “[t]o be considered stable the emergency medical condition that caused the individual to seek care in the dedicated ED must be resolved, although the underlying medical condition may persist.” (CMS, State Operations Manual Appendix V – Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases (7/19/19) at Tag A-2407/C-2407)).

⁴According to the EMTALA regulations,

Inpatient means an individual who is admitted to a hospital for bed occupancy for purposes of receiving inpatient hospital services as described in § 409.10(a) of this chapter with the expectation that he or she will remain at least overnight and occupy a bed even though the situation later develops that the individual can be discharged or transferred to another hospital and does not actually use a hospital bed overnight.

(42 CFR 489.24(b)). Per the Interpretive Guidelines,

Individuals who are placed in observation status are not inpatients, even if they occupy a bed overnight. Therefore, placement in an observation status of an individual who came to the hospital's DED does not terminate the EMTALA obligations of that hospital or a recipient hospital toward the individual.

(Interpretive Guidelines at Tag A-2407).

⁵According to the EMTALA Interpretive Guidelines,

If an inpatient develops an EMC, the hospital is required to meet the patient's emergency needs in accordance with acceptable standards of practice. The hospital CoPs protects patients who are admitted, and the hospital may not discharge or transfer any patient to another facility inappropriately. The protective CoPs are found at 42 CFR Part 482.

(Interpretive Guidelines at Tag A-2407)

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