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No More EMTALA Exception to Idaho's Total Abortion Ban

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The Ninth Circuit Court of Appeals has ended the EMTALA exception to Idaho's total abortion ban, I.C. 18-622.

In 2022, the US Department of Justice (DOJ) sued the state of Idaho, claiming that EMTALA preempted the total abortion ban in emergency cases. The federal district court of Idaho entered a preliminary injunction staying Idaho's enforcement of its total abortion ban in EMTALA cases pending final resolution of the case. (See our August 26, 2022, Health Law Update.) However, on September 28, 2023, the Ninth Circuit overruled the district court, holding that an intervening decision by the Idaho Supreme Court and Idaho's amendment to the total abortion ban in 2023 mitigated, to a large extent, the concerns raised by the district court. Accordingly, the Ninth Circuit stayed the district court's injunction, thereby ending the EMTALA exception to the total abortion ban pending a final decision in the district court case. A copy of the Ninth Circuit decision may be accessed [here](#).

The DOJ has filed a motion requesting en banc reconsideration of the Ninth Circuit panel's decision; we will have to see how that plays out. In the meantime, the net result is that, in Idaho, abortions of clinically diagnoseable pregnancies are illegal unless (1) necessary to prevent the death of the mother, or (2) in the case of rape or incest after the rape or incest has been reported to the police. (I.C. 18-622). As recently amended, the total abortion ban does not apply to termination of an ectopic pregnancy. Also, as interpreted by the Idaho Supreme Court, the total abortion ban does not prohibit the termination of nonviable fetuses. (See our January 11, 2023, Health Law Update.)

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