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Supreme Court Restores the EMTALA Exception to Idaho's Abortion Ban for Now

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On June 27, 2024, the United States Supreme Court temporarily restored the Emergency Medical Treatment and Labor Act (EMTALA) exception to Idaho's abortion ban. As a result, Idaho hospitals may perform abortions in EMTALA cases when necessary to preserve the health of the pregnant woman.

How We Got Here. In 2022, the United State Department of Justice (DOJ) brought a lawsuit challenging Idaho's abortion statute in cases in which EMTALA applies. In August 2022, the federal District Court of Idaho entered a preliminary injunction that prohibited Idaho from enforcing its broad abortion ban in EMTALA cases pending resolution of the DOJ's lawsuit. (See Order, available here: https://f.datasrvr.com/fr1/822/74681/Winmill-abortion-injunction-decision_(003).pdf). Idaho appealed to the 9th Circuit, which first lifted then restored the preliminary injunction. Idaho then sought immediate relief from the United States Supreme Court, which agreed to take the case and stayed the District Court's injunction. However, last week, the Supreme Court changed its mind and, in a per curiam decision, concluded that it had improvidently agreed to take the case and sent the matter back to the lower courts for further proceedings. In so doing, the Supreme Court vacated its order staying the District Court injunction, thereby restoring the injunction, which effectively, if temporarily, allows Idaho hospitals to perform abortions in EMTALA cases. A copy of the Supreme Court's decision is available here: https://www.supremecourt.gov/opinions/23pdf/23-726_6jgm.pdf.

The Net Effect for Now. Under the District Court's injunction, the EMTALA exception to Idaho's abortion ban only applies if the circumstances trigger EMTALA. To trigger EMTALA, the following circumstances are satisfied:

1. The pregnant woman comes to a hospital's emergency department seeking emergency care. (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. EMTALA does not apply outside the hospital or hospital-based department setting and, accordingly, neither does the EMTALA exception. 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.,

> (A) 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—
>
> > (i) 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,
> > (ii) serious impairment to bodily functions, or
> > (iii) serious dysfunction of any bodily organ or part; or
>
> (B) with respect to a pregnant woman who is having contractions—
>
> > (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
> > (ii) 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 the Department of Health and Human Services (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).

3. The abortion is necessary to stabilize or resolve the emergency medical condition. As defined by the District Court, 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).

(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 inpatient for further treatment, the hospital's obligation under [EMTALA] ends…." (42 CFR § 489.24(a)(1)(ii)).

> **Exception: Application to inpatients.**
> (i) 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.
> (ii) [EMTALA] is not applicable to an inpatient who was admitted for elective (nonemergency) diagnosis or treatment.
> (iii) 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 in a manner consistent with the EMTALA regulations, the EMTALA exception would not apply if the emergency condition develops after the patient was admitted as an inpatient. (*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.

Watch for Further Proceedings. The Supreme Court's decision was issued without a clear majority consensus on the merits so it is difficult to assess how this will play out. Idaho hospitals and the nation will have to monitor further proceedings at the lower courts and on appeal as the case continues. For now, however, the EMTALA exception is back in force, at least until the next turn in this twisting road.
