

Modern Healthcare

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Supreme Court abortion draft creates tangle of issues for big hospital systems

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Multistate systems would have to navigate a confusing patchwork of state laws that pose an array of legal and ethical dilemmas.

Striking down Roe v. Wade would disrupt healthcare providers' operations and increase their legal liability, lawyers and policy experts said.

A draft opinion of the Supreme Court, obtained by Politico and released Monday night, shows a majority of justices have voted to overturn Roe v. Wade, the landmark 1973 case that upheld the constitutional right to get an abortion. Chief Justice John Roberts confirmed the authenticity of the draft Tuesday morning, but clarified that the document isn't a final position. A formal opinion from the court is expected by late June.

If Roe v. Wade is overturned, health systems, hospitals, physician groups and clinics that work across state lines would have to navigate a confusing patchwork of state laws that pose an array of legal and ethical dilemmas. Multistate organizations may wind down some obstetrics services as a result, limiting access and reducing the already relatively low quality of maternal care.

"It is going to create significant confusion among providers, especially those who work in multiple jurisdictions," said Mark Silberman, chair of the white collar, government investigations and regulatory practice compliance group at the law firm Benesch.

With no Roe v. Wade, abortion laws would be determined by states. Thirteen states have "trigger bans" that would effectively outlaw abortion pending a Supreme Court decision overturning Roe v. Wade, according to the Guttmacher Institute, a pro-choice research group. Nine states still have pre-1973 abortion bans on the books that are not enforced. Another 16 states and the District of Columbia have laws protecting abortion rights.

Health systems with hospitals in multiple states would have to adjust their policies from state to state, said Greer Donley, an assistant law professor at the University of Pittsburgh and expert on reproductive healthcare law.

Whether health systems can refer or transfer patients to their hospitals in other states for abortions would depend on specific state laws, Donley said. A bill introduced but not passed this year in Missouri would allow private citizens to sue anyone who helps a state resident receive an abortion, even if it takes place out of state.

If the bill and others like it pass, "they could create liability, and that would make it really complicated and hard for hospital systems to know what to do," Donley said.

Overturning Roe v. Wade could have a chilling effect on discussions between providers and patients, Silberman said.

"The downstream consequences this could have regarding other fundamental rights and their impact on healthcare is overwhelming," he said. "If the decision comes down as expected, there

will be a flurry of litigation and legislation that will follow in the wake of this that is going to yield an extended period of uncertainty."

Physician training on abortion practices may also differ from state to state if national abortion rights are overturned. Currently, all obstetrics and gynecology residency programs must provide access to abortion training.

But nearly 45% of OB-GYN residency programs are located in states likely or certain to ban abortion, according to a study published last week in *Obstetrics & Gynecology*. Out of 6,007 current OB-GYN residents, 2,638 would likely not get access to in-state training on how to perform an abortion, the study found.

Outside of access issues, scrapping *Roe v. Wade* would increase providers' legal exposure and inflate healthcare costs.

Hospitals in states that prohibit abortions may violate the Emergency Medical Treatment and Labor Act if they do not treat a pregnant woman who can only be stabilized by terminating the pregnancy, said William Horton, a partner at the law firm Jones Walker.

"The other issue that suggests itself: In a state which says that a fetus is a person from the moment of conception, would the state have EMTALA obligations to the fetus separate from those it owes to the mother? I think the answer has to be no," he wrote in an email. "But I'm not sure that a state like Alabama would necessarily accept that and might still prosecute the hospital under the state's abortion restrictions."

Donley said EMTALA should preempt state law but she's heard anecdotal evidence from Texas that there's "total confusion" about how the state's own abortion restrictions and EMTALA interact.

When Texas passed a law [severely restricting abortion access](#) in September, the U.S. Health and Human Services Department released guidance reminding hospitals of their responsibility to provide patients stabilizing treatment or a transfer to another facility to provide that treatment under the law. Hospitals cannot cite state law as the basis for transferring a patient, HHS said.

Additionally, abortion providers often have licenses in multiple states, a major advantage for them under the current law, especially in the era of telehealth. The Food and Drug Administration in December [tossed a requirement](#) that abortion pills be prescribed in person.

But states outlawing abortion could theoretically punish providers for performing the procedure even if they do so in states where the procedure is legal, Donley said.

"Many physicians are understandably really worried about the fact that if their license is revoked or a disciplinary action is taken against them in Texas, that has serious consequences for their medical malpractice insurance and their ability to practice in all 50 states," Donley said.

President Joe Biden's administration will have little recourse to maintain abortion rights if *Roe v. Wade* is overturned, said Katie Keith, a Georgetown University law professor and policy consultant.

"No one should be looking to the Biden administration to save abortion rights on its own. It'll sit with Congress and the courts," she said.

HHS Secretary Xavier Becerra said in an interview Tuesday the department is stressing that abortion remains legal across the country.

"Right now, we're telling everyone, you have the right to receive abortion services, contraception services, and don't hesitate to make use of it. Until you hear otherwise, we're gonna offer you the services and we'll do everything to protect your rights to get that care," Becerra said.

Biden released a statement Tuesday morning affirming his commitment to a person's right to choose whether they get an abortion.

The U.S. House of Representatives passed a bill last fall codifying abortion rights, but the Senate has been unable to come up with the 60 votes necessary to pass it.

If abortion rights aren't codified into federal law, more women would give birth in the U.S., which has disproportionately high maternal mortality rates and related costs, compared with other industrialized nations.

The U.S. maternal mortality rate has increased from 17.4 deaths per 100,000 live births in 2018 to 23.8 in 2020, according to the latest [data](#) from the Centers for Disease Control and Prevention. Black mothers are more than twice as likely to die than white mothers.

The U.S. maternal mortality rate is the highest among industrialized countries. Most other high-income countries have fewer than 9 deaths per 100,000 live births, the healthcare research firm Commonwealth Fund found. Health complications stemming from childbirth drain at least \$32.3 billion from the U.S. economy over a six-year span, the fund's [analysis](#) showed. Mental health issues are the biggest cost driver.

Inline Play

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