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What overturning *Roe v. Wade* could mean for health care providers

Daily Briefing

Monday's Supreme Court draft opinion leak has experts considering the confusing patchwork of different state reproductive care laws providers may need to navigate if the decision becomes final.

May 17: Maternal and reproductive health market trends for 2022

Background

The opinion, authored by Justice Samuel Alito and marked as a first draft dated in February, relates to *Dobbs v. Jackson Women's Health Organization*, a case currently before the court that challenges a Mississippi law banning abortions after 15 weeks.

The Supreme Court verified the draft opinion's authenticity on Tuesday, but said it does not represent the court's final view.

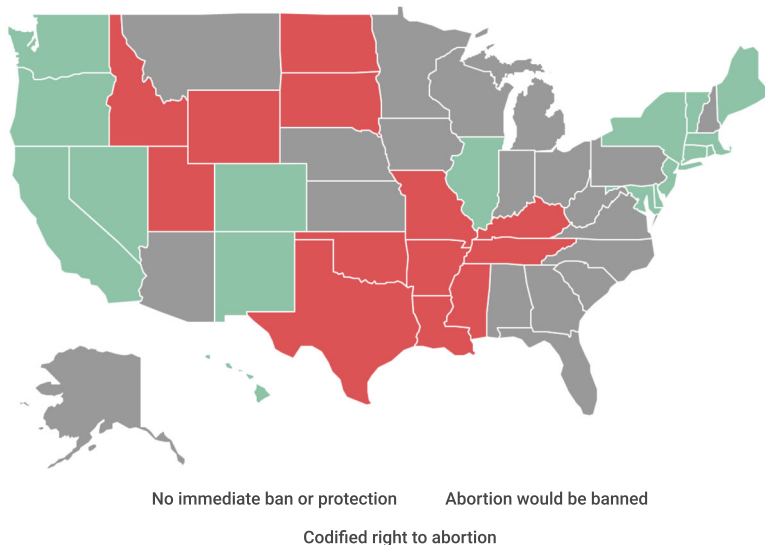
The draft opinion says that states can make their own decision on whether abortion should be legal. "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion," it says. "*Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."

The court's final decision is expected by the end of June or early July.

A potential patchwork of state abortion laws

If the court overturns *Roe v. Wade*, the legality of abortion access will be left up to the states. According to the **Guttmacher Institute**, 26 states are certain or likely to either ban or severely restrict abortion access if *Roe* is overturned, including 13 states that have passed abortion bans that will take effect immediately if *Roe* is overturned, also known as "trigger laws."

Meanwhile, at least 17 states and the Washington, D.C. have codified the right to an abortion even if the Supreme Court overturns *Roe*.



Source: Axios

According to Elizabeth Nash, a lead state policy analyst for the Guttmacher Institute, at least nine states have abortion bans from before *Roe v. Wade* was decided still on the books, but those laws wouldn't automatically take effect even if the court overturns the decision.

"It would take some kind of action," Nash said, like an attorney general issuing an opinion or a state filing a court case.

Providers may face confusing care situations

If the court overturns *Roe*, health care providers, hospitals, and health systems will be faced with a confusing situation, said Mark Silberman, chair of the white collar, government investigations and regulatory practice compliance group at the law firm **Benesch**.

"It is going to create significant confusion among providers, especially those who work in multiple jurisdictions," he said.

According to Greer Donley, an assistant law professor at the **University of Pittsburgh** and an expert on reproductive health care law, multistate hospitals and health systems would have to adjust their abortion policies based on their location.

In addition, whether a health system can refer or transfer a patient from one state to another would also depend on the states' abortion laws, Donley added. For example, a bill introduced in Missouri would allow private citizens to sue a person who helps a Missouri resident receive an abortion, even if out of state.

If bills like that become law, "they could create liability, and that would make it really complicated and hard for hospital systems to know what to do," Donley said.

Abortion providers often have licenses in multiple states, *Modern Healthcare* reports. But according to Donley, states that make abortion illegal could punish providers who perform abortions, even in states where it's legal.

Hospitals in states where abortion is prohibited may also potentially violate the Emergency Medical Treatment and Labor Act (EMTALA) if they don't treat a pregnant woman who needs to have her pregnancy terminated in order to be stabilized, according to 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 said. "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."

According to Donley, EMTALA should preempt state law, but she claims she has heard anecdotal evidence that there's "total confusion" in Texas about how the state's abortion law interacts with EMTALA.

Overturing *Roe* could also affect how providers and patients interact more generally, 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." (Gonzalez, *Axios*, 5/3; Varney, *Kaiser Health News*, 5/3; Goldman/Kacik, *Modern Healthcare*, 5/3)

Maternal and reproductive health market trends for 2022

Tuesday, May 17 | 1 p.m. ET

After several years defined by the pandemic, maternal and reproductive care has changed in important ways. Join Advisory Board's Jinia Sarkar and Gabriela Marmolejos to learn:

- Our growth forecasts for maternal and reproductive health care
- The most important trends affecting the specialty
- How key trends will impact cross-industry stakeholders



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