

[Considerations regarding Interstate Travel for Abortion Services Post-Dobbs](#)

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On June 24, 2022, through a decision and ruling in [Dobbs v. Jackson Women's Health Organization, 2022 U.S. LEXIS 3057 \(S. Ct. June 24, 2022\)](#), the Supreme Court overturned [Roe v. Wade, 410 U.S. 113 \(1973\)](#), eliminating the federal standard protecting the right to abortion and returning the regulation of abortion to the states. Post-*Dobbs*, state leaders have made varying determinations regarding access to abortion. Indeed, some states have banned access to abortion completely while others have maintained some access to abortion. This article presents an overview of considerations regarding interstate travel for abortion services, including proposals to expand Medicaid to further protect access to abortion care for individuals residing in states with the most restrictive abortion bans, and a breakdown of legal and logistical barriers for providers of abortion services in restrictive states.

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For discussion of related reproductive health issues after *Dobbs*, see [The Impact of State Laws Criminalizing Abortion](#) and [Medication Abortion, Telemedicine, and Dobbs—Key Considerations for Healthcare Providers](#).

For the status of abortion laws in each of the 50 states and the District of Columbia, see [State Abortion Laws Tracker After Dobbs v. Jackson Women's Health Organization](#). For more information on the *Dobbs* decision and its impact on healthcare, as well as on other areas of law, like employee benefits, insurance, labor and employment, and tax, see [Dobbs v. Jackson Women's Health Organization Resource Kit](#).

Securing Access to Reproductive and Other Healthcare Services

On July 8, 2022, President Biden issued an [Executive Order](#) (EO) on Protecting Access to Reproductive Healthcare Services. Although this order has yet to be fully implemented, and therefore has yet to create easier pathways for people to travel across state lines for abortions, it is nonetheless worth monitoring given what it has already accomplished.

Presidential Directive to Secretary of Health and Human Services

The EO directs the Secretary of Health and Human Services (HHS) to consider action to advance access to reproductive healthcare services. Included in the EO is access to reproductive healthcare through Medicaid for patients who travel out of state for reproductive healthcare services. During the August 3, 2022, [White House Press](#)

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[Briefing](#) by Press Secretary Karine Jean-Pierre, the White House clarified that the EO would allow the Secretary of HHS to "invite states to apply for Medicaid waivers to allow them to provide reproductive healthcare to women who live in states where abortions are banned." In other words, the EO would allow HHS to "leverage Medicaid to support patient care for those living in states with abortion bans."

Specifically, per the EO, the HHS Secretary must submit a report to the President that, among other items, identifies potential actions: "(A) to protect and expand access to abortion care, including medication abortion; and (B) to otherwise protect and expand access to the full range of reproductive healthcare services, including actions to enhance family planning services such as access to emergency contraception." The HHS Secretary issued its [report](#) on August 26, 2022, outlining the actions HHS will take "to protect and expand access to abortion care . . . nationwide." Notably, the report provides that CMS will "work with states to advance access to reproductive [healthcare], including to the extent permitted by federal law, through Medicaid for patients traveling across state lines for medical care."

Potential Alternatives to Abortion-Related Travel

The HHS Secretary created a [website](#) that lays out patients' rights to contraception and shares links to abortion options.

Abortion Services in Cases of Emergency

Notably, the HHS website provides that, under the [Emergency Medical Treatment and Labor Act \(EMTALA\)](#), hospitals are required to provide any individual presenting to an emergency room with an emergency medical condition stabilizing medical care necessary to save the individual's health or life, including abortion care. Boiled down, if an individual is experiencing a medical emergency, under EMTALA, an abortion is a viable option if medically necessary.

Medication Abortion Services

Alternatively, medication abortion may be another option to interstate travel for abortion-related services. Abortion via medication has been approved by the U.S. Food and Drug Administration (FDA) since 2000 as a safe and effective option. Federal regulation permits medication abortion to be dispensed by telehealth and sent by mail via certified prescribers and pharmacies.

[Planned Parenthood](#) reports that medication abortion can cost up to \$750, but states that price is dependent on where an individual resides, insurance, and which health center the medication comes from. If an individual is able to fund a medication abortion, ordering such medication online for delivery is another option for those who live in states where abortion remains legal after Dobbs.

For example, the online healthcare provider [HeyJane](#) provides virtual abortion care, including prescription and shipment of abortion pills, for those that live in California, Colorado, Illinois, New Jersey, New Mexico, New York, and Washington. There are financial aid opportunities and no barriers for those with immigration concerns.

That said, it is unclear how an individual in a state like Texas, for example, where abortion is prohibited, might access medication abortion services from a provider like HeyJane, when HeyJane does not provide care to states other than those listed. For that matter, because HeyJane does not provide services to all states where abortion remains legal, it is equally unclear how citizens of those states could access HeyJane's services.

Federal laws, discussed herein, might loosen the barriers for abortion medication delivery.

States Funding Abortions under Medicaid

Federal law mandates that state Medicaid programs provide coverage for pregnant women. 42 U.S.C. § 1396a. The so-called Hyde Amendment, first passed in 1976, [Pub. L. No. 94-439](#), § 209, as an amendment to a federal

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appropriations bill, bans states from using federal Medicaid dollars to pay for abortions except in cases where the life or physical health of the pregnant woman would be endangered if the fetus is carried to term or if the pregnancy is the result of rape or incest. Each state can decide to use their **state** Medicaid funding to cover more abortions than those scenarios acceptable under the Hyde Amendment. See, e.g., [Preterm, Inc. v. Dukakis, 591 F.2d 121 \(1st Cir. 1979\)](#). Per the [Kaiser Family Foundation](#) (KFF), currently 16 states provide state funding for abortions through the use of state Medicaid funds under broader circumstances than federal Medicaid. The 16 states that provide more expansive state funding for abortions under Medicaid are:

1. Alaska	9. Minnesota
2. California	10. Montana
3. Connecticut	11. New Jersey
4. Hawaii	12. New Mexico
5. Illinois	13. New York
6. Maine	14. Oregon
7. Maryland	15. Vermont
8. Massachusetts	16. Washington

Essentially, no matter the state an individual is in, abortion is covered under federal Medicaid if pregnancy was the result of rape or incest or endangers the life of the pregnant woman. However, if an individual qualifies for health insurance through state Medicaid in the above-referenced states, she is able to receive covered abortion services in medical situations that are more expansive than life endangerment or rape or incest. These 16 states provide funds through state Medicaid for all or most medically necessary abortions. As noted by KFF, each state defines medical necessity differently and each state dictates its own requirements.

Medicaid coverage between states does not transfer under all circumstances. [42 C.F.R. § 431.52](#). However, if a woman needs emergency healthcare, the state she is traveling to must provide coverage. Additionally, Medicaid regulations and [guidance](#) provide four situations in which a state must provide out-of-state coverage:

- 1 A medical emergency
- 2 The beneficiary's health would be endangered if required to travel to state of residence
- 3 Services or resources are more readily available in another state –and–
- 4 It is general practice for recipients in a particular locality to use medical resources in another state

Accordingly, patients traveling across state lines with state Medicaid coverage may be able to receive coverage for their out-of-state abortions. The abortion could be deemed a medical emergency per criterion (1) above. Alternatively, under criterion (3) above, abortion services could be more readily available in the state to which the person wishes to travel. For example, if Jane receives state Medicaid in Texas, and Jane wants to seek an abortion, she can travel to New Mexico and likely receive coverage through Medicaid under criteria (1) or (3).

Proposed Federal Legislation Addressing Abortion-Related Travel

While states are divided on the issue, federal lawmakers have introduced several bills to provide federal relief to women seeking abortion services in states with restrictions, and those who must travel across state lines to obtain abortions. Examples are as follows.

H.R. 8297: Ensuring Access to Abortion Act of 2022

On July 15, 2022, the House passed the [Ensuring Access to Abortion Act of 2022, H.R. 8297](#), which prohibits any person acting under state law from:

- Restricting a healthcare provider from providing abortion services that are lawful in the state to a patient who is not a resident of that state, or restricting any person from assisting a healthcare provider from offering such services

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- Restricting any person's ability to travel across a state line to obtain an abortion that is lawful in the state in which the service is provided, or restricting a person's ability to assist another in traveling across state lines for the purposes of obtaining a lawful abortion –and–
- Restricting the movement via interstate commerce of any drug approved or licensed by the FDA for the termination of a pregnancy

The Ensuring Access to Abortion Act of 2022 also contains a private right of action for any person harmed by a violation of the law for declaratory and injunctive relief, compensatory damages (including for economic losses and for emotional pain and suffering), and reasonable attorney's fees and costs. At the time of this article's preparation, the Senate had not yet voted on H.R. 8297.

H.R. 8452: Reproductive Health Travel Fund Act of 2022

The [Reproductive Health Travel Fund Act of 2022, H.R. 8452](#), introduced on July 20, 2022, attempts to provide further protections for interstate travel for abortion by establishing a program through HHS that would award grants to eligible entities to pay for abortion-related expenses and provide logistical support for individuals in accessing abortion services. The statute would appropriate \$300,000,000 for each fiscal year between 2023 through 2027. While the grant money will not cover the costs of the abortion services, it will be permitted to cover costs associated with round trip travel to the location where the abortion services are provided, as well as lodging, meals, childcare, translation services, doula care, and patient education and information services.

Entities eligible for funding under the Reproductive Health Travel Fund Act of 2022 include nonprofit organizations or community-based organizations that assist individuals seeking an abortion through programs, services, or activities that are unbiased and medically and factually accurate. Entities that discourage individuals from seeking abortion services would be excluded from the grant program. At the time of this article's preparation, this bill had been introduced in the House but had not been voted on.

H.R. 8296: Women's Health Protection Act of 2022

On July 15, 2022, the House also passed the [Women's Health Protection Act of 2022, H.R. 8296](#). This Act may indirectly reduce the number of people forced to travel across state lines to seek abortion services. The Women's Health Protection Act of 2022 is designed to protect a healthcare provider's ability to provide abortion services and promote access to abortion services by offering a host of safeguards including, but not limited to, protections against:

- Limitations on a healthcare provider's ability to provide abortion services via telemedicine
- Limitations on a healthcare provider's ability to provide immediate abortion services when that healthcare provider believes, based on the good-faith medical judgment of the provider, that delay would pose a risk to the patient's health
- A requirement that a healthcare provider offer or provide the patient seeking abortion services medically inaccurate information in advance of or during abortion services
- A requirement that, prior to obtaining an abortion, a patient make one or more medically unnecessary in-person visits to the provider of abortion services or to any individual or entity that does not provide abortion services –and–
- A prohibition on abortion at any point or points in time prior to fetal viability, including a prohibition or restriction on a particular abortion procedure

The Women's Health Protection Act of 2022 would also provide a private right of action for any individual or entity against any state or government official that violates the law. The act would also permit a healthcare provider to commence an action for relief on its own behalf, on behalf of the provider's staff, and on behalf of the provider's patients. At the time of this article's preparation, the Senate had not yet voted on H.R. 8296.

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More to Come

As states and the federal government continue to change abortion laws, it is important to stay up to date on what is currently available and any potential legal consequences. As private health insurance is state regulated, seeking any medical services outside of an insurer's network can be difficult, and oftentimes costly, since many policies do not offer nationwide networks. While many private insurance plans do cover some out-of-network emergency services, the landscape of out-of-network abortion services is unclear. For residents of states with the most restrictive abortion bans, private insurance companies may wonder how to treat abortion coverage for services performed out-of-network in cases where the physical health of the pregnant woman is endangered, or a pregnancy was the result of rape or incest. While the three proposed pieces of legislation discussed above appear to propose safeguards and additional resources to allow interstate travel for abortion, they do not appear to supersede or target the extent of private insurance abortion services coverage.

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