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# Academic Health Focus

## Post-Roe Governance Considerations for Academic Medical Centers

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**The U.S. Supreme Court *Dobbs* decision,<sup>1</sup> which ended the federal constitutional right to an abortion set forth in *Roe v. Wade*,<sup>2</sup> has had a profound immediate effect on the healthcare delivery system.** By leaving the issue of constitutional and statutory abortion rights to the states, the extent of abortion and other reproductive rights has now become a patchwork quilt, and, in many states, these rights are now unclear and evolving.

### **All Hospitals and Health Systems Are Affected, including AMCs**

For hospitals and health systems overall, including academic medical centers (AMCs) and academic health systems, the post-*Roe* reality has raised numerous and difficult legal questions about service delivery, operations, and finances.<sup>3</sup> These issues, which often have ethical, moral, health equity, and mission implications, should be evaluated thoughtfully at the governance level with advice from legal counsel.

### ***Delivery of Abortion Services***

For hospitals in numerous jurisdictions, current or future state law may disallow some, all, or most pregnancy termination services. Hospitals in these jurisdictions should take a thoughtful position on any adjustment of abortion services, and communicate this position to the community, patients, medical staff, and employees. If abortion services are being curtailed, the board should evaluate health equity and access considerations as part of this position development.

This position needs to clearly articulate the hospital's policy regarding pregnancy termination in the event the life or safety of the mother requires pregnancy termination. The governing board, in consultation with legal counsel, should consider this issue

1 *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022).

2 410 U.S. at 113 (1973).

3 Kathryn Peisert, Todd Sagin, and Kimberly Russel, "The Reversal of *Roe v. Wade*: Implications for Healthcare Boards," *BoardRoom Press*, The Governance Institute, August 2022.

from the perspective of EMTALA<sup>4</sup> as well as state law. Federal authorities have taken the position that the federal EMTALA law requires hospitals to provide emergency abortion services under certain circumstances regardless of conflicting state law.<sup>5</sup>

For hospitals in states that continue to be more permissive in allowing abortions, it will be important to anticipate a rise in demand from out-of-state patients and, for these patients, to project the possibility of future law enforcement inquiry or action from the patient's home jurisdiction. Boards should also analyze this projected demand from financial and mission perspectives.

### ***Fertility Treatment***

As states reach legal determinations related to abortion rights and limitations, questions are being raised about the legal status of a fetus, an embryo, and other human reproductive tissue and biological matter. For all hospitals providing fertility treatment, it will be important to anticipate possible future legal challenges to these treatments. For AMCs in particular, sophisticated fertility treatments, and the potential storage of large numbers of embryos and other human reproductive biological matter, may require a more comprehensive post-*Roe* plan.<sup>6</sup> And, as discussed below, AMC-hosted clinical research related to infertility treatment also may be adversely affected.

### ***Gender Confirmation and Other Potentially Impacted Services***

The *Dobbs* decision is limited to abortion rights and may have direct corollary legal consequences related to embryos, fetuses, and other human reproductive biological matter. However, certain states are also becoming more critical of health service entitlements for transgender and homosexual patients and may have focused concern for access to related health services for minors.<sup>7</sup> Boards should consider whether any current hospital service lines need to be monitored as vulnerable. In conducting this evaluation, related mental health services should be included.

4 Emergency Medical Treatment & Labor Act of 1986, 42 U.S.C. 1395dd.

5 Lowell Brown, Gayland Hethcoat, and Jill Steinberg, "[Which Law Should Emergency Departments Follow? DOJ Sues Idaho Over Conflict Between EMTALA and State Abortion Restrictions](#)," ArentFox Schiff, August 8, 2022; Lowell Brown, et al., "[CMS Guidance on EMTALA and Abortion Raises New Issues for Hospital Emergency Services](#)," ArentFox Schiff, July 28, 2022.

6 NYU Law, "[A Q&A with Melissa Murray on the Dobbs Decision's Impact on Assisted Reproductive Technology](#)," September 27, 2022; see also Jiang Changchuan, et al., "[Dobbs v. Jackson and Access to Fertility Care among Newly Diagnosed Adolescents and Young Adults with Cancer in the USA](#)," *The Lancet*, October 1, 2022 (discussing potential adverse impact of *Dobbs* decision on access to fertility care among newly diagnosed cancer patients).

7 Brian Lyman, "[Alabama Attorney General Uses Dobbs Decision to Defend Transgender Medicine Ban](#)," *Montgomery Advertiser*, June 29, 2022.

## ***Minor Patients***

Some states historically have had heightened parental consent requirements for minor abortion procedures, with corresponding exceptions to state confidentiality protections.<sup>8</sup> Post-*Roe*, some states are likely to impose increased limitations on access by minor patients to abortion, fertility treatment, gender confirmation treatment, and other related service lines.

## ***Privacy and Data Requirements***

There is significant uncertainty regarding the potential conflict between HIPAA and state healthcare confidentiality laws on one hand, and state civil and criminal laws prohibiting abortion services on the other. Although patients historically could be assured that pregnancy termination medical records would be protected from disclosure by covered entities, that may be called into question in some states. While HHS issued guidance seeking to clarify continuing privacy protections under HIPAA after the *Dobbs* decision,<sup>9</sup> there likely will be continued debate about the interplay between federal and state privacy protections. In addition, certain hospital data is not HIPAA-protected, but nevertheless may reveal information that could be used to prosecute anti-abortion state laws.<sup>10</sup> Hospital boards should work with legal counsel to consider these federal and state privacy laws.

### **→ Key Board Takeaways**

- All hospitals and health systems face a range of business, mission, and legal issues in the wake of the *Dobbs* decision, ranging from permitted scope of reproductive health services to privacy and data requirements. These issues need to be assessed under state law.
- AMCs and academic systems also need to consider medical education and residency training program accreditation implications, along with clinical research program issues, emanating from *Dobbs*.
- For AMC and academic system governing boards, it is important to ensure that all of these issues are being addressed by senior management and that any “mission critical” ramifications are evaluated at the governance level.

8 Guttmacher Institute, “[Parental Involvement in Minors’ Abortions](#),” November 1, 2022.

9 HHS, “[HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care](#).”

10 Edward Helmore, “[Tech Companies in Spotlight as U.S. Abortion Ruling Sparks Privacy Threat](#),” *The Guardian*, July 2, 2022; Connor Perrett, “[Internet History, Texts, and Location Data Could All Be Used as Criminal Evidence in States Where Abortion Becomes Illegal Post-Roe, Digital Rights Advocates Warn](#),” *Insider*, June 24, 2022.

## **AMCs May Be Impacted in Unique Ways**

AMCs, in addition to being affected by all the issues discussed above, also have medical education, residency training, and clinical research as core activities. For AMC and academic health system boards, these issues need to receive focused post-*Roe* attention.

### ***Medical Education and Residency Training Programs***

A recent study found that about 45 percent of U.S. residency programs are in states likely to ban abortion. This same study predicted that only 56 percent of obstetrics and gynecology residents would have access to abortion training post-*Roe*.<sup>11</sup> For AMCs located in these abortion-averse states, there may be a decline in applications into OB/GYN residency programs. The AMCs and medical schools themselves will need to make clear decisions about reproductive medical education and residency training. Over time, this may extend into infertility treatment and contraception training.

For ACGME-accredited residency programs, it will be imperative to adhere to accreditation standards. Newly adopted ACGME standards for obstetrics and gynecology residency programs, while continuing to require resident clinical experience with provision of abortions, now require residency programs in restrictive states to ensure residents have access to required training in states where the procedure is still legal.<sup>12</sup> For residency programs located in jurisdictions where abortion is illegal, “support” must be provided for the out-of-state training experience. This support, depending upon the circumstances, may be financial, logistical, or educational. In contrast, the LCME, which accredits medical schools, has not yet prescribed specific content in a medical school curriculum.<sup>13</sup>

### ***Clinical Research***

All AMCs where clinical research is conducted need to implement a post-*Roe* assessment to determine if any research needs to be discontinued or modified. As part of this process, strong guidance should be given to Institutional Review Boards (IRBs) and researchers. While this analysis clearly needs to focus on reproductive health, pregnancy, fertility, contraception, fetal, and gender identity research, it also should extend more broadly to any research that may test for pregnancy or utilize human reproductive tissue.

11 Kavita Vinekar, et al., “Projected Implications of Overturning *Roe v. Wade* on Abortion Training in U.S. Obstetrics and Gynecology Residency Programs,” *Obstetrics & Gynecology*, August 2022.

12 *ACGME Program Requirements for Graduate Medical Education in Obstetrics and Gynecology*, Revised September 17, 2022.

13 Liam Knox, “Studying Medicine in a Post-*Roe* America,” Inside Higher Ed, July 7, 2022.

While the plethora of clinical research issues in a post-*Roe* world are vast, AMC boards should consider the many potential ways in which research may be impacted, for example, including:

- State governments, including law enforcement agencies, may seek to access research data that includes pregnancy-related information. Pharmaceutical research that tests for pregnancy throughout the clinical trial may create record of data that states may wish to access in future anti-abortion law enforcement efforts.<sup>14</sup> Wearable device fertility research may inadvertently create similar data risk.<sup>15</sup>
- Research sponsors may avoid trial locations in states that are imposing abortion limitations.
- Research subject consents may need to be modified to reflect new privacy issues, legal risks, and newly introduced limitations on the scope of research.
- State laws regarding storage and use of human reproductive tissues and biological materials may change; this may impact embryo storage, human tissue banks, and IVF facilities.
- IRBs may need to adjust screening procedures, review processes, and informed consents, depending on state law.
- Multi-state research needs to be assessed to ensure consideration of proper research activities in abortion-restrictive states.

AMC boards should ensure that all applicable clinical research issues are considered, and that the organization's policies are clear regarding research selection, and research-related operations.

## Conclusion

The *Dobbs* decision, and its state law fallout, is having a profound impact on healthcare delivery in the United States. For AMCs and academic health systems, this requires governance attention to a host of issues, including permitted scope of reproductive health services now and in the future, privacy and data considerations, medical education and residency program accreditation, and clinical research program activities.

*The Governance Institute thanks Anne M. Murphy, Partner, ArentFox Schiff, LLP, for contributing this article. She can be reached at [anne.murphy@afslaw.com](mailto:anne.murphy@afslaw.com).*



14 Aoife Brennan, "[Subject, Not Suspect: The New Hazards of Conducting Clinical Research in the \*Dobbs\* Era](#)," STAT, September 26, 2022.

15 Catherine Klapperich, "[How the \*Dobbs\* Decision Changed My Research on Reproductive Health Technology](#)," STAT, June 30, 2022.