

## **Guidance on Laws and Regulations Affecting the Performance of Abortions in Texas**

The Texas Hospital Association offers guidance on the laws regulating abortions, and potential implications for hospitals related to procedures considered an abortion by definition. These legal and regulatory processes require new focus after the U.S. Supreme Court issued its [decision](#) in *Dobbs v. Jackson Women’s Health Organization* that overturned *Roe v. Wade* and *Planned Parenthood v. Casey*.

### **1. What is the significance of the *Dobbs v. Jackson Women’s Health Organization* [decision](#)?**

On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women’s Health Organization*, overturning *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), upending five decades of constitutional protection of a woman’s right to have an abortion. The court noted that abortion “presents a profound moral question.” However, the Constitution “does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* abrogated that authority,” the court found, and overruled those decisions to “return that authority to the people and their elected representatives.” As a result of the *Dobbs* decision, states have increased leeway to impose limits on abortions without fear that a constitutional challenge will invalidate those limitations.

### **2. What laws in Texas regulate abortions?**

Texas law contains numerous statutes governing or regulating abortions, with the primary regulatory scheme found in chapters 170, 170A, and 171 of the Texas Health and Safety Code. Chapter 245 of the Health and Safety Code imposes licensing and other requirements on licensed abortion facilities, as well as facilities where abortions may be performed but that are exempt from abortion facility licensing (this includes hospitals).

Additional requirements on the disposition of fetal remains are found at chapter 697 of the Health and Safety Code, and implicate abortions and the facilities where abortions are performed.

Texas statutes enacted in 1925 contain provisions that prohibit abortions and are found at articles 4512.1-4512.6 of the Texas Civil Statutes. These statutes were never explicitly repealed after the *Roe v. Wade* decision in 1973, but current enforceability is uncertain after the *Dobbs* case, particularly in light of a 2004 federal appeals court decision finding those statutes had been implicitly repealed. Some Texas officials including Attorney General Ken Paxton have asserted that these laws are now in effect and enforceable.

Finally, the Texas Family Code, chapter 33, contains provisions related to performing an abortion on an unemancipated minor. In addition, the Texas Administrative Code (TAC) contains rules adopted by the Health and Human Services Commission and other departments and agencies.

**The attached Appendix contains selected summaries of these laws and references other laws and rules touching on abortion.**

**3. What is the definition of “abortion” in Texas?**

Except where otherwise noted, “abortion” is defined under Texas law in accordance with the definition found at [section 245.002\(1\)](#), Health and Safety Code, enacted in 2017:

(1) “Abortion” means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:

- (A) save the life or preserve the health of an unborn child;
- (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or
- (C) remove an ectopic pregnancy.

A notable exception is the definition of abortion found in the 1925 law at [Article 4512.1](#), which reads as follows:

By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

**4. Does the “required by law” exception<sup>1</sup> in the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule require a covered entity to disclose protected health information (PHI) of an individual who has received an abortion or care related to an abortion to a third party?**

HHS’ Office of Civil Rights (OCR) indicates that the “required by law” exception in the Privacy Rule “*permits but does not require* a covered entity to disclose PHI about an individual without the individual’s authorization, when such disclosure is required by law and the disclosure complies with requirements of the other law.” (*emphasis added*). On June 29, 2022, OCR issued additional [guidance](#) on the Privacy Rule’s applicability to disclosures of PHI relating to reproductive care. OCR states that any disclosure “required by law” is limited only to the disclosure of PHI that is mandated by the law that compels such disclosure and where the law is enforceable in court. Any disclosure of PHI exceeding the relevant legal requirements is not allowed by the Privacy Rule and a state law must expressly require reporting of the PHI at issue.<sup>2</sup>

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<sup>1</sup> 45 C.F.R. § 164.512(a)(1).

<sup>2</sup> See Tex. Health & Safety Code § 171.006 (requiring reporting by hospitals of certain abortion complications or “adverse events” as defined by that statute diagnosed or treated at the hospital).

Texas law does require covered entities to comply with the HIPAA Privacy Rule.<sup>3</sup> OCR believes a disclosure that is not expressly required by law and/or exceeds the requirements of such law would constitute a breach of unsecured PHI requiring notification to HHS and the affected individual.

**5. When is a covered entity permitted to disclose PHI (which includes information regarding abortion related medical care or treatment) to law enforcement?<sup>4</sup>**

[According to OCR](#), covered entities are permitted, but not required, to “disclose PHI about an individual for law enforcement purposes ‘pursuant to process and as otherwise required by law,’ under certain conditions. Covered entities may disclose only the PHI requested through a court order or court-ordered warrant, subpoena, or summons if all the conditions listed in the law enforcement disclosure exception are met.”

In its [guidance](#), OCR specifically notes that the Privacy Rules’s law enforcement exception does not allow a hospital or a health care provider to report an individual’s abortion or other reproductive health care to law enforcement either of their own volition or at the request of law enforcement. In example, OCR illustrates that health care providers complying with law enforcement requests for abortion related medical records, without a court order or other mandate enforceable by a court, would not be a permitted disclosure of PHI and would constitute a breach requiring notification to HHS and the individual under the Privacy Rule.

As Texas law requires covered entities to comply with the HIPAA Privacy Rule, covered entities should review this guidance to ensure that any disclosures of PHI comply with the conditions set forth in the law enforcement exception or another exception found in the Privacy Rule.

**6. What is OCR’s position regarding disclosure of PHI related to abortion or abortion-related medical care or treatment to avert a serious threat to health or safety?<sup>5</sup>**

[According to OCR](#), covered entities are permitted to disclose PHI related to abortion or abortion-related medical care or treatment if the covered entity, in good faith, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and the disclosure is to a person or person who are reasonably able to prevent or lessen the threat. Such disclosure must be consistent with applicable law and professional ethical conduct standards.

OCR states **the Privacy Rule** does not, by itself, permit a health care provider practicing in a state that bans abortions to report to law enforcement that an individual intends to seek an abortion out-of-state where abortion is legal, if the individual disclosed that information to the health care

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<sup>3</sup> Tex. Health & Safety Code § 181.004. (*see also* Tex. Health & Safety Code § 181.001(b)(3) definition of “Health Insurance Portability and Accountability Privacy Standards” which includes rules found in Subpart E of 45 C.F.R. Part 164 in such definition).

<sup>4</sup> 45 C.F.R. § 164.512(f).

<sup>5</sup> 45 C.F.R. § 164.512(j).

provider. It is OCR’s interpretation that such a statement of intent made by an individual to their health care provider, does not qualify as a serious and imminent threat to health or safety and would generally be inconsistent with professional ethical standards. Per OCR, such a disclosure would constitute a breach requiring notification to HHS and the affected individual.

## **7. Could federal emergency treatment statutes and regulations supersede Texas law?**

Federal regulation will generally supersede state-level requirements when a conflict exists that prevents compliance with both. On July 11, 2022, the Secretary of the Department of Health and Human Services issued [guidance to health care providers](#), specific to the role of the Emergency Medical Treatment and Active Labor Act (EMTALA) in states where abortion is further restricted due to the *Dobbs* ruling. HHS’ guidance sets forth HHS’ belief that “the federal EMTALA statute protects [providers’] clinical judgment and the action [providers] take to provide stabilizing medical treatment to [a provider’s] pregnant patients, regardless of the restrictions in the state where [the provider maintains their] practice.”

HHS’ guidance indicates that:

if a physician believes that a pregnant patient presenting at an emergency department, including certain labor and delivery departments, is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment. And when a state law prohibits abortion and does not include an exception for the life and health of the pregnant person — or draws the exception more narrowly than EMTALA’s emergency medical condition definition — that state law is preempted.

## **8. Has the State of Texas challenged the interpretation set forth above?**

Yes. On July 14, Texas Attorney General Paxton [filed suit](#) on behalf of the State of Texas, asserting that EMTALA “does not mandate, direct, approve, or even suggest the provision of any specific treatment,” that it “says nothing about abortion”, and that “appellate courts have confirmed that EMTALA confers no right to any specific treatment and does not operate as federal oversight on the practice of medicine.” The Attorney General further asserts that the 1925 statutes (referenced herein above) “have never been repealed,” and that a criminal prohibition on abortion is currently the law in Texas.

The suit seeks a declaration that the HHS and CMS are violating the law and that the “Abortion Mandate” contained in HHS’ EMTALA guidance is unlawful, unconstitutional, and unenforceable. The lawsuit is pending in the federal district court for the Northern District of Texas.

## **9. What are a hospital’s obligations under EMTALA?**

Hospitals subject to EMTALA must conduct an appropriate medical screening examination (MSE)

of all individuals who come to the emergency department (ED). Providers have discretion to determine what constitutes an appropriate MSE, as the content of the MSE may vary according to the individual's presenting signs and symptoms and can be as simple or complex as needed to determine if an emergency medical condition (EMC) exists.

Providers have further discretion to determine when an EMC exists, as an EMC is present when there are acute symptoms of enough severity such that the absence of immediate medical attention could reasonably be expected to result in serious impairment or dysfunction. A MSE must be conducted by qualified personnel, which may include physicians, nurse practitioners, physician's assistants, or RNs trained to perform MSEs and acting within the scope of their license.

If an EMC is determined to exist, the hospital must provide available stabilizing treatment or an appropriate transfer to another hospital that has the capabilities to provide stabilizing treatment. EMTALA requires that all patients receive an appropriate MSE, stabilizing treatment, and transfer, if necessary, irrespective of any state laws or mandates that apply to specific procedures.

**10. Are a hospital's EMTALA obligations altered in cases involving complications related to pregnancy?**

CMS released guidance specific to EMTALA obligations specific to patients who are pregnant or experiencing pregnancy loss. [CMS' guidance was updated in July, 2022](#) and reminds providers that:

the determination of an emergency medical condition is the responsibility of the examining physician or other qualified medical personnel. An emergency medical condition may include a condition that is likely or certain to become emergent without stabilizing treatment. Emergency 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.

The guidance provides additional information on specific EMTALA provisions as they relate to care for patients where state laws prohibit or restrict access to abortion. THA Members should review this guidance against current policies and procedures to determine whether edits are appropriate.

## APPENDIX

### **Summary of Selected Texas Laws Regulating and/or Prohibiting Abortion**

#### **A-1: Texas Health and Safety Code, Chapter 170, “Prohibited Acts Regarding Abortions”**

[Chapter 170](#) is a short chapter that primarily relates to late-term abortions. Under Section 170.002, a person may not intentionally or knowingly perform an abortion on a woman who is pregnant with a viable unborn child during the third trimester of the pregnancy. The prohibition does not apply if at the time of the abortion the person is a physician and concludes in good faith according to the physician's best medical judgment that (1) the fetus is not a viable fetus and the pregnancy is not in the third trimester; (2) the abortion is necessary to prevent the death or a substantial risk of serious impairment to the physical or mental health of the woman; or (3) the fetus has a severe and irreversible abnormality, identified by reliable diagnostic procedures.

A physician who performs an abortion that, according to the physician's best medical judgment at the time of the abortion, is to abort a viable unborn child during the third trimester of the pregnancy shall certify in writing to the commission, on a form prescribed by the commission, the medical indications supporting the physician's judgment that the abortion was authorized by (2) or (3) above. If the physician certifies the abortion was authorized by (3), the physician must certify in writing on the form the fetal abnormality identified by the physician. The certification must be made not later than the 30th day after the date the abortion was performed.

#### **A-2: Texas “Trigger Law” (Health and Safety Code, Chapter 170A, “Performance of Abortion”)**

[Editor’s Note: As of the date of the issuance of this Guidance, chapter 170A is not yet in effect. It will become effective on August 25. This unique procedural issue is discussed further below in this Section A-2.]

[Chapter 170A](#) is the so-called Texas trigger law. It was passed in 2021 and contains criminal, civil, and licensing board penalties on persons who perform an abortion. More specifically, under section 170A.002(a), a person “may not knowingly perform, induce, or attempt an abortion.” The only exception to this prohibition, as provided for in Subsection (b), is if the person performing, inducing, or attempting the abortion is a licensed physician and in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced. In that case the person performing, inducing, or attempting the abortion must do so in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create a greater risk of the pregnant female's death or a serious risk of substantial impairment of a major bodily function of the pregnant female.

Violations of chapter 170A carry civil and criminal penalties and the potential for disciplinary action by licensing agencies. More specifically, under section 170A.004, a violation of the prohibition is a felony of the second degree, except that the offense is a felony of the first degree if an unborn child dies as a result of the offense. Section 170A.005 allows for a civil penalty of not less than \$100,000 for a violation. Finally, under section 170A.007, in addition to any other penalty that may be imposed under chapter 170A, the appropriate licensing authority “shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation of section 170A.002.”

Although HB 1280 was passed and signed into law in 2021, it did not take effect immediately. Rather, according to SECTION 3 of the bill, the law takes effect on the 30th day after:

- (1) the issuance of a United States Supreme Court judgment in a decision overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion;
- (2) the issuance of any other United States Supreme Court judgment in a decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or
- (3) adoption of an amendment to the United States Constitution that, wholly or partly, restores to the states the authority to prohibit abortion.

The issuance of the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, overturning *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) appears to satisfy condition (1) above. On July 26 the judgment was issued in the *Dobbs* case. Accordingly, chapter 170A will become effective August 25, 2022.

### **A-3: Health and Safety Code, Chapter 171, “Abortion”**

As summarized further below, Chapter 171 is the most comprehensive regulatory scheme related to abortions. It contains various requirements or prohibitions related to: where abortions can be performed; reporting of abortion-related complications; documentation related to abortions; informed consent, including extensive pre-procedure requirements; abortions performed after 20 weeks; distribution and administration of abortion-inducing drugs; partial-birth abortions and dismemberment abortions; and abortions performed when a fetal heartbeat is detected.

#### *Subchapter A – General Provisions*

- Section 171.002 is a definitions section and contains definitions applicable to Chapter 171 for “abortion” (the meaning assigned by Section [245.002](#)), “abortion provider”, “medical emergency”, and “sonogram”.
- Section 171.003 indicates that an abortion may be performed only by a physician licensed to practice medicine in Texas.
- Section 171.0031 indicates that a physician performing or inducing an abortion must have active admitting privileges at a hospital that (A) is located not further than 30 miles from the location at which the abortion is performed or induced; and (B) provides obstetrical or gynecological health care services. Additionally the physician must provide the pregnant woman with (A) a telephone number by which the pregnant woman may reach the

physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed or induced with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance or induction of the abortion or ask health-related questions regarding the abortion; and (B) the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated.

- Section 171.004 indicates that an abortion of a fetus age 16 weeks or more may be performed only at an ambulatory surgical center or hospital licensed to perform the abortion.
- Section grants the Health and Human Services Commission the authority to enforce Chapter 171 except for Subchapter H.
- Section 171.006 (first occurrence) contains abortion complication reporting requirements. It applies to an “abortion complication” or “adverse event”, defined as “any harmful event or adverse outcome with respect to a patient related to an abortion that is performed or induced on the patient and that is diagnosed or treated by a health care practitioner or at a health care facility” and lists 28 conditions that are included in those terms. The reporting requirements apply to:

(1) a physician who (A) performs or induces at an abortion facility an abortion that results in an abortion complication diagnosed or treated by that physician; or (B) diagnoses or treats an abortion complication that is the result of an abortion performed or induced by another physician; or

(2) a health care facility that is a hospital, abortion facility, freestanding emergency medical care facility, or health care facility that provides emergency medical care.

A physician must submit the report within three business days. A health care facility described report within 30 days. The specific matters to be reported and penalties for failing to report are set forth in the section.

- Section 171.006 (second occurrence) addresses reporting requirements for abortions performed on a woman who is younger than 18 years of age.
- Section 171.008 address documentation requirements for abortions performed or induced on a pregnant woman because of a medical emergency. It requires the physician who performs or induces the abortion to execute a written document that certifies the abortion is necessary due to a medical emergency and specifies the woman’s medical condition requiring the abortion. Specific documentation requirements are set forth in the section.

#### *Subchapter B – Informed Consent (Sonogram, Written Materials, etc.)*

- Section 171.011 prohibits performing an abortion without the voluntary and informed consent of the woman on whom the abortion is to be performed.
- Section 171.012 specifies the requirements for consent to be voluntary and informed, including the provisions of mandatory written materials and the performance of a sonogram 24 hours in advance of the abortion, or two hours in limited circumstances, with audible heart auscultation.
- Section 171.0121 specifies the documentation that must be kept in the medical record.
- Section 171.0122 indicates that the woman is not required to view the written materials or the sonogram or hear the heart auscultation.

- Section 171.0123 specifies that if the pregnant woman chooses not to have an abortion, the physician or an agent of the physician must provide the pregnant woman with a publication that provides information about paternity establishment and child support.
- Section 171.0124 creates an exception to the informed consent requirements in a medical emergency, and includes documentation and reporting requirements.
- Sections 171.013-.016 contain requirements related to the written materials that must be provided as part of the informed consent process.
- Section 171.017 indicates that if the woman is an unemancipated minor subject to Chapter 33, Family Code, the 24-hour periods established under Sections 171.012 and 171.013 may run concurrently with the period during which actual or constructive notice is provided under Section 33.002, Family Code.
- Section 171.018 indicates that a physician who intentionally performs an abortion on a woman in violation of this subchapter commits a misdemeanor punishable by a fine not to exceed \$10,000.
- Aspects of this subchapter are addressed in [25 TAC §§1.71-1.73](#).

*Subchapter C – Abortion Prohibited At or After 20 Weeks Post-fertilization*

- Section 171.042 provides definitions for “post-fertilization age” and “severe fetal abnormality”.
  - Section 171.043 indicates that a physician may not perform or induce or attempt to perform or induce an abortion without, prior to the procedure making a determination of the probable post-fertilization age of the unborn child or possessing and relying on a determination of the probable post-fertilization age of the unborn child made by another physician.
  - Section 171.044 prohibits a person from performing, inducing, or attempting to perform or induce an abortion if it has been determined that the probable post-fertilization age of the unborn child is 20 or more weeks.
  - Section 171.045 indicates that for post 20-week abortions permitted under the exception in 171.046, the physician must terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provides the best opportunity for the unborn child to survive.
  - Section 171.046 provides an exception if there exists a condition that, in the physician's reasonable medical judgment, so complicates the medical condition of the woman that, to avert the woman's death or a serious risk of substantial and irreversible physical impairment of a major bodily function, other than a psychological condition, it necessitates, as applicable:
    - (1) the immediate abortion of her pregnancy without the delay necessary to determine the probable post-fertilization age of the unborn child;
    - (2) the abortion of her pregnancy even though the post-fertilization age of the unborn child is 20 or more weeks; or
    - (3) the use of a method of abortion other than a method described by Section 171.045(b).
- The prohibitions and requirements under Sections 171.043, 171.044, and 171.045 do not apply to an abortion performed on an unborn child who has a severe fetal abnormality.
- Section 171.047 protects the privacy of the woman in a civil or criminal proceeding or action involving an act prohibited under the subchapter.

- Section 171.048 addresses the construction and enforceability of the subchapter.

*Subchapter D – Abortion-Inducing Drugs*

- Section 171.061 is the definitions section and includes definitions for “abortion”; “abortion-inducing drug”; “adverse event” or “abortion complication”; “gestational age”; “medical abortion” which is also referred to as “medication abortion,” “chemical abortion,” “drug-induced abortion,” “RU-486,” and “Mifeprex regimen”; “physician”; “pregnant”; “provide”, as used with regard to abortion-inducing drugs; and “unborn child”.
- Section 171.062 indicates that the Texas Medical Board shall enforce the subchapter.
- Section 171.063 indicates:
  - A person may not knowingly provide an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion in the pregnant woman or enabling another person to induce an abortion in the pregnant woman unless the person who provides the abortion-inducing drug is a physician; and the provision of the abortion-inducing drug satisfies the protocol authorized by this subchapter. A manufacturer, supplier, physician, or any other person may not provide to a patient any abortion-inducing drug by courier, delivery, or mail service.
  - Before the physician provides an abortion-inducing drug, the physician must (1) examine the pregnant woman in person; (2) independently verify that a pregnancy exists; (3) document, in the woman's medical record, the gestational age and intrauterine location of the pregnancy to determine whether an ectopic pregnancy exists; (4) determine the pregnant woman's blood type, and for a woman who is Rh negative, offer to administer Rh immunoglobulin (RhoGAM) at the time the abortion-inducing drug is administered or used or the abortion is performed or induced to prevent Rh incompatibility, complications, or miscarriage in future pregnancies; (5) document whether the pregnant woman received treatment for Rh negativity, as diagnosed by the most accurate standard of medical care; and (6) ensure the physician does not provide an abortion-inducing drug for a pregnant woman whose pregnancy is more than 49 days of gestational age.
  - The physician who gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug shall provide the pregnant woman with (1) a copy of the final printed label of that abortion-inducing drug; and (2) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the administration or use of the drug or ask health-related questions regarding the administration or use of the drug.
  - A physician who provides the abortion-inducing drug must schedule a follow-up visit for the woman to occur not later than the 14th day after the earliest date on which the abortion-inducing drug is administered or used or the abortion is performed or induced. At the follow-up visit, the physician must (1) confirm that the woman's pregnancy is completely terminated; and (2) assess any continued blood loss.
  - The physician who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug, or the physician's agent, must make a reasonable effort to

ensure that the woman returns for the scheduled follow-up visit. The physician or the physician's agent shall document a brief description of any effort made to comply with this subsection, including the date, time, and name of the person making the effort, in the woman's medical record.

- The physician must report any known serious adverse events.
- Section 171.0631 requires a person providing an abortion-inducing drug to satisfy the applicable informed consent requirements of Subchapter B.
- Section 171.0632 requires a physician who provides an abortion-inducing drug to comply with the applicable physician reporting requirements of Section 245.011.
- Section 171.064 permits the Texas Medical Board to take disciplinary action under Chapter 164, Occupations Code, or assess an administrative penalty under Subchapter A, Chapter 165, Occupations Code, against a person who violates Section 171.063.
- Section 171.065 creates a criminal offense (state jail felony) for a person who intentionally, knowingly, or recklessly violates the subchapter commits an offense.
- Section provides that a state executive or administrative official may not decline to enforce this subchapter, or adopt a construction of this subchapter in a way that narrows its applicability, based on the official's own beliefs on the requirements of the state or federal constitution, unless the official is enjoined by a state or federal court from enforcing this subchapter.

#### *Subchapter E, Education and Training Programs on Trafficking of Persons for Certain Facility Personnel*

- Under Section 171.081, Subchapter E applies to each person who (1) is employed by, volunteers at, or performs services under contract with (A) an abortion facility licensed under Chapter 245; or B) an ambulatory surgical center licensed under Chapter 243 that performs more than 50 abortions in any 12-month period; and (2) has direct contact with patients of the facility.
- Section 171.082 requires the executive commissioner of the Health and Human Services Commission by rule to require a person described by Section 171.081 to complete within a reasonable time after beginning work at the facility a training program to identify and assist victims of human trafficking.

#### *Subchapter F, Partial-Birth Abortions*

- Section 171.101 contains definitions for “partial-birth abortion” and “physician”.
- Section 171.102 prohibits a physician or other person from knowingly performing a partial-birth abortion, unless it is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy.
- Section 171.103 provides a criminal penalty (state jail felony) for a violation of Section 171.102.
- Sec. 171.104 provides a civile cause of action for the father of the fetus or a parent of the mother of the fetus, if the mother is younger than 18 years of age at the time of the partial-birth abortion, including (1) money damages for physical injury, mental anguish, and emotional distress; and (2) exemplary damages equal to three times the cost of the partial-

birth abortion. A person may not bring or maintain an action under this section if (1) the person consented to the partial-birth abortion; or (2) the person's criminally injurious conduct resulted in the pregnancy.

- Under section 171.105, a physician who is the subject of a criminal or civil action for a violation of Section 171.102 may request a hearing before the Texas Medical Board on whether the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy.
- Under section 171.106, a woman on whom a partial-birth abortion is performed or attempted in violation of the subchapter may not be prosecuted under the subchapter or for conspiracy to commit a violation of the subchapter.

### *Subchapter G, Dismemberment Abortions*

- Section 171.151 defines “dismemberment abortion” as an abortion in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of the unborn child's body to cut or rip the piece from the body. The term does not include an abortion that uses suction to dismember the body of an unborn child by sucking pieces of the unborn child into a collection container. The term includes a dismemberment abortion that is used to cause the death of an unborn child and in which suction is subsequently used to extract pieces of the unborn child after the unborn child's death.
- Section 171.152 prohibits a person from intentionally performing a dismemberment abortion unless the dismemberment abortion is necessary in a medical emergency. A woman on whom a dismemberment abortion is performed, an employee or agent acting under the direction of a physician who performs a dismemberment abortion, or a person who fills a prescription or provides equipment used in a dismemberment abortion does not violate this prohibition.
- Section 171.153 provides a criminal penalty (state jail felony) for violations.
- Section 171.154 relates to judicial construction of the subchapter.

### *Subchapter H, Detection of Fetal Heartbeat*

- Section 171.201 provides definitions for “fetal heartbeat”; “gestational age”; “gestational sac”; “physician”; “pregnancy”; “standard medical practice”; and “unborn child”.
- Section 171.202 contains various legislative findings.
- Section 171.203 elaborates on the concept of “standard medical practice” related to the detection of a fetal heartbeat. It prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat, and provides specifications for the testing that must occur. The physician must record in the pregnant woman's medical record (1) the estimated gestational age of the

unborn child; (2) the method used to estimate the gestational age; and (3) the test used for detecting a fetal heartbeat, including the date, time, and results of the test.

- Section 171.204 prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.
- Section 171.205 contains an exception if a physician believes a medical emergency exists that prevents compliance with the subchapter. (Note: the general definition of medical emergency in chapter 171, section 171.002(3), is applicable to this exception and reads as follows: “Medical emergency” means a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.)
- Section 171.206 indicates that the subchapter does not create or recognize a right to abortion before a fetal heartbeat is detected, and may not be construed to (1) authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter; (2) wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including Chapter 6-1/2, Title 71, Revised Statutes; or (3) restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.
- Section 171.207 indicates that the requirements of the subchapter are enforced exclusively through the private civil actions described in Section 171.208, and no enforcement subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of the subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.
- Section 171.208 allows any person, other than an officer or employee of a state or local governmental entity in this state, to bring a civil action against any person who (1) performs or induces an abortion in violation of the subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of the subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or (3) intends to engage in the conduct described by Subdivision (1) or (2).
- If a claimant prevails in an action brought under this section, the court shall award (1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of the subchapter; (2) statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced in violation of the subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted; and (3) costs and attorney's fees.
- A person may bring an action not later than the fourth anniversary of the date the cause of action accrues. Additional procedural aspects and defenses related to the civil action are also addressed in this section and in Section 171.209.
- Section 171.210 addresses venue of an action under section 171.208.

- Sections 171.211 and 171.212 address various aspects of challenging the validity of the subchapter and severability.

**A-4: Health and Safety Code Chapter 245, “Abortion Facilities” (a/k/a “Texas Abortion Facility Reporting and Licensing Act”)**

- Section 245.002 provides definitions for “abortion”; “abortion facility”; “department” (the Texas Department of State Health Services); “ectopic pregnancy”; “executive commissioner” (the executive commissioner of the Texas Health and Human Services Commission); “patient”; and “person”.
- Section. 245.003 prohibits a person from establishing or operating an abortion facility in this state without an appropriate license issued under this chapter.
- Section 245.004 (first occurrence) exempts (1) a hospital licensed under Chapter 241 (Texas Hospital Licensing Law); or (2) the office of a physician licensed under Subtitle B, Title 3, Occupations Code, unless the office is used for the purpose of performing more than 50 abortions in any 12-month period, from needing a license.
- Section 245.004 (second occurrence) exempts (1) a hospital licensed under Chapter 241 (Texas Hospital Licensing Law); (2) the office of a physician licensed under Subtitle B, Title 3, Occupations Code, unless the office is used substantially for the purpose of performing abortions; or (3) an ambulatory surgical center licensed under Chapter 243, from needing a license.
- Section 245.005 contains application and license issuance requirements.
- Section 245.006 governs inspections of licensed facilities.
- Section 245.007 governs fees charged by the department.
- Section 245.009 confers rulemaking authority.
- Section 245.010 describes minimum standards for facilities, and indicates that only a physician as defined by Subtitle B, Title 3, Occupations Code, may perform an abortion.
- Section 245.0105 requires each facility to be assigned a unique license number. a facility must include the number in any abortion advertisement.
- Section 245.011 requires a physician who performs an abortion at an abortion facility to complete and submit a monthly report to the department on each abortion performed by the physician at the abortion facility. The required information to be reported and confidentiality requirements are specified. Failure to comply with the section is a Class A misdemeanor.
- Section 245.0115 requires the department to notify the Texas Medical Board of any violations of the reporting requirements.
- Section 245.0116 requires the department to publish on its Internet website a monthly report containing aggregate data of the information reported.
- Section 245.012 governs denials, revocations, and suspensions of licenses.
- Section 245.013 allows for injunctive relief for continuing violation of the standards or licensing requirements provided under the chapter.
- Section 245.014 indicates that operating a facility without a license is a Class A misdemeanor.

- Section 245.015 provides a civil penalty against a person who knowingly violates the chapter or who knowingly fails to comply with a rule adopted under the chapter in the amount of not less than \$100 or more than \$500 for each violation.
- Sec. 245.016 contains an exception for performing an abortion in an unlicensed facility if the physician reasonably believes that the abortion is necessary to prevent the death of the patient or to prevent serious impairment of the patient's physical health.
- Section 245.017 allows the department to assess an administrative penalty against a person who violates the chapter or a rule adopted under this chapter. The penalty may not exceed \$1,000 for each violation. Each day of a continuing violation constitutes a separate violation.
- Section 245.018 contains procedures for assessing an administrative penalty.
- Section 245.019 governs hearings regarding an administrative penalty.
- Section 245.020 governs notice of orders of violations, judicial review, and refunds.
- Section 245.022 allows the department may assess reasonable expenses and costs against a person in an administrative hearing if, as a result of the hearing, the person's license is denied, suspended, or revoked or if administrative penalties are assessed against the person.
- Section. 245.023 requires the department to make certain information available to the public, including (1) the status of the license of any abortion facility; (2) information on inspections and administrative or civil penalties imposed against a or a physician. The department shall maintain a toll-free telephone number that a person may call to obtain the information described above.
- Section 245.024 requires an abortion facility to comply with Subchapter B, Chapter 171, Health and Safety Code.
- Section 245.025 requires an abortion facility to display separate signs related to human trafficking. Specifications for the signs are included in the section.

**A-5: Health and Safety Code, Chapter 697, “Disposition of Embryonic and Fetal Tissue Remains”**

[Editor’s Note: The enforcement of this chapter had been enjoined by a federal district judge since 2018. However, on June 28, the federal Fifth Circuit Court of Appeals vacated that injunction in light of the decision in the *Dobbs* case and remanded the case back to the district court for further proceedings. Providers impacted by Chapter 697 will need to monitor that status of this case and any action by HHSC to implement the requirements of Chapter 697 through rulemaking.]

- Section 697.001 states the purpose of the chapter as expressing the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains.
- Section 697.002 provides definitions for “cremation”; “department” (the Department of State Health Services); “embryonic and fetal tissue remains”, which excludes the umbilical cord, placenta, gestational sac, blood, or body fluids; “executive commissioner” (the executive commissioner of the Health and Human Services Commission); “incineration”; “interment”; and “steam disinfection”.
- Section 697.003 indicates that embryonic and fetal tissue remains are not pathological waste under state law, and chapters 711 and 716 of the Health and Safety Code and chapter

651, Occupations Code, do not apply to the disposition of embryonic and fetal tissue remains.

- Section 697.004 requires a health care facility in this state that provides health or medical care to a pregnant woman to dispose of embryonic and fetal tissue remains that are passed or delivered at the facility by (1) interment; (2) cremation; (3) incineration followed by interment; or (4) steam disinfection followed by interment. The ashes resulting from the cremation or incineration of embryonic and fetal tissue remains (1) may be interred or scattered in any manner as authorized by law for human remains; and (2) may not be placed in a landfill. A health care facility responsible for disposing of embryonic and fetal tissue remains may coordinate with an entity in the registry established under Section 697.005 in an effort to offset the cost associated with burial or cremation of the embryonic and fetal tissue remains of an unborn child. The umbilical cord, placenta, gestational sac, blood, or body fluids from a pregnancy terminating in the death of the embryo or fetus for which the issuance of a fetal death certificate is not required by state law may be disposed of in the same manner as and with the embryonic and fetal tissue remains from that same pregnancy as authorized by chapter 697.
- Section requires the Department of State Health Services to establish and maintain a registry of participating funeral homes and cemeteries willing to provide free common burial or low-cost private burial; and private nonprofit organizations that register with the department to provide financial assistance for the costs associated with burial or cremation of the embryonic and fetal tissue remains of an unborn child. DSHS must make the registry information available on request to a physician, health care facility, or agent of a physician or health care facility.
- Section 697.006 requires DSHS to develop a grant program that uses private donations to provide financial assistance for the costs associated with disposing of embryonic and fetal tissue remains.
- Section 697.007 indicates that DSHS (presumably now HHSC) may suspend or revoke the license of a health care facility that violates chapter 697 or a rule adopted under chapter 697.
- Section 697.008 provides that a person that violates chapter 697 or a rule adopted under chapter 697 is liable for a civil penalty in an amount of \$1,000 for each violation. and the attorney general may sue to collect the civil penalty and reasonable expenses incurred in collecting the civil penalty.
- Section 697.009 contains rulemaking authority.

**A-6: Texas Revised Civil Statutes articles 4512.1-4512.6 (Title 71, Chapter 6 ½), “Abortion”**

[Editor’s Note: These articles were original enacted in 1925 and found in the Penal Code, and were transferred to the Civil Statutes in 1973. While *Roe* and *Casey* were in force, articles 4512.1 - .4, and .6 were unenforceable. However, they were never explicitly repealed. The enforceability of these statutes after the decision in the *Dobbs* case overturning *Roe* and *Casey* is currently shrouded in uncertainty. In 2004, the federal Fifth Circuit Court of Appeals found that the articles were impliedly repealed in the case of *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004). Other commentators, including the Texas Attorney General, have argued that the *McCorvey* case was wrongly decided and that the 1925 laws are currently enforceable.]

- Article 4512.1 provides that if any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By “abortion” is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.
- Article 4512.2 provides that whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.
- Article 4512.3 provides that if the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.
- Article 4512.4 provides that if the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.
- Article 4512.5 provides that whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.
- Article 4512.6 provides that nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

**A-7: Texas Family Code §§33.002-33.0022 (Abortions Performed on Unemancipated Minors)**

[Texas Family Code chapter 33](#) governs abortions performed on unemancipated minors. Selected provisions are summarized below. Other provisions of the chapter cover the judicial procedures applicable to situations where a court order is used in lieu of parental/guardian/conservator consent.

- Section 33.002 indicates that a physician may not perform an abortion on a pregnant unemancipated minor unless:
  - the physician performing the abortion gives at least 48 hours actual notice, in person or by telephone, of the physician's intent to perform the abortion to (A) a parent of the minor, if the minor has no managing conservator or guardian; or (B) a court-appointed managing conservator or guardian;
  - the physician who is to perform the abortion receives an order issued by a court under Section 33.003 or 33.004 authorizing the minor to consent to the abortion as provided by Section 33.003 or 33.004; or
  - the physician who is to perform the abortion (A) concludes that a medical emergency exists; certifies in writing to the Department of State Health Services and in the patient's medical record the medical indications supporting the physician's judgment that a medical emergency exists; and (C) provides the notice required by Section 33.0022.

Additional provisions cover constructive notice if the required notice can't be delivered, and how to certify that notice. A physician who intentionally performs an abortion on a pregnant unemancipated minor in violation of this section commits an offense punishable

by a fine not to exceed \$10,000. It is a defense to prosecution under this section that the minor falsely represented her age or identity to the physician to be at least 18 years of age by displaying an apparently valid proof of identity and age. A physician must use due diligence to determine that any woman on which the physician performs an abortion is not a minor or is emancipated, and the concept of due diligence is defined.

- Section 33.0022 provides that if the physician concludes that a medical emergency exists and that there is insufficient time to provide the notice required by Section 33.002 or obtain the consent required by Section 33.0021, the physician must make a reasonable effort to inform, in person or by telephone, the parent, managing conservator, or guardian of the unemancipated minor within 24 hours after the time a medical emergency abortion is performed on the minor of (1) the performance of the abortion; and (2) the basis for the physician's determination of a medical emergency. Written notice must be provided not later than 48 hours, and the physician must execute for inclusion in the medical record of the minor an affidavit that explains the specific medical emergency that necessitated the immediate abortion.
- [22 TAC §165.6](#) addresses physicians' record-keeping requirements under chapter 33. See also 25 TAC §133.45(h), requiring a hospital that performs an abortion to comply with chapter 171 and §164.52(a)(19), Occupations Code (related to parental consent requirements for an abortion performed on an unemancipated minor).

#### **A-8: Other Statutes and Implementing Regulations Affecting Abortions**

Other Texas statutes contain references to abortions. Those statutes include:

- Civil Practice and Remedies Code §30.022, governing the award of attorneys' fees in a suit challenging the enforceability of a statute regulating or restricting abortions.
- Family Code §32.003(a)(4), prohibiting a minor from consenting to an abortion (but see Family Code chapter 33).
- Family Code chapter 33, governing abortions performed on unemancipated minors.
- Family Code §§34.002(c) and 34.003(b)(14), restricting a nonparent adult caregiver from consenting to an abortion for a minor.
- Family Code §151.002, conferring rights on a living human child born alive after an abortion or premature birth and establishing a physician-patient relationship between the child born alive and the physician who attempted the abortion.
- Government Code §311.036 (Code Construction Act), indicating that a statute that regulates or prohibits abortion may not be construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute explicitly states that it is repealing the other statute, and containing other statutory construction provisions related to abortion statutes.
- Government Code §402.036(g), excluding from grants from the Choose Life Account abortion providers or an affiliate of an abortion provider. The implementing regulation for this section is found at [1 TAC §54.6](#).
- Government Code §2273.003, prohibiting a governmental entity from entering into a taxpayer funded transaction with an abortion provider or an affiliate of an abortion provider.

- Human Resources Code §32.024, prohibiting the expenditure of certain Medicaid funds on elective abortions. See also [1 TAC §354.1167](#), allowing reimbursement for abortions performed in an emergency, [1 TAC §354.1169](#), allowing reimbursement for treatment of an ectopic pregnancy.
- Health and Safety Code §32.005, prohibiting the expenditure of funds under the Texas maternal and infant health improvement services program unless the mother's life is in danger. [1 TAC §382.17\(b\)](#) places restrictions on Healthy Texas Women program providers from performing elective abortions both inside and outside the program. See also 1 TAC §§382.19, 382.21, 382.115, 382.117, 382.119.
- Health and Safety Code §166.152(e)(4), prohibiting an agent under a medical power of attorney from consenting to an abortion.
- Health and Safety Code §173.005(b), prohibiting the donation of human fetal tissue derived from an elective abortion.
- Health and Safety Code §§241.007 and 243.017, requiring a hospital and an ambulatory surgery center, respectively, to comply with Subchapter B, Chapter 171, Health and Safety Code.
- Health and Safety Code §Sec. 285.202, except in the case of a medical emergency, prohibiting a hospital created under general or special law that uses tax revenue of the district to finance the performance of an abortion from receiving state funding; and including documentation and record-keeping requirements related to an emergency
- Insurance Code §546.053, prohibiting a health benefit plan issuer from using genetic information to coerce or compel a pregnant woman to have an induced abortion.
- Insurance Code §1281.004-.006, imposing requirements on health benefit plan issuers whose plans cover elective abortions.
- Insurance Code §1454.052, excluding payment for abortions in the provisions requiring equal health care coverage for women.
- Insurance Code §1696.002, prohibiting a qualified health plan offered through a health benefit exchange from providing coverage for elective abortions.
- Occupations Code chapter 103, providing a right for a physician, nurse, staff member, or employee of a hospital or other health care facility to object to directly or indirectly performing or participating in an abortion, including protection from discrimination and a right to sue.
- Occupations Code §164.052, containing various provisions related to a physician performing a prohibited abortion and defining those instances as prohibited practices subject to discipline.
- Occupations Code §164.0551, requiring a physician to comply with subchapter B, Chapter 171, Health and Safety Code.

#### **A-9: Additional Selected Texas Administrative Code Provisions**

- [25 TAC Chapter 139](#) contains the rules and regulations related to abortion facility reporting and licensing. The chapter implements chapter 245, Health and Safety Code. The reporting requirements applicable to physicians and facilities are found at [§§139.4 and 139.5](#).
- 25 TAC Chapter 138 contains the rules and regulations related to the disposition of embryonic and fetal tissue remains. This chapter implements chapter 697, Texas Health and Safety Code.

- [25 TAC §133.45\(h\)](#), requiring a hospital that performs an abortion to comply with chapter 171 and §164.52(a)(19), Occupations Code (related to parental consent requirements for an abortion performed on an unemancipated minor).
- [25 TAC §133.49](#), related to a hospital's obligation to report abortion complications.