

Important Practice Alert

PA Abortion Regulation After *Roe v. Wade*¹

On June 24, 2022, the United States Supreme Court overturned *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* in the *Dobbs* decision.² This means that state legislatures are now permitted to determine if the right to have an abortion will remain and what limitations, if any, will be imposed on that right.

In Pennsylvania, the current PA Abortion Control Act (the “Act”) remains in force, as it has since 1992, with one possible addition (spousal notice), discussed below.

The Act is complex with numerous and onerous requirements placed on physicians who perform abortions. Failure to fully comply with the Act may lead to criminal prosecution and potential loss/suspension of a physician’s license to practice.

Among other major requirements, the Act provides for the following:³

- Abortions are banned in Pennsylvania after 24 weeks – there are very limited exceptions, such as with the physician’s reasonable belief that it is necessary to prevent either the death or substantial and irreversible impairment of a major bodily function of the woman
- Abortions may only be performed by a physician and then only after the physician (or a referring physician) determines that, in the physician’s best clinical judgment, the abortion is necessary
- Physicians must determine the probable gestational age prior to performing an abortion
- 24-hour waiting period for abortions imposed
- Parental consent required for minors (or pursuant to a court order in certain circumstances)
- Possible prior spousal notification requirement – see discussion below
- 24-hour advance, elaborate informed consent requirements – including informing the woman that the father will be liable to assist if there is no abortion; information regarding the nature and risks of the procedure, risks of continuing the pregnancy, medical assistance benefits available if the pregnancy is continued; and offering the woman printed material published by the PA Department of Health

¹ This practice alert is current as of June 30, 2022. The information contained in this article is for general information purposes only, should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.

² *Dobbs v. Jackson Women’s Health Organization* (U.S. Supreme Court; Docket No. 19-1392; decided June 24, 2022) (“*Dobbs*”).

³ This is not intended to be an exhaustive list or discussion of the provisions of the Abortion Control Act.

- Physicians cannot accept payment prior to making a determination that the person is pregnant and physicians also cannot accept referral fees
- Exceptions are included in the case of medical emergency. A medical emergency is defined as that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.
- Significant criminal and civil penalties for physicians who violate the Act are included – see chart below
- The State Board of Osteopathic Medicine and the State Board of Medicine are required to vigorously enforce the Act's provisions

Spousal Notice Provision

Prior notice of a married person's spouse is required by § 3209 of the Act (18 Pa.C.S. § 3209). With limited exceptions physicians must obtain a written statement stating that spousal notification has occurred.

Violating this provision constitutes "unprofessional conduct" on the part of the physician that could lead to suspension or revocation of the physician's license to practice. In addition, a knowing violation subjects the physician to civil suit by the "...spouse who is the father of the aborted child for any damages. . ." caused by the abortion, to \$5,000 in punitive damages and to the payment of reasonable attorney's fees.

As of this writing, POMA is informed that the injunction against the spousal notification requirements of § 3209 issued in the Casey case remains in effect. Licensing actions for failure to notice the spouse appear to be stayed; however, it is possible that civil actions by a spouse against the physician may not be enjoined.

It is possible that a court may be asked to lift the injunction. If that happens, POMA understands that any such move will be challenged in court.

Before ignoring the spousal notification provisions of § 3209, physicians should contact their attorneys for further guidance.

Potential Penalties

Numerous, and often draconian, penalties are included in the Act. Some of those penalties are criminal penalties, including felonies, misdemeanors and summary offenses. These include violations that would subject a physician who violates the provision to a maximum of 7 years imprisonment and significant fines. Civil penalties, monetary damages and potential punitive damages are also provided for certain failures to follow the Act's provision.

At least eight sections of the Act describe any action by a physician in violation of the statute as "unprofessional conduct." In addition to at least one provision providing

for a mandatory three month suspension of a physician's license, actions deemed "unprofessional conduct" subject physicians to such penalties as the State Board of Osteopathic Medicine (or State Board Medicine, if applicable) deem appropriate for a first offense, suspension of the physician's license for at least 90 days for the second offense and revocation of the physician's license for the third offense.

So...what now?

Pennsylvania has not enacted further restrictions on abortions beyond those in the Act and does *not* have a "trigger law" in place. Thus, following the *Dobbs* decision, abortion is still *legal* in Pennsylvania, so long as the provisions of the Act are followed.

However, as noted above, before performing abortions, physicians should consult with their attorneys as to whether spousal consent is necessary.

While the law in Pennsylvania remains virtually intact after *Dobbs*, there likely will be increased scrutiny on abortion providers and increased enforcement of the Act's requirements. Physicians should be aware of this potential for increased scrutiny/enforcement and make certain that their actions fully comply with the Act's detailed requirements.

Finally, physicians should remain informed about pending legislation in the Pennsylvania General Assembly. While Governor Wolf has vowed to veto any additional legislation limiting the right to an abortion beyond those currently in the Act (and it thus is unlikely that there will be changes in the law in 2022), what happens in 2023 will depend on the results of the upcoming gubernatorial/legislative elections.