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### EMTALA preemption prohibition of abortion and avoiding the double-edge sword

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by Michael R. Rinard II

In the wake of the recent U.S. Supreme Court decision to overturn *Roe v. Wade*, which held the Constitution does not protect abortion, hospitals are faced with critical state law questions regarding their respective state statutes that may conflict with the Emergency Medical Treatment and Labor Act (EMTALA).<sup>[1]</sup>

The Centers for Medicare & Medicaid Services (CMS) released a memorandum on July 11, 2022, clarifying that the EMTALA law provides healthcare professionals giving clinically necessary pregnancy termination services in emergency situations—regardless of state prohibitions—protection from legal consequences of respective state law.<sup>[2]</sup>

Despite CMS' affirmation of legal protection from state law, many clinical professionals face the fear of criminal prosecutions and political pressures within their communities. Physicians may ask themselves how to avoid negative legal and community consequences rather than focus on their own medical judgment in serving the patient's best interests. This conundrum could force a "freezing" effect, circumventing the confidence of clinical decision-making.

It is no surprise that physicians, as well as hospital administrators, have begun knocking on compliance professionals' doors to receive guidance and perspective as uncertainty sweeps hospitals throughout the country. To provide that guidance, compliance professionals have collaborated with legal professionals to develop a strategic plan for facing this uncertainty.

Before your organization's plan can be executed, it is important for compliance professionals to understand how current cases are evolving and get a perspective of where government agencies are focusing their theory of enforcement. The following is a recent case study that compliance professionals can use to help drive conversation and strategic planning.

#### Case study

A recent story about a 41-year-old woman from Joplin, Missouri, illustrates the concerns about the confidence in the legal protections of EMTALA.<sup>[3]</sup> In this case, the Missouri Health Department is currently investigating whether Freeman Health System violated federal rules when Mylissa Farmer presented to the emergency department (ED) with a loss of all her amniotic fluid due to the medical complications in her pregnancy.

Under Missouri state law, Missouri bans abortions unless in cases of medical emergencies.<sup>[4]</sup> Under Missouri's "trigger law," if any person knowingly performs or induces an abortion of an unborn child without a medical

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emergency, that person will be guilty of a Class B felony and be subject to suspension or revocation of their professional license. The state law places the legal burden of proof upon the physician to show that the patient's condition is a medical emergency to perform an abortion.

When Ms. Farmer arrived in the ED with tests confirming that the fetus, in the 18th week of pregnancy, was not expected to survive, the physician hesitated to provide the abortion because the fetus still had a heartbeat and Ms. Farmer's condition was not considered "life-threatening" at the moment.<sup>[5]</sup> Ms. Farmer was informed that she could not receive an abortion in Missouri until her condition was an emergency, despite the appropriate medical management of the condition was to abort the fetus to avoid the future risk of maternal mortality or the removal of the uterus. After attempting to receive an abortion in Kansas and Colorado, Ms. Farmer eventually received an abortion in Granite City, Illinois.<sup>[6]</sup>

Although medical emergencies are considered an exemption from the anti-abortion law, it shifts the burden of proof to the medical professional without much legal training as to what is required to satisfy the burden. As this case study reveals, when physicians feel pressured to make a legal determination rather than simply a medical decision, it may create confusion and induce the physician to second-guess their medical judgment because of the criminal and career penalties. Felony and medical license restrictions are a very high price to the physician's personal well-being. For the compliance professional to assist in building confidence in hospital practices and policies, there must be a review of what EMTALA requires and how CMS will enforce those provisions.

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