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## EMTALA Exception to Idaho's Abortion Law Is in Effect for Now

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At least for the foreseeable future, Idaho's total abortion ban is **unenforceable** to the extent it conflicts with the federal Emergency Treatment and Active Labor Act (EMTALA). In other words, when EMTALA applies, a physician may perform an abortion if necessary to preserve the health of the pregnant woman, not just to save her life. The EMTALA exception remains limited in scope as discussed in our August 26, 2022, Health Law Update, “Idaho Abortion Law: The Limited EMTALA Exception.”

Idaho's criminal abortion ban, which originally took effect in August 2022, makes abortion of a clinically diagnoseable pregnancy illegal unless necessary to save the life of the mother or in the case of rape or incest. (Idaho Code § 18-622). Before the law took effect, the US Department of Justice (DOJ) sued the State of Idaho claiming that EMTALA preempted the total abortion ban in emergency situations. On August 24, 2022, the US District Court for the District of Idaho entered a preliminary injunction prohibiting enforcement of Idaho's abortion ban in situations where EMTALA applies. The District Court held that Idaho's abortion ban—which subjects a physician to potential “indictment, arrest, pretrial detention, loss of her medical license, a trial on felony charges, and at least two years in prison” for performing abortions—conflicts with federal law requiring physicians at hospitals receiving Medicare funds to offer stabilization treatment to patients arriving with emergency medical conditions. The District Court held that, under the US Constitution, federal law necessarily prevails over conflicting Idaho state law, and accordingly ordered that Idaho could not enforce the abortion ban to the extent it conflicts with EMTALA-mandated care. That preliminary injunction remained in effect for over a year while the State of Idaho appealed the court's ruling.

On September 28, 2023, a three-judge panel of the US Court of Appeals for the Ninth Circuit granted a stay of the preliminary injunction pending appeal—essentially pausing the District Court's order and eliminating the EMTALA exception to the abortion ban that had been in effect for the past year. Shortly after the panel decision was entered, the DOJ filed an emergency petition asking a larger panel of Ninth Circuit judges to reconsider the EMTALA issue in what is known as a request for en banc review. That petition requested an administrative stay of the panel decision while the appeal to the en banc court is ongoing—a pause, on the pause, of the District Court's preliminary injunction, if you will.

On October 10, 2023, the Ninth Circuit granted the DOJ's petition for en banc review and vacated the panel decision. That order effectively reinstated the District Court's preliminary injunction and once again made it

lawful for physicians in Idaho to perform abortions in EMTALA situations. The Idaho Legislature asked the en banc court to stay the preliminary injunction pending the next stage of the appeal, as the panel had done, but the en banc court denied that request.

Last week, the State of Idaho asked the US Supreme Court to hear the case. And what will happen next is anyone's guess. Provided the Supreme Court does not intervene in the meantime, the Ninth Circuit will hear oral argument in January 2024 and a decision on the EMTALA exception should come sometime after that.

For now, the EMTALA exception to Idaho's abortion ban is in effect, but healthcare providers should pay close attention to future developments and health law updates on this subject as the case is moving quickly through the courts toward, perhaps, a final decision.

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