

# NOW & NEXT

## Healthcare Alert

JULY 10, 2023

### New York strengthens protections for providers delivering reproductive healthcare via telehealth

By Rebecca Simone, Alexandra Busto, Laurie T. Cohen, Justin D. Pfeiffer, and Clara Robertson<sup>1</sup>

There are still practical and legal consequences for providers that the New York bill does not address.



#### What's the Impact?

- / New York providers that deliver reproductive health services to patients outside of the state via telehealth, including medication abortion, cannot be extradited to other states for criminal proceeding.
- / New York providers will be shielded while physically present in New York; however, risks remain, particularly with respect to out-of-state professional licenses and have resulting implications for a provider's payer credentialing and other contracting.

On June 23, 2023, a year after the *Dobbs* Supreme Court decision, Governor Hochul signed [S.1066B/A.1709B](#), which adds protections for providers who provide abortion and reproductive services through telehealth.<sup>1</sup>

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<sup>1</sup> Clara Robertson (Summer Associate) assisted with the preparation of this alert.

[S.1066B/A.1709B](#) amends the criminal procedure law to prohibit the extradition of providers charged with providing a “legally protected health activity,” as long as the provider is physically present in New York State when rendering such services. The law defines “legally protected health activity” as including “reproductive health services” that are provided in person or via telehealth. These services include “assisted reproduction, contraception, miscarriage management or the termination of a pregnancy, and self-managed terminations.” The law also protects providers’ ability to attempt to secure insurance coverage for such care, regardless of the patient’s location, but only if the provider is physically present in New York and the service is permitted under New York law.

The bill amends other laws to facilitate such protections for telehealth providers. For example, the bill amends the Executive Law to prevent any local or state “government employee or entity or other person” from working with an out-of-state agency or department to provide information related to a legally protected health activity in New York, or from using any time or resources “in furtherance of any investigation [...] in or by another state that aims to impose civil or criminal liability or professional sanctions on a person or entity for any legally protected health activity.”<sup>iii</sup> It also adds a new section 4550 to the New York Rules of Civil Procedure, to prevent the admission of evidence related to a legally protected health activity from being offered to support any allegations of “wrongdoing, whether civil, criminal, or professional, or otherwise by virtue of recipients of such services not being physically present in [New York].”<sup>iii</sup>

## Impact and analysis

Through this bill, New York has sent a powerful message that it will continue to support reproductive health services, including abortion, as opposed to some other states that have enacted legislation to restrict such access. However, certain risks remain for any New York provider that offers medication abortion services to a patient located in a state that prohibits such access.

Imagine, for example, a physician located in New York who provides telehealth consultation to a patient sitting in Texas. The physician must be licensed to practice medicine in Texas since the patient is located in Texas (and may be licensed in New York as well). Texas has issued regulations restricting abortion services, which impacts physicians that provide services to patients located in Texas (whether in person or via telehealth). Specifically, Texas House Bill 1280, which went into effect on August 25, 2022, mandates criminal and civil penalties for anyone who “performs, induces, or attempts an abortion” at all stages of pregnancy, with narrow exceptions only for situations where the female is “at risk of death” or has a “serious risk of impairment of a major bodily function unless the abortion is performed or induced...”<sup>iv</sup> Violating the law is a felony and, further, the provider may be subjected to a civil penalty of “not less than \$100,000” per violation.<sup>v</sup> Additionally, Senate Bill 8, which took effect on September 1, 2021, outlaws abortions past the point of a detectable heartbeat,<sup>vi</sup> or at around six weeks of gestation, while not including exceptions for rape or incest.

If the physician in New York prescribes a medication abortion in contradiction of Texas law, the New York law will protect the physician by prohibiting extradition to Texas, and the fact that a

physician has provided these services will not impact the physician's New York medical license. However, New York law cannot protect the physician from prosecution if the physician travels to Texas, or from an action to revoke or limit the physician's license to practice in Texas.

Moreover, the impact of such actions in another state may have spillover effects, even if the physician doesn't travel to Texas or wish to practice there any longer. Specifically, the physician may be required to disclose the disciplinary action or criminal proceeding to the federal Medicare program, the New York or other state Medicaid programs, and to commercial payors, any of which could limit the physician's ability to participate in those programs or provider networks. Similarly, providers are often required to make representations in contracts with employers or other provider networks identifying that the provider is in good standing with state licensing authorities and has not been subject to prior disciplinary actions. Finally, it is possible that such out-of-state professional discipline or criminal prosecution would have consequences with the physician's malpractice insurance carrier. Thus, there are still practical and legal consequences that the New York bill does not address.

## Looking ahead

New York providers should contemplate these significant risks prior to providing abortion services across state lines. Further, as state laws are enacted in this area and the federal government takes additional steps to support access to abortion services, it will be important for state and federal agencies to address these potential effects (through enforcement discretion, position statements, or otherwise).

Nixon Peabody's digital health and telehealth practice are experienced in assisting clients in navigating these complex and evolving areas of law. If you need assistance with such areas, please reach out to your Nixon Peabody LLP contact or one of the following attorneys:

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<sup>i</sup> 2023 NY Senate-Assembly Bill S.1066B, A.1709; see also N.Y. Crim. Proc. Law § 570.17 (McKinney); see Press Release, Kathy Hochul, Governor, [On Eve of Dobbs Decision Anniversary, Governor Hochul Signs Legislation Strengthening Access to Reproductive Health Care](#) (June 23, 2023). Notably, the provisions in S.1066B/A.1709B supplement other protections that New York passed in 2022. For example, 2022 NY Senate-Assembly Bill S.9080B/A.9718B protects providers who perform abortion services in New York on patients who are from states where abortion is illegal.

<sup>ii</sup> [Sponsor's Mem, Bill Jacket, L 2023-34, ch 101](#), see N.Y. Exec. Law § 837-x (McKinney).

<sup>iii</sup> N.Y. C.P.L.R. 4550 (McKinney)

<sup>iv</sup> Human Life Protection Act of 2021, H.B. 1280, 87th Reg. Session (2021); see Tex. Health & Safety Code Ann. § 170A.002.

<sup>v</sup> Tex. Health & Safety Code Ann. § 170A.004-05.

<sup>vi</sup> Tex. Health & Safety Code Ann. § 171.204.