



LOUISIANA’S ABORTION LAW(S) FOR PHYSICIAN GUIDANCE

IN A POST-*ROE* WORLD

August-September 2022 Ed.

1. What does the “overturning” of *Roe v. Wade* mean?

Abortion is no longer a federal constitutional right; instead, each state utilizes its own legislation pertaining to abortion rights, abortion limitations, or, in some conservative states, the overall legality of abortion. Prior to June 24, 2022, states were allowed to place constrictions on their abortion legislation, but they could not constitutionally ban abortion.

2. Has Louisiana enacted specific legislature as to abortion?

Yes; as of August 1, 2022, abortion in Louisiana is illegal in most cases following the moment of “fertilization”:

It is unlawful for a physician or other person to perform an abortion, with or without the consent of the pregnant woman.

Performing an abortion carries a sentence of imprisonment at hard labor for not less than one year nor more than ten years and a fine of not less than ten thousand dollars nor more than one hundred thousand dollars.

A pregnant woman upon whom an abortion is committed or performed will not be held responsible for the criminal consequences of any violation of this Section.

The laws on abortion do not apply to the sale, use, prescription, or administration of a contraceptive or an emergency contraceptive.

3. Can an abortion be performed to save the life of the mother?

Yes, under the following circumstances:

“Serious health risk to the unborn child's mother” means that in reasonable medical judgment the mother has a condition that so complicates her medical condition that it necessitates the

abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. *ABORTION, 2022 La. Sess. Law Serv. Act 545 (S.B. 342)*.

4. What are the exceptions for performing an abortion that do not involve the life of the mother?

The Louisiana Department of Health, Office of Public Health (LDH/OPH), pursuant to the rulemaking authority granted by Louisiana Revised Statute 14:87.1 (cited throughout this supplement and updated by *ABORTION, 2022 La. Sess. Law Serv. Act 545 (S.B. 342)*), adopted the following “Emergency Rule,” effective August 1, 2022:

List of Conditions That Shall Deem an Unborn Child “Medically Futile”
(*LAC 48:1 Chapter 4.101*)

1. Achondrogenesis;
2. Anencephaly;
3. Acardia;
4. Body Stalk Anomaly;
5. Campomelic Dysplasia;
6. Craniorachischisis;
7. Dysencephalia splanchnocystica (Meckel-Gruber syndrome);
8. Ectopia Cordis;
9. Exencephaly;
10. Gestational Trophoblastic Neoplasia;
11. Holoprosencephaly;
12. Hydrops Fetalis;
13. Iniencephaly;
14. Perinatal Hypophosphatasia;
15. Osteogenesis Imperfecta (type 2);
16. Renal Agenesis (bilateral);
17. Short rib polydactyly syndrome;
18. Sirenomelia;
19. Thanatophoric Dysplasia;
20. Triploidy;
21. Trisomy 13;
22. Trisomy 16 (full);
23. Trisomy 18;
24. Trisomy 22; and

25. A profound and irremediable congenital or chromosomal anomaly existing in the unborn child that is incompatible with sustaining life after birth in reasonable medical judgment as **certified by two physicians that are licensed to practice in the State of Louisiana.**

“Interested persons may submit written comments to David McCay, Louisiana Department of Health, P.O. Box 3836, Baton Rouge, LA 70821-3836. He is responsible for responding to inquiries regarding this Emergency Rule.”

5. Can a nurse or physician’s assistant administer a medical abortion?

No, when any drug or chemical is used for the purpose of inducing an abortion the physician who prescribed the drug or chemical must be in the same room and in the physical presence of the pregnant woman when the drug or chemical is initially administered, dispensed, or otherwise provided to the pregnant woman. 2022 La. Sess. Law Serv. Act 545 (S.B. 342).

6. What should I do if the fetus has a pulse following a performed medical or surgical abortion?

An infant at any stage of development who has survived an abortion procedure resulting in his or her live birth shall be given reasonable and immediate medical care as provided in R.S. 40:1061.13(C),* whether the abortion was considered legal or illegal under the law at the time that the abortion was performed. 2022 La. Sess. Law Serv. Act 545 (S.B. 342).

*amended by 2022 La. Sess. Law Serv. Act 545 (S.B. 342). Specific examples of reasonable and immediate medical care are not provided by the legislature but should be followed by the physician’s best care and judgment as the medical provider.

7. Are there additional steps I need to follow if the abortion needs to happen after the fetus is a viable age?

Yes; “Viable” or “viability” in Louisiana law, means that stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before the physician, and in light of the most advanced medical technology and information available to the physician, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his mother, with or without artificial support.

- 1). You must certify in writing that the abortion is necessary to preserve the life or health of the woman;
- 2). You must certify in writing the medical indications for such abortion **and** the probable health consequences;
- 3). You must utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases where the method or technique of abortion

which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of the woman than another available method or technique, the physician may utilize such other method or technique. **In all cases** you must certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

4). An abortion of a viable unborn fetus can only be performed or induced when there is **an attendance a second physician** who shall take control of and provide immediate medical care for an infant born alive as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child and born-alive infant, respectively, provided that it does not pose an increased risk to the life or health of the woman.

8. What does the “heartbeat” law mean and how does it apply to me?

The “heartbeat” law was proposed legislation to prohibit abortions following the detection of a fetal heartbeat; however, with the “Abolition of Abortion in Louisiana Act of 2022” following the repeal of *Roe v. Wade*, abortion is prohibited from the “moment of fertilization” (except for “serious health risk to the unborn child's mother” and a “medically futile” fetus).

9. What are all the legally defined terms associated with abortion?

§ 87.1. Definitions

(1)(a) “Abortion” or “induced abortion” means the performance of any act with the intent to terminate a clinically diagnosable pregnancy with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child by one or more of the following means:

(i) Administering, prescribing, or providing any abortion-inducing drug, potion, medicine, or any other substance, device, or means to a pregnant female.

(ii) Using an instrument or external force on a pregnant female.

(b) Abortion shall not mean any one or more of the following acts, if performed by a physician:

(i) A medical procedure performed with the intention to save the life or preserve the health of an unborn child.

(ii) The removal of a dead unborn child or the inducement or delivery of the uterine contents in case of a positive diagnosis, certified in writing in the woman's medical record along with the results of an obstetric ultrasound test, that the pregnancy has ended or is in the unavoidable

and untreatable process of ending due to spontaneous miscarriage, also known in medical terminology as spontaneous abortion, missed abortion, inevitable abortion, incomplete abortion, or septic abortion.

(iii) The removal of an ectopic pregnancy.

(iv) The use of methotrexate to treat an ectopic pregnancy.

(v) The performance of a medical procedure necessary in good faith medical judgment or reasonable medical judgment to prevent the death or substantial risk of death to the pregnant woman due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child in a manner consistent with reasonable medical practice.

(vi) The removal of an unborn child who is deemed to be medically futile. The diagnosis shall be a medical judgment certified by two qualified physicians and recorded in the woman's medical record. The medical procedure shall be performed in a licensed ambulatory surgical center or hospital. Upon the completion of the procedure, the physician shall submit an individual abortion report consistent with R.S. 40:1061.21 that includes appropriate evidence of the certified diagnosis.

(2)(a) "Abortion-inducing drug" means any drug or chemical, or any combination of drugs or chemicals, or any other substance when used with the intent to cause an abortion, including but not limited to RU-486, the Mifeprex regimen, misoprostol (Cytotec), or methotrexate.

(b) Abortion-inducing drug shall not mean a contraceptive, an emergency contraceptive, or the use of methotrexate to treat an ectopic pregnancy.

(3) "Bona fide medical reason" means a medical condition which is recognized by any medical licensing board as a standard of care, except that "bona fide medical reason" shall not include abortion, as defined in Paragraph (1) of this Section.

(4) "Clinically diagnosable pregnancy" means a pregnancy that is capable of being verified by one of the following conventional medical testing methods, whether or not any testing was in fact performed by any person:

(a) A blood or urine test, whether used at-home or in a medical setting, that tests for the human pregnancy hormone known as human chorionic gonadotropin (hCG) that medically indicates that implantation has occurred.

(b) An ultrasound examination.

(5) "Conception" or "fertilization" means the fusion of a human spermatozoon with a human ovum.

(6) “Contraceptive” means any device, measure, drug, chemical, or product, including single-ingredient levonorgestrel, that has been approved by the United States Food and Drug Administration for the purpose of preventing pregnancy and is intended to be administered prior to the time when a clinically diagnosable pregnancy can be determined, provided that the contraceptive is sold, prescribed, or administered in accordance with manufacturer's instructions.

(7) “Dismembered” or “dismemberment” means the use of a clamp, forceps, curette, suction cannula, or any other surgical tool or instrument with the intent to disarticulate the head or limbs from the body of the unborn child during an abortion, including but not limited to the common abortion methods known as suction curettage and dilation and evacuation.

(8) “Emergency contraceptive” means a drug, chemical, or product, including but not limited to single-ingredient levonorgestrel or ulipristal, that has been approved by the United States Food and Drug Administration designed or intended to be taken after sexual intercourse but prior to the time when a clinically diagnosable pregnancy can be determined, provided that the emergency contraceptive is sold, prescribed, or administered in accordance with manufacturer's instructions or is prescribed in accordance with the standard of care that generally accepted by the American College of Obstetricians and Gynecologists.

(9) “Fetal body part” means a cell, tissue, organ, or other part of an unborn child who is aborted by an induced abortion.

(10) “Fetal heartbeat” means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

(11) “Fertilization” means the fusion of a human spermatozoon with a human ovum.

(12) “Gestational age” means the age of the unborn child as measured by the time elapsed since the first day of the last menstrual period as determined by a physician and confirmed through the use of an ultrasound test of a quality generally used in existing medical practice.

(13) “Genetic abnormality” means any defect, disease, or disorder that is inherited genetically. The term includes, without limitation, any physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, and any other type of physical, mental, or intellectual disability, abnormality, or disease.

(14) “Good faith medical judgment” or “reasonable medical judgment” means a physician's use of reasonable care and diligence, along with his best judgment, in the application of his skill. The standard of care required of every healthcare provider, in rendering professional services or health care to a patient, shall be to exercise that degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same community or locality.

(15) “Infant” means the offspring of human parents from the moment of live birth, regardless of the duration of gestation in the womb prior to live birth.

(16) “Late term abortion” means the performance of an abortion when the gestational age of the unborn child is fifteen weeks or more.

(17) “Live birth”, “born alive”, or “live born human being”, means a member of the species homo sapiens that is expelled or extracted from its mother, at any stage of development, who after that expulsion or extraction breathes or shows signs of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

(18) “Medical emergency” means the existence of any physical condition, not including any emotional, psychological, or mental condition, within the reasonable medical judgment of a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy to avert the pregnant woman's death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy.

(19)(a) “Medically futile” means that, in reasonable medical judgment as certified by two physicians, the unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth.

(b) The Louisiana Department of Health shall promulgate, in accordance with the Administrative Procedure Act, administrative rules establishing an exclusive list of anomalies, diseases, disorders, and other conditions which shall be deemed “medically futile” for purposes of this Subpart. The rules may also encompass diagnostic methods and standards by which a medically futile condition may be diagnosed, including but not limited to tests that are appropriate to the developmental stage and the condition of the unborn child.

(20) “Miscarriage” or “stillbirth” means the spontaneous or accidental death of an unborn child, whether the death occurred in the womb or in the process of birth. Death of the unborn child is indicated by the lack of signs of breathing or any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

(21) “Partial birth abortion” means an abortion in which:

(a) The person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.

(b) The person performing the abortion performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

(22) “Physician” means a person licensed to practice medicine in the state of Louisiana.

(23) “Pregnant” means that female reproductive condition of having a developing embryo or fetus in the uterus which commences at fertilization and implantation.

(24) “Receive a fetal organ” means acquiring any fetal organ or fetal body part, or the rights to any fetal organ or fetal body part, through an act of donation or sale via any transaction prohibited by this Subpart.

(25) “Serious bodily injury” shall have the same meaning as defined in R.S. 14:2. For the purposes of this Section, “serious bodily injury” that includes the loss of an organ shall include a hysterectomy.

(26) “Serious health risk to the unborn child's mother” means that in reasonable medical judgment the mother has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.

(27) “Unborn child”, “unborn human being”, or “fetus” shall have the same meaning as “unborn child” as defined in R.S. 14:2.

(28) “Viable” or “viability” means that stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before the physician, and in light of the most advanced medical technology and information available to the physician, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his mother, with or without artificial support.

(29) “Woman” or “mother” means a female human being, whether or not she has reached the age of majority. ABORTION, 2022 La. Sess. Law Serv. Act 545 (S.B. 342).

Stephen M. Pizzo, Partner, Blue Williams

Blue Williams is a multi-specialty law firm that has provided strategic representation to the Gulf South since 1983. Mr. Pizzo is a partner in the Metairie office and has been with Blue Williams since its inception in 1983. His practice consists primarily of healthcare law and professional liability. He has been a member of the Louisiana State Bar Association since 1979.