

## **Post Dobbs Executive Order Seeks Patchwork Continuity of Reproductive Rights Through Regulatory and Enforcement Changes and FTC Signals it Will Use its Enforcement Authority to Protect Reproductive Healthcare Data**

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### Key Takeaways:

- President Biden issues a new executive order directing the Department of Health and Human Services and the Federal Trade Commission to take steps to safeguard access to reproductive healthcare services, protect patient privacy, promote the safety of patients, providers and clinics, and coordinate the implementation of reproductive healthcare efforts through an interagency task force.
- The Federal Trade Commission pledges commitment to using the full scope of its legal authorities to protect location, health, and other sensitive consumer data.

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### **I. President Biden Issues Executive Order on Protecting Access to Reproductive Healthcare Services**

On the heels of *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade*, on July 8, the Biden Administration issued an [Executive Order \(EO\)](#) seeking to maintain the remaining state-based patchwork abortion access by directing the Federal Trade Commission (FTC) and the Department of Health and Human Services (HHS) to consider regulatory and enforcement actions around patient privacy and access to abortion-related services, noting in particular the "potential threat to patient privacy caused by the transfer and sale of sensitive health-related data and by digital surveillance related to reproductive healthcare services." While changes in enforcement priorities and regulatory schemes have not yet taken shape, the EO makes clear that changes affecting businesses are on the horizon.

The EO focuses on four areas:

- (1) safeguarding access to reproductive healthcare services;
- (2) protecting patient privacy and access to accurate information;
- (3) promoting the safety and security of patients, providers, and clinics; and
- (4) coordinating implementation efforts through the creation of an interagency task force.

To that end, the EO directs HHS to take additional steps or actions to, among other things,

- protect and expand access to abortion care, including FDA-approved medication,
- protect and expand access to a full range of reproductive healthcare services, such as emergency contraception and family planning services and providers,
- ensure that pregnant patients or patients experiencing pregnancy loss receive protections for emergency medical care, including by considering updates to current guidance clarifying physician responsibilities and protections under the Emergency Medical Treatment and Labor Act (EMTALA),

- launch public outreach efforts,
- work along with the Attorney General to ensure the safety of patients, providers, and third parties, and to protect the security of clinics (including mobile clinics), pharmacies, and other entities providing, dispensing, or delivering reproductive and related healthcare services,
- convene pro bono attorneys to provide legal representation to patients, providers, and third parties,
- work in consultation with the FTC and the Attorney General to consider options to address deceptive or fraudulent practices, including online, and protect access to accurate information, and
- consider ways, through the Health Insurance Portability and Accountability Act, Public Law 104-191, 110 Stat. 1936 (1996), as amended by Public Law 111-5, 123 Stat. 115 (2009) (HIPAA) or otherwise, to better protect sensitive information related to reproductive healthcare, in particular through the issuance of new guidance and a consumer how-to guide.

HHS must issue a report by August 7, 2022 with its recommendations.

The EO also directs HHS and the White House Gender Policy Council to establish and lead an interagency Task Force on Reproductive Health Care Access, which will be responsible for coordinating federal interagency policymaking related to reproductive healthcare services. The task force will also include the Attorney General, who will provide technical assistance to states seeking to provide legal protection to out-of-state patients and providers offering reproductive healthcare.

The EO further directs the FTC to consider taking steps to protect consumer privacy when seeking information about and provision of reproductive healthcare services.

## II. FTC Signals Its Direction on Illegal Use and Sharing of Highly Sensitive Data

Following the issuance of the EO, on July 11, 2022, Kristin Cohen, Acting Associate Director of the FTC's Division of Privacy & Identity Protection, published a [post](#) on the FTC's Business blog indicating that the FTC is committed to fully enforcing the law against illegal use and sharing of sensitive data, including reproductive health data. The blog post discusses prior enforcement actions brought against companies that have misused or failed to protect sensitive health data to underscore that the FTC will "vigorously enforce the law if [it] uncover[s] illegal conduct that exploits Americans' location, health, or other sensitive data." The post further cautions companies from making claims that they aggregate or anonymize data when such claims turn out to be false (which you can read more about [here](#)).

As the new EO and the FTC blog post underscore, *Dobbs* will have far-reaching implications for organizations across the United States. Foley Hoag's [Reproductive Healthcare Practice Group](#) is committed to providing you with the legal guidance and resources you need to navigate a rapidly evolving legal landscape. For questions regarding this alert or additional guidance on reproductive healthcare issues, please contact practice co-Chairs [Shrutih Tewarie](#) or [Christopher Hart](#).

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