

FY2023 NDAA: Military Abortion Policies

Updated November 9, 2022

Background

The June 24, 2022, [Supreme Court decision on *Dobbs v. Jackson Women's Health*](#), which overturned *Roe v. Wade* and allowed states to restrict abortion access, raised [questions from some Members of Congress](#) about military personnel and family member access to abortion services when assigned to installations in such jurisdictions. While servicemembers can generally submit assignment preferences, Department of Defense (DOD) [policy](#) dictates that the primary assignment consideration is “current qualifications and the ability to fill a valid requirement.” Commanders may approve exceptions in certain instances (e.g., personal hardships).

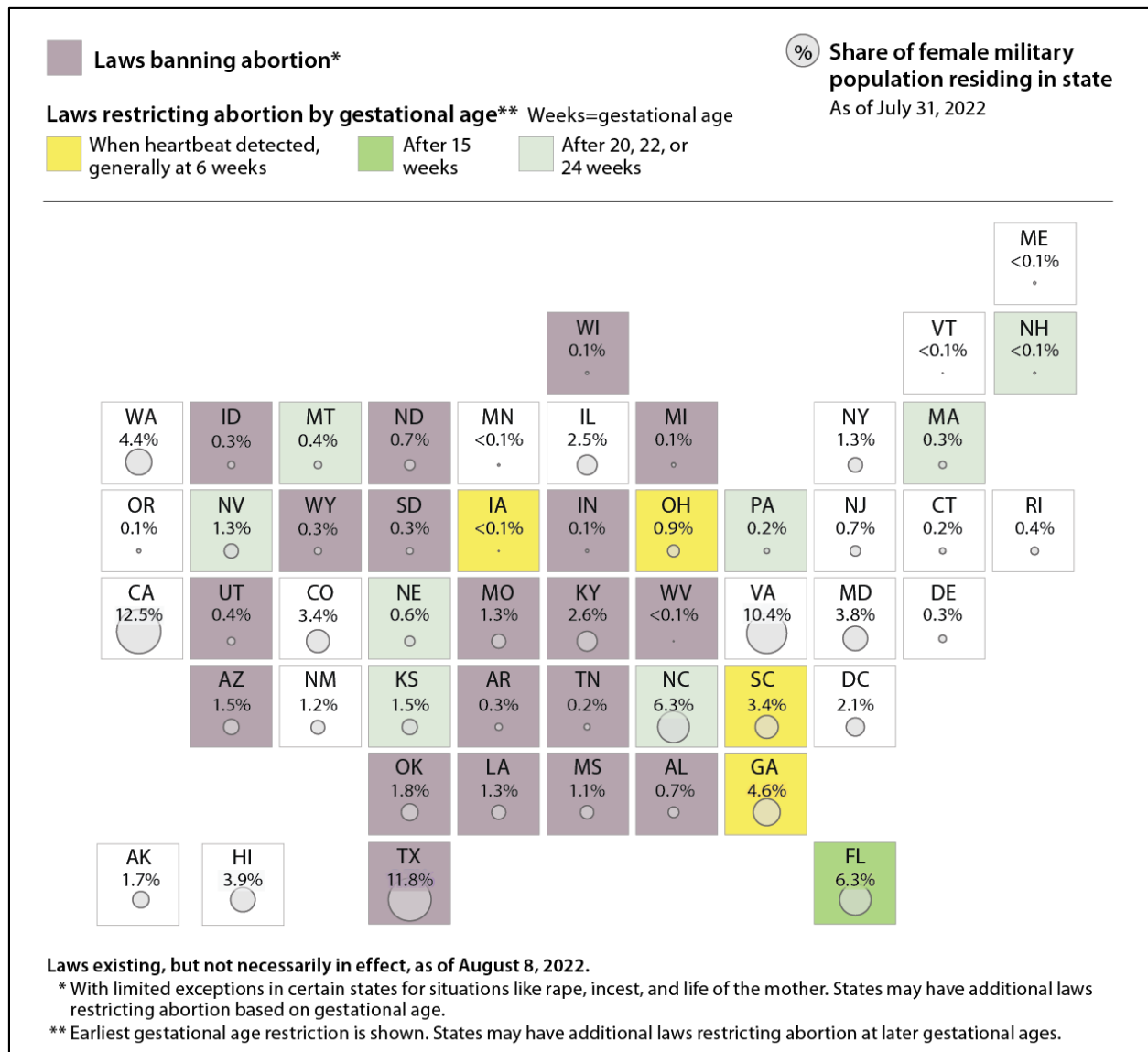
[Title 10, Section 1093](#) of the *United States Code* (U.S.C.), prohibits DOD from using funds or facilities to perform an abortion unless the pregnancy resulted from rape or incest, or “the life of the mother would be endangered if the fetus were carried to term.” On June 28, 2022, DOD issued a [memorandum](#) stating that the *Dobbs* decision “does not prohibit the Department from continuing to perform covered abortions.” DOD [reports](#) that since 2016 it performed fewer than 100 covered abortions in military medical facilities. Abortions that do not meet these criteria are considered *noncovered abortions*. Federal regulations and [TRICARE policies](#) also prohibit abortion counseling, referral, preparation, and follow-up care for noncovered abortions. These services are not available in military treatment facilities.

The U.S. Military Healthcare System serves about 1.62 million women of reproductive age (15-45), including servicemembers, retirees, and their dependents. DOD reports that unintended pregnancies are 50% higher for active-duty women than their civilian counterparts. As of July 31, 2022, about 46,000 active-duty women and 75,000 reserve component women were [assigned](#) to states with laws that ban or restrict abortion beyond certain gestational age (**Figure 1**).

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IN11960

Figure 1. Share of Female Military Population by State and Abortion Laws

Source: CRS analysis of Defense Manpower Data Center data. CRS Law Librarian Laura Deal provided analysis of state laws.

Recent DOD Actions

Servicemembers and their family members who seek a noncovered abortion typically pay out of pocket for all expenses associated with the procedure, including any required travel. On [October 3, 2022](#), DOD's [General Counsel](#) concluded that DOD “can lawfully expend funds to pay for service members and their dependents to travel to obtain abortions that DOD itself cannot perform.” In an [October 20, 2022, memo](#), Secretary of Defense Lloyd Austin directed that travel and transportation expenses (authorized under Title 37 of the U.S.C.) may be used to “facilitate official travel to access non-covered reproductive health care that is unavailable within the local area of a servicemember’s permanent duty station.”

The October memo also directs a uniform DOD policy allowing for administrative leave of absence for servicemembers seeking noncovered reproductive health care. [Chapter 40 of Title 10](#), U.S.C. authorizes

servicemember leave generally. While this chapter does not include specific authority for abortion-related leave or sick leave, it does authorize *convalescent leave in connection with the birth of a child*. Servicemembers who request leave typically must submit a request to their commanding officer for approval. *Some observers have questioned* whether, absent specific statutory authority, a commanding officer could deny a servicemember's request for leave to seek an abortion. The October memo directs consistent guidance on servicemember privacy and for commanders "to display objectivity and discretion when addressing reproductive health care matters and underscores their duty to enforce existing policies against discrimination and retaliation in the context of reproductive health care choices."

Selected Legislative Activity

As part of the annual defense authorization and appropriation cycle, Congress may consider legislation related to abortion policies for military servicemembers and their families. Identical bills (H.R. 7945 and S. 4354) introduced in the House and Senate would repeal abortion restrictions under [10 U.S.C. §1093](#). Versions of the National Defense Authorization Act for Fiscal Year 2023 passed by the [House](#) (H.R. 7900) and reported by the Senate Committee on Armed Services, or SASC (S. 4543), did not include similar repeal language.

Section 8145 of the House Committee on Appropriations-reported FY2023 Department of Defense Appropriations Act (H.R. 8236) would prohibit funds from being used to deny leave for servicemembers and DOD civilians who seek an abortion. It would also cover leave requests for those assisting a "spouse, partner, or significant other" in obtaining an abortion.

The SASC-reported bill does not reference abortion; however, it includes provisions related to leave and assignment policies. Section 623 would provide authority for convalescent leave following the recommendation of a medical or behavioral health provider. Section 525 would prohibit consideration of a servicemember's "agreement or disagreement" with state laws when determining duty assignments. Both of these provisions could apply [more broadly](#) to situations unrelated to abortion.

Considerations for Congress

Some Members of Congress continue to debate military abortion policies in the wake of the *Dobbs* decision. Some [observers argue](#) that restrictions on DOD abortion services create hardships for servicemembers and their families, particularly women of reproductive age, due to out-of-pocket costs associated with noncovered abortions, career impacts related to unwanted pregnancies, or other health and privacy concerns related to abortion and post-abortion care. Additionally, [some Members contend](#) that *Dobbs* will exacerbate these barriers for servicewomen living in states with restrictive abortion laws, and [may harm recruitment and retention](#) of women due to the possibility of involuntarily assignments to such jurisdictions.

Some Members and antiabortion groups [oppose all public funding of abortions](#) as well as [use of defense funds for transportation and other expenses](#) associated with accessing the procedure, contending that taxpayers should not fund such procedures and that funds should be directed toward other defense priorities.

Another consideration may be the extent to which servicemembers, their families, and military medical personnel would be protected from legal liability for seeking or providing abortion services in jurisdictions with abortion restrictions, particularly where state laws may be more restrictive than military laws. The October 2022 memo directs development of a program to support DOD health care providers who may face civil or criminal penalties for "appropriately performing their official duties."

Congress might also consider the potential impact of state abortion laws on DOD's ability to recruit federal civilians and contractors in these jurisdictions and the extent to which travel accommodations, if any, might be authorized for these employees.

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