

FY2023 NDAA: Military Abortion Policies

Updated March 21, 2023

Background

The June 24, 2022, [Supreme Court decision in *Dobbs v. Jackson Women's Health*](#), which overturned *Roe v. Wade* and allowed states to further 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).

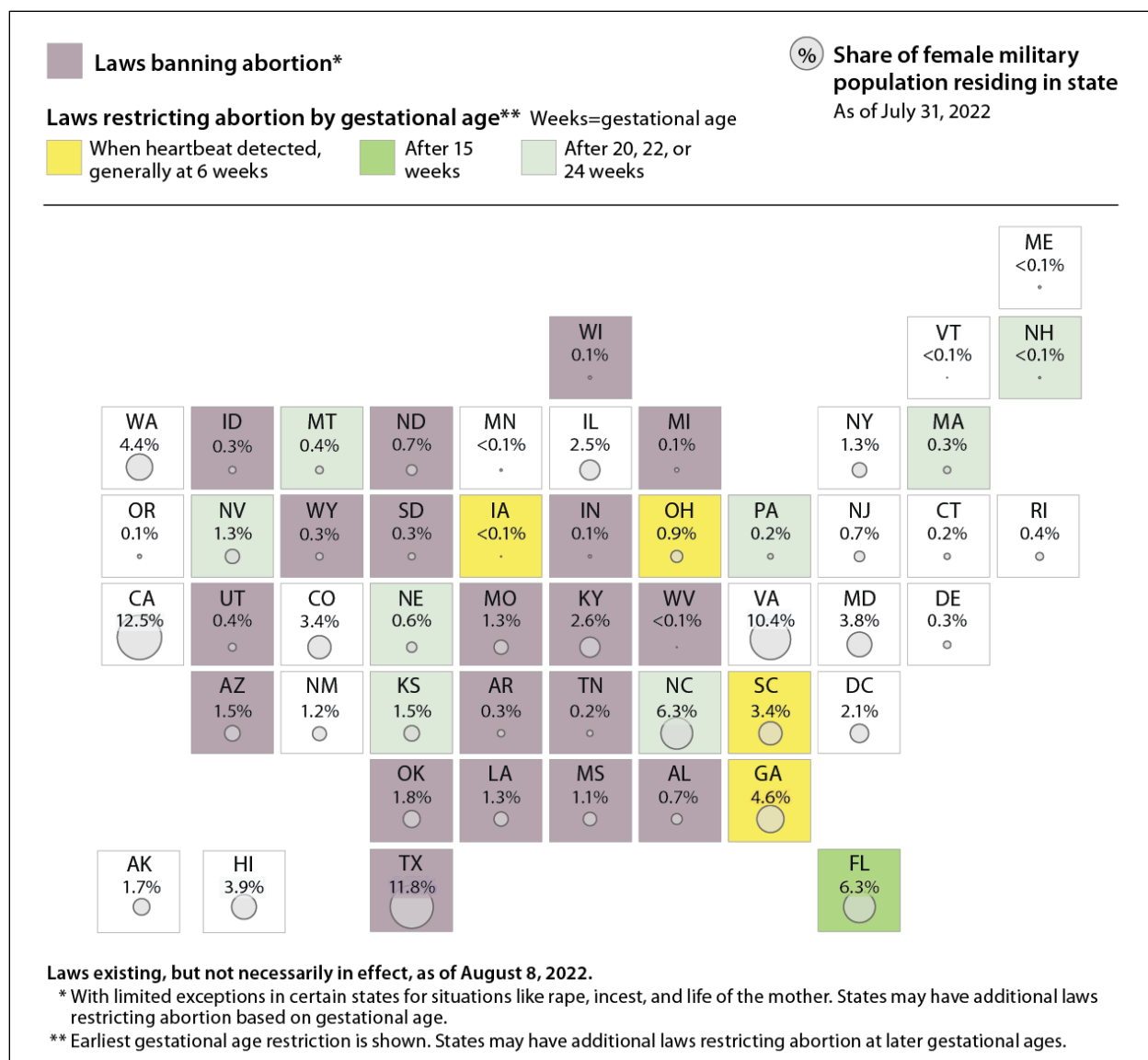
[Title 10, Section 1093](#) of the *United States Code* (U.S.C.), prohibits DOD from using funds or facilities to perform an abortion unless the pregnancy resulted from rape or incest, or “the life of the mother would be endangered if the fetus were carried to term.” On June 28, 2022, DOD issued a [memorandum](#) 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 Military Health 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 a certain gestational age ([Figure 1](#)).

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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 related travel. On [October 3, 2022](#), the [Department of Justice’s Office of Legal 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 memorandum](#), 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 Secretary of Defense's October memorandum directed 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. [DOD released updated policies](#) for travel, leave, and command notification on February 16, 2023.

Selected Legislative Activity

As part of its deliberations on defense policy and funding for fiscal year 2023, Congress considered 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 have repealed 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 have prohibited funds from being used to deny leave for servicemembers and DOD civilians who seek an abortion, and would have covered leave requests for those assisting a "spouse, partner, or significant other" in obtaining an abortion.

The SASC-reported defense authorization bill (S. 4543) did not reference abortion; however, it included provisions related to leave and assignment policies. Section 623 would have provided authority for convalescent leave following the recommendation of a medical or behavioral health provider. Section 525 would have prohibited consideration of a servicemember's "agreement or disagreement" with state laws when determining duty assignments. Both of these provisions could have applied [more broadly](#) to situations unrelated to abortion. A Senate-proposed amendment ([SA 6477](#)) to the bill would have prohibited appropriated funds from being used to carry out the Secretary of Defense's October 20, 2022 memorandum relating to ensuring access to reproductive health care. There were no related provisions adopted in the enacted legislation.

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 Secretary of Defense's October 2022 memorandum 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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