

South Carolina Abortion Laws: Where Things Stand in the Fall of 2022

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On June 24, 2022, the United States Supreme Court published its decision to overturn *Roe v. Wade*. In *Dobbs v. Jackson Women's Health Organization* (19-1392), the Supreme Court held: "The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."^[i] In other words, regulating the right to an abortion became an issue of state law.

It is interesting that in South Carolina although the right to regulate abortions was returned to the State, the law remains as it was before the *Dobbs* decision was rendered. A State law titled the "Fetal Heartbeat and Protection from Abortion" Law ("Fetal Heartbeat Law") went into effect in South Carolina days after *Dobbs* but was later enjoined from enforcement by the South Carolina Supreme Court on August 17, 2022. The South Carolina State Legislature also actively took up various legislative proposals but failed to pass anything by the end of the 2022 session. This article explores the status quo and examines the possible future of abortion law in South Carolina.

History of South Carolina Abortion Law, from *Roe* to *Dobbs*. Prior to *Dobbs*, South Carolina's abortion laws were codified in 1974 in response to the 1973 United States Supreme Court decision in *Roe v. Wade*, wherein the Court recognized a women's right to an abortion as a matter of privacy under the United States Constitution (the "1974 Abortion Laws").^[ii] The 1974 Abortion Laws allowed for abortions in all three trimesters of pregnancy under specified circumstances.^[iii]

In 2021, the South Carolina legislature passed the Fetal Heartbeat Act which was signed into law on February 18, 2021 and generally prohibited abortions after the fetus has a detectable heartbeat. Subsequently, the Act was enjoined from being enforced in March of 2021 by a federal district court.^[iv] Then, after the *Dobbs* decision, on June 27, 2022, the federal injunction was lifted, allowing the Fetal Heartbeat Act to become law.^[v]

The Fetal Heartbeat Act, however, was only enforceable law from June 27, 2022 to August 17, 2022, when the South Carolina Supreme Court enjoined enforcement of the Act.^[1] At that time, South Carolina Supreme Court granted Planned Parenthood South Atlantic, Greenville Women's Clinic, Katherine Farris, M.D., and Terry Buffkin, M.D., petition for original jurisdiction to challenge the constitutionality of the Fetal Heartbeat Act. The South Carolina Supreme Court heard oral argument in this case on October 19, 2022, but has not yet rendered a decision.

To add further confusion on the status of South Carolina's abortion laws, days after the *Dobbs* decision was published, the South Carolina State Legislature began debating legislation (H. 5399) in response to the *Dobbs* decision. The House of Representatives and the Senate, however, had very different ideas about the scope of the legislation. The House-passed version would have prohibited all abortions except in the case of rape or incest (if fewer than twelve weeks) or life or health of the mother. It contained no exception for fetal anomalies. In contrast, the Senate-passed version basically built on the Fetal Heartbeat Act, allowing abortions up to the time a heartbeat is detected and thereafter allowing abortions in the case of rape or incest (in the first trimester), the life or health of the mother, or a fetal anomaly. A conference committee of three Senators and three House members were unable to reach a compromise, and the 2022 session concluded without passage of the bill.

Current Status of South Carolina Abortion Law in November 2022.

As a result of the Fetal Heartbeat Law being enjoined and the Legislature adjourning without passing legislation, as of the date of this article, South Carolina's 1974 Abortion Laws are enforceable. Therefore, abortions are permissible in all three trimesters of pregnancy, under specified circumstances.

Where is South Carolina Abortion Law Likely to Go from Here?

The 1974 abortion laws are likely to remain in effect until the Supreme Court removes the injunction blocking the Fetal Heartbeat Law or the South Carolina Legislature passes new abortion laws in the upcoming legislative session. The 2023 session will commence on January 10, 2023, and abortion legislation will be a top priority for a number of legislators. Legislation has already been pre-filed for the 2023 session representing various views on the issue of abortion.

What Steps Can a Healthcare Provider Take Now?

The main action a healthcare provider can take now is to monitor the news closely and/or monitor state provider association news for updates regarding the Fetal Heartbeat Law and State legislative action. Providers will want to quickly modify practices if needed to comply with possible new restrictions if and when new abortion laws are passed or become enforceable.

Nexsen Pruet will be tracking changes in State law as a result of *Dobbs* that will impact health care providers. We will publish updates as the law evolves, and please let us know if Nexsen Pruet can assist you in navigating this changing regulatory landscape.

[1] Opinion at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

[ii] South Carolina Supreme Court opinion 2022-08-17-01; S.C. Code Ann. §§ 44-41-10 to -80.

[iii] See S.C. Code Ann. §§ 44-41-20.

[iv] <https://www.wltx.com/article/news/local/judge-blocks-south-carolina-fetal-heartbeat-abortion-law/101-19b9855f-22bb-488d-a104-9f2751e90db3>

[v] <https://www.live5news.com/2022/06/27/scs-fetal-heartbeat-bill-now-effect-judge-rules/>

[vi] SC Judicial Branch (sccourts.org)