

Legal Penalties for Physicians Providing Gender-Affirming Care

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The policy landscape on gender-affirming care has significantly changed within the past decade, with high variability in access to care between states. By 2022, approximately half of US states had implemented protective state-level health policies related to gender-affirming care coverage in private and public insurance.¹ However, despite consensus between professional medical associations regarding gender-affirming standards of care, bans on this care, particularly for minors, have gained legislative traction within the past 5 years.

Proposed bills related to bans on gender-affirming care for minors increased from 4 in 2018 to 43 in 2022, with a total of 4 states (Alabama, Arkansas, Arizona, and Texas) enacting laws or policies banning access during this period. In the ongoing 2023 legislative session, 118 bills have been proposed across 31 states related to restricting access to gender-affirming care.² By April 2023, 11 of these bills had been passed into law (in Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Mississippi, South Dakota, Tennessee, Utah, and West Virginia) and 1 administrative rule was enacted in Florida. Thus, in total, 15 states have laws and policies that ban gender-affirming care for minors. Within the stipulations of state bans, physicians who continue care face 4 major direct penalties: (1) medical license disciplinary action; (2) a private right of legal action against physicians, which can include extensions on malpractice statutes of limitations; (3) civil legal action the state can take against physicians; and (4) felony provisions that enable criminal penalties against physicians.

Many of these states' laws deem the practice of providing gender-affirming care for minors as "unprofessional conduct." The laws in Arizona, Arkansas, Georgia, Indiana, Iowa, Tennessee, Utah, and West Virginia hold that physicians are subject to discipline by the appropriate review board. The enacted laws in Kentucky, Mississippi, and South Dakota further state that physicians who violate these laws will have their license to practice medicine revoked by the state medical board.

Laws in 8 states (Arizona, Arkansas, Indiana, Iowa, Mississippi, South Dakota, Tennessee, and Utah) provide a private right of legal action, allowing citizens to bring lawsuits against physicians for providing gender-affirming care. In addition, these states extend medical malpractice statutes of limitations for claims related to providing gender-affirming care for minors. Some states allow malpractice action against a physician until the patient is 25 years old (South Dakota and Utah) and other states allow lawsuits to be filed from 10 to 30 years after the patient reaches 18 years of age (Arizona, Arkansas, Indiana, Iowa, Kentucky, Mississippi, and Tennessee).

In addition to creating a private right of action, laws in 5 states (Arizona, Arkansas, Iowa, Mississippi, and Tennessee) provide that the state may take legal action against physicians who provide gender-affirming care to minors. For example, Tennessee allows the attorney general to bring action against a physician for

providing gender-affirming care for a minor within 20 years of the violation, with a civil penalty of \$25 000 per violation.

Last, 3 states have criminalized the provision of gender-affirming care. Both Alabama and Idaho made it a felony for physicians to provide gender-affirming treatments for patients aged 18 years and younger, punishable by up to 10 years in prison or a fine of \$5000 to \$15 000. In Texas, a governor's directive issued in February 2022 defined certain gender-affirming services for youth as "child abuse" and stated that health care professionals facilitating access to these services are subject to criminal penalties, as are all licensed professionals with mandatory reporting duties for "failure to report such child abuse."³

In addition to these 4 direct physician penalties established by recent state legislation, these laws include 2 other major themes that affect the broader medical community: delegitimizing informed consent and amending the very definitions of "the practice of medicine." For the former, a number of such laws include amendments that supersede traditional understandings and implications of informed consent in the respective sections on malpractice lawsuits. For example, Tennessee specifies that it is not a feasible legal defense to cite that a minor or the parent of the minor consented to gender-affirming care. Furthermore, in Utah, an individual can disaffirm consent before reaching 25 years of age if they had received gender-affirming care as a minor. Allowing the retroactive disaffirmation of informed consent is a particularly alarming alteration of this primary tenet of medical ethics and law. For the latter, some laws have included amendments that explicitly redefined "the practice of medicine" (eg, laws in Mississippi and Utah). For example, an amendment to the Mississippi Code states that the "practice of medicine shall not mean to provide gender transition procedures for any person under eighteen years of age."⁴ These actions by state legislators to rewrite and enforce definitions of "appropriate medical practice" stand in contrast to the established guidelines by international and national bodies of physicians, including the World Professional Association for Transgender Health, American Academy of Pediatrics, and American Medical Association.⁵

Although the legal implications summarized thus far pertain to laws and policies passed from 2021 to 2023 that relate to gender-affirming care for minors, many states are currently considering bills that contain implications for physicians providing gender-affirming care to adults. The first major attempt at restricting adult gender-affirming care occurred on April 13, 2023, via an emergency rule by the Missouri attorney general, which has since been temporarily blocked by a state judge. On review of all 2023 proposed legislation, 6 states (Florida, Kansas, Nebraska, Oklahoma, South Carolina, and Texas) have considered bills that would affect access to gender-affirming care for adults. Proposed legislation would increase the ban on gender-affirming care to older ages, varying between 19 and 26 years of age. Although these proposed bills have not yet passed, they signal further aggressive attempts to extend bans or limits on gender-affirming care to adults and extend physician penalties for providing such care.

Concurrent to these state laws, the federal response adds to the legal complexity for physicians in these states. The federal guidance that has been most influential for protection of gender-affirming care is section 1557 of the Patient Protection and Affordable Care Act, which in 2016 was interpreted to include gender identity within its protections against sex discrimination. However, oscillating interpretations and court challenges have led to conflicting positions on enforcement of this policy.⁶ In March 2022, the US Department of Health and Human Services Office for Civil

Rights (OCR) issued a new notice on the federal enforcement policy. The guidance stated that caregivers denied gender-affirming care for their child or clinicians restricted from providing such care may file an administrative complaint for OCR to investigate. However, in October 2022, after legal challenge, a district court in Texas issued a judgment vacating the guidance. The Biden administration's final rule on the interpretation of section 1557 is expected to be released in 2023. In addition, states such as California have taken legislative steps to protect physicians and patients from persecution under other states' laws to the greatest extent possible.

Physicians may find themselves in legal limbo, straddling state laws banning gender-affirming care and federal nondiscrimination law, both of which remain unclear because of ongoing legal challenges in the courts. Regardless of the enforcement of these laws, the chilling effect caused by both perceived and actual legal threat, as well as harassment and threats against physicians, has had an adverse effect on gender-affirming care practices.⁷ The targeting of physicians through these legal penalties impedes them from practicing evidence-based medicine and blocks patients from accessing standard of care treatments.

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