

FY2023 NDAA: Military Abortion Policies

June 27, 2022

Background

The June 24, 2022, [Supreme Court decision on *Dobbs v. Jackson Women's Health*](#), which allows states to restrict abortion access, has raised [questions from Members of Congress](#) about the ability of military personnel and their family members to access abortion services when assigned to military installations in such jurisdictions. In most cases, while military servicemembers can submit assignment preferences, [Department of Defense \(DOD\) policy](#) dictates that the primary consideration for assigning servicemembers is “current qualifications and the ability to fill a valid requirement.” Senior officials may approve exceptions to this policy in certain instances (e.g., personal or family hardships).

Under [Title 10, Section 1093](#) of the *United States Code* (U.S.C.), DOD is prohibited from using funds or facilities for 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.” This provision was first enacted in [1984](#). Prior to adding the statutory restriction, Congress had included provisions in annual defense appropriations bills that restricted funding for military abortions, starting with appropriations for FY1979 (P.L. 95-457, §863). Such abortion funding restrictions in appropriations bills are often referred to as [Hyde-type amendments](#) after their original sponsor, Representative Henry J. Hyde. Federal regulations and [TRICARE policies](#) also prohibit abortion counseling, referral, preparation, and follow-up care for noncovered abortions, and these services are not available in military treatment facilities. Servicemembers who are seeking a noncovered abortion with a civilian provider typically pay out of pocket for all expenses associated with the procedure, including any required travel.

In addition, servicemembers who are requesting leave for any reason will typically need to submit the request to their commanding officer or supervisor for approval. Servicemember leave is authorized under [Chapter 40 of Title 10, United States Code](#); however, there is not a leave category in law specifically for abortion or other specific medical procedures. Some observers have questioned whether, absent a specific authority, a commanding officer could deny a servicemember’s request for leave to seek an abortion. Recent changes to [Army](#) and [Air Force](#) policies would limit a commander’s ability to deny leave under these circumstances. These policies encourage servicemembers to seek follow-up care by a military medical professional to establish any convalescent leave or physical duty limitations.

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IN11960

Legislative Activity in the 117th Congress

As part of the annual defense authorization and appropriation cycle, Congress may consider legislation related to abortion access for military servicemembers and their families. Identical provisions (H.R. 7945 and S. 4354) have been introduced in the House and Senate that would repeal restrictions on DOD's ability to fund and perform abortions under [10 U.S.C. §1093](#). The House and Senate Committees on Armed Services did not include similar language in markup of their versions of the National Defense Authorization Act for Fiscal Year 2023 (FY2023 NDAA).

The House Committee on Appropriations Subcommittee on Defense reported its version of the [Department of Defense Appropriations Act, 2023](#) on June 13, 2022. This bill included a provision (§8145) that would prohibit appropriated funds from being used to deny leave for servicemembers and DOD civilians who are seeking an abortion. It would also cover leave requests for those individuals who are assisting a "spouse, partner, or significant other" in obtaining an abortion. While [military law](#) recognizes a servicemember's spouse as a "dependent" for the purposes of benefits and protections, it does not include in this definition a "partner" or "significant other."

Considerations for Congress

According to [TRICARE annual reporting](#), the Military Healthcare System serves approximately 1.62 million women of reproductive age (15–45), including servicemembers, retirees, and their dependents. Some [observers have argued](#) that existing statutory restrictions on DOD abortion services create hardships for this population due to out-of-pocket costs associated with noncovered abortions, career impacts related to unwanted pregnancies, or other health and privacy concerns related to the procedure and postprocedure care. Additionally, [some Members of Congress contend](#) that *Dobbs* will exacerbate these barriers for servicewomen living in states with laws that restrict abortion access (e.g., costs of out-of-state travel). [Other observers have argued](#) that this decision may also harm recruitment and retention of military women due to the possibility of being involuntarily assigned to such states. According to CRS analysis of [DOD data](#), as of June 27, 2022, there were approximately 45,000 active-duty women and 39,000 reserve component women stationed in states with so-called [trigger laws](#) designed to ban abortion now that the Supreme Court has overturned *Roe v. Wade*. Some Members of Congress and antiabortion groups [oppose all public funding of abortions](#), contending that taxpayers should not have to contribute to a procedure to which they have a moral objection.

Congress may consider codifying existing and proposed authorities for military personnel leave and assignment policies as they relate to noncovered abortion services. Defining such policies in statute could standardize implementation across the military departments and provide continuity across presidential administrations. On the other hand, it could also lead to less flexibility for the Secretaries concerned to tailor policies that best fit service culture and operational needs. Congress might also explore the extent of commanders' discretionary authority to approve leave associated with pregnancy termination, and mechanisms to appropriately balance servicemember privacy concerns with unit readiness.

Other considerations may include the extent to which servicemembers, their families, and military medical personnel are 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 (e.g., prohibiting abortions in the case of rape or incest).

For more on TRICARE coverage of abortion and reproductive health services, see CRS Report R46785, *Federal Support for Reproductive Health Services: Frequently Asked Questions*, coordinated by Elayne J. Heisler.

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