



FY2023 NDAA: Military Abortion Policies

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Background

The June 24, 2022, [Supreme Court decision on *Dobbs v. Jackson Women's Health*](#), which overturns *Roe v. Wade* and allows states to restrict abortion access, has raised [questions from some 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 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.” Abortions that do not meet these criteria are considered *noncovered abortions*. This provision was first enacted in [1984](#). Prior to adding the statutory restriction, Congress had included provisions in annual defense appropriations bills restricting funding for the military to perform 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 and their family members 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 request leave for any reason typically need to submit a request to their commanding officer or supervisor for approval. [Chapter 40 of Title 10, United States Code](#) 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*. Some observers have questioned whether, absent specific statutory authority, a commanding officer could deny a servicemember’s request for leave to seek an abortion.

On June 28, 2022, DOD issued a [memorandum](#) stating that the *Dobbs* decision “does not prohibit the Department from continuing to perform covered abortions” and that “Department policy authorizes active

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duty Service members to travel as necessary to receive abortion care—either as Government-funded, official travel for covered abortion, or at the Service member’s own expense on regular leave for all other cases.”

Selected Legislative Activity in the 117th Congress

As part of the annual defense authorization and appropriation cycle, Congress may consider legislation related to covered abortions 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](#). 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.

The House Committee on Appropriations reported its version of the Department of Defense Appropriations Act, 2023 (H.R. 8236) on June 24, 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 *U.S. Code* 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.”

While the SASC-reported bill does not include a reference to abortion, it does include two provisions related to servicemember convalescent leave and assignment policies. Section 623 would provide an explicit statutory 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 for that individual. Both of these provisions could be [more broadly applicable](#) to situations unrelated to abortion.

Considerations for Congress

Members of Congress have continued to debate military abortion policies in the wake of the *Dobbs* decision. Some [observers have argued](#) that existing statutory restrictions on DOD abortion services create hardships for many servicemembers, particularly women of reproductive age and their families, 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. The U.S. Military Healthcare System serves approximately 1.62 million women of reproductive age (15-45), including servicemembers, retirees, and their dependents. The [Department of Defense \(DOD\)](#) reports that unintended pregnancies are 50% higher for active-duty women than their civilian counterparts.

Additionally, [some Members of Congress contend](#) that *Dobbs* will exacerbate these barriers (e.g., costs of out-of-state travel) for servicewomen living in states with laws that restrict abortion access. [Other observers have argued](#) that the decision may 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.

Other considerations for Congress 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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