

NEW MEXICO ABORTION LAW POST-*DOBB*S

Abortion remains legal in New Mexico at all stages of pregnancy. New Mexico does not require parental notification or consent for minor patients, nor impose a waiting period, limits on public funding to support abortion, or method bans.

Criminal Law

Bans

In February 2021, New Mexico formally repealed criminal punishment for so-called partial birth abortions. See New Mexico S.B. 10, “Respect New Mexico Women and Families Act,” 2021. Under the 1969 ban,

No person shall perform a partial-birth abortion except a physician who has determined that in his opinion the partial-birth abortion is necessary to save the life of a pregnant female or prevent great bodily harm to a pregnant female:

- A. because her life is endangered or she is at risk of great bodily harm due to a physical disorder, illness or injury, including a condition caused by or arising from the pregnancy; and
- B. no other medical procedure would suffice for the purpose of saving her life or preventing great bodily harm to her.

N.M. Stat. Ann. § 30-5A-3. The treating physician could be subject to a fourth degree felony charge, as well as to civil actions by the pregnant person on whom they performed the abortion or their parents if a minor at the time, or the biological father of the fetus. N.M. Stat. Ann. §§ 30-5A-5, 4.

Prosecution of Non-Physicians

Although not specifically addressed elsewhere by the legislature, it seems unlikely that a person who self-manages their abortion is unlikely to be criminally charged with homicide. See *State v. Willis*, 652 P.2d 1222, 1224 (N.M. Ct. App. 1982) (“Therefore it seems that the Legislature made a distinction between killing a human being and killing what we would consider a viable fetus today... it does not follow that the Legislature meant to include viable fetus within the definition of human being without specifically making provision therefor.”)

Child Abuse

A fetus is not a child for the purposes of the child abuse statute. *State v. Mondragon*, 203 P.3d 105, 108 (N.M. Ct. App. 2008). Moreover, because one who used drugs while pregnant could not have reasonably understood their action to be criminal with respect to the fetus, a mother who used cocaine during pregnancy could not be charged with criminal child abuse. *State v. Martinez*, 137 P.3d 1195, 1197 (N.M. Ct. App. 2006) (“Since we have concluded that the statutory definition of “human being” does not include a fetus, Defendant could not have reasonably known that her conduct was criminal.”)

Civil Schemes

Wrongful Death

Under New Mexico's wrongful death legislation, "person" does not include a nonviable fetus. *Miller v. Kirk*, 905 P.2d 194 (N.M. 1995). Relying on legislative intent, however, the New Mexico Supreme Court held that a viable fetus was a "person" within the legislative scheme. *Salazar v. St. Vincent Hospital*, 619 P.2d 826 (N.M. 1980). See generally N.M. Stat. Ann. § 41-2-1.

State Surveillance

Even in the absence of a criminal punishment, New Mexico monitors the abortions performed within its borders. N.M. Stat. Ann. § 24-14-18 provides:

- A. Each induced abortion which occurs in this state shall be reported to the state registrar within five days by the person in charge of the institution in which the induced abortion was performed. If the induced abortion was performed outside an institution, the attending physician shall prepare and file the report.
- B. The reports required under this section are statistical reports to be used only for medical and health purposes and shall not be incorporated into the permanent official records of the system of vital statistics. The report shall not include the name or address of the patient involved in the abortion. The department shall not release the name or address of the physician involved in the abortion. A schedule for the disposition of these reports shall be provided for by regulation.

The parameters of this law have not been tested in New Mexican courts. Given the state's repeal of criminal punishment of abortion and friendly attitude toward abortion, it's unlikely that New Mexico would use this provision to the detriment of abortion seekers. Noteworthy, however, is the lack of attention self-managed abortion.

Public Funding

New Mexico's Equal Rights Amendment, N.M. Const. Art. II § 18, guarantees that "[e]quality of rights under law shall not be denied on account of the sex of any person." The state's supreme court relied on that provision to hold the New Mexico Medical Assistance Division's rule denying state public funding to Medicaid-eligible pregnant people unconstitutional. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 857 (N.M. 1998). However, New Mexico remains bound by the 10th Circuit's ban on federal Medicaid funds application to abortions announced in *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995).

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Criminalization of Pregnancy & Reproductive Health State-by-State Reports

Consistent with our Mission, the National Association of Criminal Defense Lawyers has launched its Criminalization of Pregnancy and Reproductive Health Project (CPRHP) to support attorneys defending individuals and entities at risk of prosecution as a result of the criminalization of abortion and abortion services. Following up on our 2019 report *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights into Criminal Wrongs*, NACDL's CPRHP has worked with dozens of law professors and other legal experts to create this overview of relevant state laws including existing abortion laws, trigger laws that are or will soon be in effect, pre-Roe statutes that prosecutors might invoke, and fetal personhood laws. NACDL is committed to developing resources to prepare attorneys to advise clients and defend cases in the face of the criminalization of personal choice and health.

NACDL's Criminalization of Pregnancy & Reproductive Health

This report was made possible by NACDL's Criminalization of Pregnancy & Reproductive Health efforts.

Learn more about this work at <https://www.nacdl.org/protecthealth>.

Acknowledgements

Thank you to all the volunteers who contributed these state reports. See a full list of acknowledgements at <https://www.nacdl.org/protecthealththanks>.

Disclaimer

NACDL is providing resources regarding the Criminalization of Pregnancy and Reproductive Health to the criminal defense community. Resources are provided without warranty or guarantee. Please consult the laws and rules of your state and local authorities.

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