

**Practice Note:**  
***Non-covered Reproductive Health Care***  
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I. Introduction

In June 2022, the United States Supreme Court handed down its landmark decision in *Dobbs v. Jackson Women’s Health Organization*.<sup>1</sup> Overturning the seminal cases *Roe* and *Casey*, the *Dobbs* decision ultimately allowed for individual states to regulate abortion and other reproductive health care.<sup>2</sup> In the months following the decision, states rushed to codify laws that ranged from expanding abortion access to restricting abortion access entirely.<sup>3</sup> By November of the same year, twelve states banned abortion starting at the point of conception, except in extremely limited circumstances.<sup>4</sup> With a rapidly changing legal landscape, the Department of Defense (DoD) worked to update its policies and regulations to minimize the impact on Service members. By mid-2023, the Army had multiple publications covering what has been termed “non-covered reproductive health care.”<sup>5</sup> Given the tight timelines for processing requests and the sensitive nature of the information involved, unit commanders and their legal advisors must understand these policies and procedures.

II. Background

Following the *Dobbs* decision, the legal environment concerning abortion and other reproductive health care access across the United States changed dramatically. Multiple states already had “trigger bans” in place, which are laws that would immediately go into effect if *Roe* was overturned.<sup>6</sup> Other states had laws that were unenforceable after *Roe*, but remained on the books and were once again active.<sup>7</sup> The opposite is also true. Even in the weeks and months preceding the *Dobbs* decision, multiple states worked to update their abortion laws to safeguard or even expand access.<sup>8</sup> The Center for Reproductive Rights, a global human rights organization,

maintains an interactive map to show what abortion laws look like in each state.<sup>9</sup> The map shows how the laws from state to state run the entire spectrum. While some states have protected or expanded access to abortions, others have put in place a range of restrictions to even an outright ban on abortions.<sup>10</sup> Further, in some states, these heightened restrictions have had second- and third-order effects. For example, Alabama's Supreme Court recently ruled that embryos are considered children under the state's Wrongful Death of a Minor Act.<sup>11</sup> In turn, the ruling caused clinics within the state to pause in vitro fertilization (IVF) services immediately.<sup>12</sup>

Just a few months after the *Dobbs* decision, the DoD instituted policies to mitigate the potential impact on Service members and ensure that they would continue to have access to reproductive health care, regardless of where they were stationed.<sup>13</sup> These changes included providing more flexibility to Service members regarding command notification of pregnancy and authorizing administrative absences for non-covered reproductive health care, along with travel and transportation allowances.<sup>14</sup> Ultimately, the Army instituted its own directives and policy updates, giving commanders more guidance.

### III. Current Army Policy

Following the DoD's release of updated policies for all Services, the Army published Army Directive (AD) 2023-05 on February 27, 2023, concerning administrative absences for non-covered reproductive health care (NCRHC).<sup>15</sup> The Army published further guidance in June 2023 with two All Army Activities (ALARACT) messages, ALARACT 043/2023 and ALARACT 044/2023, concerning the administrative absences as well as travel and transportation allowances under the Joint Travel Regulation (JTR).<sup>16</sup> Additionally, the Army created a Frequently Asked Questions webpage containing these references and answers to common questions about the new

policies.<sup>17</sup> Together, these resources ensure that commanders, with the help of their legal advisors, understand how to process absence requests and fund travel for their Soldiers.

Army Directive (AD) 2023-05 establishes that commanders must “exercise objectivity, compassion, and discretion when addressing all healthcare matters, including reproductive healthcare matters.”<sup>18</sup> It also institutes a specific “duty to enforce existing policies against discrimination and retaliation in the context of reproductive healthcare choices.”<sup>19</sup> The AD defines NCRHC as “lawfully available [assisted reproductive technology] and non-covered abortion.”<sup>20</sup> Assisted reproductive technology (ART) includes ovarian stimulation and egg retrieval, sperm collection and processing, intrauterine insemination, and IVF.<sup>21</sup> “Covered abortion” includes abortions “where the life of the mother would be endangered if...carried to term” or where the pregnancy resulted from rape or incest.<sup>22</sup>

#### A. Administrative Absences

Army Directive 2023-05 guarantees eligible access to NCRHC, regardless of a Soldier’s duty station.<sup>23</sup> To obtain this type of health care, Soldiers may request a non-chargeable administrative absence.<sup>24</sup> The request must include supporting documentation, typically a medical provider’s certification of the condition and location of care, with the period of absence limited to the “minimum number of days essential to receive the required care and travel needed to access the care...”<sup>25</sup> The company-level commander may approve an absence for up to 21 days, and the absence request can be for the Soldier herself or to accompany a dependent or dual-military spouse who receives NCRHC.<sup>26</sup> While company-level commanders can approve these requests, the authority to disapprove the administrative absence request is withheld to the brigade-level (or higher) commander, with a servicing legal advisor.<sup>27</sup> The total processing time for a valid request must not exceed seven business days.<sup>28</sup> Generally, the absences should be granted “to the greatest

extent practicable,” regardless of whether similar care is available locally.<sup>29</sup> The primary reasons for disapproval include when there is an intention “to sell, to offer for sale, or to receive proceeds from a sale” resulting from accessing such health care, or in the judgment of the brigade-level commander, with advice from their legal advisor, the Soldier’s absence “would impair proper execution of the military mission.”<sup>30</sup> Commanders are not allowed to impose additional requirements, such as meeting with a chaplain, before making a decision on the absence.<sup>31</sup> Commanders are still authorized to grant, separately, convalescent leave following receipt of this type of health care based on the provider's recommendation.<sup>32</sup>

#### B. Travel and Transportation Allowances

In addition to the updates to administrative absences for NCRHC, the DoD’s JTR was updated to include the new paragraph 033013, which covers travel and transportation allowances when Soldiers seek to access NCRHC.<sup>33</sup> Soldiers and their dependents are eligible for travel and transportation reimbursement to receive NCRHC when timely access is unavailable within their “Permanent Duty Station (PDS), Temporary Duty (TDY) location, or the last location the dependent was transported on Government orders.”<sup>34</sup> For non-covered abortions, substantiating documentation includes licensed medical provider validation of the pregnancy.<sup>35</sup> For non-covered ART, the substantiating documentation includes “details of the procedures to be performed, dates of consultation appointments and/or procedures, and include any of the following: identification of a treatment plan schedule, medical diagnosis, and patient names to verify eligibility.”<sup>36</sup> Unlike administrative absences for NCRHC, the travel and transportation allowance requires the Soldier’s certification, in writing, of “the closest available, capable medical facility for the non-covered reproductive health care service” and includes consideration of the time-sensitive nature of the procedure.<sup>37</sup> If the Soldier or their dependent wishes to use a

location other than the certified, closest available facility, then a cost comparison is done to determine reimbursement, limited to the constructed cost of using the closest medical facility.<sup>38</sup> The JTR also allows for reimbursement of one or more attendants or escorts when the Soldier is incapable of traveling alone, as well as accompanying dependents when they are command-sponsored at an OCONUS PDS and incapable of self-support with no suitable care arrangements available.<sup>39</sup>

### C. Key Takeaways for Commanders and Judge Advocates

In reviewing the policies laid out above, a few key takeaways are important for commanders and their servicing judge advocates to understand. First, while the company-level commander is the approval authority, only a brigade-level or higher commander with a servicing legal advisor may disapprove an absence request for NCRHC. Further, it does not matter whether the Soldier can receive the NCRHC in the local area or not. Second, commanders who, as a “matter of conscience or moral principle,” object to NCHRC are not required to participate in the process but must still ensure that the request is being forwarded higher and meets the seven-day timeline from submission to decision.<sup>40</sup> Third, the updates to the JTR allow reimbursement not just for the Soldier who seeks to access NCHRC but also for eligible dependents or the dual-military spouse who seeks access to NCHRC. Finally, in processing these requests, access to the necessary protected health care information must be strictly limited to those personnel with a “specific need to know.”<sup>41</sup>

## IV. Conclusion

With the patchwork of legal access to abortion and other reproductive health care following the *Dobbs* decision, the DoD has taken steps to guarantee access to NCRHC for Soldiers and their dependents. These new policies require quick processing of requests and deal with sensitive

health care information. Commanders and their servicing judge advocates must understand the new policies for administrative absences and travel and transportation allowances to ensure Soldier access to NCRHC regardless of where they are stationed.

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<sup>1</sup> *Dobbs v. Jackson Women's Health Org.*, 596 U.S. 215 (2022).

<sup>2</sup> *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>3</sup> RISA KAUFMAN, ET. AL., *Global impacts of Dobbs v. Jackson Women's Health Organization and abortion regression in the United States*, NATIONAL LIBRARY OF MEDICINE (Nov. 16 2022).

<sup>4</sup> *Id.*

<sup>5</sup> *See* U.S. DEP'T OF ARMY DIR. 2023-05, ADMINISTRATIVE ABSENCE FOR NON-COVERED REPRODUCTIVE HEALTH CARE (Feb. 27, 2023) [hereinafter AD 2023-05]; U.S. DEP'T OF ARMY ALL ARMY ACTIVITIES 043/2023, ADMINISTRATIVE ABSENCE FOR NON-COVERED REPRODUCTIVE HEALTHCARE (Jun. 8, 2023) (hereinafter ALARACT 043/2023); U.S. DEP'T OF ARMY ALL ARMY ACTIVITIES 044/2023, TRAVEL AND TRANSPORTATION FOR NON-COVERED REPRODUCTIVE HEALTH CARE (Jun. 8, 2023) [hereinafter ALARACT 044/2023].

<sup>6</sup> *See* KAUFMAN, ET. AL.

<sup>7</sup> *Id.*

<sup>8</sup> SHARON BERNSTEIN, *Fearing end of Roe v. Wade, liberal U.S. states rush to protect abortion rights*, REUTERS (May 11, 2022), <https://www.reuters.com/world/us/democrats-scramble-protect-abortion-rights-liberal-us-states-2022-05-11/>.

<sup>9</sup> *After Roe Fell: Abortion Laws by State*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited Mar. 4, 2024).

<sup>10</sup> *See id.*

<sup>11</sup> *LePage v. Ctr. for Reprod. Med., P.C.*, 2024 Ala. LEXIS 60 (Ala. 2024).

<sup>12</sup> ARIA BENDIX, *Three Alabama clinics pause IVF services after court rules that embryos are children*, NBC NEWS, (Feb. 21, 2024), <https://www.nbcnews.com/health/health-news/university-alabama-pauses-ivf-services-court-rules-embryos-are-childre-rcna139846>.

<sup>13</sup> Secretary of Defense Memorandum: Ensuring Access to Reproductive Health Care (Oct. 20, 2022).

<sup>14</sup> DoD Releases Policies to Ensure Access to Non-Covered Reproductive Health Care, U.S. DEPARTMENT OF DEFENSE, (Feb. 16, 2023), <https://www.defense.gov/News/Releases/Release/Article/3301006/dod-releases-policies-to-ensure-access-to-non-covered-reproductive-health-care/>.

<sup>15</sup> *See* AD 2023-05, *supra* note 5.

<sup>16</sup> *See* ALARACT 043/2023, *supra* note 6; ALARACT 044/2023, *supra* note 5.

<sup>17</sup> Non-covered Reproductive Health Care - Administrative Absence FAQ, HUMAN RESOURCES COMMAND, <https://www.hrc.army.mil/content/26739> (last visited Mar. 4, 2024).

<sup>18</sup> AD 2023-05, *supra* note 5, at para. 4.a.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at Encl.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at para. 4.b.

<sup>24</sup> *Id.* at para. 4.c.

<sup>25</sup> *Id.* at para. 4.c., 4.f.

<sup>26</sup> *Id.* at para. 4.d.

<sup>27</sup> *Id.* at para. 4.e.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at para. 4.h.

<sup>30</sup> *Id.* at para. 4.i.-j.

<sup>31</sup> *Id.* at para. 4.k.

<sup>32</sup> *Id.* at para. 4.l.

<sup>33</sup> *See* U.S. DEP'T OF DEF. JOINT TRAVEL REGULATION (Mar. 1, 2024) [hereinafter JTR]; *See also* Memorandum: Travel and Transportation for Non-covered Reproductive Health Care, SECRETARY OF THE ARMY (Feb. 27, 2023).

<sup>34</sup> JTR, *supra* note 33, at para. 033013.B. (Eligibility).

<sup>35</sup> *Id.* at para. 033013.B.1. (Eligibility).

<sup>36</sup> *Id.* at para. 033013.B.2. (Eligibility).

<sup>37</sup> *Id.* at para. 033013.B.3. (Eligibility).

<sup>38</sup> *Id.* at para. 033013.B.3.b. (Eligibility).

<sup>39</sup> *Id.* at para. 033013.B.3.-4. (Allowances).

<sup>40</sup> *See* ALARACT 043/2023, *supra* note 6, at para. 3.D.-3.E.

<sup>41</sup> *Id.* at para. 3.M.