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# REPRODUCTIVE RIGHTS

Post-*Dobbs* Considerations for Employers

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# Overview

- *Dobbs v. Jackson Women's Health Organization*
- Where state laws stand today
- Anticipated legislative developments
- Travel/lodging and pharmacy benefits
- Ancillary issues – discrimination, leave, data privacy, workplace culture, implications for other rights

# Overview of the *Dobbs* Decision

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# Overview of the *Dobbs* Decision

- 6-3 (5-4?) opinion; overturns *Roe* and *Casey*
- The Constitution does not expressly or implicitly protect the right to choose abortion and leaves it to the states to regulate
- Laws regulating abortion are entitled to a “strong presumption of validity” and will be upheld unless there is no “rational basis on which the legislature could have thought [the law] would serve legitimate state interests”

# Overview of the *Dobbs* Decision

- Justice Alito's opinion states that the decision does not affect the Court's precedents on other substantive due process rights, like marriage or contraception
  - Justice Kavanaugh concurred
  - Justice Thomas, however, urged the Court to "reconsider all of [its] substantive due process precedents," including *Griswold* [contraception], *Lawrence* [intimate relationships], and *Obergefell* [marriage equality]
- Justice Kavanaugh's concurring opinion indicates that, in his view, a state may not bar a resident of that state from traveling to another state to obtain an abortion

# Where State Laws Stand Today

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# Restrictive State Laws

- **Twenty-four** states have active laws that restrict abortion access
- **Thirteen** of these state laws have “trigger” provisions meaning that they were effective immediately after *Roe* was overturned or become effective within 30 days
- The remaining laws are:
  - currently subject to active federal injunctions, which will likely be lifted now that *Roe* is overturned; or
  - were never challenged after *Roe* came down or were passed recently and have yet to receive a legal challenge
- Laws remain subject to state constitutional challenges and **two** were recently enjoined

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# Scope of Restrictive State Laws

- In terms of restrictions:
  - **19** prohibit all forms of abortion.
  - **Six** prohibit abortion after the detection of a fetal heartbeat (roughly six weeks).
  - **Three** prohibit abortion after 15 weeks.
  - Three states have multiple prohibitions (week-based bans and bans on all abortions) that could come into effect.
- The great majority of these laws are **criminal** and make violations a felony.
- Oklahoma and Texas also have **civil** laws that allow private citizens to file suits to enforce violations and recover civil penalties.



# Restrictive State Laws and Employer Benefits

- Only the civil laws in Texas and Oklahoma explicitly prohibit employers from paying for or reimbursing the costs of an abortion for an employee.
  - The Texas statute is clearly limited to payment or reimbursement for abortions performed within Texas
  - The Oklahoma statute is vaguer on this point, though it is likely limited to abortions performed within Oklahoma
- The remaining laws do not explicitly forbid employers from covering abortion or abortion services and are primarily directed at health care providers.
- There is some risk that companies that cover abortion or abortion services **within a state** where those are prohibited would be subject to prosecution under general conspiracy, aiding and abetting, or accomplice laws.

# Extraterritorial Application of Current State Laws

- None of the current laws **explicitly** apply to abortions occurring outside of the respective states.
- The language used in those statutes and the general presumption against extraterritorial application of state laws means the **practical risk** of a state prosecuting a company for reimbursing an employee for receipt of abortion services outside of a state or travel to receive an abortion outside of a state is **low**, with the possible exception of Oklahoma.
- That said, there are arguments prosecutors could theoretically use to argue for a broader application of these laws.
- The constitutional right to interstate travel along with federalism principles and the dormant commerce clause counsel against broad application though.

# State Protective Laws

- At least 16 states and Washington, DC, have enacted laws that keep abortion legal even with *Roe* overturned.
- At least four states have so-called “shield laws,” which protect providers and patients from bans in other states

# **Anticipated Legislative Developments**

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# Anticipated Legislation Restricting Access

- States may enact more aggressive laws in this area. There are only 9 legislatures currently in session, but the governor or the legislators themselves could call emergency sessions to consider legislation.
- Potential restrictions include:
  - Explicit prohibition on citizens traveling outside of a state to receive these services (e.g., proposed Missouri bill)
  - Bans on employer coverage for travel or reimbursement for abortion-related services
  - Retaliatory legislation against companies that adopt travel or reimbursement policies for abortion services
  - Restrictions on covering tele-health services for abortion and abortion medication generally

# NRLC Model Legislation

- The National Right to Life Committee has proposed model legislation for states that would:
  - Adopt a broad definition of “aiding and abetting” an abortion, including providing instructions over the telephone, the internet, or any other medium of communication regarding means to obtain an illegal abortion.
  - Prohibit “illegal abortion activity,” which would cover any entity associated with an abortion provider (i.e., as an investor or employee) or anyone who “actively participates” in the work of an abortion provider.
  - Declare that the state claims “maximum jurisdiction” in this area to the extent permitted by the 14th Amendment.

# Texas Letter

- Texas Rep. Briscoe Cain sent a letter on April 29, 2022, demanding that a company rescind its announced policy on paying travel costs for employees who leave Texas to receive abortion services.
- The letter stated that Cain would introduce legislation in the following areas if the company did not comply:
  - Bar companies with such policies from Texas state contracts
  - Define such policies as *per se* breaches of fiduciary duty for publicly traded companies under Texas law
  - Impose criminal liability on director or officers of publicly traded companies if such policies are adopted without unanimous shareholder consent.

# Potential Defenses

- Potential employer defenses to state actions in this area include:
  - ERISA Preemption
  - Right to Interstate Travel (see Justice Kavanaugh's concurrence)
  - Dormant Commerce Clause (states cannot pass legislation that excessively burdens interstate commerce)
  - Federalism Principles
- These defenses are largely untested and will likely be the subject of extensive litigation.



# Anticipated Legislation Expanding Access

- Additional states are drafting shield laws to protect out-of-state individuals traveling and seeking in-state abortions, in-state providers, and others seeking to assist individuals in obtaining abortions.
- Conflict of laws issues

# **Travel/Lodging and Pharmacy Benefits**

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# Travel and Lodging Benefits

- Now that abortion is, or will soon become, illegal or severely restricted in many states, employers with employees in such states may consider different ways to assist employee access to abortion.
- Employers could add travel and lodging benefits to facilitate abortion access for employees in the following ways:
  - **Add travel and lodging benefits under an existing group health plan.**
    - Subject to ERISA, HIPAA, ACA, and Mental Health Parity (MHP)
    - Limited to participants enrolled in the group health plan
    - State law may prohibit this for fully-insured group health plans

# Travel and Lodging Benefits

- Employers could add travel and lodging benefits to facilitate abortion access for employees in the following ways: (cont.)
  - **Add travel and lodging benefits under a Health Reimbursement Arrangement (HRA).**
    - Also subject to ERISA, HIPAA, ACA, and MHP
    - Cannot reimburse expenses in excess of the limits set forth in Section 213 of the Internal Revenue Code
    - Must be integrated with other group health plan coverage for active participants or qualify as an “Excepted Benefit HRA”
      - In addition to other restrictions, an Excepted Benefit HRA cannot provide benefits in excess of \$1,800 per year

# Travel and Lodging Benefits

- Employers could add travel and lodging benefits to facilitate abortion access for employees in the following ways: (cont.)
  - **Add travel and lodging benefits under an Employee Assistance Program (EAP) that is an excepted benefit.**
    - While still an ERISA plan, excepted benefits can be offered to all employees (not just those participants in the group health plan) without any ACA concern.
    - To be an excepted benefit, the EAP:
      - ✓ Cannot provide “significant benefits” in the nature of medical care or treatment;
      - ✓ Cannot be coordinated with benefits under another group health plan;
      - ✓ Cannot charge a premium; and
      - ✓ Cannot require any cost sharing for offered services

# Travel and Lodging Benefits

- Employers could add travel and lodging benefits to facilitate abortion access for employees in the following ways: (cont.)
  - **Provide travel and lodging benefits as a general taxable reimbursement.**
    - A taxable reimbursement could be provided for any travel and lodging expense incurred by an employee, or, more narrowly, for “wellness”-related travel
    - Would require substantiation of the travel expenses, but not the underlying medical expense
    - More costly to employer but may protect employer from civil or criminal liability under state law
    - Not subject to ERISA

# Travel and Lodging Benefits

- Tax treatment of travel and lodging benefits.
  - Transportation expenses
    - Must be primarily for and essential to medical care
    - Automobile travel subject to mileage limitations on a tax-free basis
    - Bus, train, or plane expenses may be reimbursed on a tax-free basis
  - Lodging expenses
    - Also must be primarily for and essential to medical care
    - May not be lavish or extravagant
    - There is no significant element of personal pleasure, recreation, or vacation in the travel
    - May be reimbursed tax-free up to \$50 per person per night
  - Meal expenses – may not be reimbursed on a tax-free basis
  - Okay to provide benefits above these limits if the excess benefits are taxed as wages

# Travel and Lodging Benefits

- Other considerations for employers:
  - Should a travel and lodging enhancement apply to just abortion access or all medical care not available within a geographic radius (such as 50 miles from where an employee resides)?
  - Should an annual or lifetime limit be imposed on travel and lodging benefits?
    - May result in parity concerns under Mental Health Parity if the benefit is expanded to all medical care not accessible within a geographic region and the same limit is imposed on mental health and substance use disorder benefits
  - Should abortion coverage under the plan in states where it is unavailable be treated as an in-network benefit if travel to an out-of-network provider is required to access the care?



# Pharmacy Benefits

- Another consideration for employers involves pharmaceutical abortions and whether a state law can restrict the group health plan from covering pharmaceutical abortions within its state.
- States have authority to regulate pharmacy benefit managers (PBMs) operating in state.
- The Biden Administration has announced that it intends to protect the right to seek medical care and the right to access medications for reproductive healthcare, including pharmaceutical abortions.
- Per the HHS website: “Medication abortion has been approved by the FDA since 2000 as a safe and effective option. Federal regulation permits medication abortion to be dispensed by telehealth and sent by mail via certified prescribers and pharmacies, in addition to in-person dispensing in clinics, medical offices, and hospitals.”

# ERISA Preemption

- ERISA Section 514 generally preempts any state laws that relate to an ERISA Plan, except for banking, securities and insurance laws.
  - Fully-insured plans are subject to state insurance laws.
- ERISA's preemption statute does not preempt "generally applicable" state criminal law.
  - Does not specifically target the group health plan.
  - Criminal monetary penalties are generally higher than civil monetary penalties.
  - Criminal liability may be imposed on the plan fiduciary.

# Ancillary Issues

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# Antidiscrimination Issues

- Title VII (sex, religion) and the Pregnancy Discrimination Act may prohibit employers from taking adverse actions against employees for decisions related to abortion.
- This applies both to employees who *choose* to receive an abortion or abortion services and employees who *choose not* to receive an abortion or abortion services.
- Employers should also be aware of the potential for harassment and hostile work environment claims on the basis of sex and religion stemming from this issue.
- Finally, employees with religious objections to abortion may request exemptions from having to provide any contributions to policies that support employee travel or reimbursement for abortion or abortion services.

# Leave Issues

- Employers may consider implementing voluntary PTO policies for employees who need time off to receive an abortion or abortion services, especially for employees who do not have access to PTO or sick leave generally
- In addition, federal and state laws may require employers to provide paid or unpaid leave in certain circumstances:
  - An employee with a medical condition that leads to an abortion could qualify for unpaid, job-protected leave under the FMLA and ADA.
  - The PDA could require that employers provide paid or unpaid leave to pregnant employees who require an abortion if they offer leave to workers with similar medical limitations as part of sick leave or short-term disability policies.
  - Appointments for abortion consultations and services will likely qualify for leave under state and municipal paid sick leave laws.
  - State pregnancy accommodation laws may require that employers offer leave or other accommodations to employees who need abortions.
  - States seeking to protect access to abortion services may also enact more expansive paid leave protections.

# Data Privacy

- Tech companies regularly collect user location data
- Data from internet searches and phone records also of concern
- Could be subject to warrants and subpoenas by prosecutors seeking user data to document out-of-state travel
- Additional concerns regarding PHI
  - HR records not protected by HIPAA.
  - Employer group health plans are covered entities under HIPAA.
  - HIPAA, however, includes an exception for disclosures for judicial and administrative proceedings, which would include a prosecutor's subpoena.
  - An employer group health plan can insist that certain conditions be satisfied before disclosing the information, including that the prosecutor notify the individual whose information is being sought and obtain a qualified protective order for the PHI.

# Workplace Culture

- There will be a wide variety of employee opinions. Consider:
  - Authentically stating leadership's views on the decision while seeking to maintain a culture of inclusivity and respect
  - Providing support to employees who are shocked, hurt, and angry (e.g., EAP services or other mental health resources)
  - Being prepared to respond to pressure from affinity groups
  - Reviewing social media, dress code policies, and policies related to affinity group statements and events
  - Remaining mindful of the protections surrounding protected concerted activity

# Implications for Other Rights

- The analysis in *Dobbs* potentially calls into question rights previously recognized by the Supreme Court, such as the right to inter-racial and gay marriage, access to contraceptives, and same-sex intimacy.
- The majority opinion and Justice Kavanaugh's concurrence stress that the decision does **not** undermine those rights and differentiates those cases from abortion.
- The majority's statement that only rights "deeply rooted" in our history or "implicit to the concept of ordered justice" are protected by Substantive Due Process could be cited against those prior rulings though.
- In addition, Justice Thomas's concurrence explicitly calls for the overturning of most of the decisions granting those rights.
- We expect future litigation in this area.



# Summary

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- *Roe v. Wade* is no longer the law of the land.
- There will be significant activity at the state level.
- How far the states will go and what guardrails the courts will impose remains to be seen.
- We have seen a number of companies publicly announce that they will be providing travel benefits and other support to employees seeking abortions. Others have quietly changed their plans. Yet others are waiting to see how the legal landscape develops.
- Employers should remain cognizant of legal developments and ancillary issues.

# Resources

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# Reproductive Rights: Post-*Dobbs* Impact

Our lawyers are closely monitoring and analyzing the impact of state laws regulating abortion access to advise clients on how best to respond. We offer a centralized portal to aggregate our insights and analyses of *Dobbs* and its subsequent influence on state laws throughout the United States.

[Visit our Reproductive Rights: Post-\*Dobbs\* Impact resource center](#)

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# Resources

- Morgan Lewis Reproductive Rights Task Force
  - Internal group of labor and employment, employee benefits, tax, white collar, health care, and privacy lawyers providing both thought leadership and practical advice to clients navigating the evolving landscape of employer concerns post-*Dobbs*
- 50-State Survey of Restrictive Abortion Laws
  - Comprehensive review of current laws, including “trigger laws” and enjoined laws now or soon to be in effect
  - Will be updated as new laws are enacted
  - Available to our clients for a flat fee

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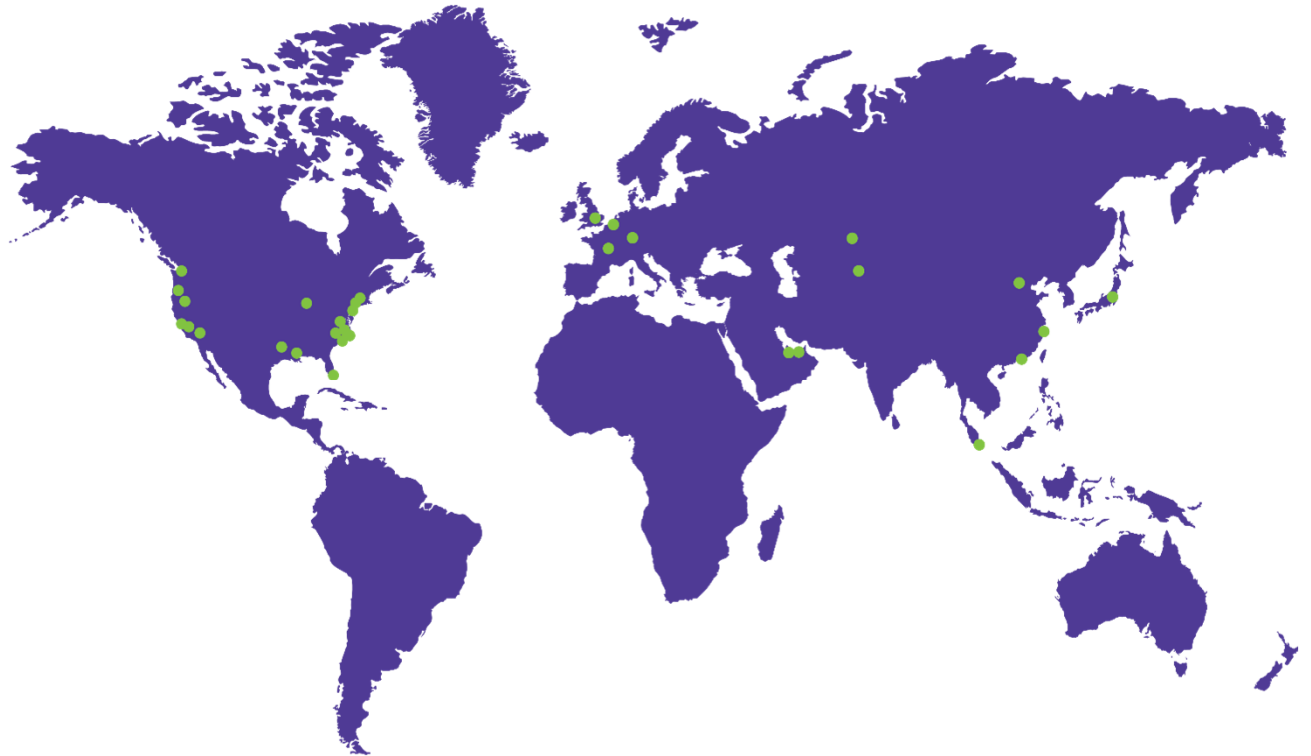
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