

## HIRING TO FIRING – S01 EP 5 – WHAT CAN THE HANDMAID'S TALE TEACH US ABOUT CORPORATE ABORTION POLICIES?

AUGUST 30, 2022

**Evan Gibbs** ([00:08](#)):

Welcome to Hiring to Firing: The Podcast. I'm Evan Gibbs, and with me is my co-host, Tracey Diamond. We're both partners at Troutman Pepper in the firm's Labor and Employment Practice Group. Based on the nature of our practices, neither of us are strangers to controversial workplace issues, but today is quite a doozy. Today, we're going to discuss corporate abortion policies in light of the U.S. Supreme Court's June 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overturned the Court's prior 1973 decision *Roe v. Wade*, which granted abortion rights to women across the United States.

**Tracey Diamond** ([00:41](#)):

In particular, we're going to talk today about what companies can do if they want to offer abortion assistance to employees, and the risks and challenges in putting in place such policies. Our guests today are also partners of our firm, Ashley Hager and Lynne Wakefield. Thank you so much for joining us, both of you. Ashley is a fellow member of our Labor and Employment Group, and Lynne is a member of our employee benefits and executive compensation team.

**Tracey Diamond** ([01:06](#)):

Lynne, why don't you tell us a little bit about your practice?

**Lynne Wakefield** ([01:09](#)):

Thanks, Evan and Tracy, for having me on the podcast today. My practice focuses on helping employers with the full spectrum of issues arising in connection with the implementation, design, and administration of employee benefit plans. This includes both qualified retirement plans, like 401(k) plans and traditional pension plans, and also health and welfare plans. Most recently, I've been helping employers as they react to the Dobbs decision and how that may impact their employee benefit plans and programs, and in particular, their medical coverage.

**Tracey Diamond** ([01:40](#)):

I bet that's been keeping you quite busy.

**Lynne Wakefield** ([01:43](#)):

It has, for sure.

**Tracey Diamond** ([01:44](#)):

How about you, Ashley? What's the focus of your practice?

**Ashley Hager** ([01:47](#)):

I'd say my time is split pretty equally between handling litigation, I do a lot of discrimination, harassment-type litigation, but also wage and hour class and collective actions, and then providing advice to employees. Like Lynne, she focuses on benefit side and I focus on just

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about everything else, helping employers with policies and handbooks and practices for handling accommodation requests, leave requests, all that sort of stuff. Really, in the last few months, we've really gotten a lot of requests about abortion-related policies and procedures. That's how we came to be here today to talk about this.

**Tracey Diamond** ([02:20](#)):

I know you've spent a lot of time digging deeply into the various state laws, and we're going to get to that in a little bit further in our podcast.

**Evan Gibbs** ([02:27](#)):

Like I mentioned when we started, today we're talking about corporate abortion policies. As always, we're going to kick our discussion off with a relevant clip from a popular show. Today, we're going to tee things up with a clip from *The Handmaid's Tale*, the popular Hulu show which tells the story of life and a totalitarian society in what was the United States. The country, now known as Gilead, is ruled by a fundamentalist regime that treats women as property of the state. Faced with a plummeting birth rate, the few remaining fertile women are forced into sexual servitude. Let's take a listen to our clip.

**Speaker 5** ([03:01](#)):

Ladies, you should all know that I feel really sorry about this. I have to let you go.

**Speaker 6** ([03:08](#)):

What?

**Speaker 5** ([03:08](#)):

I have to let you all go.

**Speaker 6** ([03:12](#)):

Wait, we're being fired?

**Speaker 5** ([03:13](#)):

No, not fired. No. Let go.

**Speaker 7** ([03:16](#)):

What does that even mean?

**Speaker 5** ([03:18](#)):

You can't work here anymore. It's the law now.

**Speaker 6** ([03:23](#)):

Hey, why is it just the women?

**Speaker 5** ([03:24](#)):

I don't have a choice.

**Speaker 6** ([03:26](#)):

Roger? Roger?

**Speaker 6** ([03:34](#)):

Thank you.

**Speaker 8** ([03:35](#)):

Under his eye.

**Speaker 6** ([03:37](#)):

Excuse me?

**Speaker 9** ([03:45](#)):

Why'd they send the army?

**Speaker 10** ([03:46](#)):

I don't think that's the army.

**Speaker 11** ([03:52](#)):

I think it's another kind of army.

**Tracey Diamond** ([03:58](#)):

This clip is particularly relevant to today's discussion because it showed the company that June worked for letting go all of the female employees of that company. You heard the company's manager. You couldn't see it, but he's literally wringing his hands and saying, "There's nothing I can do. I'm really sorry, ladies. You have to leave in 10 minutes. There's nothing I can do."

**Tracey Diamond** ([04:17](#)):

Recently, we're hearing a lot of companies, or a lot of individuals, actually, saying things like, "Oh my goodness, this feels like *The Handmaid's Tale* in reality." We're not here to take an opinion one way or another on the abortion debate, but we have been getting a lot of questions from companies that do want to provide abortion assistance for employees in those states where it is now banned or where they fear it soon will be banned. The focus of today's discussion is, for those companies that do want to provide this abortion assistance, what do they need to look out for?

**Ashley Hager** ([04:49](#)):

I think, really, the first order of business is to figure out what the current climate is for abortion in the states where the company has operations. Shortly before the Dobbs decision came out, we all knew it was coming, we had a couple of clients who asked us to provide them with some insight into what those state laws provided for.

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**Ashley Hager (05:08):**

What we found, and this is, again, back in May and June of this year, is that we had about 21 states that fell into the category that I would call hostile to abortion, that restricted abortion pretty significantly and pretty early on in the pregnancy. Then we had another 21, 22 states that you would categorize as protective or friendly to abortion. Some of those had abortion rights codified in statute or even in the constitution, or there had been Supreme Court rulings from that state that said that a woman's right to an abortion was protected by due process rights or right to privacy, stuff like that. Then there was another handful of states, another seven or eight states, that you would have to say they're somewhat in the middle. They just aren't clear, or they've had cases going each way.

**Ashley Hager (05:52):**

One thing that was really interesting to me when I got into this... I'm an employment lawyer. I don't practice in healthcare law and hadn't spent much time, really, frankly, focusing on abortion, I think like a lot of us, from a legal perspective, until it became pretty clear that the Supreme Court was going to overturn *Roe v. Wade*. What was surprising to me, just as an initial matter, was that states don't just have one law on abortion. I want to say Mississippi had something like six different laws. Georgia, where I'm based and where Evan is based, we had several different laws.

**Ashley Hager (06:20):**

What it really comes down to, and I think maybe people have heard this a lot more recently, is that some states had laws that were prohibiting abortion from before *Roe*; that once *Roe* was decided, they didn't overturn it, so those laws were still on the books. Some of them had laws that were enacted through the years and might have been enjoined by a court or found unconstitutional, but yet they were still there, or parts of the law were enjoined, parts of it weren't. Frankly, it's just a mess.

**Ashley Hager (06:44):**

As we got into it and were trying to parse out what was going to happen if *Roe* was overturned, we really found it's not surprising that there's been so much litigation, even already in the last few weeks since *Dobbs* was issued, because there is such a patchwork of really contradictory laws. When I say that a state has multiple laws, you really find that they had everything from prohibiting abortion completely with very few exceptions to prohibiting it after 20 weeks or so, matching up with where *Roe v. Wade* was, and everything in between, and all varieties of exceptions for rape or incest or the health of the mother or if the fetus was not viable, to having almost no exceptions.

**Ashley Hager (07:20):**

Really, the first order of business for an employer, I think, as they're trying to figure out what they want to do with respect to abortion for their employees is to figure out what's the latest in the states where they have facilities and also the states where they have remote workers. I haven't seen the statistics, but the number of abortions for any given company is, obviously, relatively low, but you never know where the issue is going to arise from an employee or their dependent who might want to get an abortion in the state where they live.

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**Tracey Diamond** ([07:46](#)):

It seems to me that the key there also is the latest, employers keeping up with the latest, because it seems like things are changing really rapidly. I think just in the last week, there's been changes in Indiana and in Kansas, I believe, where there was some kind of constitutional vote about whether or not to change the constitution in Kansas, and it was voted to keep abortion. You know better than I do in terms of the specifics there.

**Ashley Hager** ([08:07](#)):

Exactly right. It's moving super fast, and legislatures are introducing new laws. The courts are issuing rulings right and left. The Eleventh Circuit recently ruled on the Georgia abortion law and found that it was permitted to go forward, but almost immediately there's been another challenge to the Georgia abortion law in state court, because now that the federal constitutional rights are gone that protected an abortion, now it's a question of state constitutions.

**Ashley Hager** ([08:31](#)):

I think most of us haven't spent, certainly in the employment area, and probably in the benefits area as well, we haven't spent a lot of time thinking about or studying constitutional law, but now it's coming back to the forefront. Are the state supreme courts going to interpret their constitution the same way that the Supreme Court interpreted the U.S. Constitution or not?

**Ashley Hager** ([08:49](#)):

Some of the states, Georgia just being the one I'm most familiar with, have a much more robust right to privacy in those state constitutions than is in the U.S. Constitution, so who knows which way those are going to go? Those rulings are coming out every day, and courts are issuing injunctions. I just saw that a court in Louisiana had stayed the law there as well. Again, it could have been lifted by the time we finish this podcast. You really do have to check and see what the latest and greatest is.

**Evan Gibbs** ([09:14](#)):

Lynne, if a company wants to implement an abortion assistance policy, is that something that the employer could just draft a policy on, or would that need to be part of the company's medical plan?

**Lynne Wakefield** ([09:24](#)):

Evan, to date, we haven't really seen employers adopting "abortion assistance policies" per se because there are medical plan compliance issues associated with offering abortion-related benefits on a freestanding basis. As Ashley mentioned, there's so much going on, both at the legislative level and in the courts, I think it can be really easy for a company to get paralyzed in all of the issues and the different intersecting laws.

**Lynne Wakefield** ([09:58](#)):

From a benefit plan perspective, really, we're seeing two distinct issues arising out of the Dobbs decision. The first one is whether and to what extent the employer's medical plan provides coverage for abortions and whether there's a desire to change that coverage in light of the Dobbs decision. For example, does the medical plan cover elective and non-elective abortions,

or does the medical plan only cover medically necessary or non-elective abortions? That's the first thing that employers who are looking at this issue need to make sure that they understand. What's the current state of the medical plan coverage, and where do they want to go? Do they want to keep it how it is, or do they want to make changes in light of the changing climate?

**Lynne Wakefield** ([10:45](#)):

The second issue we're seeing is whether the company wants to provide travel assistance for medical procedures that may be illegal in a particular employee's state of residence. Looking at the medical plan currently, seeing is there currently travel assistance provided for medical procedures, and if so, is that broad coverage or is it limited to certain travel assistance, so for instance, limited to circumstances where someone may be traveling to a center of excellence to get a heart transplant, something of that nature?

**Lynne Wakefield** ([11:19](#)):

For companies who do want to provide coverage for employees who are residing in states where abortion is illegal to travel to another state to get a legal abortion, we really think that the best way to do that is through the medical plan, if possible, because providing the travel assistance likely constitutes medical care for ERISA purposes and could give rise to the creation of a freestanding ERISA-covered medical plan if offered outside of the medical plan context. There's some companies out there that are doing it, but I think the most conservative position from our perspective is to provide the medical coverage for abortions through the medical plan and provide the travel benefit through the medical plan as well.

**Evan Gibbs** ([12:05](#)):

Is abortion a typically covered procedure in most medical plans, or something that employers have to negotiate separately? I'm just curious, historically, if that's been in most medical plans.

**Lynne Wakefield** ([12:18](#)):

Some of it may depend on whether the company is sponsoring a fully insured medical plan that's regulated by the state or whether they're offering a self-insured medical plan where they may have more design flexibility. I think from our perspective, a number of plans do, in fact, cover abortions currently. For those companies that we've been working with where medically necessary abortions are covered, the incidence of that benefit actually being taken advantage of is relatively low in the grand scheme of things.

**Tracey Diamond** ([13:01](#)):

Lynne, what about miscarriages? Is there a difference in the plans in terms of miscarriage coverage versus abortion coverage? I ask this because I've been reading a lot about how some of these statewide bans are making it very difficult for individuals to get miscarriage treatment because it presents so similarly to abortion treatment, and doctors are afraid of getting themselves into trouble by giving a D&C for a miscarriage, let's say, as opposed to an abortion.

**Lynne Wakefield** ([13:30](#)):

In my experience, I haven't seen plans calling out coverage for miscarriage specifically. Typically, the starting point for a plan is that it's providing coverage for medically necessary

care under Code Section 213(d), and then there are particular parameters that are put in place around that coverage, whether it be exclusions or limitations. Typically, because abortion is something that comes up, that's something that's written into the coverage, but typically I haven't seen specific provisions in plan documents that address miscarriage directly. Now, that may change in light of this, but we'll have to see how the law develops.

**Tracey Diamond** ([14:10](#)):

Also, what about abortion pills? Does that get called out specifically, or it's just covered in that general provision?

**Lynne Wakefield** ([14:16](#)):

From a plan perspective, under healthcare reform, plans that are subject to the Affordable Care Act are required to cover preventive care, and one of the preventive care mandates says that plans have to cover contraceptive care at 100%, with no cost-sharing in network. One of the types of contraceptive care that has to be covered is Plan B. That is specifically called out from a federal regulatory perspective. Some of these other drugs that have been in the media are not necessarily directly addressed in the plan terms.

**Tracey Diamond** ([14:56](#)):

For our listeners, Plan B is the morning-after pill, right?

**Lynne Wakefield** ([15:00](#)):

Correct.

**Tracey Diamond** ([15:00](#)):

Then Plan C, is that what you're talking about with the other types of drugs?

**Lynne Wakefield** ([15:04](#)):

Correct. Again, from a healthcare reform perspective, we know we have to cover at least one form of the Plan B coverage. The other coverage isn't mandated from a healthcare reform perspective, and typically I haven't seen it addressed specifically in the way plan documents are currently drafted.

**Evan Gibbs** ([15:20](#)):

To follow up on the point you mentioned a minute ago, Lynne, it sounds like employers that self-insure, it sounds like they're going to have a lot of additional flexibility to determine, I guess, what their plans cover versus what they don't. Is that right?

**Lynne Wakefield** ([15:33](#)):

That's right. The distinction between a self-insured medical plan and a fully insured medical plan is important just to make sure that everyone is conceptually aware.

**Lynne Wakefield** ([15:42](#)):

A self-insured medical plan is one in which the employer retains a third-party administrator to administer the medical coverage, and pays that administrator an administrative fee for the

services it performs, but all of the medical plan benefits are ultimately paid from the company, either their general assets or through a trust, or some other funding vehicle. A fully insured plan is where a company is contracting with an insurer and paying an insurer a premium, and then ultimately the insurer is the one that's paying the medical benefits pursuant to a fully insured policy that has to be approved by the state.

**Lynne Wakefield** ([16:23](#)):

Yes, there is a distinction with respect to abortion and other coverage between self-insured and fully insured plans, because fully insured medical plans generally are going to be required to comply with the various state law mandates regulating abortion, but ERISA will generally preempt those state laws as applied to self-insured medical plans. At the end of the day, employers sponsoring the self-insured medical plans are going to have more flexibility to design their abortion coverage than employers that are sponsoring the fully insured plans.

**Evan Gibbs** ([16:55](#)):

That's a helpful explanation. I personally appreciate that.

**Lynne Wakefield** ([16:58](#)):

I think what we're seeing in the marketplace is we're seeing the TPAs out there coming up with products and mechanisms to address some of this for the self-insured populations, so offering different options in terms of abortion coverage, in terms of the travel benefits that might be available. The state law is going to take a little bit longer, I think, to develop because, again, those policies are ultimately written and then approved by the state. I think some companies out there wanting to implement a travel benefit, but they've got a fully insured medical plan, there may be some complexity in figuring out how to do that until the plans get revised and until the insurers are comfortable with that.

**Tracey Diamond** ([17:41](#)):

It'll be interesting to see if more companies go to self-insured plans from fully insured plans because of the abortion issue.

**Lynne Wakefield** ([17:49](#)):

It takes a certain size population to make the economics work out. If you've got 750 or less in terms of your employee population, it's more financially advantageous to contract with an insurer, so typically we see larger companies offering the self-insured plans. I don't know if this will be just another decision point in helping companies, particularly those who may be on the bubble, deciding which way to go.

**Tracey Diamond** ([18:15](#)):

Ashley, once an employer knows what kind of abortion assistance it wants to provide and how they would go about providing it, does the employer face any liability from a criminal or a civil standpoint that they should be aware of?

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**Ashley Hager (18:27):**

Yeah, that's a great question. That's really the question that employers were coming to us with right around the time that the Dobbs decision was coming out. There was a lot in the news about a few high-profile employers offering travel assistance as a benefit pretty quickly. We actually had some clients who came out and said they wanted to offer that and told their employee population that, and then they had second thoughts about whether they could be held criminally liable for that.

**Ashley Hager (18:50):**

We did do some scrambling to look into those issues under the laws as they existed at the time, and I think this is another area where it's like an arms race, as the states come out with the laws and then people try to find ways around them, and then the states try to close those loopholes. It's just this escalating process.

**Ashley Hager (19:08):**

For the laws as they existed at the time we were looking into this, what we found is we really had to think about two different issues with respect to criminal liability. What's the risk that you're going to be charged with a crime, and then what's the risk that you're going to be found criminally liable?

**Ashley Hager (19:24):**

When we looked at all of those 50 state sets of laws, we found that most of the anti-abortion laws that are out there are criminal laws. They're either in the criminal code or they might be in the public health code or in professions, things like that, but they do say that providing an abortion, and they are directed almost exclusively at the providers and their staff, but that providing an abortion is a crime, usually a felony. States have different levels of penalties there, but they do include imprisonment and then very substantial fines ranging from \$10,000 to \$100,000, so really significant crimes from the laws that deal directly with providing an abortion.

**Ashley Hager (20:02):**

In addition, we took a quick look at the issue of fetal homicide. This, again, is an area that I hadn't focused on as much, but as we got into this more, we realize there's almost... I think it's something like 33 states have laws addressing fetal homicide. Those really came up in the context of if someone shot and killed a pregnant woman and the fetus died as well, then could you be liable for two sets of penalties? Or if you were in a car wreck and injured the fetus, could there be liability there? We were looking at it, as well, because it makes harm to a fetus a crime as well. Again, these laws are really directed primarily at the provider. The fetal homicide laws, almost all have an exception for the mother, the pregnant person, and saying that a pregnant person cannot be held liable for fetal homicide.

**Ashley Hager (20:45):**

But all of this being directed at the providers raises the question of, what about people who help the providers, so not just talking about the nurses and the staff in, say, an abortion clinic, but what we care about on this podcast today, what about the employers who are paying for

the abortion or who have an insurance plan that covers the abortion, or more directly, who are paying for someone to travel to get an abortion in a state where it's legal?

**Ashley Hager** ([21:10](#)):

What we found as we dug into it more, there's really two theories under which someone could be held criminally responsible. That would be, number one, just like any crime, if you conspire to commit a crime, you can be held liable, or you're an accessory to a crime. You buy the bullets given to the person who shoots the gun, kind of thing. Then there's also the concept of aiding and abetting. I think there's been a lot more talk in the media about that recently, about whether someone could be held liable for aiding and abetting these crimes by providing travel assistance or, again, insurance coverage. Lynne alluded to the fact that ERISA can preempt some laws, but ERISA generally does not preempt generally applicable criminal laws. What does that mean? We'll tell you more in segment two in five years, when all these laws have gotten worked out a little bit more.

**Ashley Hager** ([21:55](#)):

As we looked at the laws of the 50 states, we did find a small handful of those laws that do explicitly address aiding and abetting. Probably the most well-known ones are Oklahoma and Texas, where they actually provide for civil liability for aiding and abetting, where a Texas or an Oklahoma citizen can bring a civil suit against someone who aids and abets a provider in providing an abortion. Alabama has a law, as well, that says that if someone aids and abets an abortion, they've engaged in criminal activity, unless it was necessary to preserve the pregnant woman's life or health.

**Ashley Hager** ([22:30](#)):

We do have a few more that address promoting an abortion. Virginia and Ohio have some laws that talk about promoting or advertising abortion, which I think when those were passed, they weren't focused on employer travel policies, but probably advertising agencies or entities that promote abortion. But could they be used against an employer who provides travel assistance? I think they could.

**Ashley Hager** ([22:53](#)):

If a state is already hostile to abortion in general, I could see more and more state legislatures saying that they're going to pass aiding and abetting laws. In fact, there's a group called the Texas Freedom Caucus, and they sent a letter which quickly circulated all around the internet, particularly among law firms, where they wrote to the chairman of a large law firm who's in Texas, saying, "We think that you may be violating Texas anti-abortion law, and we think you may have already committed some felonies. We're looking into this, and we're going to introduce some legislation next session that will impose additional criminal sanctions specifically on law firms that pay for abortions or abortion travel."

**Tracey Diamond** ([23:29](#)):

It's one thing to threaten it, though, or put out the bully pulpit, but it's another thing to actually bring the legislation and get it through. What are the chances, do you think?

**Ashley Hager** ([23:37](#)):

I think the chance that it gets introduced is high because I think a lot of people are trying to cater to one constituency or another. We just saw the House pass a bill protecting the right to abortion with no hope of getting it passed. Everyone is taking a lot of positions there. I will not be surprised at all if more and more states don't try to close this loophole of employers paying for abortion travel.

**Ashley Hager** ([23:58](#)):

Then you get into, can these laws be enforced? There's a couple of arguments that an employer who is charged with a crime for aiding and abetting are going to be able to argue, number one, who are you aiding and abetting? These laws, when they talk about aiding and abetting, they're talking about aiding and abetting the provider, not the pregnant woman. If you're an employer who has an employee in a state that's hostile to abortion, who travels to a state that's friendly to abortion to get an abortion, the abortion is legal where it's performed. You're not helping that woman commit a crime. You're not helping the provider in that friendly state commit a crime, because it's legal in that state. That seems to me to be the biggest argument that you shouldn't be criminally liable for providing that travel assistance.

**Ashley Hager** ([24:36](#)):

Then you have the issues of whether a state can have extraterritorial effect of its laws, whether they be criminal or civil laws. The consensus is they shouldn't. Texas shouldn't be able to outlaw what a Texas resident does when they're on vacation in New York City or in California. But I'm sure that's going to be challenged.

**Ashley Hager** ([24:54](#)):

There's been a lot of talk about the fact that Justice Kavanaugh dropped a footnote in his concurrence in the Dobbs opinion about whether there's a constitutional right to travel. That's actually not an area that there's a whole lot of law in. Obviously, there's going to be. We're just going to have to watch and see how the courts interpret all of these issues.

**Ashley Hager** ([25:13](#)):

There are certainly a number of arguments that employers would be able to make if they are charged with some criminal liability or civil liability. I mentioned those two states already that give their citizens a right to bring a civil case. I do expect that there's going to be a lot more of those. Now, how are they going to find out about it? I don't know, but there's certainly that risk out there that the claims are going to be brought.

**Ashley Hager** ([25:34](#)):

I will tell you, like Lynne mentioned, we have had a lot of employers asking these questions, and I would say that the majority of the ones who have looked into the matter have decided to go ahead with taking those risks and providing the abortion travel assistance, not all of them. Some employers either decide that they have too big of a target on their backs because of who they are and what they do or where they're located, or that their population or their clients are not going to look favorably upon that kind of benefit. I would say that, on the whole, most employers we're seeing are going forward with it, which I think supports the conclusion that,

yes, there is a theoretical risk of criminal liability and civil liability, but they've decided that it's a risk that they're willing to take.

**Evan Gibbs** ([26:16](#)):

I'm curious, have you seen any statutory penalties associated with any of the civil violations?

**Ashley Hager** ([26:22](#)):

Yeah, Texas and Oklahoma, I think they copied off of each other's tests, but the civil liability in both of those two state statutes, you can get injunctive relief or \$10,000 plus fees. That's the carrot out there.

**Tracey Diamond** ([26:36](#)):

Lynne, are there any other employee benefits considerations associated with offering abortion coverage and/or providing abortion-related travel benefits?

**Lynne Wakefield** ([26:44](#)):

I think, like everything else we've been talking about today, there are a number of different intersecting considerations. I know that there are a number of high-profile companies in the news that are offering these types of travel-related benefits, which makes it seem like a fairly simple decision, but the devil is in the detail.

**Lynne Wakefield** ([27:02](#)):

Because the travel assistance is medical care, it has to be provided through a compliant vehicle. There are a few different options for that. It can be offered through the medical plan, like we've talked about, but in that case, it's really limited to individuals who are enrolled in the medical plan, so you're not hitting your entire employee population. There are some other options out there, putting it in a health reimbursement arrangement, or can we offer it through an employee assistance program, or EAP, in which case the benefit could be more widely available? There are some different ways to structure it if employers are struggling with the limited reach of their medical plans.

**Lynne Wakefield** ([27:38](#)):

Just a couple of other issues. There are definitely tax issues here. While the reimbursement for abortion coverage through a medical plan isn't taxable, providing abortion-related travel benefits can trigger federal income tax and reporting obligations. In particular, although amounts paid for transportation to another city may be reimbursed on a tax-free basis if the trip is primarily for receiving a medical service, tax-favored lodging is limited to \$50 per night per person. To the extent that the abortion-related travel benefits exceed those limits, the excess amounts will have to be reflected as imputed income to the participants. That's another issue to work through.

**Lynne Wakefield** ([28:18](#)):

The final thing I would say is there are also mental health parity concerns that need to be factored in. If a medical plan is providing medical-surgical benefits and mental health benefits, the limitations on the mental health benefits can't be any more restrictive than the limitations

on medical benefits. If we're providing travel assistance for abortions, do we have to provide travel assistance for individuals who have to travel out of state to get eating disorder coverage? Things like that have to be thought about.

**Lynne Wakefield** ([28:49](#)):

We've seen companies deal with this issue by structuring the travel benefit more broadly. It's not just travel to a state where abortion is legal; it's a travel benefit that allows someone to travel to another state to get medically necessary care, where that care may not be available in their state due to legal considerations or otherwise.

**Tracey Diamond** ([29:13](#)):

Boy, that \$50-a-night lodging really needs to be updated, huh? I can't imagine where you're staying for 50 bucks a night.

**Lynne Wakefield** ([29:20](#)):

Yeah. Exactly.

**Tracey Diamond** ([29:21](#)):

I was just going to make a Handmaid's Tale comment. It's interesting when you think back to the show, and of course, the book and then the TV series that was made after the book were both made well before this debate, but a simpler time, in a sense, where Gilead takes over. There aren't 50 different states with 50 different state laws, just one federal law turning women into property and putting them into sexual servitude. It's a much more complicated landscape in real life, and a landscape that very much, at the moment, may depend on where you live. Certainly, interesting constitutional issues right now.

**Evan Gibbs** ([29:55](#)):

Where do you see the next steps in the fight? Where are the fights in the future?

**Ashley Hager** ([29:57](#)):

To me, the biggest fight is going to be over abortion medication, because when a state outlaws abortions, most clinics there, most doctors there, are not going to be performing procedures in the state anymore. That'd be foolish. The issue of the medication is just it's so easy to cross state lines, people who order their allergy medication from Canada or from Mexico. It's just so portable that someone who lives in a state where abortion is prohibited could fairly easily go to another state where it's permitted and obtain the medication.

**Ashley Hager** ([30:29](#)):

Some states do have requirements that the pills be taken under the direction of a physician. I think about half the states require that a physician administer the medication to someone, and about a third of the states require that the doctor be physically present. That seems to be an attempt to lock down telemedicine appointments, so that someone could have a telemedicine appointment with a doctor in California who prescribes the meds. I know there's some foreign companies that are planning to continue to ship abortion meds to individuals in the United

States, no matter where they live, and they're daring the states to catch them. It's a needle in a haystack.

**Tracey Diamond** ([31:04](#)):

Certainly hope we're not going to reach a point where someone is opening everybody's mail. That would certainly bring us back into Handmaid's Tale territory much more quickly.

**Ashley Hager** ([31:12](#)):

It's so much easier to regulate the providers because you've got one provider providing a service to a lot of people, but to regulate the behavior of half the population of childbearing age is just going to be not feasible.

**Ashley Hager** ([31:22](#)):

The other hot issue, and I'll just touch on it briefly, is the issue of subpoenas and privacy rights. I'm sure healthcare providers are struggling with that right now, about what are they going to do if they receive a subpoena from a state prosecutor who's looking to find out who they've provided services to, and was it really a miscarriage, to your earlier point, or was it really an abortion, that kind of thing? Are the phone companies going to be hit with questions about subpoenas for data and so forth?

**Ashley Hager** ([31:55](#)):

Then we have the issue of employers. Could an employer get a subpoena asking for information about who's taken advantage of certain benefits under the health insurance? Lynne might know more about this than I do, but I understand that some plans are moving towards putting abortion under the heading of reproductive healthcare, so that it's not as clear about whether someone is getting treatment for infertility or contraceptives or abortion if it's under a broader rubric.

**Tracey Diamond** ([32:23](#)):

Kind of goes to my point earlier about miscarriages and abortions sometimes presenting somewhat similarly.

**Ashley Hager** ([32:29](#)):

That's another good point about the abortion medication. I, again, am not a doctor, but it's my understanding that some of those abortion medications are used to treat other things, whether it be a miscarriage or whether it might be something totally unrelated, like rheumatoid arthritis. Are you going to outlaw the medication completely, or are you going to outlaw certain uses of the medication?

**Ashley Hager** ([32:46](#)):

Then we have the extra overlay of the FDA is starting to take the position that, "If we've approved a drug, State, you can't tell us that people can't take it in the state," and then the states are pushing back. There's already a clash between one of the abortion medication providers and the State of Mississippi. Mississippi is pushing back, saying, "No, FDA, you just get to regulate whether something is safe and effective. You don't get to say whether we let

people in our state use it or not." That's another clash of the titans that I think we're going to see unfolding over the next few months.

**Tracey Diamond** ([33:15](#)):

We need to wrap things up, but this has certainly been a very interesting and timely discussion. The implications really are overwhelming and can be mind-boggling. We hope our listeners have been able to get some information that's helpful to them when they make their own important decisions about whether or not to provide this assistance.

**Evan Gibbs** ([33:32](#)):

Thank you, Lynne and Ashley, so much for joining us today. We really appreciate it. Listeners, of course, we appreciate you joining us for this installment. Please be sure to subscribe to our podcast. We're on all the major platforms. And please leave us a review or shoot us an email to let us know what you think. We'd love to hear your feedback.

**Tracey Diamond** ([33:47](#)):

Also, don't forget to take a look at our blog, [hiringtofiring.law](#). Thanks so much.

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