

Issues Employers Should Consider Before Offering Abortion Assistance Benefits Post *Roe v. Wade*

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On June 24, the Supreme Court [issued a decision](#) in *Dobbs v. Jackson Women's Health Organization* that overturns the constitutional protection of abortion rights established in *Roe v. Wade* and *Planned Parenthood v. Casey*. The decision rejected a challenge to a Mississippi law that prohibited abortion if the probable gestational age of a fetus is greater than 15 weeks, except in the case of a medical emergency or severe fetal abnormality. Previously, the Mississippi law had been found unconstitutional under *Roe* and *Casey* because it restricted pre-viability abortions, which a Mississippi federal district court and the Fifth Circuit Court of Appeals held violated the framework set forth in those decisions. In reaching its decision in *Dobbs*, the Supreme Court found that “*Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”

When a draft of this decision leaked earlier this year, some large companies made headlines by announcing plans to provide financial assistance to employees for abortions and abortion-related travel. These companies indicated that they intended to provide financial assistance to employees who reside in a state that outlaws or restricts the right to an abortion. This could include medical coverage to obtain medication by mail or reimbursement for travel to a state where abortions are lawful to undergo the procedure.

This advisory is not intended to evaluate the merits of the Supreme Court's opinion or state statutes eliminating or restricting the right to abortion. Rather, it highlights certain considerations and potential risks for companies to consider in implementing an abortion assistance benefit now that the final decision in Dobbs has been issued.

Possible Civil and Criminal Liability

Perhaps the most significant consideration for a company interested in providing an abortion assistance benefit is whether such a benefit could subject the company to civil or criminal liability. New laws recently enacted in Texas and Oklahoma are the clearest examples of the potential risks in this situation. These laws create a civil cause of action for knowingly engaging, or intending to engage, in conduct that aids or abets an abortion, including paying for or reimbursing the costs of an abortion (through insurance or otherwise). Depending on the nature of the abortion assistance provided and whether the particular state law at issue is preempted by ERISA, a company assisting employees or their dependents in obtaining an illegal abortion in these states may be subject to civil liability under these laws.

Companies providing abortion assistance could also face criminal liability under state laws regulating and

restricting abortion procedures. While some states explicitly protect the right to abortion through constitution, statute, or case law, other states have recently moved to tighten restrictions on abortion. At least 13 states have enacted “trigger ban” laws that will spring into effect to restrict or prohibit abortion in most cases either immediately or shortly after a decision, like *Dobbs*, overturning *Roe* is issued. Many states have laws restricting abortion that have been enjoined or challenged as being unconstitutional under *Roe*, and that likely will be restored after further litigation now that *Roe* has been overturned. Some states also have laws that were passed before *Roe* was decided that were invalid under *Roe* but never repealed. These laws will now likely become effective again. A number of states’ governors or legislators had also promised to introduce new legislation restricting or prohibiting abortions in the event that *Roe* is overturned, and we expect to see significant activity on this front now that the *Dobbs* decision has been released.

Similarly, nearly 40 states establish the crime of fetal homicide, with some conferring “personhood” on fetuses at any stage of development for all purposes under state law. While most of these laws contain an exception for abortions performed with the pregnant woman’s consent, these fetal homicide laws could result in criminal liability for any crime inflicted on a fetus, separate and apart from crimes inflicted on the mother.

Violations of the abortion and fetal homicide laws generally result in criminal liability for the person performing the abortion and, in rare cases, for the person on whom the abortion is performed. But companies interested in providing abortion assistance to employees and their dependents need to be aware of these laws too because an individual who assists another person in obtaining an illegal abortion may be liable for conspiring to commit a crime or aiding and abetting a crime, and a business may be criminally liable for the crimes its employees, managers, directors, or agents commit or conspire to commit in its interest.

Thus, in addition to civil claims under laws like those in Texas and Oklahoma, companies should consider the risk of potential criminal liability in providing abortion assistance to employees and their dependents in states where abortion is or will be limited or restricted now that the constitutional protection for abortion provided in *Roe* has been overturned. If a company assists an employee in obtaining an abortion in violation of the law of the state where the employee lives — for instance, providing medical coverage for abortion-inducing medications sent via mail to an employee’s home state to obtain an abortion not permitted by the state’s abortion laws — the company may be subject to criminal liability.

Providing financial assistance for an employee to travel to a different state to receive an abortion permitted by that state’s law presents a less clear case. Although at least one state has considered a bill that would attempt to penalize its citizens for traveling to another state to receive an abortion in violation of state law, such a restriction would be difficult to enforce. Indeed, although creative prosecutors may attempt it, it will likely be more difficult to bring criminal charges against a company that assists an employee in obtaining an abortion that is legal in the state where it is performed.

Tax, Benefits, and Other Considerations

Companies that wish to move forward with an abortion assistance benefit will also need to consider tax, benefits, and other practical implications. For instance, there is at least one proposal at the federal level that would preclude companies from deducting the cost of abortion-related payments.

From a benefits perspective, companies should first review their current medical plan coverage for abortions (e.g., to determine whether abortion is covered or excluded, and if covered, whether the coverage is limited to medically necessary abortions) and determine whether that coverage is consistent with its intent and objectives. A company sponsoring a fully insured medical plan will be subject to compliance with various state law mandates regarding abortion coverage, while those state law mandates may be preempted in the context of a self-insured medical plan. As a result, companies sponsoring self-insured medical plans may have more flexibility in defining the parameters of their abortion coverage. Note that generally applicable criminal laws are likely not preempted by ERISA, so insurers may take the position that they cannot offer benefits where they are illegal. This could affect both payment for in-person procedures or appointments and payment for abortion medicine. Companies also will need to define the parameters of any abortion-related travel and any related tax and benefits implications. For example, questions to consider include the following:

- Will abortion-related travel assistance be provided only if an abortion is prohibited entirely in the employee's state of residence, or also if an abortion is prohibited only after a certain point in the employee's pregnancy?
- Will abortion-related travel assistance be provided under or outside of the company's medical plan, and how does that impact the taxation of such assistance?
- Will the company authorize extra paid leave to obtain an abortion, and how will this leave interact with existing leave policies or required leaves under the Family and Medical Leave Act and state law?
- Will the company provide abortion-related travel assistance to an employee's covered dependent and time off for employees who wish to accompany a dependent to an abortion procedure in another state?

In sum, the issues associated with an abortion assistance benefit are myriad, complex, and rapidly evolving. Only time will tell whether state prosecutors will seek to hold companies criminally liable for offering these types of benefits, and whether more states will attempt to enact laws applying their restrictions beyond their state borders. Lawmakers are actively proposing abortion-related legislation in nearly every state (either restricting it, explicitly protecting it, or, in some states, both), a trend that will only intensify now that the Supreme Court's decision overturning *Roe* has been released.

Companies seeking to provide abortion assistance benefits should contact counsel to discuss the particular risks and considerations relevant to their business.

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