



The Impact on Employer Benefit Plans of the Supreme Court Decision Overturning Roe v. Wade

CARLTON C. PILGER

Of Counsel
Fisher Phillips

Email: cpilger@fisherphillips.com

Phone: (404) 240-4141

The U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization* on June 24. With that ruling, the Court overturned *Roe v. Wade* and ended nearly half a century of federally protected abortion rights. Following *Dobbs*, states will now have the authority to regulate abortion and related services. Employers will face many questions regarding their benefit plans and what, if any, abortion benefits they choose to maintain or establish in the wake of this landmark decision.

We recognize that the issues associated with today's webinar are highly sensitive and deeply personal for many of our attendees. We are not here today to promote any position, but instead the sole purpose of this webinar is to take a practical look at how the Dobbs decision impacts your compliance efforts in the context of employee benefits, labor, and employment laws.

Agenda

Background

- *Roe v. Wade*
- *Dobbs v. Jackson Women's Health Organization*
- Extent of mandated coverage for abortion

Employer considerations (Workplace)

- Employee retention
- Privacy
- Social Media
- Safety

Potential Employee Benefit Impacts

- Group health plans
- Travel benefits & other policies
- State activity/Potential criminal and civil liability
- ERISA preemption

Roe v. Wade

- 1973 Supreme Court decision
 - The Fourteenth Amendment of the U.S. Constitution provides a fundamental "right to privacy" that protects a woman's right to choose whether to have an abortion
 - Such right not absolute; must balance the government's interests in protecting health and prenatal life
- *Roe* Impact
 - States unable to impose excess burdens on women or limit their right to access an abortion
 - Led to other litigation as to whether state actions unduly infringed upon a woman's right to privacy
 - *Planned Parenthood v. Casey* the next most prominent U.S. Supreme Court decision in which the Court deemed fetal viability at 23 or 24 weeks which was shorter than in *Roe* (i.e., 28 weeks)

Dobbs v. Jackson Women's Health Organization

- Challenge to Mississippi state law that bans most abortions after first 15 weeks of pregnancy.
- Official opinion overturning *Roe* issued June 24. Majority ruled that states now will have authority to regulate abortion as they see fit. The U.S. Constitution does not confer a right to abortion.

Extent of coverage requirements for abortion

- No federal requirement to cover elective abortions; EEOC rules require coverage to protect health of mother
- Generally not an essential health benefit (but may depend on state benchmark)
- Accordingly, employer plans generally have flexibility regarding whether, and to what extent, to cover abortions
- Some 26 states will ban or strictly limit access to abortion

Developing a Policy or Statement on the Court's Decision in Dobbs v. Jackson Women's Health

- Many large companies have faced pressure to address Dobbs and its ramifications. Pressures from customers, clients, employees, and media outlets have led some major U.S. companies to develop policies to address Dobbs.
- Other companies and firms have been careful to avoid addressing the issue and want to wait and see how the issues continue to play out.
- Each company must carefully weigh the costs and benefits to the policies.

Pros and Cons of Company Decisions Addressing Dobbs v. Jackson Women's Health

There are pros and cons to consider as companies chooses to address (or avoid addressing)Dobbs:

1. Customer and client pressures to act
2. Public relations concerns for the company
3. Civil and criminal liability issues for policy changes (discussed later)
4. Employee retention and recruitment issues
5. Costs of healthcare coverage issues, lost time from work

Pros and Cons of Company Decisions Addressing Dobbs v. Jackson Women's Health

- Government response to Dobbs is a significant consideration for corporate America.
- The Biden Administration has made it a priority to address the ramifications of the Dobbs decision, using the HHS and other agencies to develop options to assist those seeking abortions in states with restrictions.

Pros and Cons of Company Decisions Addressing Dobbs v. Jackson Women's Health

- Other states governors, attorney generals and legislatures are seeking to restrict a corporation from paying for travel by employees seeking abortion access in another state.
- Senator Marco Rubio has proposed a federal law that would limit corporate tax write offs related such employer paid travel costs or other payments made by the company. The bill also includes restricting payments for gender affirming care paid by an employer.

Pros and Cons of Company Decisions Addressing Dobbs v. Jackson Women's Health

Such travel restrictions would certainly face court challenge.

In fact, Justice Kavanaugh has expressed his view this type of state travel ban would run afoul of the Constitution. In his concurring opinion in Dobbs, Justice Kavanaugh stated:

“May a state bar a resident of that state from travelling to another state to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”

Risks Associated With Social Media in a Post-Dobbs World

- Employees should be aware of legal issues relating to employee's posting comments or opinions on social media. Companies are already facing significant pressure from employees from those employees who are pro and con the Dobbs decision.
- Reputation. What if the employees might take personal positions on social media that may adversely affect the public perception of the company.
- Employee relations. The Cube Wars – corporate America is also seeing personal disputes between employees playing out online creating morale issues in the workplace.
- What can the employer do to address workplace issue?

National Labor Relations Act

Section 7 rights: “**Employees** shall have the right...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”

Employees’ Section 7 rights apply to communications via Social Media

Protected Concerted Activity and Social Media

- Activity that addresses the terms and conditions of employment
- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to conditions of employment

Social Media And Protected Concerted Activity

- Section 8(a)(1): Employers cannot maintain a work rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights”
- Two types of rules:
 - Explicit or Implicit restrictions – employees would reasonably construe the rule to prohibit protected concerted activity
 - Ambiguous rules – limiting language, context, examples?
- Takeaway: Review your social media policy or create a compliant policy.

- Train employees on company's expectations regarding use of Internet-based social media and appropriate vs. inappropriate use of social networking sites.
- Employees that understand the personal and professional risks of inappropriate activity will be much more likely to self-regulate their online behavior.

Workplace Violence in the Wake of Dobbs?

- No official definition.
- Examples:
 - Threats
 - Harassment
 - Bullying
 - Emotional abuse
 - Minor assault (e.g., pushing or shoving)
 - Stalking
 - Violent physical assault (e.g., punching, stabbing, shooting)

- Most states do not require employers to:
 - Have a workplace violence policy; or
 - Prohibit weapons in the workplace; or
 - Have a plan for dealing with a workplace shooter.
- All employers have a common law duty to **exercise reasonable care to prevent foreseeable harm.**

Foreseeable Harm

- Foreseeability depends on all the circumstances.
 - Statistically not foreseeable that an asteroid will injure a window washer.
 - Foreseeable a faulty safety harness would cause injury.
- Foreseeability of WPV, factors (e.g.):
 - Nature of the work (e.g., handling \$ or volatile people);
 - Proximity to others, or isolation from others;
 - Prior incidents.

Add, expand or reduce abortion benefits under group health plan

- Fully insured plan
 - Carriers subject to state restrictions
 - *Idaho, Indiana, Kansas, Kentucky, Michigan, Missouri, Nebraska, North Dakota, Oklahoma, Texas and Utah restrict abortion at some level.*
 - *California, Illinois, Maine, Maryland, New York, Oregon and Washington mandate coverage.*
 - Access issues – provider availability for out-of-state residents and plan payment limitations for out-of-network services in other states
 - Subject to potential changes based on forthcoming restrictions from legislature as well as insurance department or commission
 - Extra-territorial rules may limit coverage in out-of-state policies of insureds in states with bans

Add, expand or reduce abortion benefits under group health plan

- Self-funded plan
 - ERISA preempts state laws that “relate to” self-funded plans
 - How far preemption will go remains unclear, particularly regarding criminal laws of general applicability
 - Greater potential latitude to offer coverage to benefits-eligible employees, though many plans do not cover all abortions
 - Monitor state laws regarding payment for abortion or travel for abortion or facilitating access to services or drugs related to abortion

Add or expand travel benefits for abortion

- Within existing health plan
 - Code Section 213(d) expenses
 - Certain IRS limits will apply (e.g., mileage at IRS medical travel rate, \$50 lodging limit subject to certain conditions, meals generally excluded)
 - Only benefits those actually enrolled under plan
 - Subject to insurer and TPA restrictions
 - No HIPAA protection for claims that are evidence of criminal activity, though HHS guidance attempts to create potential limited protection

Expanded Pharmacy Benefits for Abortion

- Some employers reviewing extent of coverage for medical (i.e., pharmaceutical) abortions (to be distinguished from surgical abortions)
- Employer considerations
 - Ability of states to restrict the plan's coverage of such benefits
 - Ability of states to restrict the ability of service providers (e.g., PBMs) to administer these benefits or ship/deliver these drugs to state residents
 - Potential for civil or criminal liability for plan administrators for violating state laws

Add or expand travel benefits for abortion

- Separate group health plan (outside major medical)
 - Expenses for abortion-related travel could be deemed health care, and program could be deemed a group health plan
 - If so, ACA, ERISA, HIPAA, COBRA come into play – must meet excepted benefit rule or limit coverage to major medical enrollees to avoid federal compliance issues
- Health Reimbursement Arrangement (HRA) – (integrated with group health plan or EBHRA with annual dollar cap at \$1,800)
- Employee Assistance Program (EAP)
 - Can benefit employees not enrolled in the group health plan
 - EAP properly structured to be “excepted benefits” will pass muster under Affordable Care Act (ACA)

Add or expand travel benefits for abortion

- General expenses reimbursement benefit – non-group health plan
 - Must be treated as taxable
 - Employer administered
 - No ERISA preemption protection
 - No HIPAA privacy protection
 - For privacy concerns, likely would cover other medical services and require limited substantiation
 - Risk that deemed non-compliant group health plan by DOL, HHS or IRS

Design Considerations

- In or out of group health plan
- Dollar limits and tax status
- High Deductible Health Plans/Health Savings Accounts (HSA)
- HIPAA privacy protections and criminal liability
- Mental Health Parity
- Coverage for travel only if resident where abortion unavailable vs. all medical by some type of mileage radius
- In-network vs. out-of-network cost differences

Liability Considerations

- HIPAA privacy protections
- Mental Health Parity
- Other claims of discrimination in coverage
 - Transgender reproductive services
 - Vasectomy services

State activity

- Certain states have enacted or are considering enacting laws to greatly restrict or ban outright women's access to abortion
- Other states have enacted or are considering enacting laws that would make it a civil or criminal violation to "aid and abet" or otherwise assist an individual in accessing abortion
- Particular states also considering additional action
 - Texas threatening limiting companies from doing business in state based on covering, supporting, or permitting access to abortion
 - Missouri contemplating expanding prohibitions to abortions on state residents performed outside state's borders
- More than a dozen states have existing laws that were previously rendered unconstitutional under *Roe v. Wade* which have triggered (or will trigger) following *Dobbs*

ERISA Preemption

- ERISA generally preempts state laws; certain areas specifically saved from preemption including insurance
- Importantly, in this context, ERISA also saves from preemption “any generally applicable criminal law of a State”
- Also, federal common law presumption against preemption where a state exercises general police powers
- How far will preemption go?
- Constitutional ramifications and informal statements from SCOTUS and DOJ

Next Steps for Employers

- Review state laws
- Review current policies
- Review insurance coverage (if any)
- Train managers
- If there are changes, develop communications to clearly explain how reproductive health benefits will change



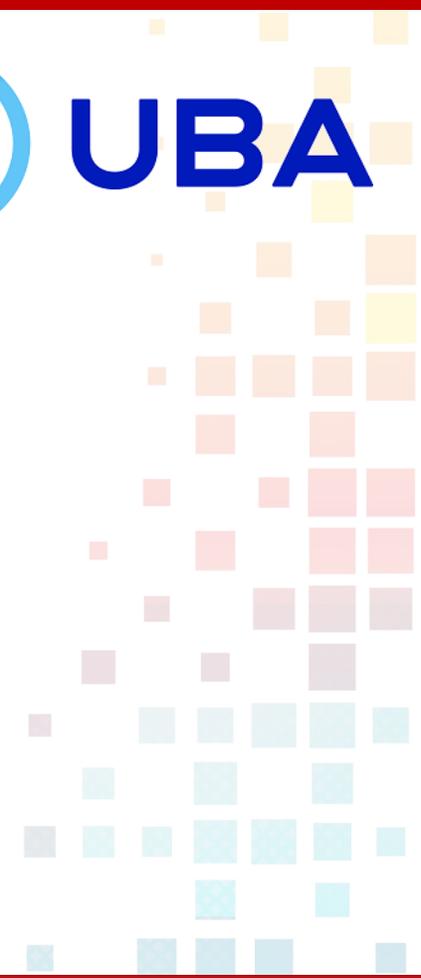
Final Questions



Email: ubamember@fisherphillips.com

HRCI –

SHRM –



CARLTON C. PILGER

Of Counsel
Fisher Phillips

Email: cpilger@fisherphillips.com

Phone: (404) 240-4141



Thank You

CARLTON C. PILGER
Of Counsel
Fisher Phillips

Email: cpilger@fisherphillips.com
Phone: (404) 240-4141