

# **What Overturning *Roe v. Wade* Means for Employee Benefits**

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# *Roe v. Wade* (1973)

- Supreme Court held that prohibiting abortion infringes on a woman's constitutional right to privacy but that a state has an interest in protecting life.
  - A state may not restrict abortion at all in the first three months of pregnancy (first trimester).
  - A state may establish guidelines only to protect the mother's health during the next three months (second trimester).
  - After "viability," which the Court placed at 24 to 28 weeks of gestation, a state may prohibit abortion unless it is deemed necessary to preserve the mother's "life or health."

# *Planned Parenthood v. Casey* (1992)

- Reaffirmed *Roe*
- Rejects the trimester rules from *Roe*
- Adopts undue burden test
  - An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

# ***Dobbs v. Jackson Women's Health Org.***

- Mississippi enacted the Gestational Age Act, which prohibits abortions after 15 weeks with limited exceptions.
- Jackson Women's Health Organization filed suit in federal court to enjoin the law.
- A District Court permanently enjoined enforcement of the law on the basis that a ban prior to fetal viability was unconstitutional under *Roe* and *Casey*.
- The Supreme Court granted certiorari to resolve the question of "whether all pre-viability prohibitions on elective abortions are unconstitutional."

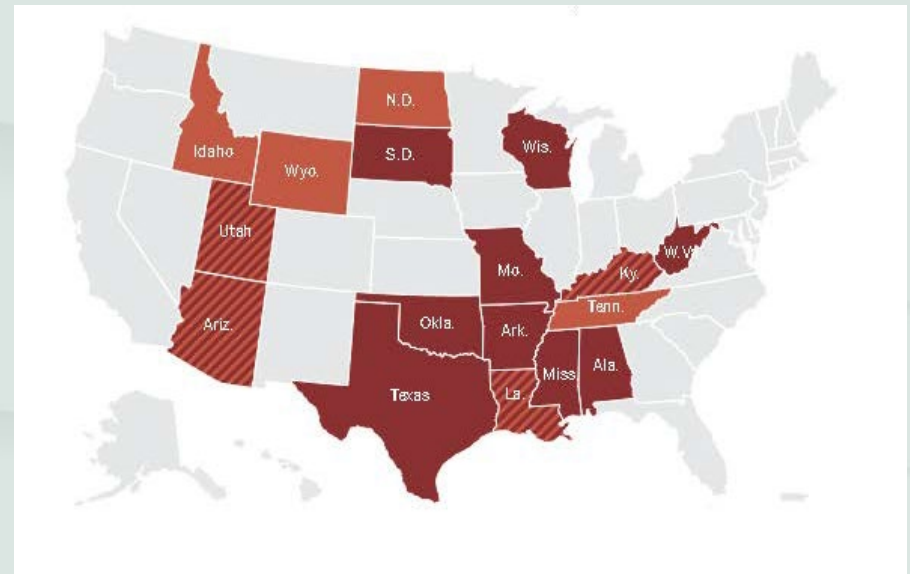
# *Dobbs v. Jackson Women's Health Org.*

- In a 5-4 decision, the Court held *Roe* was egregiously wrong.
  - Fourteenth Amendment does not protect the right to an abortion.
  - *Roe* and *Casey* are overruled.
- The abortion issue must be returned to state-elected officials.
  - State abortion laws should be reviewed under a “rational basis” standard.
  - A law regulating abortion is entitled to a “strong presumption of validity” under the rational basis standard.

# State Laws

- States with near total abortion bans in effect now:

- Alabama
- Arizona
- Kentucky
- Missouri
- North Dakota
- South Dakota
- Texas
- Wyoming
- Arkansas
- Idaho
- Louisiana
- Mississippi
- Oklahoma
- Tennessee
- West Virginia
- Utah



*New York Times*

# State Laws

- States with restrictions on abortion after a certain time:

- Arizona (15 weeks effective in September)
- Florida (15 weeks, which was found unconstitutional pre-*Roe*)
- Georgia (6 weeks)
- Kentucky (15 weeks)
- Ohio (6 weeks)
- South Carolina (6 weeks)
- Tennessee (6 weeks; total ban to take effect soon)
- Utah (18 weeks)



*New York Times*

# State Laws

- States where abortion is protected:

- Alaska
- California
- Colorado
- Connecticut
- D.C.
- Delaware
- Illinois
- Hawaii
- Maine
- Maryland
- Massachusetts
- Minnesota
- Nevada
- New Jersey
- New Hampshire
- New York
- New Mexico
- Rhode Island
- Oregon
- Washington
- Vermont



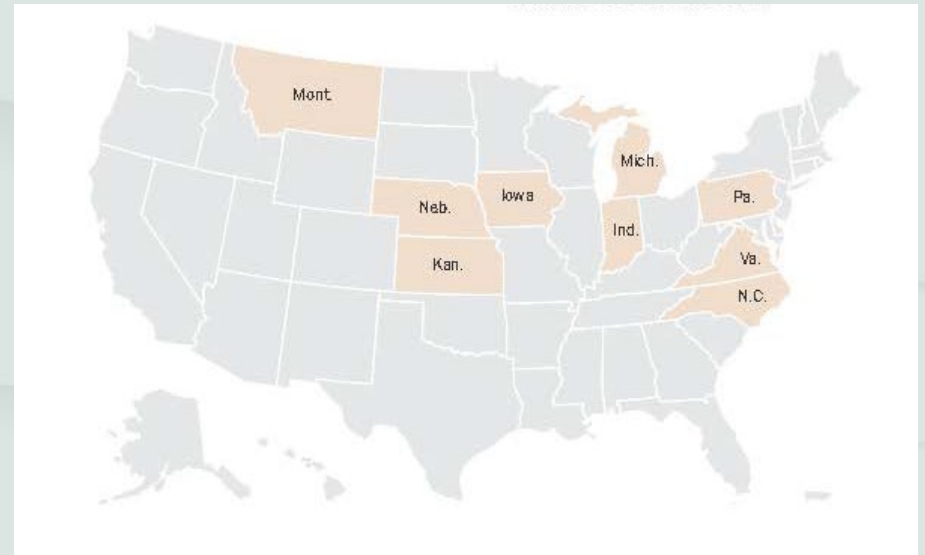
*New York Times*



# State Laws

- States where legal status of abortion is uncertain:

- Indiana
- Kansas
- Montana
- North Carolina
- Virginia
- Iowa
- Michigan
- Nebraska
- Pennsylvania



*New York Times*

# State Law Litigation

- **Arizona** – A judge blocked a "personhood" provision in an existing abortion ban in the state as vague.
- **Florida** – A judge issued state-wide injunction but appeal made ban temporarily effective.
- **Idaho** – State Supreme Court blocked ban at 6 weeks in April. New hearing set for August.
- **Kentucky** – A judge granted TRO against state trigger law.
- **Louisiana** – A district court judge blocked ban.
- **Michigan** – Trigger law temporarily blocked.
- **Mississippi** – Judge declined to block trigger law. State Supreme Court to review.
- **North Dakota** – Pending lawsuit to block trigger law.
- **Ohio** – State Supreme Court denied request to block ban.
- **Oklahoma** – Lawsuit filed challenging trigger law.
- **South Carolina** – Temporarily blocked prior to *Dobbs*
- **Texas** – State Supreme Court stayed lower court injunction.
- **Utah** – A judge has temporarily blocked the state's trigger ban on most abortions.
- **Wisconsin** – Lawsuit filed.
- **West Virginia** - A judge temporarily blocked a ban on abortion that was enacted in 1849, allowing abortions to resume.

# State Aiding and Abetting Laws

- Texas and Oklahoma's abortion laws permit individuals to file civil actions against entities or individuals that perform abortions or knowingly engage in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the cost of an abortion through insurance or otherwise.
- A company benefit plan may violate Texas law if it reimburses a Texas-based employee for abortion services received in a state that permits abortion or travel costs.
  - Republican state legislators have sent Citigroup and Sidley Austin cease-and-desist letters regarding travel benefits.

# State Aiding and Abetting Laws

- **Extraterritorial Application of State Law?** The general presumption against the extraterritorial application of state law and related constitutional concerns suggest such laws would not hold up to actions brought against entities providing or reimbursing services received out of state. This issue is already in litigation in both Texas and Oklahoma.
- **ERISA Preemption?** ERISA preemption may apply to a state law that “relates to” an ERISA plan. ERISA, however, does not preempt “any generally applicable criminal law of a State.”
- **Kavanaugh:** In his concurring opinion, Justice Kavanaugh opined that a state may not bar a resident of that state from traveling to another state to obtain an abortion based on the “constitutional right” to interstate travel.
- **White House:** “If a woman lives in a state that restricts abortion, the Supreme Court’s decision does not prevent her from traveling from her home to a state that allows it. If any state or local official tries to interfere with women exercising this basic right, the Biden Administration will fight that deeply un-American attack.”

# HHS OCR Guidance - 6/29/22

- HIPAA *permits but does not require disclosures* of PHI if a disclosure is required by law or for law enforcement purposes. Unless one of those exceptions applies, an individual's PHI *cannot* be disclosed by a covered entity or business associate without that individual's authorization.
  - “Required By Law” – HIPAA allows the disclosure if a state law mandates a covered entity to disclose PHI that would be enforceable in court. A request from a government agency is not enough to allow a disclosure; the law must compel the covered entity to disclose.
  - “Law Enforcement Purposes” - HIPAA would not permit the disclosure of PHI for law enforcement purposes without a subpoena or warrant. Even then such a disclosure can only include the requested PHI and nothing more.

# Executive Order - 7/8/22

- Requires HHS to provide a report on how to strengthen access to reproductive health.
- Vows to take steps to ensure privacy to health information.

# How will this impact your benefits?

- Group health plan
- Medical travel benefits
- Prescription benefits
- Other medical benefits

# ERISA Preemption

- ERISA preempts any state laws that relate to an employee benefit plan covered by ERISA.
  - Exception for state insurance law.
    - But self-funded ERISA plans cannot be deemed “insurance” under state law.
  - Exception for state “generally applicable criminal laws.”



# Insured Health Plans

- ERISA will not preempt any state insurance law regarding whether abortions can be covered.
- Fully insured plans are governed by the law of the state in which the policy is issued.
- An employer's ability to change the location for the policy issuance will be dictated by the insurance company's situs requirements.

# Self-Insured Health Plans

- State civil laws regarding abortion may be preempted because they relate to an employee benefit plan.
- Preemption is less likely with regards to criminal laws, but there is some question about whether a law specific to criminalizing abortion is “generally applicable.”

# Travel Benefits

- Many large employers across the country have announced they would provide travel benefits to employees who need to travel out of state to receive reproductive care.
- Some insured and self-insured plans already provide travel benefits (e.g., for transplants, to centers of excellence).

# Through the Plan

- Employers with self-funded plans could amend the plan to allow for (or add to existing) travel benefits.
  - Will need to coordinate with TPA.
- If the plan is insured, the insurer would need to allow for such coverage.
- Be aware of potential HDHP and Parity Act issues.

# Through an HRA

- Integrated Health Reimbursement Account.
  - Employer could fund HRA to cover travel expenses.
  - But limited to individuals enrolled in health plan.
  - Potential administrative difficulties coordinating with insurer.
  - If the plan is a HDHP, participants could not be reimbursed until they hit their deductible.
- Non-integrated HRA
  - Would be considered a group health plan under the ACA and would not meet market reform rules.

# Through an HSA

- Health Savings Accounts are merely funding vehicles in which participants can use the HSA to pay for any qualifying medical care.
- Employers can contribute to HSAs.
- Employees must be enrolled in High Deductible Health Plan (HDHP) to receive contributions to an HSA.

# Through an EAP

- Providing travel benefits through an Employee Assistance Program could allow for broader scope of coverage, but including medical care in EAP could make it a group health plan subject to the ACA.
- Must ensure that EAP is an excepted benefit under the ACA regulations.
  - Not provide significant benefits in the nature of medical care;
  - Not require participants in a separate group health plan to exhaust benefits under the EAP before being eligible for the group health plan;
  - Not condition eligibility on participation in another group health plan;
  - Not require employee premiums or contributions to participate;
  - Not require cost sharing.

# Outside of a Group Health Plan

- Separate policy for medical travel benefits.
  - Would likely be a welfare plan under ERISA.
  - Would also qualify as a group health plan under the ACA and would be non-compliant.
  - Would need to be integrated with health plan to ensure ERISA and ACA compliance.



# Mental Health Parity and Addiction Equity Act Implications

- The Parity Act requires that mental health benefits be in parity with medical surgical benefits.
- If your health plan (either itself or through an integrated HRA) provides travel benefits for medical procedures but not for mental health treatments (e.g., transgender care), you may have a Parity Act issue and should consult with ERISA counsel.
- An integrated travel benefit that's broadly written and does not address abortion specifically could avoid Parity Act issues and support an ERISA preemption argument over a state challenge.

# Tax Implications

- Abortion and abortion-related travel qualify as “medical care” within the meaning of Internal Revenue Code Section 213(d)(1).
- As qualifying medical care, reimbursements for abortions and travel can be made on a pre-tax basis (through an integrated HRA or an HSA).
- But illegal operations or treatments are not medical care under the regulations.

# Tax Implications

- Lodging can be reimbursed up to \$50 per night (\$100 if traveling with companion).
- Travel by car is currently reimbursable at 22 cents per mile.
- Meal expenses are not deductible unless provided by the hospital.

# Outside of the Box

- Taxable travel benefit plans
  - Travel benefits that are not integrated with a group health plan are taxable.
  - Benefits exceeding limits are also taxable.
  - Possibility of employee fraud
  - But may still reduce costs
- Third-party providers of benefits (e.g., Level)
  - Provide options including tax-favored and taxable plans
  - Protects employee privacy
  - May help insulate from aiding and abetting laws
  - But ERISA preemption might not be available
  - Read your contracts carefully!

# Prescription Benefits

- Medication abortion is FDA approved for use up to 10 weeks of pregnancy and in 2020 accounted for 54% of US abortions.
- Your plan may cover abortion-inducing medication, such as mifepristone and misoprostol.
  - FDA does not require individual to be in-person to take
  - Some states require physical presence to receive medications

# Implication to Other Benefits

- ACA requires coverage of FDA approved contraceptives, including Plan B (emergency contraceptives).
- Infertility treatments
- Paid leave benefits

# Next Steps

- Review the terms of your current health care plan.
- Should you consider moving from an insured to a self-funded plan?
- If you want to offer travel benefits, determine how they are going to be structured and administered.
- Wait and see.

# Questions?

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