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Supreme Court Overrules Roe v. Wade – Employers Must Think Carefully About How to Respond

On Friday June 24, 2022, the United States Supreme Court issued a decision that overrules *Roe v. Wade*. *See* *Dobbs et al. v. Jackson Women's Health Org. et al.*, Case No. 19-1392 (slip opinion). According to the decision, the federal constitution does not bestow the right to an abortion or protect an individual woman's personal liberty interest concerning the same, but rather each state may fully regulate and outright ban or criminalize procedures as each state sees fit. As is discussed further below, this decision has important implications for employers that will now need to carefully review and potentially tailor their policies to accommodate individual states' varying views on the legality and morality of abortion and individual liberty interests.

In *Roe v. Wade*, the Court held that individual citizens have a constitutional right to privacy that entitles them to obtain an abortion without government interference. However, in subsequent cases the Court also held that an individual's privacy right, as applied to abortion, was not absolute and waned over time as the fetus reached "viability." The Court created the "trimester framework" under *Roe* where a state's ability to pass laws that limit or criminalize abortion depended on the stage of the pregnancy. Generally, the *Roe* framework prohibited states from restricting abortion before 14 weeks gestation, but permitted states to regulate abortion procedures in ways reasonably related to material health from 14 weeks until viability, and allowed states to ban abortions altogether once a fetus reached a stage of viability.

In 2018, the state of Mississippi passed a law that generally prohibits abortions performed after the 15th week of pregnancy (Miss. Code Ann. § 41-41-191, i.e. The Gestational Age Act, GAA). Although there is disagreement as to the exact point that a fetus becomes "viable" (i.e., can live outside of the womb), it was undisputed that a fetus is not yet viable at 15 weeks and therefore that the Mississippi law sought to

completely prohibit some pre-viability abortions in contravention of the framework established under *Roe v. Wade.*

Jackson Women's Health Organization (JWHO) is the only abortion provider in the state of Mississippi. It filed a lawsuit challenging the constitutionality of the GAA in Federal District Court. The district court granted summary judgment in JWHO's favor and permanently enjoined enforcement of the GAA. The Fifth Circuit Court of Appeals affirmed. However, the state of Mississippi appealed the case to the Supreme Court, which granted review on the issue of whether all pre-viability prohibitions on elective abortions are unconstitutional.

In a 6-3 ruling, the *Dobbs* majority overruled *Roe v. Wade* altogether, holding that pre-viability prohibitions on elective abortions do not violate the United States Constitution. The majority wrote, "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." *See* Slip Opinion, pgs. 78–79. Additionally, the *Dobbs* majority held that, going forward, abortion regulations will be subject to "rational basis" review.

Some employers have responded to *Dobbs* by pledging to offer insurance, travel, and other compensatory benefits to employees living in states that may criminalize or ban abortions in order to work around such restrictions. For example:

- Microsoft announced that it will extend its abortion and gender affirming care services for employees in the United States to include travel expense assistance. *See* here.
- Dick's Sporting Goods announced that if an employee lives in a state that restricts access to abortion, then the company will provide up to $4,000 in travel expense reimbursement for that employee to travel to the nearest location where abortions are legally available. *See* here.

Despite quick pronouncements of reproductive rights support from some employers, it is unclear how such initiatives will interact with state laws that criminalize and/or recognize civil liability for the "aiding and abetting of abortion." For example, some states (e.g., Texas and Oklahoma) permit private individuals to file civil lawsuits against third parties, including employers, that "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." This means, for example, that an employer who "aids and abets" a woman in Texas by covering the cost of abortion-inducing medication or the expenses to travel to another state to obtain a lawful abortion may find itself on the receiving end of a lawsuit subjecting it to civil liability for such actions.

The Supreme Court's decision in *Dobbs* implicates other employment law considerations, as well. For example, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, protects women against discrimination and harassment in employment based on pregnancy, childbirth, or related medical conditions. The Equal Employment Opportunity Commission (EEOC) takes the position that these laws prohibit an employer from taking adverse employment action against an employee for having an abortion or not having an abortion. Employers should also remember that the Americans with Disabilities Act and certain state laws require preservation of the confidentiality of employee medical information, including a decision to have or not have an abortion. Employers sponsoring group health plans should also bear in mind the HIPAA privacy and confidentiality requirements applicable to their group health plans.

Employers are also grappling with questions relating to health plan coverage for abortion-related procedures in the wake of *Dobbs*. The Affordable Care Act does not require health plans to cover abortion procedures. In the wake of *Dobbs*, state insurance laws could be enacted that prohibit public employer and fully-insured group health plans with insurance policies issued in that particular state from covering certain types of abortions. (This is because state insurance laws typically are "saved" – or exempted – from ERISA's preemption of state laws.) In contrast, private sector self-funded plans may be able to claim that ERISA preempts such state abortion laws if the plan's coverage of abortion conflicts with those state laws. However, whether and how ERISA's preemption clause will apply to state abortion laws has not yet been tested, so the success of such an assertion is unknown.

Additionally, abortion rights can be a divisive topic that creates conflict in a workplace. In general, employees do not have a "right of free speech" to discuss abortion-related topics in the workplace of private employers since the First Amendment only precludes the government from restricting free speech. However,

the National Labor Relations Act requires employers in both union and non-union settings to permit "protected concerted activity" among employees to discuss topics related to the "terms and conditions" of employment. Such topics might include the availability (or lack thereof) of insurance coverage or employer reimbursement of travel expenses incurred to obtain abortion procedures.

Employers should carefully monitor abortion-related legislation in the wake of *Dobbs* on a state-by-state basis and plan accordingly. One potential result of *Dobbs* is that employers may be required to specifically tailor their health and welfare benefits and policies based on their geographic footprint.

KEY TAKEAWAYS

- *Roe v. Wade* has been overruled. Therefore, each individual state may regulate abortion as it sees fit, including outright prohibition regardless of pregnancy term, as long as there is a rational basis for the law.
- Employers should carefully monitor how the states in which they operate and where their employees work regulate abortion. Depending on the benefits an employer offers, it may have to specifically tailor its health and welfare benefits and policies to match the unique mix of abortion laws/regulations to which it is subject. A one-size fits all policy is unlikely to prove workable.
- The *Dobbs* decision serves as a reminder for employers to remain compliant with existing employment laws implicated by employees' privacy, reproductive health decisions, and workplace dialogue on sensitive and divisive political, religious, and personal topics.

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