

Dobbs v. Jackson Women's Health Organization:

What are the complexities to navigate for your organization and the future of abortion protections in the US?

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Speakers

Petrina McDaniel: Welcome

Traci Martinez: General Employment

Kris Woliver: Employment Tax and Benefits

Colin Jennings: Aiding and abetting Statutes

Doug Anderson: Insurance

Emy Trende: Healthcare

Beth Goldstein: Policy



General Employment

Post-Roe Employer Considerations

- Hostile work environment, discrimination, or retaliation concerns
- Employer policies
 - Paid sick leave
 - Travel stipend (miles, lodging, and food)
 - Solicitation v. anti-solicitation
 - Peaceful protest bail



Employment, Tax and Benefits

Employee Benefits – Abortion Care and Travel Reimbursement

- **ERISA**: federal law that governs employee benefit plans and their administration
- **Self-funded plan** (aka self-insured) plan – a health plan where employer pays for participant/beneficiary claims out of pocket as they arise; typically relies on a third party claims administrator to process claims for benefits
 - ERISA preemption protections
- **Fully insured plan** – health plan where employer purchases insurance for employees/ beneficiaries through third party insurer; employer pays fixed premium to carrier and carrier has financial burden of employee/beneficiary healthcare
 - ERISA does not preempt state insurance regulation/law for fully insured plans; plans bound by applicable state insurance law

Employee Benefits Continued

- **Avoid limiting transportation reimbursements (plan-specific) exclusively for abortion-related care**
 - Mental Health Parity and Addiction Equity Act violation risk
- **Abortion-specific travel reimbursement policies outside of benefit plan context**
 - Risks of treatment as a non-compliant ERISA plan
 - Risks of treatment as a standard policy (not ERISA plan) subject to state law
- While we know greater flexibility for abortion-related services in self-funded plans, major gray areas post-*Dobbs*

Tax Considerations

- **26 USC § 213(d)**
 - Transportation “primarily for and essential to medical care” can be reimbursed as a medical benefit tax-free
 - Subject to reasonableness standard
 - Reimbursement of lodging subject to \$50/day cap; remainder is taxable income
 - Cost of meals/childcare reimbursements treated as taxable income
 - Provision is longstanding; untested for abortion care post-*Dobbs*

A pair of ornate metal scales of justice sits on a dark wooden table in a courtroom. The scales are positioned on the left side of the frame. The background shows a courtroom with wooden paneling and several empty wooden chairs. A teal rectangular box is overlaid on the right side of the image, containing the text "Aiding and abetting statutes" in white. The overall lighting is dim and blue-toned.

Aiding and abetting statutes

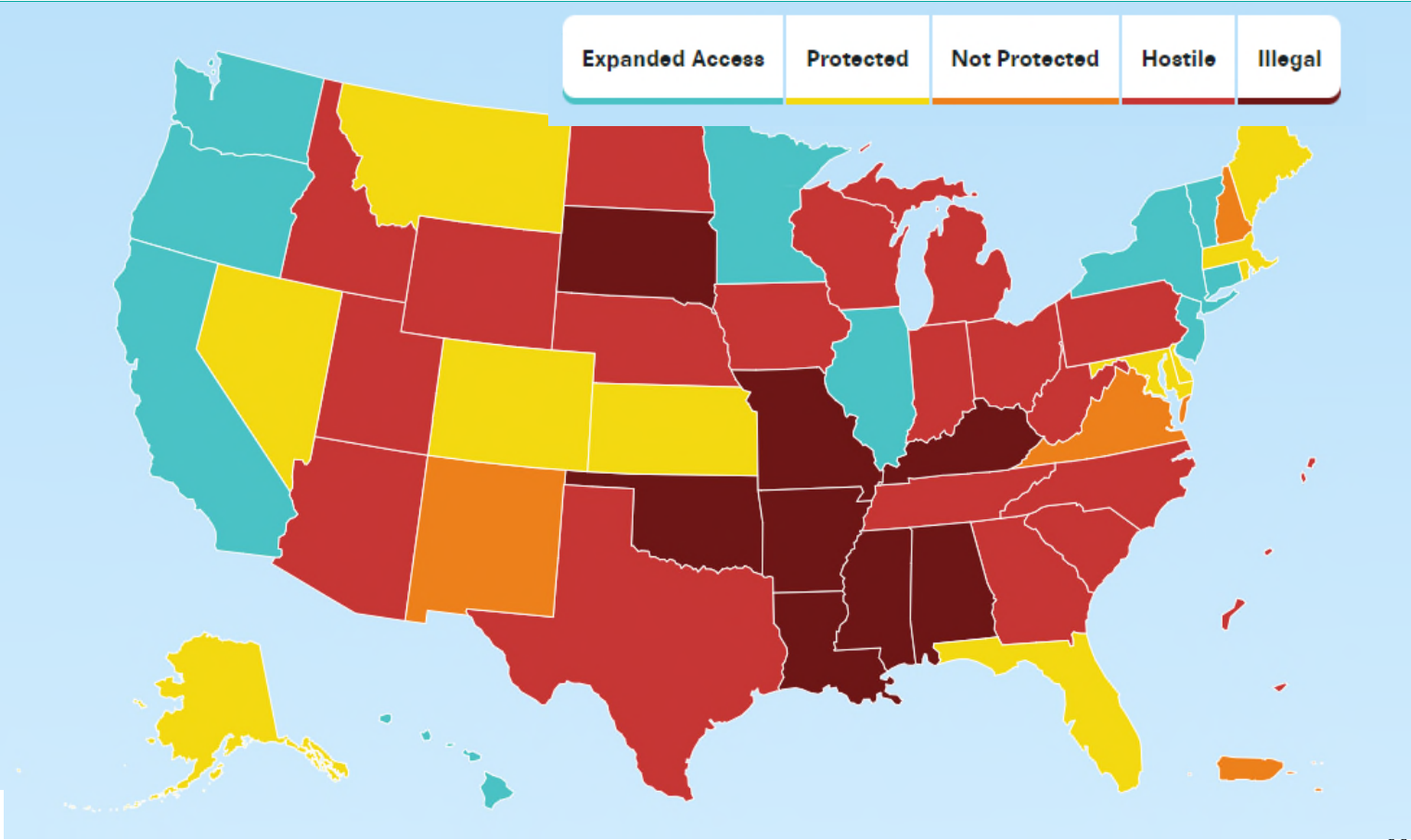
Can a State Bar an Individual from Leaving?

“[A]s I see it, some of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”

-*Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

State of the Union – Abortion Laws by State

- Individual
- Employer
- Physician
- Insurance Company



Other forms of Accountability

- In addition, to civil and criminal liability, employers must also note that there may be professional consequences. These could include:
 - Loss of government contracts;
 - Loss of professional licenses;
 - Removal from advisory boards; and
 - Reversal of tax benefits.



Aiding and Abetting

Dear Ms. Ostolaza:

It has come to our attention that Sidley Austin has decided to reimburse the travel costs of employees who leave Texas to murder their unborn children. It also appears that Sidley has been complicit in illegal abortions that were performed in Texas before and after the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. We are writing to inform you of the consequences that you and your colleagues will face for these actions.

Abortion is a felony criminal offense in Texas unless the mother's life is in danger. *See* West's Texas Civil Statutes, article 4512.1 (1974) (attached). The law of Texas also imposes felony criminal liability on any person who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.2 (1974). This has been the law of Texas since 1925, and Texas did not repeal these criminal prohibitions in response to *Roe v. Wade*, 410 U.S. 113 (1973). These criminal prohibitions extend to drug-induced abortions if any part of the drug regimen is ingested in Texas, even if the drugs were dispensed by an out-of-state abortionist. To the extent that Sidley is facilitating abortions performed in violation of article 4512.1, it is exposing itself and each of its partners to felony criminal prosecution and disbarment.

We will also be introducing legislation next session that will impose additional civil and criminal sanctions on law firms that pay for abortions or abortion travel. The legislation that we will introduce will include each of the following provisions.



Third. It will require the State Bar of Texas to **disbar any lawyer** who has violated article 4512.2 by "furnishing the means for procuring an abortion knowing the purpose intended," or who violates any other abortion statute enacted by the Texas legislature. If the State Bar fails to disbar an attorney who has violated these laws, then any member of the public may sue the officers of the State Bar and obtain a writ of mandamus compelling them to impose the required disciplinary sanctions.

Where Do We Go from Here?



An aerial photograph of a large crowd of people standing on a dark, reflective surface. The crowd is arranged to form a large, stylized number '7'. The people are wearing various colored clothing, and the overall scene is dimly lit, with some highlights on the ground.

Insurance

Dobbs and Health Insurance

- Pre-Dobbs: Health insurance generally covered abortions involving rape, incest and to save the life of the mother; elective abortions were sometimes covered by insurance, but not always
- General principle: Health insurance does not cover health care services that are not legal to provide
- Health insurance is governed by a mix of state and federal law, and the rules depend on the type of coverage (individual coverage, employer coverage, Medicaid, Medicare, state/local government)
- Federal law takes precedent over state law
- Notable federal laws
 - Insurance plans must cover emergency services required under EMTALA, and the DoJ has taken the position that EMTALA requires abortion services to treat emergency conditions
 - The Hyde Amendment permits federal funding of abortion services in situations involving rape, incest and to protect the life of the mother and applies to Medicare and Medicaid
 - The Affordable Care Act requires coverage of maternity services and contraceptives, but not abortion in every state or drugs to induce abortions

Dobbs and Insurance Covering Liabilities

- Liability can arise if a company acts or is perceived to act outside the bounds of the law
- Types of coverages implicated: D&O insurance; Fiduciary Liability; Professional Liability: E&O Coverage; General Commercial Liability
- General Principles:
 - Liability insurance does not cover intentional acts; only fortuitous events
 - Following a company policy to reach an intended result is not a fortuitous event covered by insurance
 - Liability insurance does not cover losses resulting from illegal acts; defense costs may be available until a court decides an illegal act has occurred
 - Aiding and abetting laws may make employer assistance illegal if the assistance is provided in a state that makes the conduct illegal, even if the abortion occurs in another state
- Courts will decide the nature and extent of coverage
- Having no insurance coverage for possible lawsuits will have a chilling effect

Spousal Coverage

- Spousal coverage is not impacted directly by *Dobbs*, but could be impacted in the future based on the *Dobbs* rationale
- All legally married spouses are treated the same under current coverage; if the policy offers spousal coverage, all spouses are eligible
- Pre-*Windsor* and *Obergefeld*, insurers and health plans had a choice as to whether to cover same-sex couples, and often included plan language to do so, but it was on a plan-by-plan basis
- If federal decisions recognizing marriage are overturned, we will likely return to the pre-*Windsor* and *Obergefeld* situation, where coverage of same sex spouses is at the discretion of the insurer or health plan in those states that do not recognize same-sex marriages

A healthcare professional in blue scrubs with a stethoscope around their neck is shown from the chest up. They are holding a smartphone in their left hand and pointing at a digital interface with their right hand. The interface consists of a grid of hexagonal icons representing various medical concepts: a syringe, a heart with an ECG line, a microscope, a caduceus, a pill, a clipboard, a first aid kit, a laboratory flask, a pulse line, a hospital building, and a first aid kit. A large green square is overlaid on the right side of the image, containing the word "Healthcare" in white text.

Healthcare

Challenges Facing Healthcare Providers

- **Maintaining Provider Confidence and Patient Trust.**

- **With regard to *non-medically necessary* pregnancy termination care services.**

- Provider operations have been substantially impacted only with regard to facilities that offer these services, though those are comparatively few on a national level.
- Due to “heartbeat”/gestational age restrictions, time may be of much greater essence to those patients who seek these services; therefore early education in the reproductive/routine care process may be beneficial.

| U.S. State | Change in the no. of abortion clinics, 2014-2017 ^a | % change in the no. of abortion clinics, 2014-2017 ^a | No. of abortion clinics, 2017 ^a |
|--------------|---|---|--|
| U.S. total | 19 | 2 | 808 |
| California | 9 | 6 | 161 |
| Texas | -7 | -25 | 21 |
| North Dakota | 0 | 0 | 1 |
| Ohio | -3 | -25 | 9 |

Source: Guttmacher Institute (data.guttmacher.org)

If you do not offer certain procedures ever – due to facility policy, funding sources (state and federal funds), or your own beliefs – consider making these positions clear at beginning of care relationship, assuming that patient may not have time to legally obtain care elsewhere if situation arises. Early transparency may prevent conflict later (allegations that a care provider was misleading, or that a patient would not have consented to the care relationship if they had known about the limitations in options).

Challenges Facing Healthcare Providers

- **Maintaining Provider Confidence and Patient Trust.**
 - With regard to *medically necessary* pregnancy termination care services.
 - State and local laws are pre-empted where they directly conflict with EMTALA.
 - Emergencies must still be treated as emergencies under the law, and treated to the point of stabilization or transferred appropriately.
 - With regard to medically necessary abortion procedures, most providers we have spoken with report experiencing few operational changes regarding treatment of emergency conditions (ectopic pregnancy, septic uterus, eclampsia) – *though some headlines tell a different story.*
 - Second-guessing emergency care protocols may result in violation of other laws that prohibit gender-based care discrimination, or set forth professional care standards.
 - Documentation of case-specific professional judgment is more crucial now. Providers may obtain reassurance from additional consult resources, including outside resources.
 - Risk of administration and counsel over-legislating the physician judgment space, effectively imposing new care standards.

Challenges Facing Healthcare Providers



- **Maintaining Patient Privacy.**

- HHS guidance cautions that disclosures of PHI to law enforcement may violate HIPAA. For example:
 - Reporting of suspected crime ***in the absence of a state law requiring such reporting.***
 - Disclosing PHI to law enforcement absent an enforceable warrant or subpoena.
 - A statement indicating an individual’s intent to get a legal abortion, or any other care tied to pregnancy loss, ectopic pregnancy, or other complications related to or involving a pregnancy does not qualify as a “serious and imminent threat to the health or safety of a person or the public” that can be reported.
- But take note of entities that may not be obligated to comply with HIPAA.

Challenges Facing Healthcare Providers

■ Preventing Staff Activism Activities That May Violate Law or Facility Policy.

- Passion may drive non-compliance with the law (providing referrals, unauthorized reporting to law enforcement or outside parties, reporting on fellow staff).
- Remind staff: professional liability insurance will not cover criminal activity.
- Privacy laws are not the only factor: physician-patient privilege is sacred and protected by law and professional board rules, even in cases where there may be an exception to state and federal privacy laws.
- Reporting on staff activities outside official peer review channels poses significant risks to both provider and patient confidentiality and peer review privilege.
- Remind clinicians that they should not make public statements on behalf of their employer or in a manner that implies the employer's endorsement ("white coat and logo") unless authorized to do so.
- It's not just a matter of protecting the hospital. *The manner in which a hospital's policy is interpreted by the public can have implications on whether or not a patient seeks care.*



Challenges Facing Healthcare Providers



- **Protecting Staff Conscience Rights.**

- Federal statutes prohibit recipients of certain federal funds from discriminating against health care providers who refuse to participate in certain care services based on moral objections or religious beliefs.
- You may file a complaint with OCR under the Federal Health Care Provider Conscience Protection Statutes if you believe you have experienced discrimination because you objected to, participated in, or refused to participate in specific medical procedures, including abortion and sterilization, and related training and research activities.
- Be aware that certain hospital/facility-wide activities may cause practitioners to publish their stances (group rallies, organized petitions, fundraisers). Providers must be wary of that information being misused.

Challenges Facing Healthcare Providers

■ Other Challenges.

- Resident training shortages. ACGME requires that OB/GYN practitioners receive training on abortion procedures (unless the trainees opt out on moral or religious grounds).
- Patient education. Under law, patients now have broad access to their own medical charts. Confusing use of legal vs. clinical terminology may promote panic, misunderstanding, and mistrust.
- Telehealth and prescribing. A number of ventures have emerged attempting to provide abortion-via-prescription using telehealth. In general, telehealth laws apply the law of the location where the patient sits. If the activity is illegal in that location, the fact that the prescribing provider is sitting in a state where the prescription would be legal is irrelevant.
 - Medications mailed from outside the United States are extremely difficult to regulate. We are seeing the emergence of providers in other countries providing telehealth guidance on self-help abortion, online video guidance, and drugs by mail.
- Pharmacy. HHS OCR issued a warning to pharmacists that refusing to supply certain lawfully prescribed drugs to patients on the grounds that those drugs may be used to terminate or prevent pregnancy may constitute discrimination on the basis of sex.



Policy

Congressional Actions in the Wake of *Dobbs*

- Democrats have worked to enshrine abortion access into federal law, but the legislation has failed to advance in the Senate
- Sens. Tim Kaine (D-VA), Lisa Murkowski (R-AK), Kyrsten Sinema (D-AZ), and Susan Collins (R-ME) introduced S. 4688, the Reproductive Freedom For All Act
- Democrats have 50 votes in the Senate
 - To cut off debate and advance to a final vote, Senate rules generally require 60 votes
 - Abortion access language would be challenged if proposed via the reconciliation process
- Larger institutional reforms are unlikely
- Democrats will “nibble around the edges” to advance legislation where bipartisanship exists and spur dialogue where it does not

Midterm Election Prospects

- Historically, the party of the incumbent president loses seats in midterm elections. This is especially true when the president has a low approval rating.
- Most major polls show Republicans are likely to take the majority in the House of Representatives, while the Senate is more uncertain.

SENATORS WHO ARE RETIRING OR WHOSE TERMS OF SERVICE EXPIRE IN 2023

| | | | | | | |
|--------------------------------|------------------------------|---------------------------|-----------------------------|------------------------|----------------------------|-------------------------------|
| Michael Bennet (CO) | Mark Kelly (AZ) | Charles Schumer (NY) | <u>Roy Blunt</u> (MO) | John Hoeven (ND) | Jerry Moran (KS) | Tim Scott (SC) |
| Richard Blumenthal (CT) | <u>Patrick Leahy</u> (VT) | Chris Van Hollen (MD) | John Boozman (AR) | Ron Johnson (WI) | Lisa Murkowski (AK) | <u>Richard Shelby</u> (AL) |
| Catherine Cortez Masto (NV) | Patty Murray (WA) | Raphael Warnock (GA) | <u>Richard Burr</u> (NC) | John Kennedy (LA) | Rand Paul (KY) | John Thune (SD) |
| Tammy Duckworth (IL) | Alex Padilla (CA) | Ron Wyden (OR) | Mike Crapo (ID) | James Lankford (OK) | <u>Rob Portman</u> (OH) | <u>Patrick Toomey</u> (PA) |
| Margaret Wood Hassan (NH) | Brian Schatz (HI) | <u>Jim Inhofe</u> (OK) | Chuck Grassley (IA) | Mike Lee (UT) | Marco Rubio (FL) | Todd Young (IN) |

Dobbs and the Midterm Elections

- A Washington Post-Schar School poll conducted nationwide at the end of July found “nearly two-thirds of Americans say the end of *Roe v. Wade* represents a ‘major loss of rights’ for women,” but “those who support abortion access are less certain they will vote this fall.”
- The Kansas ballot initiative excites Democrats, but a careful analysis is required before drawing conclusions.
- Voters will evaluate candidates on a host of issues, including the economy.
- Could President Joe Biden’s recent victories improve his approval ratings? What else will happen between now and November?



Questions?

Dobbs v. Jackson Women's Health Organization:

What are the complexities to navigate for your organization and the future of abortion protections in the US?

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