LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
JULY 15, 2022

The Demise of Roe v. Wade: Employment and Benefits Considerations

On June 24, 2022, in *Dobbs v. Jackson Women's Health Org.*, 2022 WL 2276808 (June 24, 2022), the U.S. Supreme Court overruled *Roe v. Wade* 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) and held that (i) the U.S. Constitution does not confer a right to abortion and (ii) the authority to regulate abortion is held by the states. The statute at issue in *Dobbs* was Mississippi's Gestational Age Act, which banned abortion after 15 weeks except in a medical emergency or in the case of severe fetal abnormality. Employers across the nation must now determine how to evaluate and respond to the far-reaching implications of this decision.

There Is Now No Constitutional Right To Abortion

Majority Opinion

A five-to-four majority of the Supreme Court concluded that there is no right to abortion under the U.S. Constitution and held that *Roe* and *Casey* must be overruled. To reach this result, the majority first determined that the due process clause of the 14th Amendment does not protect the right to an abortion, because such a right is not "deeply rooted in our history or tradition," nor "essential to this Nation's scheme of ordered liberty." In support, the majority extensively reviewed the history of the laws prohibiting abortion and concluded that the Court in *Roe* had "ignored or misstated history."

Next, the majority explained why it rejected the legal doctrine of *stare decisis (*a Latin term that means "to stand by things decided") to overturn *Roe* and *Casey*, arguing that the Court's opinions in both were "egregiously wrong." The opinion concluded by holding that regulations and prohibitions of abortion will survive a constitutional challenge if there is a rational basis on which the legislature could conclude that the law would serve legitimate state interests, interests that include:

> The respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex or disability.

Dissent

Justices Breyer, Sotomayor and Kagan characterized the majority's decision as one which effectively stripped women of any constitutional right to bodily autonomy. First, the dissent criticized both the majority's reliance on states' views of abortion in 1868 as guidance, when the men responsible for both the 14th Amendment and the individual state laws did not perceive women as equal, and its reliance on common law, which in fact frequently outlawed abortion only *after* "quickening" (when a baby's movement was first felt). Second, the dissenting justices contended that it was impossible for this new framework to not cast doubt on other fundamental, due process rights—such as the right to same-sex marriage, the right to engage in private, sexual acts and the right to use contraceptives—because these decisions

relied on the same precedents on which *Roe* and *Casey* were decided. Third, the dissent argued that when the Court has previously disregarded *stare decisis*, it had done so because of a significant legal or factual change, neither of which was present in this case. State courts are now tasked with determining when a state's legitimate interest in prohibiting abortion ends and the right of a woman not to risk her life begins, among other, critical questions that the dissent asserted will not be easily settled by the majority's new framework.

General Labor and Employment Considerations

Deciding on a Stance

As *Dobbs* presents one of the most highly-charged societal issues, employers are well served to consider whether to formulate a response and, if so, how they will articulate that response to their employees. While an employer's position on the issue may vary from agreeing or disagreeing with *Dobbs* or deciding to remain neutral on the issue, there is value in a strategic approach to ensure that senior leaders are aligned, managers are informed and prepared and any communications to employees are consistent with the employer's intended position (and appropriately vetted in the event that those communications become public through social media or otherwise).

Protected Speech

Discussion of abortion restrictions and rights can be polarizing and thus may trigger potential conflict in the workplace when employees voice their opinions to co-workers with opposing views. In this environment, employers should be mindful that though there is no right to free speech under the First Amendment in private workplaces, certain workplace speech can be legally protected. Notably, employees engaging in protected concerted activities, such as discussing the terms and conditions of their employment, are protected under the National Labor Relations Act. So, for example, employees who discuss whether or not their employer's policies should provide benefits for abortion services (in person or over social media) may be engaged in protected activity. Generally speaking, however, private sector employers can continue to require civility from employees in the workplace. It is recommended that employers enforce their existing workplace policies and codes of conduct to maintain respect and professionalism in the workplace as opposed to an outright prohibition of content-specific speech.

Discrimination and Harassment Concerns

Furthermore, several laws that protect employees from discrimination and harassment are implicated in situations related to abortion. The New York State and New York City Human Rights Laws and Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (PDA), protect women against discrimination and harassment in employment based on pregnancy, childbirth or related medical conditions, which would include abortion. The U.S. Equal Employment Opportunity Commission has specifically determined that discrimination or harassment against an employee for having an abortion, not having an abortion, or contemplating having an abortion would be unlawful under Title VII.

Moreover, the topic of abortion is also often closely tied to religious beliefs (such as when life begins), and an employee's sincerely-held religious belief, practice or observance on this subject may be protected under the law and, under certain circumstances, could require reasonable accommodation of such religious belief.

Employers may also face concerns with respect to employees who choose to wear clothing, pins or other attire promoting pro-life or pro-choice positions while at work. Employers should reiterate or revisit their dress code policies to ensure that they are not engaging in a discriminatory practice. For example, if an employer permits attire supporting issues such as LGBTQ rights and the Black Lives Matter movement, which are viewed as being tied to gender and race, and prohibits attire supporting pro-life issues, which may be tied to an individual's religious beliefs, then employers may be treating one group more favorably than another, giving rise to potential discrimination claims. Thus, decisions on implementing policies that prohibit or support a controversial issue must deliberately evaluate the impact on other protected classes.

Off Duty Conduct

Some states, like New York, have enacted statutes that protect employees from adverse action by their employers for certain lawful conduct outside of work. Such conduct includes political and recreational activities where those activities occur outside of working hours, off workplace premises and without the use of employer-owned property or equipment. These laws provide for notable exceptions, and it is recommended that an employer consult with legal counsel prior to taking action against an employee based on the employee's conduct outside of work.

Stay Informed on State Law

State and local laws on abortion restrictions and rights will continue to evolve. In this changing legal landscape, several states already have in place or have enacted laws that significantly curb or ban abortions and more states are likely to follow suit, even imposing civil or criminal liability for individuals and entities who "aid and abet" abortion procedures. Thus, it is imperative that employers obtain legal counsel to navigate these untested legal waters.

Benefits Policy Considerations

One manner in which some employers are responding to the *Dobbs* decision is by considering whether to make certain benefits (such as out-of-state care coverage or travel cost reimbursement) available to employees in states in which abortion is now illegal (or in which it is likely to become illegal).

The options available to an employer considering whether to offer such benefits will depend on a variety of factors, including the applicable state law at issue, and whether the employer's group health plan is self-funded or fully insured.

The Employee Retirement Income Security Act (ERISA), which governs most private sector benefit plans, including health or medical plans, generally preempts the application of state laws to the operation of such employee benefit plans. One significant exception is that ERISA does not preempt state insurance laws which apply to fully insured benefit plans, but not to self-insured plan. In other words, self-funded plans are generally not subject to state insurance laws, but fully insured plans are. This distinction is important because it is likely that the insurance laws of states that restrict abortion will also prohibit plans from providing coverage for abortion-related care. In this event, it is likely that fully insured plans subject to such state insurance laws would be prohibited from covering abortion-related care even in states where such care is legal (for example, through out-of-network coverage). Conversely, an insured plan issued in a state without abortion restrictions (such as New York) may be able to provide coverage for such services to all covered participants regardless of their location, depending on the structure and terms of the insured plan.

In contrast, self-funded plans would not be limited by state insurance law restrictions, subject to an important caveat – ERISA does not preempt state criminal laws of general applicability. Several states have already adopted (and other states have announced an intent to adopt) laws that may subject those who aid or abet a resident of such state in obtaining an abortion out-of-state to criminal liability. Unfortunately, it is difficult to discern the level of risk until the courts begin to address the application of these laws to ERISA governed health plans, their plan sponsor and employer officers and representatives who serve as plan administrators and fiduciaries.

In addition to evaluating the potential civil or criminal liability for providing abortion-related care to its employees, an employer also must consider how such care will be structured. For example, an employer with a self-funded plan may amend its plan to offer coverage for abortion-related care. Alternatively, an employer with a fully insured plan that seeks to provide support for travel expenses may be able to establish a self-funded integrated health reimbursement arrangement (HRA) to provide a certain dollar value benefit on a tax-free basis for travel and/or lodging expenses incurred by an employee who travels to another state to obtain care. Employers may also consider establishing a policy of providing taxable payments for such expenses.

In every case, the employer will need to consider the applicable legal requirements, including ERISA, the Affordable Care Act (ACA), and the applicable provisions of the Internal Revenue Code. For instance, if an employer establishes an integrated HRA to provide a certain dollar value benefit on a tax-free basis for travel and/or lodging expenses, the employer will need to consider the limits the Internal Revenue Code imposes on such expenses, whether such an arrangement discriminates in favor of highly compensated employees, whether such an arrangement implicates issues under the Mental Health Parity and Addiction Equity Act, whether the arrangement is compatible with existing plan terms, particularly in the case of a high deductible health plan (HDHP) and whether the employer has complied with the applicable provisions of ERISA (such as the summary plan description requirement). An employer contemplating a stand-alone policy of providing taxable payments for such travel or lodging expenses may need to consider potential Mental Health Parity and Addiction Equity Act and ACA restrictions, as well as privacy concerns (including HIPAA issues), in the structure of that policy.

Any employer considering whether to modify its benefit plans or policies in response to *Dobbs* should enlist its legal counsel, insurer carrier or broker, third-party administrator, and/or stop loss carrier to understand the options available to the employer, any requirements applicable to such options, and the potential legal and practical risks of implementing the contemplated employment action.

If you have any questions about the information presented in this blog post, please contact Thomas G. Eron, Nihla F. Sikkander, Daniel J. Nugent, any attorney in Bond's Labor and Employment practice or the Bond attorney with whom you are regularly in contact.

The attorneys would like to give credit to Bond Summer Law Clerks Emily Ahlqvist and Anthony Levitskiy who assisted in co-authoring this memo.

BOND SCHOENECK & KING ATTORNEYS