



Employers: Checklist for a Post-Roe Workplace

NON-BENEFITS CONSIDERATIONS:

- Employee Conduct: What options does an employer have when an employee wants to publicly express (or has already publicly expressed) their opinion about abortion or the *Dobbs* decision?**
 - Walkouts or other reactive behavior in response to the *Dobbs* ruling**
 - The National Labor Relations Act and employee advocacy:**
 - » For/against the employer taking a position concerning *Dobbs* or abortion rights (or protesting a position the company has taken)
 - » For/against the employer's adopting (or failing to adopt) policies or benefits related to abortion access or similar issues
 - » For/against the *Dobbs* decision generally, and not pertaining to the employer's position or policies
 - Conduct on the job / at the workplace vs. off duty / off premises**
 - » Discussions with other employees
 - » Interactions with customers or other third parties
 - » Wearing pins, buttons, or clothing at work with words/pictures reflecting their opinions
 - Social media**
 - » Mainstream (e.g., LinkedIn, Facebook, Instagram, and TikTok)
 - » Ephemeral (e.g., Snapchat and Instagram Stories)
 - » Encrypted (e.g., Telegram, WhatsApp, and Signal)
 - Taglines in e-mail signature blocks**
 - Leading or participating in a public rally/demonstration**
 - Public-sector workplaces**
 - » First Amendment (free speech and freedom of religion)
 - » Fourth Amendment (unreasonable search and seizure)
 - » Ninth and Fourteenth Amendments (privacy rights)
- Worker Retention/Mobility: What should an employer consider if an employee says they want to transfer to another state because of the state's laws regarding abortion?**
- Environmental, Social, and Corporate Governance: The employer is getting pressure from stakeholders (shareholders, board of directors, customers, or employees) to take a position on reproductive rights or to provide (or not to provide) certain benefits related to abortion or travel for access to abortion. What legal and practical issues should be considered?**
- Accommodation/Leave Issues: An employee is seeking a leave of absence or other accommodation related to their or another's abortion.**
 - What laws apply?**
 - Are there special processes through which the company should communicate with the employee?**
 - Is there a risk of employer liability if the employer grants the leave/accommodation?**
 - » Criminal law risk
 - » Civil law risk
- Discrimination Claims: What circumstances might lead to additional discrimination or hostile work environment claims based on such categories as sex, religion, political beliefs, pregnancy, and caregiver/familial status?**

- Background Checks:** How should an employer address abortion-related criminal history (e.g., protest/rally-related arrests and convictions) when conducting background checks?
- Policy Review:** Which employment- and/or benefits-related policies should employers review (and possibly revise) in light of the *Dobbs* decision?
 - Social Media
 - Off-Duty Conduct
 - Dress Code / Uniform
 - Background Checks
 - Reasonable Accommodations
 - Leaves of Absence / FMLA
 - No Solicitation
 - Employee Mobility/Transfers
 - Respect in the Workplace / Code of Conduct / Workplace Violence
- Out-of-State Conferences, Events, and Meetings:**
 - Review any state restrictions/prohibitions on abortion services.
 - Determine whether accommodations will be provided to pregnant employees (or employees concerned about potential early/ectopic pregnancies) who refuse to travel to states where abortion services are restricted or prohibited.
 - Be prepared to address employee opinions/objections regarding the off-site locations (and potential concerted activity under the National Labor Relations Act).
- Enhanced Scrutiny / Privacy of Health Records:** Might an employer be subject to enhanced confidentiality obligations with respect to employee health or other records?
 - Proper maintenance of or access to employee health records
 - For employers of reproductive health care workers, the confidentiality of certain personal information (e.g., addresses)
 - Service of subpoenas on an employer for employment records
 - Are there data privacy laws that might apply?
- For Employers in the Health Care or Support Services Industries:** Might your employees be subject to criminal or civil liability for performing abortion-related services or providing abortion-related products, devices, or medication?
- Labor Union Issues:**
 - For unionized workforces, is there a duty to bargain revised/expanded benefits (e.g., a travel benefit related to abortion care and leaves of absence)?
 - For non-unionized workforces, is there an increased risk of a union organizing campaign where employees are dissatisfied with benefits related to abortion care?
- Workplace Tension/Violence:** What practical strategies should employers consider to ease workplace tensions due to the *Dobbs* decision?
- Supervisor Training:** Is it advisable for employers to provide training to managers about the above-listed issues?

EMPLOYEE BENEFITS CONSIDERATIONS:

- How Is Your Group Health Plan Currently Designed?**
 - Is your group health plan self-funded or fully or partially insured?
 - » If it is self-funded, consider how ERISA preemption may apply to abortion benefits offered under the group health plan.
 - » If it is fully or partially insured, be aware that state insurance law implications on permissible types of coverage may be relevant.
- Medical-Related Travel Expenses and Benefits:**
 - How are travel expenses described and covered under the group health plan?**
 - » Are travel expenses specific to abortion care or other specified services, or are they provided for medical care in general?
 - » Does the group health plan currently provide categories of coverage for travel for certain types of medical care (e.g., certain surgeries or medical benefits not available geographically or for which standards of care are improved at a distant facility/provider)?

- **What types of benefit plans provide travel benefits for medical care?**
 - » Are your travel benefits offered in the ERISA group health plan as an ancillary benefit for medical care, under a separate reimbursement plan, or elsewhere?
 - » Consider the types of reimbursement plans that may provide for travel expenses relating to medical care, such as health savings accounts (HSAs), flexible spending accounts (FSAs), and health reimbursement arrangements (HRAs), and whether the travel expenses meet the requirements for reimbursement of travel substantially for medical care.
- **Where are you offering benefits for medical care or travel expenses?**
 - » Review where your employees reside and what state/local legislation is relevant.
 - » Are you located in a state with “trigger laws” that will go into effect now that *Roe v. Wade* is overturned? There are states with existing laws on the books that were never removed and will go back into effect, states with legislation that will take effect now that *Roe v. Wade* is overturned, and states that have proposed legislation currently being debated by state governments.
 - » What do these state laws prohibit? For example, are the enforcement mechanisms criminal and/or civil?
 - Review how “abortion” is defined and what conduct is prohibited.
 - Ask whether TPAs/employers have criminal or civil liability for inducement, aiding, abetting, or other potential liability in offering abortion services for circumventing abortion laws.
 - Consider whether bounty-hunter laws have any particular implications on TPAs/employers for coverage of abortion services / facilitating access by paying for travel costs, etc.
 - Consider whether any exemptions apply.
- **Are Any Special Telehealth and/or Health Care Features Applicable to Your Group Health Plan?**
 - **Review whether the group health plan covers long-acting reversible contraceptives (LARCs) that may prevent implantation of a fertilized zygote, in vitro fertilization, and other assisted reproductive technologies.**
 - **Consider how medical providers across the country will receive reimbursement from employer group health plans.**
 - **Review how group health plans logistically reimburse providers across the country that do not have any relationship with the plan, e.g., are not in-network.**
 - **Consider TPA/employer liability for coverage of a medically necessary abortion in a state that only permits abortion in strict circumstances (e.g., health/life of the individual giving birth).**
 - » Contested medical necessity—how might a TPA/employer be liable if it determines the abortion was medically necessary but another party or the state objects?
 - **Analyze the economic impact on the group health plan for coverage of a higher number of pregnancies or coverage of more expensive/high-risk pregnancies.**

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

If you are a health care provider or life sciences organization with questions about how the decision affects your business, please contact Amy Dow at adow@ebglaw.com. If you are an employer with questions about your workplace policies or benefits offerings, please contact Susan Gross Sholinsky at sgross@ebglaw.com.