

PREPARING FOR THE LIKELY OVERTURNING OF ROE V. WADE: WHAT PROVIDERS, EMPLOYERS, INVESTORS, AND OTHER ORGANIZATIONS NEED TO KNOW



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AGENDA

1. Background and Current Landscape
2. Texas as an Example
3. Issues for Healthcare Providers and Those Who Support Their Operations
4. Issues for Employers and Other Benefits Providers
5. Other Types of Organizations that Should Monitor
6. Risk Mitigation Strategies and Other Next Steps
7. Conclusion

Please feel free to use the Zoom Q&A feature throughout.

We will answer some questions during the program and will follow up afterward on the rest.

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ROE V. WADE (1973)

- Case brought challenging constitutionality of Texas criminal abortion laws
- Court held that state criminal abortion laws that except only a life-saving procedure for the pregnant patient violate the Due Process Clause of the 14th Amendment
- The right to privacy includes the abortion decision but must be balanced against state interests in regulation
- End result: States may regulate abortion procedures *after the first trimester* to the extent that the regulation reasonably relates to the preservation and protection of maternal health
 - States may prohibit abortion after viability, except when necessary to preserve the life or health of the mother

PLANNED PARENTHOOD V. CASEY (1992)

- Case brought challenging constitutionality of Pennsylvania restrictions on abortions
- Reaffirmed *Roe* based on *stare decisis* but rejected trimester framework
- Abortion right is an aspect of the “liberty” protected by Due Process Clause of the 14th Amendment
- States may take measures to regulate abortions provided the measures are not an “undue burden” on the right to abortion
- An “undue burden” exists if its purpose or effect is to place “substantial obstacles” in the path of a woman seeking an abortion before viability
- ***A state may not prohibit abortions before viability***

DOBBS V. JACKSON WOMEN'S HEALTH

Currently pending at SCOTUS

- Case brought challenging constitutionality of Mississippi ban on abortions after 15 weeks, except in medical emergencies or in the case of a severe fetal abnormality
- Leaked draft opinion would overrule *Roe* and *Casey*
 - Obtaining an abortion is not a fundamental constitutional right
 - Rational basis review is the appropriate review standard for constitutional challenges to state abortion regulations
 - A law regulating abortion, as a health and welfare law, is entitled to a “strong presumption of validity”
 - Each state may regulate or prohibit abortion

CURRENT STATE LANDSCAPE

- Abortion Bans – 44 states prohibit abortions after a certain point in pregnancy with some exceptions
- “Trigger” Bans – 13 states have abortion laws that would reinstate bans on abortions in the event *Roe* is overturned
- “Zombie” Statutes – pre-existing statutes (most that were passed pre-*Roe*) that are not currently enforceable due to *Roe* but may “come back to life” if *Roe* falls
- Wide variety of other restrictions on abortions
- State-specific protections vary
 - State constitutional protections
 - State statutory protections



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TEXAS: “BOUNTY” “HEARTBEAT” LAW IN EFFECT

- Since 2021, Texas Health & Safety Code prohibits “abortion” if:
 - There is a “detectable fetal heartbeat” (defined broadly) OR
 - The provider has failed to check for a “detectable fetal heartbeat” in a specified manner before proceeding (Health & Safety Code §§ 171.201 *et seq.*)
- Exception: “in case of medical emergency” (defined narrowly)
- Cannot be enforced against pregnant patient but **can** be enforced against anyone who:
 1. performs/induces such an abortion,
 2. “knowingly engages in conduct that aids or abets” such performance/ inducement (including paying for/reimbursing costs—through insurance or otherwise)—regardless of specific knowledge of illegality, or
 3. intends to do either of the above

TEXAS: “BOUNTY” “HEARTBEAT” LAW IN EFFECT

- Cannot be enforced by any government personnel—only by private citizens through civil “bounty” lawsuits
 - At least \$10,000 in statutory damages per unlawful abortion, plus
 - Defendant must pay successful plaintiff’s litigation costs
- US Supreme Court already refused to stay enforcement late last year

KEY DEFINITIONS IN TEXAS LAW

(can vary state to state, and even statute to statute within states)

- **Abortion** = “*act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means* with the intent to cause the death of an unborn child of a woman known to be pregnant”
 - Excluding “ectopic pregnancy removal,” “birth control devices,” and “oral contraceptives” Texas Health & Safety Code §§ 170A.001(1), 245.002(1)) (emphasis added)
- **Unborn child** = “an individual living member of the homo sapiens species *from fertilization until birth*, including the entire embryonic and fetal stages of development.” Texas Health & Safety Code § 170A.001(5)) (same)

POST-*ROE*, EVEN STRICTER PROHIBITIONS

- Texas Trigger Law: effective 30 days after *Roe* is overturned, “[a] *person may not knowingly perform, induce, or attempt an abortion.*” (Texas Health & Safety Code § 170A) (emphasis added)
- Exceptions:
 - Where necessary to save the patient’s life or “prevent significant risk of substantial impairment of major bodily function” to the patient (tightly defined, with significant documentation requirements)
 - Pregnant patient also cannot be prosecuted

TEXAS: POST-*ROE*, ABORTION WILL BECOME A FELONY

- Consequences of violation include:
 - **Criminal:** if abortion is successful, knowing performance, inducement, or attempt will be a **1st degree felony** (Texas Health & Safety Code § 170A.004)
 - Punishable by **5-99 years in prison plus fine** of up to \$10,000

TEXAS: POST-ROE, ABORTION WILL BECOME A FELONY

- Which means, by extension, that:

Anyone who knowingly “**causes or aids** an innocent or non-responsible person to engage in [a prohibited abortion]” or “**solicits, encourages, directs, aids, or attempts**” to do so may be held **criminally responsible** (effectively, aiding and abetting liability)

1st degree felony
(Texas Penal Code § 7.02)

A corporation or other organization may be held criminally responsible for any of these offenses that was committed by any agent within their scope of responsibility and **knowingly directed/tolerated by organizational leadership**

1st degree felony
(Texas Penal Code § 7.22)

Anyone who, with specific intent, **agrees with someone else to perform, induce, or attempt a prohibited abortion may be prosecuted for conspiracy**, as long as one overt act in furtherance of the agreement occurs

2nd degree felony
(Texas Penal Code § 15.02)

Anyone who, with specific intent, “**requests, commands, or attempts** to induce another to engage in [conduct that would constitute prohibited abortion]” **may be prosecuted for solicitation**

2nd degree felony
(Texas Penal Code § 15.03)

TEXAS: POST-ROE CIVIL/ADMINISTRATIVE IMPACTS

- Consequences of violation for knowing performance, inducement, or attempt of a prohibited abortion also include:
 - Civil enforcement by AG: a **civil penalty of $\geq \$100,000$ (plus litigation fee/cost shifting)** per unlawful abortion (Texas Health & Safety Code § 170A.005)
 - Administrative licensure action: “the appropriate **licensing authority shall revoke the license**, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion” (Texas Health & Safety Code § 170A.007)

TEXAS: WHAT ABOUT CONDUCT THAT CROSSES STATE LINES?

- Texas law generally presumes no extraterritorial effect unless clearly stated, however...
- Texas asserts criminal jurisdiction when **any conduct/result that is an element of the offense occurs in Texas**, even if remaining conduct/results occur elsewhere (Penal Code § 1.04)
 - In recent case examples, Texas appellate courts ruled that Texas **had territorial jurisdiction** to prosecute:
 - Capital murder when kidnapping took place in Texas, leading to murder in Mexico
 - Defendant's identity theft activities out of state that targeted victim's finances and security in Texas
 - Defendant who likely called from mobile phone while in Texas to minor victim located elsewhere and got victim to perform sexual acts there while defendant was on the phone
- Outer boundaries of state territorial jurisdiction do exist (from, e.g., the Due Process Clause of US Constitution) and are likely to be heavily litigated post-*Roe*

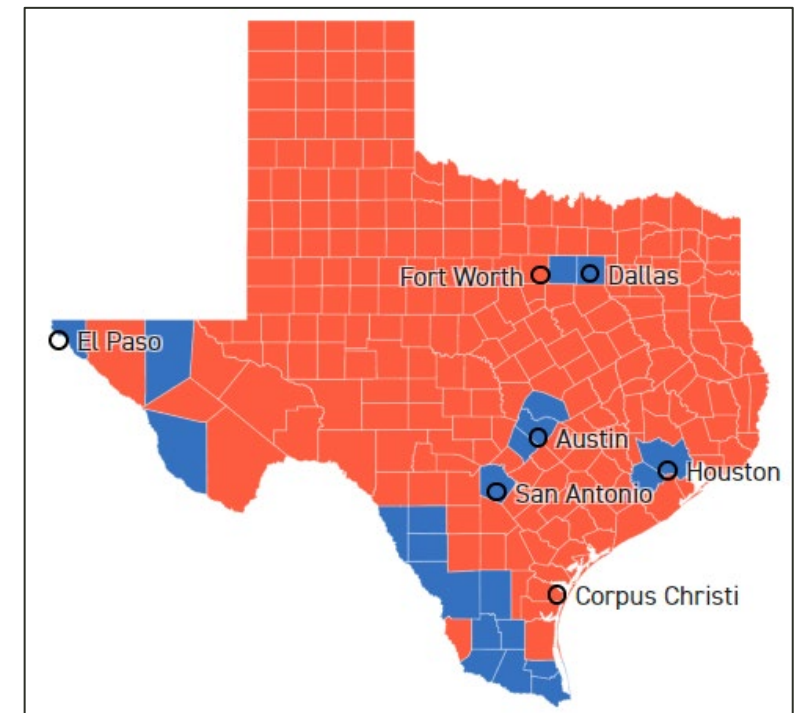
TEXAS: POST-*ROE* DECISION MAKERS

Investigative/Charging Decisions

- TX Attorney General's Office
- 254 local district/county attorneys
- State and local sheriffs/police departments
- Local grand juries

Judicial Interpretations of Law

- Initially, state criminal trial court judges
- Over time (years, not months), state appellate courts will make more uniform



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IMPACTED PROVIDERS

- Providers at Risk
 - Providers of pregnancy termination services
 - IVF providers
 - Restrictive definitions (e.g., “unborn child”)
 - Pharmacy providers

OTHERS IMPACTED

- Any organization whose operations touch on family planning services
 - Fertilization and beyond
 - Facilitators/vendors
 - In-person and virtual
 - Those who pay for such services

TYPES OF RISK

- Licensure
 - Risks to license in restrictive states
 - Services in state
 - Services out-of-state
 - Risks to license in other states
- Civil
 - Up to \$100,000 per violation
- Criminal
 - Including felony treatment

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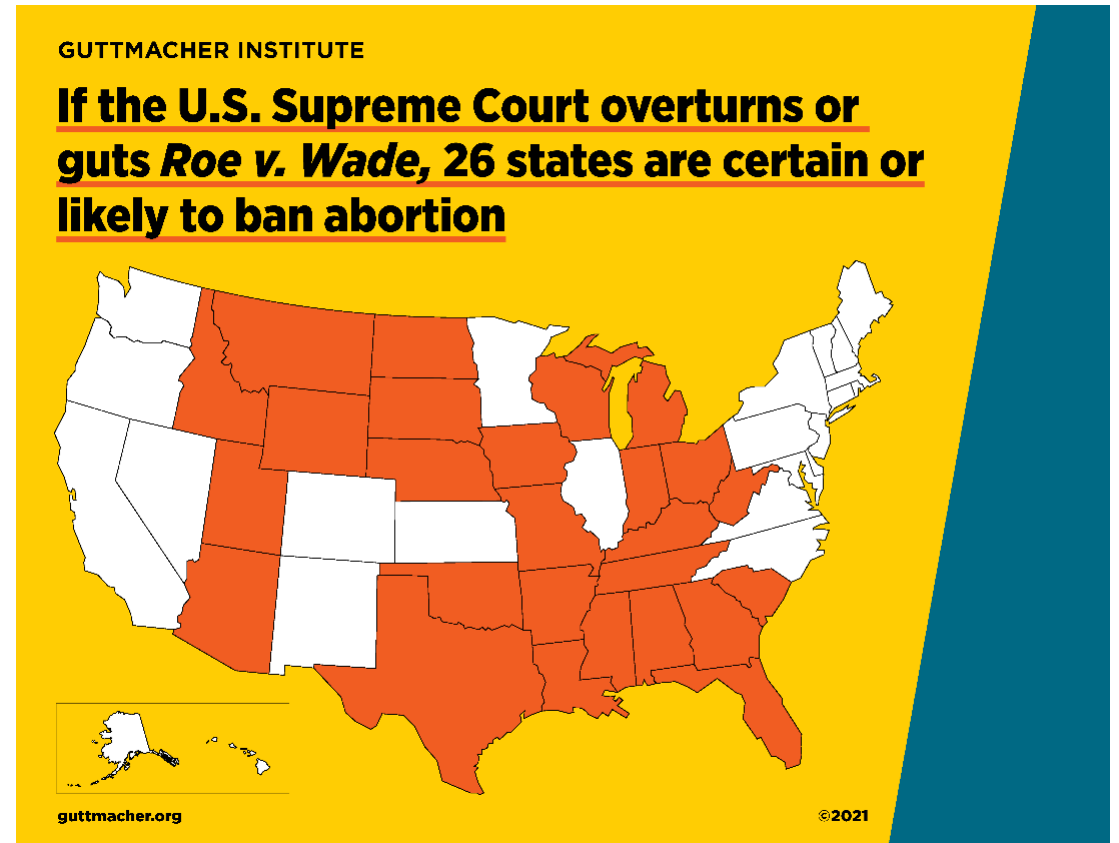
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ABORTION COVERAGE

- Fully insured group health plans generally **are** subject to state insurance laws **and** ERISA
 - Some states currently prohibit fully insured plans from covering abortion, while some states currently require coverage
- Self-funded group health plans generally **are not** subject to state insurance laws, but **are** subject to ERISA
 - Post-*Roe*, self-funded group health plans may not cover abortions in certain states
- ERISA preemption
- No federal requirement to cover abortions

ABORTION COVERAGE

- Post-*Roe*, employers that want to offer abortion benefits to employees in multiple states will need to track those states' abortion laws



POTENTIAL BENEFITS SOLUTIONS

- Travel benefits may be provided through:
 - Group health plan
 - Employee assistance program
 - Travel reimbursement plan

POTENTIAL BENEFITS SOLUTIONS

- Other potential solutions:
 - Expanded prescription drug benefits
 - Relocation benefit
 - Employee relief fund

EMPLOYER CONSIDERATIONS

- Tax treatment of benefits
- Interaction with high-deductible health plan coverage
- HIPAA Privacy compliance
- Mental Health Parity and Addiction Equity Act (MHPAEA) compliance
- Permitting mid-year election changes
- Determining population eligible for benefits
- Imposing dollar limits

EMPLOYER RISKS

- States may condition business licenses on limiting provision of coverage for or otherwise aiding and abetting abortions
- States may target companies that provide abortion coverage or reimburse abortion travel expenses
- States may attempt extraterritorial enforcement
- Federal lawmakers may target employers that reimburse employees' abortion travel costs

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ADDITIONAL ORGANIZATIONS' CONSIDERATIONS

- Health plan service providers
 - Insurers/carriers
 - Stop-loss insurers
 - Third-party administrators (TPAs)/administrative services only organizations (ASOs)
 - Pharmacy benefit managers (PBMs)

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PATH FORWARD

- The right plan will be different for each organization
- Think about organizational priorities
- Keep counsel (in-house or outside) closely involved to maximize attorney-client privilege protection over conversations and documents

SOME GENERAL RISK MITIGATION STRATEGIES

- Stay informed – the situation will continue to evolve rapidly
- Evaluate your organization's ties to Restrictive and Protective States and consider making adjustments
 - Note shield law activity in California, New York, Massachusetts, Connecticut, and elsewhere
- Be thoughtful and intentional about abortion-related public statements
- Check in with your workforce

BENEFITS NEXT STEPS

- Evaluate existing coverage and whether and to what extent to provide additional benefits
- Discuss potential coverage options with ERISA counsel and benefit plan service providers (e.g., insurers, stop-loss carriers, third-party administrators)
- Consider administration of any additional benefits
 - To which procedures/services will benefits apply?
 - Who will be eligible?
 - What substantiation of expenses will be required?
 - Will benefits be subject to limits?

NEXT STEPS FOR PROVIDERS & PROVIDER ORGANIZATIONS

- Key considerations
 - Types of services
 - Geographic footprint
 - Corporate structure
 - Organizational priorities
- Additional considerations
 - Protective states/protective legislation
- Engage in appropriate risk mitigation strategies

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