



THE OVERTURNING OF *ROE V. WADE*: WHAT TO KNOW, AND WHAT'S NEXT?

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AGENDA

1. The *Dobbs* Decision and Key Official Reactions
2. The Resulting State Landscape
3. Key Issues for Employers and Other Payors
4. Key Issues for Healthcare Providers and Those Who Support Their Operations
5. Data Privacy Impacts
6. Where We Go From Here
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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DOBBS V. JACKSON WOMEN'S HEALTH

Decided June 24, 2022

- Key points from 5-justice majority
 1. Mississippi's 15-week ban on nearly all abortions is constitutional
[CJ Roberts joined this portion only, so it was 6-3]
 2. *Roe v. Wade* and *Planned Parenthood v. Casey* were wrongly decided
 3. No fundamental federal constitutional right to abortion exists
 4. Political branches (state and presumably also federal) are free to prohibit/regulate abortion as they deem appropriate – subject only to rational basis review with a “strong presumption of validity”
 5. “[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” (p66)

DOBBS V. JACKSON WOMEN'S HEALTH

Decided June 24, 2022

- CJ Roberts, concurring in the judgment only:
 - Said majority went too far in eliminating right to abortion:

“I would take a more measured course. I agree with the Court that the viability line established by Roe and Casey should be discarded under a straightforward stare decisis analysis. ... **Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further** ... But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more.” (pp 1-2)

“**The Court's opinion is thoughtful and thorough**, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.” (p2)

DOBBS V. JACKSON WOMEN'S HEALTH

Decided June 24, 2022

- Justice Thomas added a concurrence:
 - Majority's reasoning should also lead to eventual overturning of other "substantive due process" precedents, including at least *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges* (and probably also *Eisenstadt v. Baird*, *Carey v. Population Services Int'l* and others)

DOBBS V. JACKSON WOMEN'S HEALTH

Decided June 24, 2022

- Justice Kavanaugh added a concurrence:
 - Underscored no impact on non-abortion precedents (opposite of Justice Thomas), and added:

“Second, as 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.** May a State retroactively impose liability or punishment for an abortion that occurred before today’s decision takes effect? **In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause.** Cf. *Bouie v. City of Columbia*, 378 U. S. 347 (1964).” (p10)

DOBBS V. JACKSON WOMEN'S HEALTH

Decided June 24, 2022

Justice	15-Week MS Ban?	Fundamental Right to Abortion?	Extension to Non-Abortion Precedents?	Comments on Travel, Retroactivity
Thomas	Upheld MS 15-week ban on most abortions (6 votes)	Overturned <i>Roe</i> and <i>Casey</i> , holding there is no federal constitutional right to abortion—left to political branches to regulate (5 votes)	Said same reasoning <u>should</u> doom other precedents (1)	[silent]
Alito			Said that Court’s reasoning would <u>not</u> impact <i>Griswold</i> , <i>Lawrence</i> , <i>Obergefell</i> , etc. (4) – Kavanaugh underscored	
Gorsuch				
Barrett				
Kavanaugh				Noted right to travel, retroactivity issues
Roberts		Concurred only in judgment - said Court went too far (1)	[silent]	
Sotomayor	Dissented – said Court should have affirmed <i>Roe</i> and <i>Casey</i> and invalidated Mississippi law (3)			Referenced travel right but no clear statement; silent on retroactivity
Kagan				
Breyer*				

US ATTORNEY GENERAL STATEMENT ON *DOBBS*

July 24, 2022

- Some key excerpts:
 - “[U]nder bedrock constitutional principles, **women who reside in states that have banned access to comprehensive reproductive care must remain free to seek that care in states where it is legal.** Moreover, under fundamental First Amendment principles, **individuals must remain free to inform and counsel each other** about the reproductive care that is available in other states.”
 - “And we stand ready to work with other arms of the federal government that seek to use their lawful authorities to protect and preserve access to reproductive care. In particular, the FDA has approved the use of the medication Mifepristone. **States may not ban Mifepristone based on disagreement with the FDA’s expert judgment about its safety and efficacy.**”

US ATTORNEY GENERAL STATEMENT ON *DOBBS*

July 24, 2022

- More key excerpts:
 - “[F]ederal agencies may continue to provide reproductive health services to the extent authorized by federal law. And federal employees who carry out their duties by providing such services must be allowed to do so free from the threat of liability.”
 - “The Justice Department will use every tool at our disposal to protect reproductive freedom. And we will not waver from this Department’s founding responsibility to protect the civil rights of all Americans.”

US SEC'Y OF HHS STATEMENT ON *DOBBBS*

July 28, 2022 News Conference

- Key excerpts:
 - “[I]f there is something we can do, we will find it and we will do it at HHS” but there is “**no magic bullet**” to preserve/promote abortion access through federal intervention
 - **Federal law requires offer of abortion-inducing medications in cases of rape or incest or where needed to protect the pregnant patient’s life:**
"Now more than ever, it is imperative that all federally supported programs and services are complying with the law"

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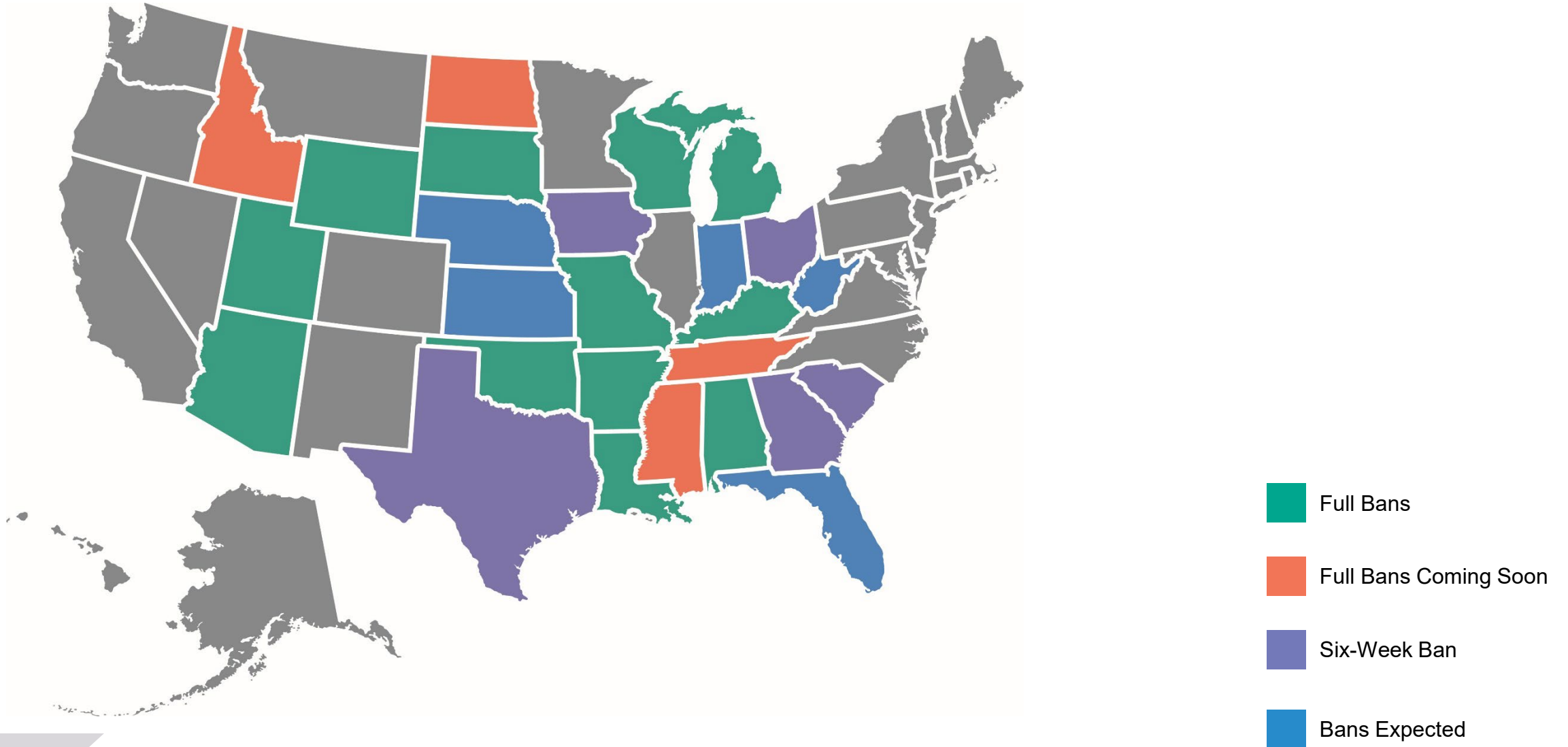
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CURRENT STATE LANDSCAPE

- Abortion Bans – 44 states prohibit abortions after a certain point in pregnancy with some exceptions
- “Trigger” Bans – 13 states have abortion laws have reinstated bans on abortions
 - Scope and effective date vary – some are already effective
- “Zombie” Statutes – pre-existing statutes (most that were passed pre-*Roe*) that became enforceable following the *Dobbs* ruling
- Wide variety of other restrictions on abortions
- State-specific protections vary
 - State constitutional protections
 - State statutory protections

ALL STATE ABORTION BANS

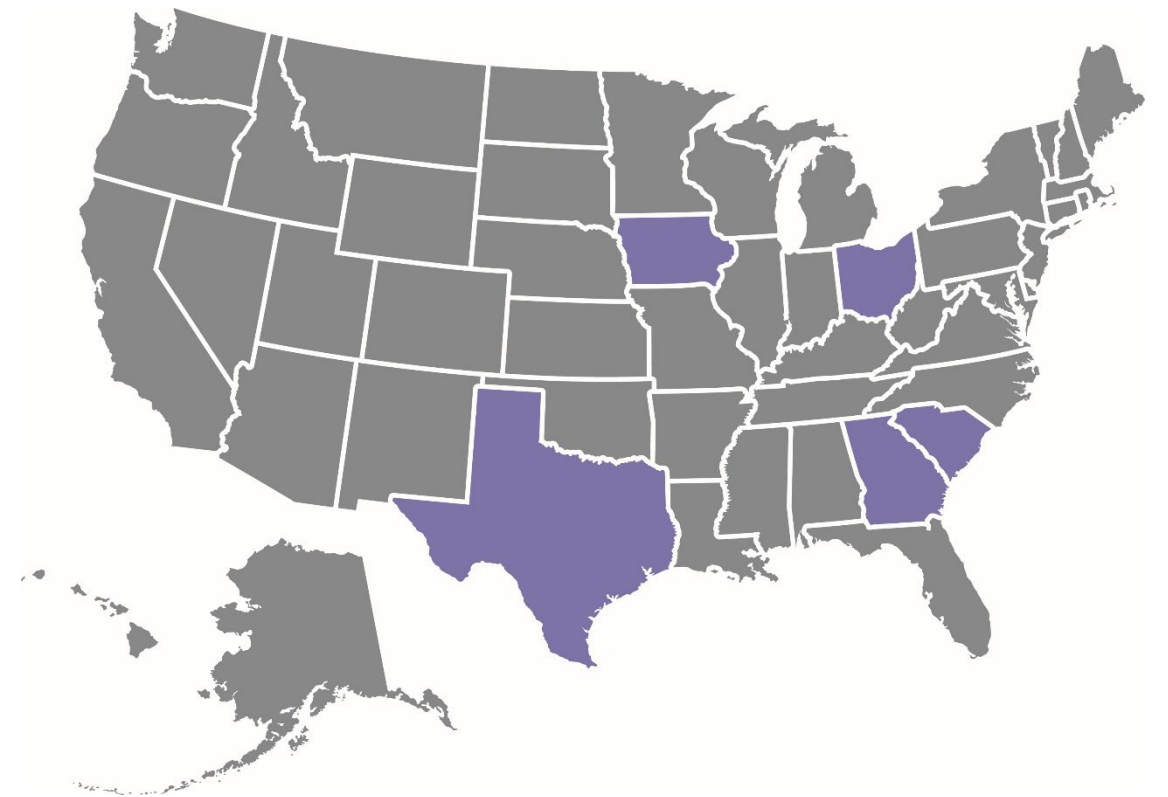


CURRENT STATE LANDSCAPE

Outcome	State	Additional Details
Full Abortion Ban	<ul style="list-style-type: none"> Alabama Arkansas Kentucky Missouri Oklahoma (rape and incest exception) South Dakota 	All abortions effectively banned.
	<ul style="list-style-type: none"> Michigan Wisconsin (slightly more permissive) 	All abortions banned, but temporarily blocked by state court or state authorities say they won't (fully) enforce.
	<ul style="list-style-type: none"> Utah Louisiana Arizona (slightly less permissive) 	
Full Abortion Ban Coming Soon	<ul style="list-style-type: none"> Wyoming Mississippi Idaho North Dakota Tennessee 	More to come

CURRENT STATE LANDSCAPE

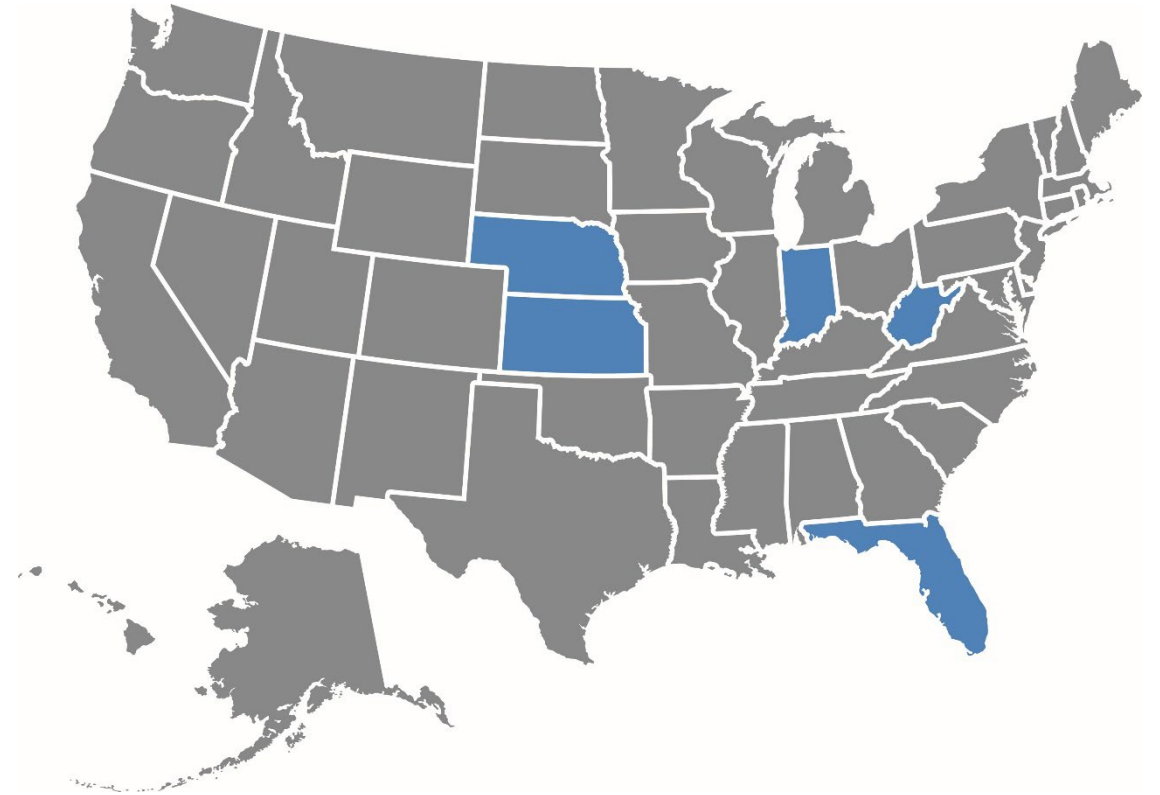
State	Additional Details
<ul style="list-style-type: none">• Ohio• South Carolina• Texas (full ban to come)	Six week ban in effect now.
<ul style="list-style-type: none">• Georgia• Iowa	Six week ban in effect soon.



CURRENT STATE LANDSCAPE: BANS EXPECTED

States

- Florida
- Indiana
- Kansas
- Nebraska
- West Virginia



EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT (EMTALA)

- EMTALA requires hospitals to perform a medical screening examination to determine if patients who present to the hospital are experiencing an “emergency medical condition”
 - If the hospital is not equipped or is unable to stabilize the patient, hospital can transfer
- EMTALA has a preemption provision
 - EMTALA’s provisions “do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.”
- CMS has taken the position that EMTALA requires hospitals to stabilize a patient, even when it requires an abortion

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REPRODUCTIVE HEALTHCARE BENEFITS

- Potential lapse in benefits post-*Dobbs*
 - Fully insured health plans
 - Some states currently prohibit fully insured plans from covering abortion, while some states currently require coverage
 - Self-funded health plans
 - Post-*Dobbs*, self-funded group health plans may not cover abortions in certain states
- No federal requirement to cover abortions

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

RISK MITIGATION

- Shifting state landscape
- 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
- Expect lengthy legal battles

NEXT STEPS FOR EMPLOYERS, PAYORS, AND BENEFIT ADMINISTRATORS

- Evaluate existing coverage and whether and to what extent to provide additional benefits
- Explore benefit options and compliance 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?
- Consider how to communicate any additional benefits internally and externally

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IMPACTED PROVIDERS & OTHERS

- Providers & Others at Risk
 - Providers of pregnancy termination services
 - IVF providers
 - Restrictive definitions (e.g., “unborn child”)
 - Oncology providers
 - Pharmacy providers
 - Hospitals
 - EMTALA
 - “Facilitators”
 - Vendors, Business Associates, platforms, MSOs, etc.)

WORKFORCE & CORPORATE CONSIDERATIONS

- Workforce
 - Patient-facing positions
 - Job descriptions
- Corporate Restructuring
 - Friendly PC structure
 - Mega-PC location
 - Crossing state lines

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

NEXT STEPS FOR PROVIDERS & OTHER IMPACTED ORGANIZATIONS

- Key considerations
 - Types of services, geographic footprint, corporate structure, organizational priorities
- Engage in appropriate risk mitigation strategies
 - Understanding regulatory landscape
 - Reducing ties to restrictive states
 - Reviewing/revising public-facing statements
 - Monitoring shield laws
 - Data storage practices; policies/procedures

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WHAT TO EXPECT NEXT

- In Restrictive States:
 - Further legislative/gubernatorial efforts to tighten prohibitions/close perceived loopholes
 - Competition among political actors for headlines about who is doing the most, the fastest
 - State AGs' offices plus thousands of county/local officials making decisions
- In Protective States:
 - More shield law activity following Connecticut's and New York's leads
 - More state constitutional amendments protecting abortion access rights

EXPECT LOTS OF LITIGATION

- Retroactivity issues in some states
- Right to travel for abortion services and to assist/fund such travel
- ERISA preemption issues regarding benefits
- FDA preemption issues regarding bans on abortion-inducing medication
- EMTALA preemption issues
- First Amendment issues on counseling, advertising, etc.
- Cross-state enforceability of subpoenas, warrants, judgments

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

MAKE SURE YOUR ORGANIZATION AND RELEVANT PERSONNEL ARE PREPARED FOR CONTINGENCIES

- Informal inquiries
 - Law enforcement “knock and talks”
 - Private investigators/lawyers
- Sting operations (official or private sector)
- Subpoenas and civil investigative demands
- Service of process (new civil lawsuits naming organization as defendant)
- Search warrant execution
- Arrest

This includes examining/updating employee indemnification and defense policies and assessing any potentially relevant insurance coverage

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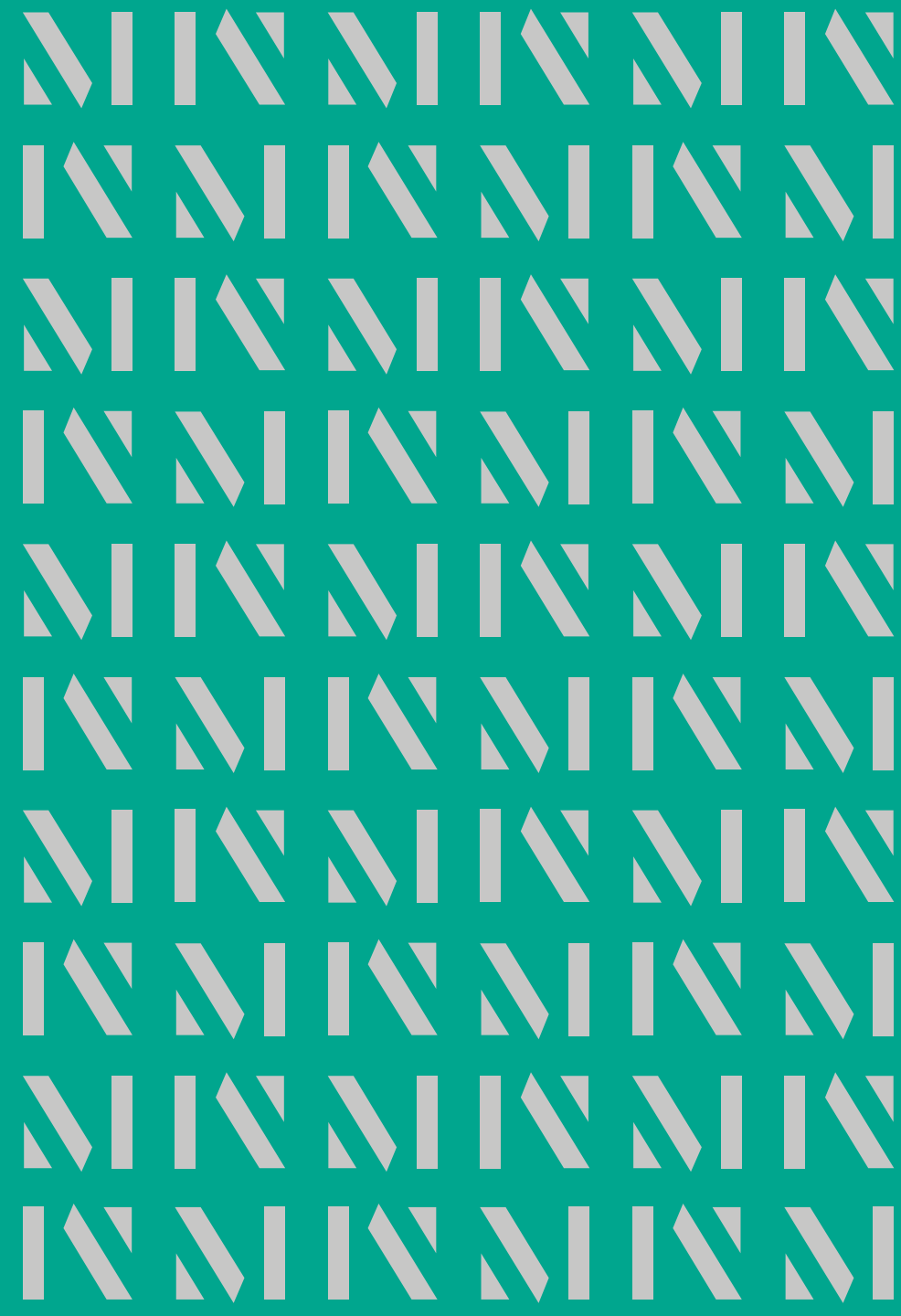
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APPENDIX



QUICK ATTORNEY-CLIENT PRIVILEGE REFRESHER

- Protects otherwise-discoverable materials in civil and criminal contexts
- Requirements vary by state, but typically include:
 - A communication
 - Between attorney and client (or on either side as needed to facilitate)
 - For the primary purpose of seeking/providing legal advice (i.e. not when attorney is playing primarily business/compliance/PR/etc. role)
 - Kept in confidence during and afterward (on a “need to know” basis within organization)
- Can be waived through disclosure by client
 - Exception: common interest situations

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

