



# PROVIDING POST-*ROE* REPRODUCTIVE HEALTH BENEFITS

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[mwe.com](https://www.mwe.com)

**McDermott  
Will & Emery**

# AGENDA

1. The *Dobbs* Decision and Resulting State Landscape
2. Employer Health Plan Coverage of Reproductive Health Benefits
3. Travel Reimbursements
4. Onsite Clinics
5. Administration of Reproductive Health Benefits
6. Relief Funds
7. Privacy
8. Enforcement
9. Next Steps

# TODAY'S PRESENTERS



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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*

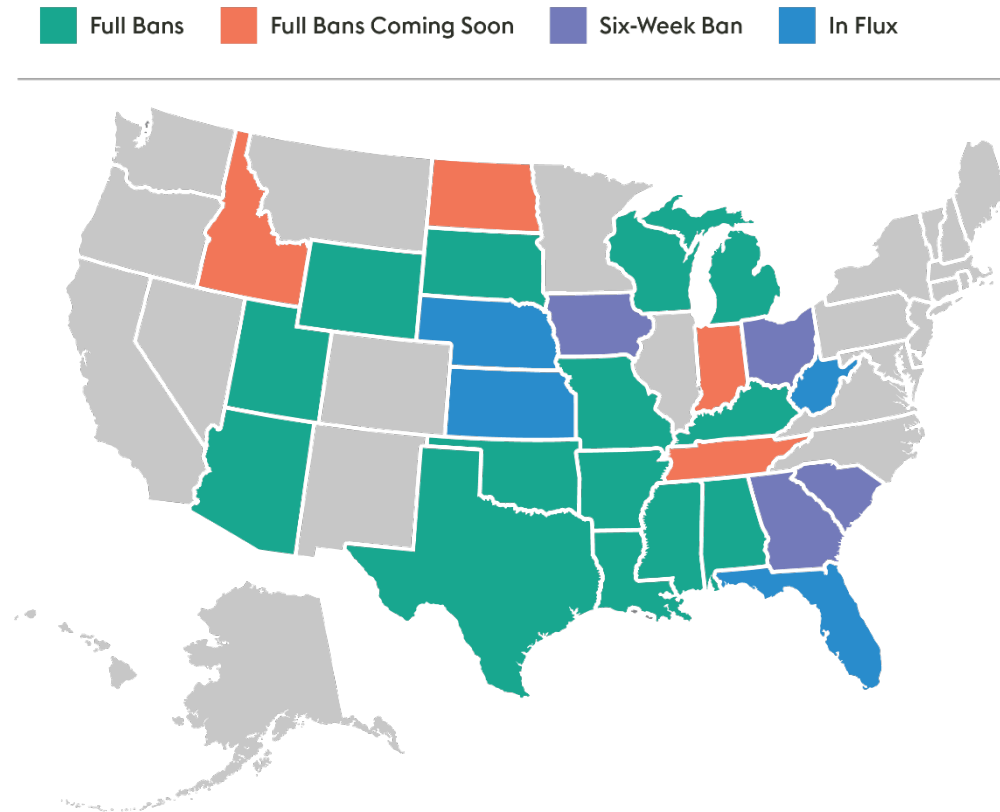
Decided June 24, 2022

- 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)

# CURRENT PATCHWORK OF STATE ABORTION LAWS

McDermott's Multidisciplinary Post-Roe Resource Center: <https://www.mwe.com/resource/roe>



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# EMPLOYER HEALTH PLAN COVERAGE OF REPRODUCTIVE HEALTH BENEFITS

- Determine current medical plan coverage of reproductive health benefits
  - Fully insured v. self-funded plans
  - Scope of benefits
    - Medically necessary restrictions
    - Medical abortions
- Consider whether to add medical plan coverage of reproductive health benefits
  - Amendments to plan
  - SPD updates/SMM may be required

# EMPLOYER HEALTH PLAN COVERAGE OF REPRODUCTIVE HEALTH BENEFITS

- Reproductive health benefits may be provided through:
  - Group health plan
  - Employee assistance program
  - Travel reimbursement plan
- Other potential solutions:
  - Expanded prescription drug benefits
  - Relocation benefit
  - Employee relief fund

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# TRAVEL REIMBURSEMENTS

- Evaluate existing reimbursement for travel expenses under Code Section 213, or whether it makes sense to add a travel benefit
- Considerations:
  - Whether to limit reimbursements to statutory limits under Code Section 213;
  - Whether/how to impute income for amounts in excess of statutory limits;
  - Whether to limit to employees covered by medical plan, or extend to the entire employee population;
  - Whether travel reimbursement will conflict with eligibility for other benefits
  - How to structure and administer travel reimbursement to comply with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)

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# ONSITE CLINICS

- Does your organization sponsor an onsite clinic that provides employees with more than occupational health or first aid?
  - Does the clinic help with reproductive health/family planning?
  - Which states do your clinics operate in?

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# ADMINISTRATION OF REPRODUCTIVE HEALTH BENEFITS

- Coordination of reproductive health benefits with benefit plan service providers
  - Pharmacy benefit managers (PBMs)
  - Third-party administrators (TPAs) and administrative services only organizations (ASOs)
  - Stop-loss insurers
  - Insurers/carriers
- Contraceptive coverage
- Record keeping



# ADMINISTRATION OF REPRODUCTIVE HEALTH BENEFITS

- Avoiding discrimination in administration
- Administering benefits confidentially
- TPAs may require indemnification for liability for aiding/abetting provisions of abortions financially

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# RELIEF FUNDS

- Relief funds may allow an alternative way to help employees access reproductive health benefits
- Carefully structure relief funds to avoid inadvertent creation of ERISA plan and the associated compliance obligations

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# PRIVACY

- Ensure that reproductive health benefits are administered confidentially
- Health plans generally must comply with HIPAA, as well as applicable state privacy laws
- Review HIPAA privacy policies to determine whether they need to be revised to include additional reproductive health benefits (e.g., HRA, EAP)

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# ENFORCEMENT

- Potential liability to plan sponsor, TPA, PBM, and/or other plan service providers
- Evaluate states in which participants reside
  - 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

# ENFORCEMENT

- Federal lawmakers may target employers that reimburse employees' abortion travel costs
- ERISA preemption
- Contract exposure



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# NEXT STEPS

- Evaluate existing coverage and whether to provide benefits, considering your organization's workforce, culture, and ties to restrictive and protective states
- Stay updated on the constantly shifting state landscape
- Carefully craft any reproductive healthcare benefits in restrictive and protective states with ERISA counsel
- Be thoughtful and intentional about abortion-related statements

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