

# The Dobbs Decision: What's New and What's Brewing

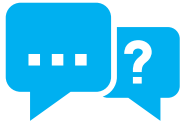


**Monday, February 13, 2023**  
**12:00 - 1:00PM**

# Webinar Procedures



All lines will be muted



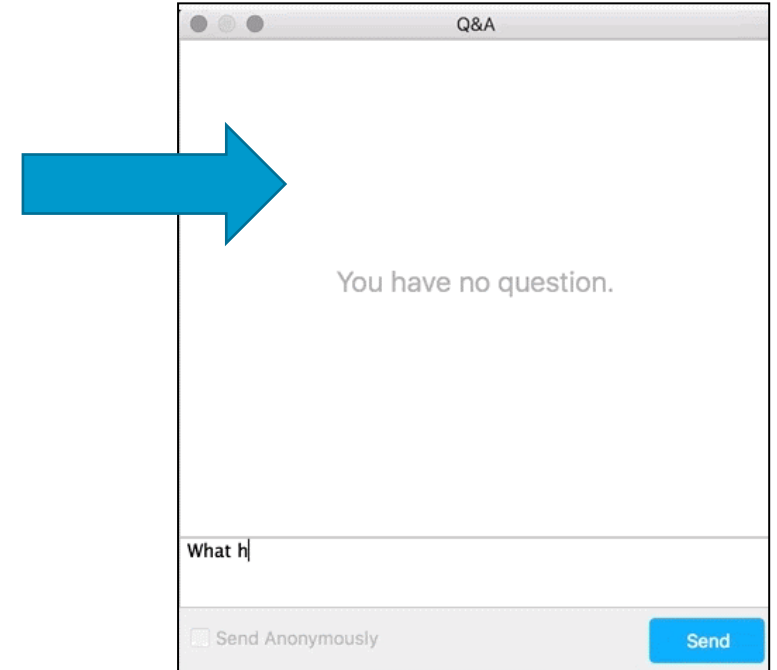
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# The *Dobbs* Decision: What's New and What's Brewing

February 13, 2023

# Epstein Becker Green

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# Presented by



**Susan Gross Sholinsky**

Epstein Becker Green

Member of the Firm  
Board of Directors

[sgross@ebglaw.com](mailto:sgross@ebglaw.com)



**Gretchen Harders**

Epstein Becker Green

Member of the Firm

[gharders@ebglaw.com](mailto:gharders@ebglaw.com)



**Delia A. Deschaine**

Epstein Becker Green

Member of the Firm

[ddeschaine@ebglaw.com](mailto:ddeschaine@ebglaw.com)



**Erin Sutton**

Epstein Becker Green

Associate

[esutton@ebglaw.com](mailto:esutton@ebglaw.com)

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# **An Introduction to Dobbs, its Progeny, and the Immediate Aftermath**

# Evolution of Abortion Law in the Supreme Court

**Roe + Casey (1973 – 2022) = States must balance individual right with interest in “potential life”**

*Roe v. Wade*, 410 U. S. 113 (1973)

- The fundamental right to privacy inherent in the Due Process Clause of the Fourteenth Amendment protects a woman's choice whether to have an abortion, but this is balanced against the government's interest in protecting the woman's health and the potential of human life.
- Instituted a trimester test:
  - **First Trimester**: state may not regulate abortion in the first trimester.
  - **Second trimester**: state may impose regulations on abortion reasonably related to maternal health.
  - **Third trimester**: fetus reaches viability, and state may regulate or prohibit abortions as long as there are exceptions to save the life or health of the mother.

*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U. S. 833 (1992)

- Reaffirmed *Roe*.
- Imposed a new standard to determine the validity of laws restricting abortions: whether a state abortion regulation imposes a “**undue burden**” on the woman seeking the abortion.
  - Defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."
  - Allowed a 24-hour waiting period requirement and a restriction on minor access to abortion to stay in place but struck down a spousal notification requirement.



# *Dobbs v. Jackson Women's Health Organization*

## *Roe and Casey overturned – Elimination of Right to Abortion under a new framework*

- The U.S. Supreme Court overturned its prior decisions in *Roe* and *Casey*, stating that *Roe* was “wrong from the start”.
- The case arose out of a challenge to Mississippi’s law that banned abortions performed after 15-weeks of gestation except in a medical emergency or in the case of severe fetal abnormality
- The *Dobbs* Court examined
  - Whether the 14<sup>th</sup> amendment’s reference to “liberty” includes abortion and concluded it does not;
  - whether the right to obtain an abortion is rooted in the Nation’s history and tradition and whether it is an essential component of “ordered liberty” and concluded it is not;
  - whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents and concluded that it is not;
- The Court further examined whether abortion laws are subject to heightened scrutiny on the basis that they amount to a sex-based classification and concluded that they are not because they are not “mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.”
- Therefore, **rational-basis review** applies to any challenge to a state’s abortion laws.

# Post *Roe*, *Casey*, and *Dobbs*

## State interest reigns supreme

After *Dobbs*, the effect today is a patchwork of overlapping laws regulating abortion, abortion providers, and abortion facilities made more complicated by a flurry of court filings seeking to either free restrictions from existing injunctions or to enjoin newly effective laws

**Pre-*Dobbs***, state laws restricting abortion fell into a few categories:

Restrictions on **providers**, such as only permitting licensed physicians to perform abortions

Restrictions on the abortion **process**, such as informed consent requirements, restrictions on telemedicine, ultrasound requirements, reporting requirements, and parental consent requirements

Restrictions on abortion **facilities**, such as building specifications and certificate/licensure requirements

**Post-*Dobbs***, in addition to existing restrictions state laws restricting abortion fall into bans based on **gestational age** and **method** of abortion, such as:

Total prohibitions on abortion from as early as “fertilization”, with limited exceptions

“Heartbeat” bans, prohibiting abortion after the fetus is ~6 weeks

“Method” bans, such as prohibiting common abortion procedures such as dilation and evacuation (D&E) or intact dilation and extraction (D&X)

Prohibitions on the prescription of abortifacients, except in limited circumstances, including prohibitions on distribution and supply of abortifacients

## A note on penalties...

State penalties range from small civil infractions to felonies, depending on the prohibited conduct and the actor involved. While some states have explicit “aiding and abetting” civil liability for abortion, most states also have accessory liability in their criminal codes.

# Dobbs Immediate Aftermath



## 24 states have already drastically increased restrictions

- Indiana and West Virginia enacted new restrictive laws that allow abortions only in cases of rape, incest, lethal fetal abnormality, and when necessary to prevent serious health risks or death, and abortion is defined broadly
- Many state laws are being actively challenged
  - Judges in several states, including Idaho, Georgia, Louisiana, and North Carolina, have ruled to permit enforcement of strict abortion bans
    - Idaho Supreme Court recently ruled that the Idaho Constitution cannot be read to protect abortion.
  - In contrast, laws in states including Arizona, Indiana, Ohio, Michigan, South Carolina and Wyoming have been stayed by injunctions
    - South Carolina Supreme Court ruled that the South Carolina Constitution offered protection for abortion under a right to privacy

# What is the status of the law?

## An example of Abortion Law Volatility in the Courts: Six months in Kentucky

### June 29, 2022

A state district court in Kentucky enjoined the state’s “trigger” law, enacting a total prohibition on abortion and the “heartbeat” law enacting a prohibition on abortion after fetal cardiac activity is detected.

### July 14, 2022

A federal district court in a separate case lifted the previous injunction on the 15 week ban and law requiring that physicians determine gestational age before any abortion.

### July 22, 2022

The state district court made the temporary injunction against the trigger law and heartbeat law permanent.

### August 1, 2022

A Kentucky appellate court overturned the injunction, allowing the trigger law and heartbeat law to go into effect.

### August 17, 2022

In a separate lawsuit, a federal district court invalidated its previous opinion regarding the state’s D&E and D&X bans, dissolved the injunction and dismissed the case.

### August 18, 2022

The Kentucky Supreme Court denied an appeal of the appellate court’s ruling allowing the trigger law and heartbeat law to go into effect but agreed to hear the case on the merits.

### August 30, 2022

A federal district court lifted an injunction on additional reporting requirements found in Kentucky HB 3, but held the remaining portions of the law as submitted to the court for further consideration.

### November 15, 2022

The Kentucky Supreme Court heard oral argument on the case challenging the validity of the trigger law and heartbeat law.

# State Efforts to Protect Abortion



**States like New York, California, Colorado, Connecticut, Illinois, and Minnesota have passed new legislation to protect access to abortion**

- States interested in protecting access to abortion are enacting laws that:
  - Shield providers from liability for performing abortions regardless of whether the abortion is lawful in the state where the abortion is performed
  - Shield providers and patients from “aiding and abetting” liability
  - Penalizes cooperation with law enforcement investigations seeking to penalize abortion
  - Prohibit disclosure of patient information related to abortion
- States are also seeking to add reproductive freedom as a protected activity under the state constitution

# Ballot Initiatives – A new strategy for reproductive health rights

## Results of Initiatives Support Rights to Abortion



### State Initiatives

- Earlier in 2022, Kansas voters rejected a constitutional amendment that would have removed the right to an abortion
- Five more states had ballot initiatives last November:
  - California
  - Michigan
  - Vermont
  - Montana
  - Kentucky
- One state has already moved to include a constitutional amendment on its 2024 ballot
  - New York

### 2022 Midterm Election Results

- **CA Prop 1: Yes (65%)**
- **Mich. Prop 3: Yes (56%)**
- **VT Article 22: Yes (77%)**
- **MT Ref. 131: No (52%)**
- **KY Amdmt 2: No (52%)**

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# Key Issues In Healthcare and Life Sciences Litigation and Enforcement

# *Dobbs*, The Aftermath: What Constitutional Questions Remain?

➤ How does the constitutional right to travel between states impact state abortion laws including state medication-induced abortion laws?

➤ What about the Commerce Clause, including the Dormant Commerce Clause?

➤ What federal laws preempt state abortion laws and, if they are preempted, to what extent?

➤ EMTALA

➤ HIPAA

➤ FDCA



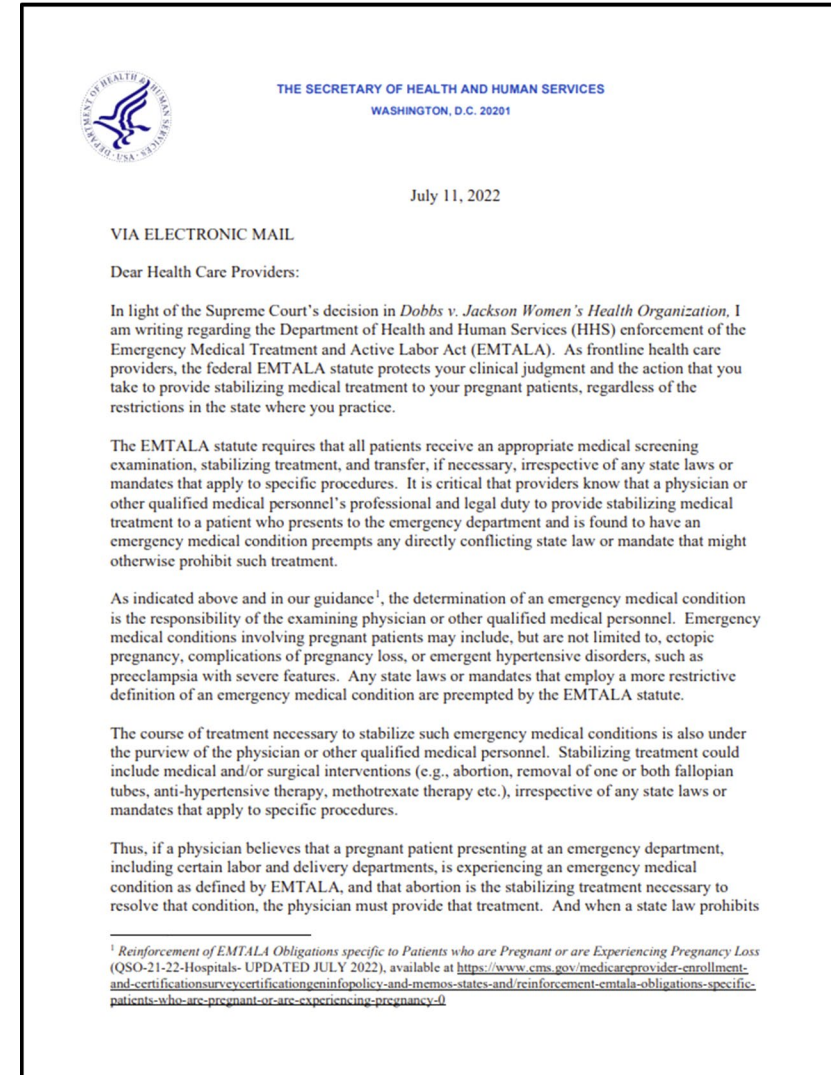
# Right to Travel Across State Lines for Reproductive Health Care

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- Right to travel implied in the 14<sup>th</sup> Amendment's Privileges and Immunities Clause, Article IV, § 2, cl. 1.
  - Because the right is not expressly outlined in the Constitution, some Constitutional scholars anticipate the question of whether state restrictions on interstate travel for purposes of an abortion will reach SCTOUS.
- White House has pledged to safeguard the right to travel to obtain reproductive health care post-*Dobbs*. This includes challenging state or local laws that attempt to restrict travel.

# HHS Guidance on Access to Emergency Abortions under EMTALA

- On July 11, 2022, HHS Secretary Becerra issued guidance to all health care providers reminding them “that a physician or other qualified medical personnel’s professional and legal duty to provide stabilizing medical treatment to a patient who presents to the emergency department and is found to have an emergency medical condition *preempts any directly conflicting state law or mandate that might otherwise prohibit such treatment.*”
- Two key cases:
  - *State of Texas v. Becerra*, 5:22-cv-00185-H (N.D. Tex.)
  - *United States of America v. The State of Idaho* (S.D. Idaho)



# FDA-Approved Abortion Medications: A battleground

- 54 percent of abortion currently accomplished through medication. There has already been a spike in utilization post-Dobbs.
- AG Garland has publicly stated that states cannot ban mifepristone because they disagree with FDA's judgement about the drug's safety and efficacy.
  - Remains unclear if states can ban use of these drugs not because of safety and efficacy, but for moral/ religious reasons.

# FDA-Approved Abortion Medications: A battleground

- In January 2023, FDA approved a modification to the Risk Evaluation and Mitigation Strategy (“REMS”) for mifepristone, the only drug that is specifically approved by FDA for the termination of pregnancy.
  - Mifepristone (200mg oral tablet) is a progestin antagonist indicated, in a regimen with misoprostol, for the medical termination of intrauterine pregnancy through 70 days gestation.
  - Prior REMS imposed a prescriber certification and “in-person” dispensing requirement
  - Modified REMS removes the “in-person” dispensing requirement, permanently allowing the drug to be dispensed by retail pharmacies and imposes a pharmacy certification requirement.
- In November 2022, Alliance for Hippocratic Medicine sued FDA in the ND of Texas asking that the Court overturn FDA’s approval of mifepristone.
- The U.S. Department of Justice’s Office of Legal Counsel (“OLC”) issued an opinion to the USPS concluding that USPS could ship mifepristone to states in compliance with the federal Comstock Act.
- Twenty state AGs penned a letter to two national chain pharmacies disagreeing with the OLC’s interpretation of the Comstock Act.

# How Does the Commerce Clause Apply to Medication-Induced Abortion

- Congress has the right to regulate trade and business between the states via the Commerce Clause of the constitution. U.S. Const. art. 1, § 8, cl. 3.
- Although the Commerce Clause is framed as a positive grant of power to Congress, the Supreme Court has long held that the Clause also prohibits state laws that “unduly restrict interstate commerce” and can prevent the states from adopting protectionist measures in order to preserve a national market for goods and services; a right preserved by the “Dormant” Commerce Clause. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 – 2460 (2019) (And, “removing state trade barriers was a principal reason for the adoption of the Constitution”).
- *Teladoc, Inc. v. Texas Medical Board*, 2015 WL 8773509 (W.D. Tex. Dec. 14, 2015)
  - a telehealth provider sued the Texas Medical Board (“TMB”) alleging that regulations passed by TMB, which required in-person physician patient visits and prohibited the ability of a physician to prescribe medication unless an in-person visit or consultation occurred between the physician and patient.
  - Teledoc’s complaint survived motion to dismiss.

# Does the Federal Food, Drug & Cosmetic Act Preempt State Restrictions on Medication-Induced Abortion?

- In *GenBioPro v. Dobbs*, the manufacturer of generic mifepristone challenged Mississippi's law limiting access to medication abortion
- The case was filed *pre-Dobbs* and both parties presented arguments to the Court regarding the impact of the *Dobbs* decision on the merits of the case.
- In August, GenBioPro sought voluntarily dismissal of the case, however, has since filed a similar case against the WVA Attorney General (*GenBioPro v. Sorsaia*, Case 2:23-cv-11111 (S.D. WVA)).
- Other courts have considered the preemptive effect of the FDCA, but not in the context of medication abortion
  - *Wyeth v. Levine*, 555 U.S. 555 (2009)
  - *PLIVA v. Mensing*, 564 U.S. 604 (2011)
  - *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013)
  - *Zogenix, Inc. v. Patrick*, No. 14-11689-RWZ, 2014 WL 3339610 (D. Mass. July 8, 2014)
  - *Gross v. Pfizer, Inc.*, 825 F. Supp. 2d 654, 659 (D. Md. 2011)
  - *Ouellette v. Mills*, 91 F. Supp. 3d 1, 4-5 (D. Me. 2015)

# What impact does *Dobbs* have on contraception including emergency contraception

- The right to access to contraception has been recognized by two U.S. Supreme Court cases that pre-date *Roe*:
  - *Griswold v. Connecticut*, 381 U.S. 479 (1965) (for married couples)
  - *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (for unmarried people)
- The *Dobbs* Court did not overturn these cases and they remain good law.
- Plan B is FDA-approved as an over-the-counter drug.
  - The FDCA expressly preempts state laws that more stringently regulate OTC drugs than the federal law, with limited exception.
    - *See* 21 U.S. Code § 379r.
  - FDA recently approved a labeling change for Plan B One-Step (and its generic equivalents) that clarifies that the drug is not an abortion-inducing drug.

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# Impact of *Dobbs* on Fertility Treatment Services



# Consequences of Post-*Dobbs* Uncertainty: Fertility Services



## How do Newly Enforceable Abortion Laws Affect Fertility Services such as IVF?

- Without the protection of *Roe* and *Casey*, states have enacted or moved to enforce broad new definitions and restrictions surrounding abortion, often with unintended consequences of impacting other healthcare services
- Because some states now totally prohibit abortion from the moment of fertilization, with limited exceptions, providers of fertility services are left wondering whether activities such as cold storage or disposal of fertilized embryos or selective elimination of implanted embryos
  - Tennessee’s Attorney General issued an opinion confirming that abortion laws are only implicated when a fertilized embryo is inside of a human body, thus, this wouldn’t apply to disposal of unused fertilized embryos.
    - However, it is unclear whether Tennessee’s abortion prohibitions would apply to selective reduction of implanted embryos
  - Indiana’s new abortion law carves out “in vitro fertilization” but does not further define what activities this might include, simply stating “[t]his article does not apply to in vitro fertilization”. See IC 16-34-1-0.5

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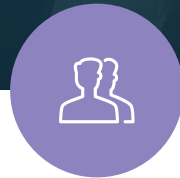
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# Impact of *Dobbs* on Employer-Offered Employee Benefits

# Why Do Employers Offer Employee Benefits?



## Historical Events



## Attracting/Retaining Employees

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- Increase appeal of employers and maintain a competitive edge
- Increase morale of employees
- Increase loyalty to the employer and incentive to remain with the organization
- Incentivize performance



## Tax Advantages

# What Does *Dobbs* Mean for Employers?



## Many large companies have publicly announced plans to continue offering reproductive health services for employees

- Notably, this has included offering to pay for or reimburse the costs of abortions and abortion-related services, such as travel and lodging

## The IRC provides tax benefits for certain Qualified Medical Expenses (QMEs)

- Providing for services generally:
  - Should constitute QMEs, whether medically necessary or elective
- Travel expenses:
  - Should constitute QMEs, as long as travel is primarily for and essential to medical care
- Lodging and meal expenses:
  - Should constitute QMEs for inpatient lodging and meals as long as the principal reason for being there is to receive medical care
  - Should constitute QMEs for lodging and meals incurred not at a hospital or facility if:
    - (1) the lodging is primarily for and essential to medical care; (2) the care is provided by a doctor in a licensed hospital, medical facility, or a licensed hospital's equivalent; (3) the lodging is not extravagant under the circumstances; and (4) there is no significant element of personal pleasure in the travel

**Additional considerations exist when traveling with a companion or with a child who is seeking medical care**

**Potential blowback from employees with conscientious objections to abortion**

# Background – Abortion Laws and Employee Benefits Pre-Dobbs



## Which employers could be protected?

- Fully insured group health plans are subject to state laws regulating insurance

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- Self-funded group health plans are protected by ERISA's preemption provisions



## ERISA preemption: Section 514

- Known as one of the broadest preemption clauses ever enacted

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- ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” This includes:
  - State statutes, regulations, common law, as well as laws from state administrative agencies



## Exceptions to ERISA preemption:

- State laws regulating insurance, banking, and securities (fully insured group health plans)

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- State criminal laws of general application
  - Criminal laws not directed at employee benefit plans

# What Should Employers Do Now?



**Review what your current employee benefit plans offer**

- What reproductive health services are specifically, or generally, covered?



**Review state laws where you have employees**

- Do these states restrict your ability to pay for or reimburse expenses related to reproductive health service procedures?



**Determine whether ERISA preemption applies**

- Is your group health plan fully insured or self-insured?
- How are the laws written?
  - Do the state restrictions appear to be directed at general criminal conduct?
  - Do the state restrictions appear to be directed toward employee benefit plans?



**Be cautious**

- Due to the unprecedented nature of these legal questions, it is likely that many of these questions will need to be resolved through litigation

# Future Potential Employee Benefits Impact



## Review provider networks

- How have the *Dobbs* restrictions impacted access and availability of providers for reproductive health care?



## Monitor state law impact on fertility benefits

- Are state laws restricting fertility benefits, including egg freezing? Does this impact fertility provider access in certain states?



## Other health benefits

- Monitor impact on contraception and gender reassignment

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# Other Issues For Employers



# Former EEOC Commission General Counsel Letter

## UNSOLICITED GUSTAFSON LETTER TO EMPLOYERS ALLEGING LIKELY DISCRIMINATION

Gustafson sent multiple letters to various employers offering travel reimbursement for abortion-related services making similar claims to EEOC claims stated above, including:

### ■ Pregnancy Discrimination

- Claiming that such benefits discriminate against those who wish to access healthcare to help them “conceive a child, maintain a pregnancy, or care for the health of their unborn children”

### ■ Disability Discrimination

- Claiming that such benefits could constitute a failure to provide “equivalent benefits for employees with physical or mental disabilities who have other healthcare needs”

### ■ Religious Discrimination

- Claiming that such benefits could constitute illegal incentivization or pressure for employees to choose abortion

SHARON FAST GUSTAFSON  
ATTORNEY AT LAW, PLC  
2601 Oberlin Rd, Ste 100-AJB  
Raleigh, NC 27608

October 11, 2022

[REDACTED]

Dear [REDACTED]:

I write this letter as a recent General Counsel of the Equal Employment Opportunity Commission (EEOC) with 31 years of experience practicing primarily employment law.

Employment lawyers have recently learned that [REDACTED] is considering a travel fringe benefit that it may provide to employees who travel to terminate pregnancies. We understand that you have not announced this healthcare travel benefit as extending to employees who wish to travel for other healthcare reasons.

#### Pregnancy and Childbirth Discrimination

[REDACTED] may violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq* (1964), if it provides such benefits for employees, spouses, or dependents, while not providing equivalent benefits for those who wish to access healthcare that will help them conceive a child, maintain a pregnancy, or care for the health of their unborn children. Pursuant to Title VII, affected employees may commence lawsuits seeking the value of the denied benefits, emotional distress damages, punitive damages, and costs and attorney's fees.

EEOC Commissioners may bring Commissioner charges alleging pattern-or-practice discrimination against employers that provide abortion travel benefits because the EEOC's Pregnancy Discrimination Guidance makes clear that an employer may not lawfully withhold from a pregnant employee or dependent an insured fringe benefit based on her decision not to have an abortion. To provide a cash travel benefit only for abortion is to encourage employees to have abortions, and such encouragement has been found to be evidence supporting a class claim of pregnancy discrimination.

The EEOC has been clear that “an employer [that] decides to cover the costs of abortion, ... must do so in the same manner and to the same degree as it covers other medical conditions” and that “[p]regnancy-related expenses should be reimbursed in the same manner as are expenses incurred for other medical conditions.” See 29 CFR 1604.10(a) Pregnancy Discrimination Guidance and 29 C.F.R. pt. 1604.10(a) - Question 37 (10/20).

# EEOC Response to Gustafson Letter

## ■ EEOC Commissioner Janet Dhillon:

- “The EEOC’s enforcement priority areas are established by the Agency’s current Commissioners, not a former General Counsel.”

## ■ EEOC Commissioner Keith E. Sonderling:

- “Congress gave only current Senate-confirmed commissioners, no one else, the power to file commissioners charges. The public must understand that no one—including the current general counsel, prior general counsels, or former commissioners—have that power.”

- EEOC’s “Official” Response by EEOC Legal Counsel Carol R. Miaskoff on October 28, 2022:
  - **“Ms. Gustafson is not an employee of the EEOC, and she lacks authority to speak on behalf of the agency. Accordingly, her letter should be understood to represent her own views, not those of the Commission.”**
  - Any charge of discrimination will be evaluated based on individual facts and circumstances

# EEOC Commissioners' Charges Relating to Abortion-Related Travel Benefits

At least three employers have received EEOC Commissioner charges alleging that a policy of providing abortion-related travel expenses discriminates against employees for the following reasons:

**Violation of the *Americans with Disabilities Act* by not providing travel benefits for employees with disabilities (including pregnancy) who wish to travel for disability related treatments**

**Violation of the Pregnancy Non-Discrimination Act and Title VII by providing travel benefits for abortion, but not providing similar benefits to pregnant employees who wish to travel for non-abortion pregnancy-related treatments**

# Other Laws Protecting Abortion Seekers

## State Sick/Leave Laws

- State/local sick leave laws generally provide time off that might cover travel and abortions
- New York State Senate is considering a [bill](#) that would provide paid family leave to mothers, non-birthing parents, and family members of a person affected by the result of any pregnancy outcome, including a stillbirth, miscarriage, or abortion, to properly cope with potential emotions from such events
- Illinois recently expanded its [Child Bereavement Act](#) to include various assisted reproduction and pregnancy loss circumstances as qualifying reasons for protected leave from work. That law, as amended, **will permit** leave for miscarriages and stillbirths, but does not explicitly include procedures such as elective abortions.
- California law also provides for [protected leave](#) for pregnancy-related disability, which does not expressly cover abortion, but since it would apply to recovery from miscarriage, it could likewise apply to recovery from abortion.

# FMLA Eligibility?

## Will Travel to Another State and Actually Obtaining an Abortion Constitute Protected FMLA Leave?

- FMLA covers leave for an employee’s own (or a family member’s) **“serious health condition”**
  - Serious Health Condition includes:
    - **“Inpatient Care”**
      - an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity . . . or any subsequent treatment in connection with such inpatient care
    - **“Continuing Treatment by a Health Care Provider”**
      - includes two specific examples that potentially could be met by obtaining an abortion: “incapacity due to pregnancy” and “prenatal care.”
      - More generally, “continuing treatment” includes both **a period of incapacity and treatment**
        - » A period of incapacity of more than 3 consecutive full calendar days and any subsequent treatment or period of incapacity relating to that same condition, which also involves
          - » Treatment two or more times within 30 days of the first day of incapacity; or
          - » Treatment by a health care provider on at least one occasion, which results in a continuing regimen
- DOL has yet to provide any direct guidance on the question of whether obtaining an abortion—including travel across state lines when necessary—qualifies for FMLA protection.

# Off-Duty Conduct

Disciplining employees for their inappropriate social media posts requires special consideration, since:

- Such posts are often made when employees are:
  - off duty; and
  - away from the workplace; and
- Relevant law may vary, depending on whether the posts are directed towards certain third parties.



# Free Speech & Social Media – Speaking Out About Dobbs

CAN AN EMPLOYER TERMINATE EMPLOYMENT (OR TAKE ANOTHER ADVERSE ACTION) BASED ON AN EMPLOYEE’S ANTI- OR PRO-DOBBS SPEECH?

Does an employee have a constitutional right to free speech?

What does the National Labor Relations Act (“NLRA”) say?

Does the speech constitute “off duty conduct”?

- Recreational Speech?
- Political Speech?

Does the “level” of the employee matter?

Does it matter whether the employee’s personal social media account or the employer’s platform was used?

Any potential discrimination claims?

- Depending on which “side” is taken?
- Has the employer taken similar actions under similar circumstances?

Any potential whistleblower claims?

# Carter v. Southwest Airlines Co. et al.

- Request for reconsideration by Southwest because the court didn't properly instruct the jury and that a religious accommodation "would have imposed an undue hardship."
- Court had ordered reinstatement of a worker allegedly fired for sharing anti-abortion views
  - According to the court, Southwest failed to provide Carter with a reasonable religious accommodation
  - Carter had been fired, allegedly because she voiced opposition over the union's allocation of funds for members to attend the January 2017 Women's March in Washington, D.C., the sponsors of which were supporters of abortion rights
  - Carter's messages said abortion was murder, called the union president "despicable," and sent videos of purportedly aborted fetuses.
  - Jury concluded that:
    - The union and Southwest (i) retaliated against Carter in violation of the Railway Labor Act and (ii) unlawfully discriminated against her religious views and refused to accommodate them under Title VII.
    - The union breached its fair duty of representation as well.
    - The court slashed the jury's award, however, from \$5M to \$800k



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**Thank you!**



Have a question? Use the Q&A box!

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## Upcoming NEBGH events:

- **Feb. 16** – Retaining and Recruiting Employees: Tackling Two Essential Benefits Challenges
- **March 6** – Bi-Weekly COVID-19 Update w/ Dr. Mark
- **June 15** – 12<sup>th</sup> Annual Health & Wellness Benefits Conference