

FYI[®] Alert

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Recent federal and state actions in response to Supreme Court's abortion ruling

The Biden administration and some states are quickly taking action in response to the U.S. Supreme Court's decision on the right to abortion. Many of these actions will directly impact employers and group health plan sponsors.

Background

As expected, there has been a flurry of state and federal activity in response to the Supreme Court's ("Court") recent decision in *Dobbs v. Jackson Women's Health Organization*. In overturning *Roe v. Wade*, the Court found that the U.S. Constitution does not include a right to abortion, leaving it to each state to decide whether and how to regulate abortion-related activities. The decision has left many employers and group health plan sponsors grappling with a host of coverage and access questions relating to women's reproductive health care. See our [June 24, 2022 FYI Alert](#) and [July 1, 2022 FYI](#) for discussions of the ruling and related issues. This *FYI* addresses a few key federal and state developments in response to *Dobbs*.

President Biden signs executive order

On Friday, July 8, 2022, President Biden signed an [executive order](#) addressing the *Dobbs* ruling. While clearly expressing the Biden administration's commitment to defending and protecting access to legal abortion procedures, the order has no immediate operative effect. Rather, the executive order directs the Secretary of Health and Human Services (HHS) to take specific actions, including the preparation of a plan covering the following abortion-related agenda items:

1. Protecting access to abortion care, including medication abortion;
2. Ensuring emergency medical care;
3. Protecting access to contraception services;

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4. Increasing outreach and public education efforts; and
5. Convening volunteer lawyers to provide legal representation for affected patients, providers, and other stakeholders.

The order also directs HHS to work in consultation with the U.S. Attorney General and the Chair of the Federal Trade Commission to evaluate steps necessary to better protect related matters of privacy and consumerism. This includes a request for HHS to issue Privacy Rule guidance to help ensure that providers and health plans understand that, with limited exceptions, they are not required (in fact, in many cases, they are not permitted) to disclose a patient's health information, even to law enforcement. The executive order requests that the comprehensive plan be submitted to President Biden within 30 days.

If HHS' swift response to the executive order is any indication, we can expect an abundance of federal activity on this matter in the upcoming weeks. On July 11, 2022, HHS issued guidance to providers making clear its position that a federal law called the Emergency Medical Treatment and Active Labor Act (EMTALA) preempts state anti-abortion laws to require access to abortion treatment in emergencies. Whether the EMTALA requires treatment that would otherwise be prohibited by any particular state abortion law is yet another example of a group health plan coverage question that may ultimately be determined by the courts.

On July 13, 2022, HHS issued additional guidance responsive to President Biden's executive order to clarify for retail and hospital pharmacies and pharmacists their obligation under federal discrimination laws to fill legally prescribed drugs, even when a drug could be used for purposes of abortion. The guidance provides several examples of illegal or potentially illegal behavior, including a common scenario involving prescription drugs with alternate uses: "an individual experiences severe and chronic stomach ulcers, such that their condition meets the definition of a disability under civil rights laws. Their gastroenterologist prescribes misoprostol to decrease risk of serious complications associated with ulcers. If the pharmacy refuses to fill the individual's prescription or does not stock misoprostol because of its alternate uses, it may be discriminating on the basis of disability." Group health plans and their prescription drug vendors should be aware of this guidance in order to better support plan participants in obtaining legally prescribed medications.

State activities relating to abortion

Many state developments have also unfolded since the *Dobbs* ruling. So-called "trigger laws" — laws that become operative following statutorily prescribed event(s) (e.g., upon the overturning of *Roe*) — are now or will soon be effective in a dozen or more states. Lawmakers in many states have also either taken action or announced proposed action responsive to *Dobbs*.

For example, on July 7, 2022, the Texas Freedom Caucus, comprised of 11 conservative Texas legislators, issued a letter to a large international law firm with Texas offices. The letter not only outlines the lawmakers' view that the firm's abortion travel benefit for employees violates Texas' anti-

abortion laws but also identifies their plans for the upcoming legislative session. According to the letter, the caucus plans to propose legislation that would prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses, regardless of where the abortion occurs: “[t]his provision will impose felony criminal sanctions on anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law.” The caucus also plans to include a proposal for the disbarment of a Texas lawyer who violates any abortion statute enacted by the Texas legislature, including “furnishing the means for procuring an abortion knowing the purpose intended.” While it remains to be seen whether these threats will be made into law, the letter nonetheless garners national attention and should serve as a caution for employers seeking to offer an abortion travel benefit in a state where abortions are prohibited.

Buck comment: While it is too preliminary to comment on how or the extent to which the criminal law proposal outlined by the Texas Freedom Caucus would apply, ERISA does not preempt criminal laws of general application. If such a law is ultimately enacted, it would almost assuredly have a chilling effect on employer-provided abortion travel benefits. Following Texas’ lead, similar laws would likely be enacted in other states as well.

At the other end of the spectrum, on July 1, 2022, New Jersey’s democrat Governor, Phil Murphy, signed two bills into law intended to protect abortion access in that state. The new laws, [A3974](#) and [A3975](#), protect providers from other state’s inquiries and prohibit the extradition of a person who travels to New Jersey for legal abortion services. Similar legislation was previously enacted in California on June 24, 2022, the same day that *Roe* was overturned. The validity of many of these state laws will likely be subject to judicial review.

In closing

While only a few weeks have passed since the Court issued the *Dobbs* decision, it is increasingly apparent that uncertainty and inconsistency in state abortion laws will likely prevail for the months and even years ahead. This environment will create complex and novel challenges for employers and group health plan sponsors seeking to offer abortion and other reproductive health care services. State and federal lawmakers and employers and their advisors are expected to expend a significant effort on matters of abortion access, coverage, and similar issues that will ultimately be determined by the courts.

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