



WEBINAR

TOP TAKEAWAYS

The Overturning of *Roe v. Wade*: What to Know, and What May Be Next

On June 24, 2022, the Supreme Court of the United States issued its decision in *Dobbs v. Jackson Women's Health Organization* (*Dobbs*), overturning *Roe v. Wade* (*Roe*) and upending 50 years of precedent protecting a woman's right to privacy in choosing to abort a pregnancy prior to the point of viability. To help determine the best steps to take for you and your business, we have crafted the below takeaways to aid you in finding the post-*Roe* path forward.

1

Carefully consider hospital emergency care for pregnant patients. Hospitals in restrictive states should carefully consider and evaluate how to provide emergency care that may result in an abortion, and should be aware of restrictive state laws that may limit the definition of an emergency medical condition for pregnant people. At the same time, under the federal Emergency Medical Treatment and Active Labor Act (EMTALA), hospitals must evaluate and appropriately stabilize patients experiencing an emergency medical condition. The Centers for Medicare & Medicaid Services (CMS) has taken the position that EMTALA requires hospitals to stabilize a pregnant patient, even if it would result in an abortion. Although certain state laws have restricted what constitutes an emergency medical situation for pregnant patients, EMTALA may preempt directly conflicting state law and could be used to defend appropriate emergency care provided to a pregnant patient experiencing an emergency medical condition. Hospitals should consider reviewing their policies and procedures accordingly and affirmatively engage with their emergency care professionals.

2

Impacts on other providers. Any organization whose operations in any way may touch on family planning services, including providers of pregnancy termination services, pharmacy providers, IVF facilities, and cancer-treatment providers should consider how state laws will affect their operations. A number of state laws now contain language that explicitly or arguably protects a fetus from the moment of conception or at any stage of development. Accordingly, IVF treatment and abortions related to chemotherapy treatments may require significant documentation and patient counseling. Additionally, management services organizations (MSOs), vendors, and HIPAA Business Associates that facilitate certain healthcare operations or provide support services may perform activities that are implicated by broadly defined abortion bans.

3

Employee benefit expansion. Healthcare benefits, including reimbursement of medical travel expenses, may be used to increase access to reproductive care (which could encompass abortion, fertility treatments and—potentially—contraceptives) for employees in restrictive states. Certain states currently prohibit fully insured health plans from covering abortion, while others require it. We expect to see more states enacting policies to prohibit or require coverage. In addition, even self-funded health plans may be subject to at least some state restrictions on reproductive care. Many employers are expanding employee travel benefits—either for abortion or medical travel expenses generally—to increase access for employees in restrictive states. Employers should carefully craft and communicate any reproductive care benefits in conjunction with their legal counsel and any third-party administrators. When offering reproductive care benefits to individuals who reside in restrictive states, employers

should use risk-mitigation strategies to minimize exposure from any state “aiding and abetting” laws.

4

What should employers and providers do now? Despite the significant uncertainty, there are a number of risk-mitigation and care-expansion strategies available to organizations that they should be considering now. Organizations can evaluate their ties to restrictive and protective states and consider making adjustments to their operations, state data footprints, practices, policies and procedures, and/or workforce training, or even state corporate structure. Organizations should ensure that plans are in place for responding to subpoenas, search warrants, lawsuits, arrests and other abortion-related investigations. Finally, organizations should check in with their workforces and be thoughtful in their internal and external communications, which enforcement authorities or private plaintiffs might try to use against them.

5

What comes next? While federal action is on the table, most developments will occur at the state and local level. We expect to see further legislative and executive efforts to tighten prohibitions and close loopholes, with competition among political actors to be the “first to act” on various issues. On the abortion-protection front, more states will seek to enact constitutional amendments and take other actions to codify abortion protections. A number of state attorneys general and county prosecutors have taken varying positions on in-state enforcement and cooperation with out-of-state enforcement efforts. We will continue to monitor and report updates in this rapidly changing legal environment.