

## EEOC Alleges Abortion Travel Benefits Violate ADA, Title VII; Abortion Rates Tick Up; Indiana Judge Rules Ban Violates Religious Freedom

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Lawyers are advising employers to beef up their health-related travel benefits to emphasize equal access for all employees as the Equal Employment Opportunity Commission begins to target employers that have expanded travel coverage for abortions.

EEOC's charges come as new data indicate the rate of abortions accessed by Americans has ticked up, reversing a years-long decline, according to a new census from the Guttmacher Institute.

While litigation over state bans simmers in several states, abortion activists scored a win in Indiana after a judge ruled the state's ban violates religious freedom protections enacted by statehouse Republicans. Abortion access has been temporarily restored in Indiana while litigation continues.

### Equal access to benefits

EEOC Commissioner Andrea Lucas in November reportedly filed a Commissioner's Charge against at least three companies that began offering travel benefits for employees living in states that ban or restrict abortion, according to *Bloomberg Law*.

[In August, lawyers warned employers to avoid taking public steps that challenge abortion restrictions after forecasting a litigation storm](#), particularly as state legislatures weigh their options for criminalizing aiding and abetting abortion access. But over 120 large corporations added travel benefits for their employees following the *Dobbs v. Jackson Women's Health Organization* ruling despite the warning, according to *Bloomberg Law*.

Now, Lucas alleges that companies' travel benefits violate Title VII of the Civil Rights Act and the Americans with Disabilities Act by providing preferential treatment to people seeking abortions, lawyers at McDermott Will & Emery explained in a Nov. 28 memo.

"Providing travel benefits for those seeking abortions provides preferential treatment to women, thus constituting gender discrimination," the memo says. "[Lucas'] contention is also that travel benefits further implicate religious discrimination by favoring those who terminate pregnancies over those who, for religious reasons, carry a child to term. Her final contention is that the provision of travel benefits violates the ADA, which she claims requires parity of benefits for those with physical disabilities."

While the MWE lawyers remain reasonably convinced the EEOC will not sue over abortion-related travel benefits and believe EEOC does not have grounds to accuse employers of religious discrimination, they advise employers to make travel benefits available to every employee by listing them as "available for all covered services or procedures that are unavailable within a covered individual's state of residence or area, regardless of the individual's gender, pregnancy or childbirth status, or disability status."

Lucas' charges mimic those of former EEOC General Counsel Sharon Fast Gustafson, who sent a letter to employers across the country in October warning them that their travel benefits violated antidiscrimination laws. The Littler Workplace Policy Institute wrote to EEOC in October asking it to investigate Gustafson for her letter, which they argue falsely conveys that Gustafson's warning comes with the support of EEOC.

“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,” Carol Miaskoff, EEOC’s current legal counsel, wrote in response to Littler.

## Abortion uptick

The nation’s years-long decline in abortions has reversed, according to new data from the Guttmacher Institute’s Abortion Provider Census, which indicate the rate of abortions accessed by women aged 15-44 has ticked up by about 8%. The census, which assessed data from around 1,600 facilities providing abortions in 2019 and 2020, found that around 21% of pregnancies ended in abortion in 2020, up from 18.4% in 2017.

Guttmacher’s data depict the abortion landscape shortly before *Dobbs*, [which has already altered how, whether and where abortions are accessed](#).

“An increase in the rate of abortions is a positive development if it means that people are exercising their right to bodily autonomy by deciding when and if they become parents,” said Rachel Jones, Guttmacher’s principal research scientist. “However, while our study demonstrates that more people in the United States are seeking abortion care, the Supreme Court’s radical decision to overturn *Roe v. Wade* just as we are seeing this historic increase means that fewer people will be able to access it.”

**One aspect of the shifting landscape that could become increasingly complicated is access to medication abortions:** Medication abortion accounted for 53% of all U.S. abortions in 2020, shooting up from around 39% in 2017, Guttmacher found, and 99% of those abortions were induced using mifepristone or misoprostol.

[But as clinics continue to shutter abortion services](#), Republicans and antiabortion activists have set their sights on restricting access to medication abortions as part of their agenda for the year ahead, [even as Democrats push FDA to finalize the updated risk evaluation and mitigation strategy for mifepristone](#).

Meanwhile, some states are working to expand coverage for abortion services: New Jersey has asked its small group and individual market plans, including those sold through its state-based exchange, [to cover abortion services for the 2023 plan year](#) after the state’s Department of Banking and Insurance found regulatory action is needed to ensure patients have access to the services without exceptions.

## Religious freedom

Marion County Superior Court Judge Heather Welch on Friday (Dec. 2) held that Indiana’s near-total abortion ban violates religious freedom rights protected by a Republican-enacted 2015 law and ruled that the determination of when life begins is not something courts or the state can decide.

[The lawsuit was filed Sept. 8 in Marion County’s district court](#) by the American Civil Liberties Union of Indiana on behalf of five anonymous Indianapolis residents and the group Hoosier Jews for Choice.

Welch agreed with plaintiffs’ argument that Indiana’s abortion ban violates Indiana’s Religious Freedom Restoration Act, a law Republican state lawmakers passed in March 2015 and which former Indiana Governor Mike Pence (R) signed into law several days later. Precedent set by the Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby* prohibits the state from setting parameters for when life begins, Welch wrote in her opinion.

Welch is the second judge to block Indiana from enforcing its ban: In October, Indiana’s Supreme Court temporarily blocked the ban from being enforced while it considers whether the ban violates religious freedoms protected by the state constitution. -- *Bridget Early* ([bearly@iwpnews.com](mailto:bearly@iwpnews.com))

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