

Post-Dobbs Employment Considerations

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In *Dobbs v. Jackson Women's Health Organization* the United States Supreme Court overturned years of precedent started by *Roe v. Wade* and conferred the right to regulate abortions to individual states. This marked change has obvious implications in social, political, and medical circles. But why does it matter for employers?

Patchwork Benefits

First, states are already enacting a variety of laws regulating access to abortions. This makes employer benefit compliance challenging, especially for multi-state employers. At least 15 states have enacted partial or total bans on abortions, and [legislation continues to develop](#). Some of these states also impose liability on people or entities that assist people in obtaining an abortion. Employers will need to carefully consider which state laws apply to their employees, especially when operating in various jurisdictions, to reduce the risk of liability if they choose to offer any abortion services benefits. This may be even more challenging in the remote work environment and in today's competitive labor market.

Discrimination Claims

Aside from just administrative challenges, the change in law opens questions for how employment discrimination claims might be handled, especially with respect to pregnancy and religious discrimination. For example, the Pregnancy Discrimination Act (PDA) prohibits employment discrimination "on the basis of pregnancy, childbirth, or related medical conditions." Federal courts have held the PDA prohibits adverse employment actions because of an employee's decision to have or not have an abortion. Courts will likely have to decide how the PDA's protections interact with a state's anti-abortion laws. In addition, Title VII of the Civil Rights Act prohibits employers from discriminating against individuals because of their religion. Religious beliefs can often be connected to employee's positions on abortion. Employers should be aware that employees may bring discrimination claims alleging that they suffered an adverse employment action based on their beliefs with respect to abortion. For example, in *Carter v. Transportation Workers Union*, a Texas jury recently awarded a former flight attendant \$5 million in damages who was allegedly fired for sending anti-abortion messages to her union.

Protected Activity

Finally, speech in the workplace regarding abortion access may be considered "protected concerted activity" protected by the National Labor Relations Act (NLRA), which prohibits retaliation against employees who discuss the terms and conditions of employment. Thus, employees discussing or advocating for an employer to provide benefits to employees for abortion-related healthcare services

or advocating for an employer to take a certain public stance on the issue, may constitute protected activity under the NLRA. This includes employee activity on social media.

Employers should review and update policies and practices as needed, especially with respect to social media or off-duty conduct. Benesch attorneys are ready to assist with questions.

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