



Employee Benefits Considerations After Dobbs v. Jackson Women's Health Organization: Foster Swift Highlights Options Available to Employers

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On June 24, 2022, the Supreme Court of the United States announced its decision in *Dobbs v. Jackson Women's Health Organization*. As a general summary, the Supreme Court in *Dobbs* held: (1) there is no constitutional right to abortion; (2) the precedent that conferred a constitutional right to abortion, *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, was overturned; and (3) the authority to regulate abortion is now given to the states and their elected officials.

Since *Dobbs* was decided, individual states have begun to pass abortion legislation. Thirteen states already have "trigger bans" in place that will criminalize abortion within 30 days of the Supreme Court's ruling. These states include: Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming. Other states, like Michigan, have abortion bans within their legislative history that could become enforceable again if the laws are not addressed after *Roe's* overturning.

Michigan's pre-*Roe* ban on abortion was enacted in 1931. After *Roe* was decided by the Supreme Court in 1973, abortion became legal in the state. Since May 17, 2022, there is a preliminary injunction in place that temporarily blocks the 1931 abortion ban. The Governor of Michigan – Gretchen Whitmer – has also expressed her support of the injunction and her intention to protect abortion in the state during her governance. A ballot initiative titled "Michigan Right to Reproductive Freedom Initiative" (2022) was introduced this year, as well. This measure would create a Michigan constitutional right to abortion access and reproductive freedom. The "Michigan Right to Reproductive Freedom Initiative" may appear on the November 8, 2022 ballot in Michigan as a proposed constitutional amendment if 425,059 Michigander signatures are collected in support. As of now, nearly 800,000 signatures have been obtained already, making it likely the proposed amendment will be on the November ballot.

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Employers have started to navigate the patchwork of state abortion laws that have arisen following *Dobbs*. Employers' self-funded healthcare plans have a bit more flexibility than fully-insured plans when it comes to determining what medical services will be provided in a healthcare plan. Companies with self-funded healthcare plans have considered offering telehealth services and pharmaceutical benefits to their employees, as well as travel cost benefits for out-of-state treatment for employees who reside in states that have prohibited abortion within their borders. With travel expense reimbursements, tax considerations will be necessary depending on the intended coverage in an individual plan, too.

At Foster Swift, we can assist you in weighing your available options under both fully-insured and self-funded healthcare plans. We can also help you navigate next steps if you seek to amend your plan to include or exclude abortion healthcare in light of *Dobbs*.

If you would like additional information regarding your employee benefits options related to abortion coverage, please contact any of the following attorneys by phone or via email to schedule a discussion or obtain our advice.

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