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**Hey Man, Don't Get Political,
Just Play the Hits!!!!**


How *Roe v. Wade* Being Overturned Can Create Big Decisions for Employers Regarding Employee Benefit Plan Coverage

Presented by: Adam W. Childers

LexMundi

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Adam W. Childers





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- * Chair/Front-Man of the Labor & Employment Practice Group
- * Favorite concert experience - Phish, Big Cypress, Florida, December 29 - January 1, 1999/2000.
- * *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Adam W. Childers, or another licensed attorney.


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Set List


Opening Number - the Dobbs decision


Listen to the Lyrics Man! - Why the Dobbs Decision Matters to Employers


Mosh Pit Brewing - Examples of What's Coming Next


Roadie Preparations - Best Practices


Encore - Who Can Help?!

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**Opening Number
– the *Dobbs*
Decision**

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What did *Dobbs* do?

- Unless you have been living under one of these ----->
- You heard about the case that overturned *Roe v. Wade* – *Dobbs v. Jackson Women's Health Organization*
- “Released” on June 24, 2022
- 6-3 Decision in favor of overturning *Roe*
 - Concurrence from Judge Thomas
 - Dissent from Justices Breyer, Sotomayor, and Kagan
 - “Originalism” – theory of constitutional interpretation that argues all statements in the Constitution must be interpreted based on how they would have been understood or intended at the time the Constitution (or amendment) was written.



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Facts of the Case

- 2018 Mississippi state law that banned most abortion operations after the first 15 weeks
- Jackson Women's Health Organization (only abortion clinic in the state) sued Thomas Dobbs, state health officer with the Mississippi State DOH
- Lower courts enjoined the law based on *Planned Parenthood v. Casey* (banning abortion before fetal viability – generally 24 weeks)
- Case presented a great opportunity for newly packed conservative court to take aim at *Roe*.

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Dobbs Holdings

- Justice Alito penned for the majority - "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."
- Justice Alito tried to calm the waters by saying this decision had no bearing on other unenumerated rights (rights not specifically spelled out in the Constitution but nevertheless recognized as fundamental) such as marriage equality, same-sex intimacy, and contraception access.
- Left the decision to the individual States.

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Justice Thomas Concurrence Raises Questions

- Justice Thomas wrote in his concurrence that the Due Process Clause (protection against arbitrary deprivation of life, liberty and property) "does not secure any substantive rights" so SCOTUS should reconsider all...substantive due process precedents" to "correct the error."
- Roe was founded in the notions of privacy and liberty. So, what about:
 - *Obergefell v. Hodges* - marriage equality for same-sex couples
 - *Loving v. Virginia* - the right to interracial marriage
 - *Griswold v. Connecticut* - the right to contraception
 - And many others under the liberty and privacy "umbrella"

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Listen to the Lyrics Man- Why the Dobbs Decision Matters to Employers

Dobbs' Impact on Employer Benefit Plans

- For most private employers, employee benefit plans are typically self-funded and governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA), and other federal laws.
- While such laws do not generally require plans to cover abortions, they may (at least to some extent) limit the ability of states to prevent plans from doing so.
 - ERISA broadly preempts state law, which likely prevents states from directly regulating the benefits (including abortion and contraception coverage) offered under an employee benefit plan.
 - ERISA preemption does not apply to a plan that is not covered by ERISA (because it is maintained by a church or quasi-governmental entity, for example)

Dobbs' Impact on Employer Benefit Plans, Cont'd

- Even when ERISA does apply, it does not preempt:
 - State insurance laws that regulate the policies funding insured group health plans. It is possible state insurance laws will prohibit insurers from covering abortion procedures (including legal procedures done out-of-state), especially in circumstances where those procedures are illegal under that particular state's laws.
 - Employers whose health plans are insured (including stop-loss insurance for self-insured plans) should check with their insurance carriers about potential effects on coverage. Insurance coverage mandates and limits will vary from state to state, so employers with multiple locations may be able to seek coverage from a state that most closely aligns with their plan.

Dobbs' Impact on Employer Benefit Plans, Cont'd

- ERISA also does not preempt a state's generally applicable criminal laws.
- 26 states, including Oklahoma, have laws that significantly restrict or outright ban abortions.
- States could seek to apply laws that criminalize "aiding and abetting" or criminal conspiracy to employers or plans providing financial assistance to someone seeking an abortion.
- While such laws are likely to be challenged, states may seek to apply them even if an abortion occurs in another state where it is legal.
 - Employers with employees in states where abortion is more restricted should be particularly cautious.

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Dobbs' Impact on Employer Benefit Plans, Cont'd

- The rise of Travel and Lodging Reimbursement Benefits
 - Employers should carefully consider the potential impact of other federal and state laws before providing any enhanced coverage, such as travel or lodging benefits.
- The Mental Health Parity and Addiction Equity Act (MHPAEA) generally requires that plans which provide mental health or addiction benefits do so on as favorable a basis as they provide other types of medical benefits. A plan that provides special benefits only for a non-mental-health procedure might run afoul of the MHPAEA.
- In addition, employers should be aware that some benefits (e.g., travel and lodging reimbursement exceeding certain limits) may be taxable.

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**Mosh Pit Brewing—
Examples of
What Happens
Next**

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Things Just Got Serious...#1

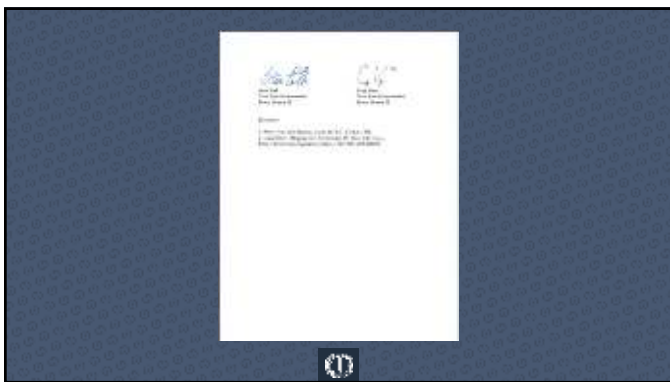


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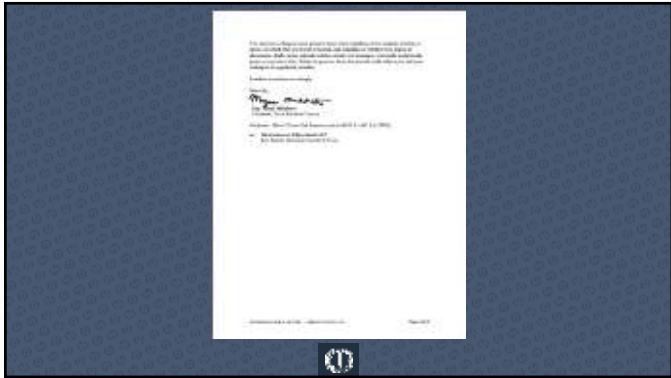


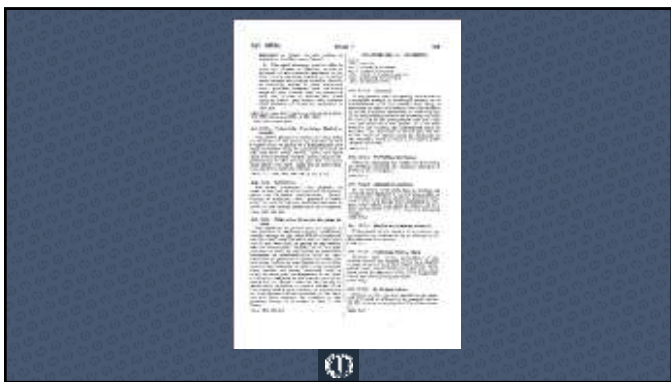














Lessons Learned and Best Practices

- Talk to your insurance carrier and understand the scope of coverage and benefits offered, and make a plan now. Be prepared.
- Monitor legislative developments in Oklahoma and other jurisdictions where your company does business. Pay particular attention to laws criminalizing the aiding and abetting of abortions.
- Have a media response plan in place if necessary.

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Lessons Learned and Best Practices, Cont'd

- Executive management should talk about company culture and the needs and expectations of the workforce. Make decisions about how far the company is willing to go in the face of these legal issues, and whether to consider alternatives such as travel and lodging reimbursement.
- Watch for further developments from SCOTUS regarding other "enumerated rights" not found explicitly in the Constitution. Could be changes that impact scope of protection for sexual orientation, gender identity, same-sex marriage, etc...

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Get Your Lighters Out and Hold 'em Up High!

- No set of best practices is complete without giving you perhaps the best advice of all. If your company finds itself in a tight spot with all the changes ushered in by the *Dobbs* decision I know of a great group of rock stars who can help.....

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The L&E Rock Stars of Crowe & Dunlevy!



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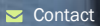
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