

# — End of Roe

What It means for Employers  
and Employee Benefit Plans

July 26, 2022

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# — Dobbs v. Jackson

## Pre-Dobbs

- ***Roe v. Wade*** – The Due Process Clause of the Fourteenth Amendment provides a fundamental “right to privacy” that protects a pregnant person’s choice to have an abortion.
- *First Trimester* – no state regulation on abortion.
- *Second Trimester* - state may impose regulations on abortion that are reasonably related to maternal health.
- *Third Trimester* - a state may regulate abortions or prohibit them entirely once the fetus reaches the point of “viability,” so long as the laws contain exceptions for cases when abortion is necessary to save the life or health of the mother.
- “*Viability*” - the ability of a developing fetus to survive independent of a pregnant person's womb.

## — *Pre-Dobbs*

- ***Planned Parenthood of Southeastern Pennsylvania v. Casey*** – The Supreme Court reaffirmed Roe and developed a new standard to review laws restricting abortions.
- *Casey Standard* - Does a state abortion regulation have the purpose or effect of imposing an “undue burden”?
- “Undue Burden” - which is defined as a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”

## — Dobbs v. Jackson Women’s Health Organization

- **Facts** – In 2018, Mississippi passed the Gestational Age Act which prohibits abortions if the “probable gestational age” of the fetus is greater than fifteen (15) weeks. Jackson Women’s Health Organization (an abortion facility) and one of its doctors filed a lawsuit to challenge the law.
- **Question(s) Presented** – Whether all pre-viability prohibitions on elective abortions are unconstitutional; whether the Constitution grants a right to obtain an abortion.
- **Ruling** - The Constitution does not grant a right to abortion. *Roe* and *Casey* are overruled.

# Majority Opinion

Alito, J.

- The states may regulate abortion.
- “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.”
- *Roe* was “egregiously wrong” and failed to ground its decision in history or precedent.
- The *Roe* test resembled the work of a legislature.
- *Dobbs* only concerns abortion and has no influence on cases regarding contraception or same-sex marriage.

# Concurring Opinion

Thomas, J.

- “[n]othing in [the Court’s] opinion should be understood to cast doubt on precedents that do not concern abortion.”
- *Dobbs* only concerns abortion but the Court should go a step further and reconsider cases like *Roe* that grant rights not listed in the Constitution:
  - *Griswold v. Connecticut* (right of married persons to obtain contraceptives),
  - *Lawrence v. Texas* (right to engage in private, consensual sexual acts),  
and
  - *Obergefell v. Hodges* (right to same-sex marriage).



# — Concurring Opinions

Kavanaugh, J.

- The Constitution does not take sides on the issue of abortion.
- A state cannot prevent its residents from traveling to another state to obtain an abortion because of the constitutional right to interstate travel.
- A state cannot retroactively impose punishment for an abortion that occurred before *Dobbs* takes effect.
- Overruling *Roe* does not mean overruling cases that recognized a right to use contraception, enter an interracial marriage, or to marry someone of the same sex.

Roberts, J.

- Prohibiting abortion before “viability” is NOT always unconstitutional.
- The Court should eliminate the “viability” rule from *Roe* and *Casey*.
- The Court does not have to “take the dramatic step” of eliminating abortion rights altogether.

# — Dissenting Opinion

Justices Breyer, Kagan, and Sotomayor

- “Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.”
- “The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them,”
- “A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there.”

# — State and Federal Response

## Federal Response

- President Biden- Executive Order.
  - Creates interagency task force to coordinate efforts to protect access to reproductive health care.
  - Affirms commitment to protecting patients who have to travel out of state, including protecting mobile clinics at the border.
  - Calls on Department of Health and Human Services (HHS) to increase public education about public healthcare and convene pro bono counsel for patients and providers.
  - Requires HHS to issue a report within 30 days outlining actions to protect medication abortions, ensure emergency medical care, and protect and expand access to the range of reproductive health services.

## — Federal Response

- Women's Health Protection Act (WHPA).
  - Passed the House 218-211.
  - Would codify the right to an abortion and explicitly prohibit several abortion restrictions that have become common under state law.
- Right to Contraception Act.
  - Passed the House 228-195, largely along party lines.
  - Confirms an individual's right to access contraceptives and a health care provider's right to provide contraceptives to patients.
  - Allows for providers and patients to bring a civil lawsuit against any state that violates the statute.

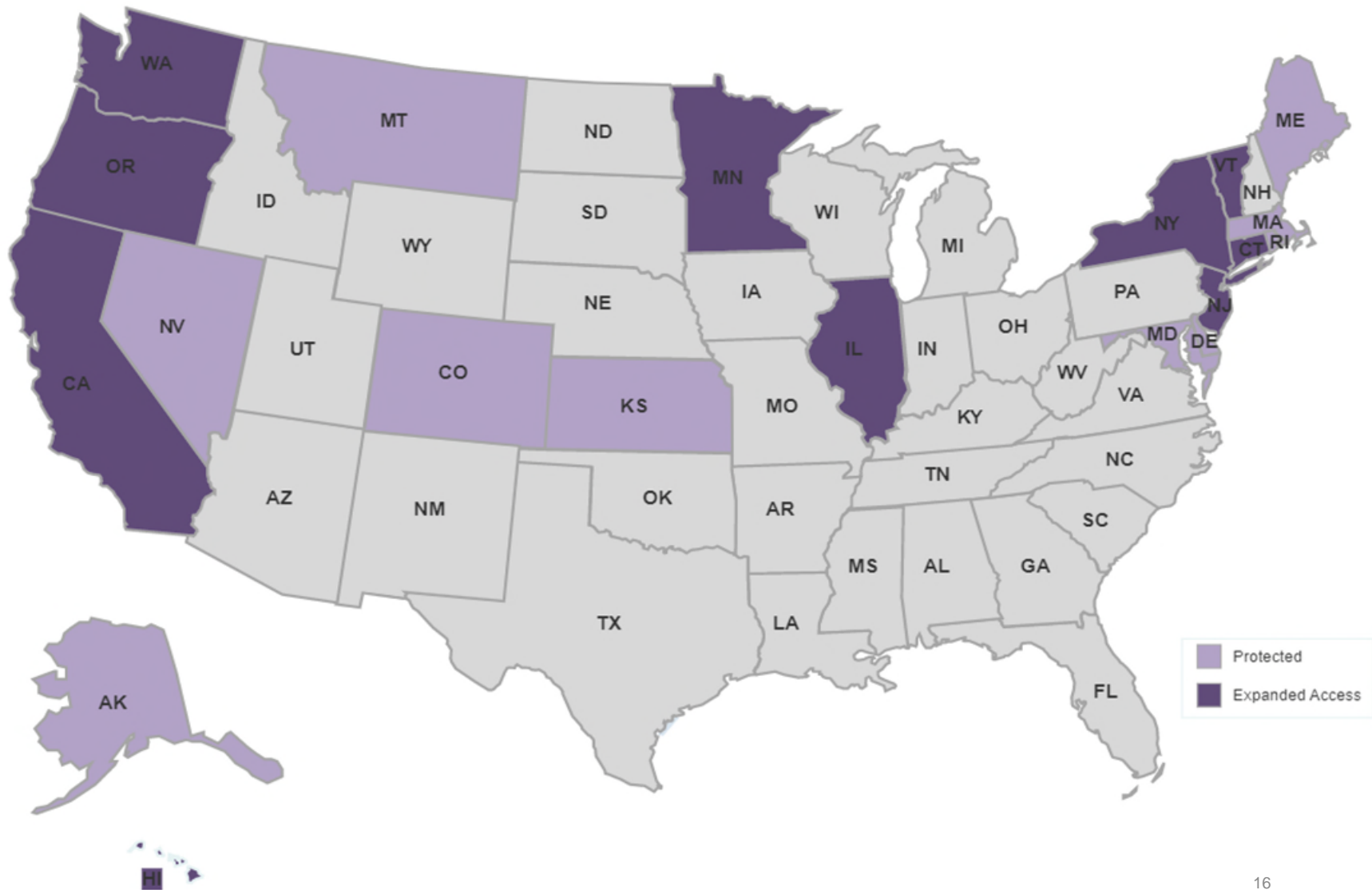


## Federal Response

- HHS HIPAA Guidance.
  - “The Privacy Rule permissions for disclosing [protected health information] without an individual’s authorization for purposes not related to health care, such as disclosures to law enforcement officials, are narrowly tailored to protect the individual’s privacy and support their access to health services.”
- HHS also issued guidance instructing hospitals to continue providing abortion services to patients in emergency situations.
  - Texas has filed suit challenging HHS’ position.



# States Expanding or Protecting Abortion Access



## — Protection for Out of State Residents

- **Pennsylvania-** Governor Tom Wolf signed an Executive Order ensuring that out of state resident can access reproductive care in the Commonwealth and affirming that as Governor he will decline any request from another state to issue a warrant or arrest someone charged with a crime for providing such services.
- **New Jersey-** Governor Murphy signed two bills protecting the privacy of people who receive an abortion, including people who come from another state.

# Employee Benefits

Addressing health coverage and travel benefits



# — Health Plan Coverage

# ERISA

- **Employee Retirement Income Security Act of 1974.**
  - Federal law.
  - Sets minimum standards for the administration of retirement and health and welfare plans sponsored by private employers, including
    - Reporting
    - Disclosures
    - Remedies for non-compliance
  - ERISA preempts any state law that “relates to” employee benefit plans.
  - State law that regulates *insurance* is not preempted.
  - Private employers’ self-funded plans are not insurance.

## — Insured v. Self-Funded Plans

- **Insured health plan.**

- Common option
- Employer selects insurer, pays annual fixed premium
- Insurer covers claims
- Participant shares cost through deductibles, co-pays, and, typically, some amount of premium
- Administered and paid for by insurer, not employer
- *Insurance* is governed by state law

## — Insured v. Self-Funded Plans

- **Self-funded health plan.**

- Employer pays cost of claims through general assets or a trust
- Only pays for the benefits used
- Risk of high-cost claims
- Stop loss insurance
- May be administered by insurer
- Self-funded health plans are *not insurance*
- ERISA preempts state insurance laws with respect to self-funded plans

## — Abortion Coverage

- **Insured and Self-Funded Plans may include abortion coverage.**
  - surgical abortion
  - medication abortion
    - Mifepristone and misoprostol.
    - FDA approved up to 10 weeks of pregnancy.
    - Prescribers (physician or pharmacist) must be certified by the manufacturers.
    - May be prescribed via telehealth services.
    - Most states require a physician to prescribe abortifacient medication.





## — Limits to ERISA Preemption

- Generally applicable criminal laws are not preempted by ERISA.
- Internal Revenue Code Section 1.213-1(e)(2)(ii)
  - “Amounts expended for illegal operations or treatments are not deductible.”
- What happens when a self-insured plan is established in a state prohibiting abortion?
- What happens when a self-insured plan is established in a state that does not ban abortion but covers residents in a state that does?
- What does it mean to “aid and abet” abortion?

# — Travel Benefits

What are the options/constraints if an employer seeks to assist employees with the cost of travel to obtain an abortion where it may be lawfully performed?

## — Travel Benefits

### **Medical Plan**

- Primarily for and essential to other medical care.
- Scope of benefits.
- In-network/out-of-network.
- Dollar limits.
- Legal issues.
- Administrative considerations.

## — Travel Benefits

### **Employee Assistance Plan**

- Health plan requirements.
- Excepted benefit.
  - Independent from regular medical plan
  - No cost to employee
  - No significant benefits in the nature of medical care

## — Travel Benefits

### **Excepted benefit HRA**

- Participants must be eligible for regular medical plan.
- Available to all similarly situated employees.
- Maximum annual contribution of \$1,800 (indexed).
- Other limitations.

## — Travel Benefits

### **Individual Account Plans**

- Health flexible spending arrangement (FSA).
- Health reimbursement account (HRA).
- Health savings account (HSA).

## — Travel Benefits

### **Outside of Health Plan**

- Travel benefit does not need to be a health benefit.
- May inadvertently create a health plan.
- Advantages and disadvantages.



## — Travel Benefits

<b>Travel Benefits in a Health Plan</b>	<b>Travel Benefits Outside of a Health Plan</b>
ERISA preemption	No ERISA preemption
Tax advantages (with limits)	Taxable
Application of HIPAA privacy rules	No HIPAA protection, but less information
Health benefit rules	Absence of health benefit rules
Existing external relationships for administration	Consider administration

# — Employment Implications

## — Protecting Abortion Access

- There are several considerations for employers who seek to ensure abortion access for employees, including potentially providing leave for employees who are receiving an abortion or accompanying their child or partner seeking reproductive care in another state.
- Considerations include
  - Existing leave policies? FMLA coverage?
  - What documentation is necessary?
  - How to ensure employee privacy?
  - Employee political and religious views?

# Family & Medical Leave Act

- The FMLA is a federal law granting leave to employees for reasons that include the following:
  - Employee's own serious health condition including any period of incapacity related to pregnancy and prenatal care.
  - Serious health condition of a qualifying family member (spouse, parent, child).
- Generally, the law provides for up to **12 workweeks** per year of job protected leave.
- Leave is unpaid but employees are permitted (and can be required to) use any available paid leave benefits.

## Family & Medical Leave Act: Eligibility

- Employee eligibility for leave – the “12’s” test:
  - 12 months of service;
  - 1250 hours or more of actual work in the 12 months preceding leave, excluding leave time; and
  - Some portion of the 12 workweek entitlement remaining.
- In addition, the employee must work at a location with at least 50 employees within a 75 mile radius.

## Family Medical Leave Act

- Can an employee use FMLA leave to cover the time spent travelling to get an abortion and/or recovering after the procedure? **Probably.**
  - FMLA regulations provide that expectant mothers are entitled to leave “for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.”
  - FMLA regulations and case law recognize that FMLA may cover treatment received out of state or even out of the country, when certified by a health care provider.

## Family Medical Leave Act

- Can an employee whose spouse or minor child is receiving an abortion use FMLA leave? **Probably.**
  - A spouse can use FMLA leave “if needed to care for a pregnant spouse who **is incapacitated** or if needed to care for her during her **prenatal care**, or if needed to care for her following the birth of a child if she has a serious health condition.” See § 825.124.
  - Care for a family member with a serious health condition may include emotional support.
  - If the person receiving the abortion is the employee’s adult child or unmarried partner, this may not be covered by FMLA. Still, the employer’s leave policy may provide leave for people in this category.

# FMLA Process

- Employee Notice: As soon as practicable for unforeseeable leave.
- Medical Certification: Employer can require medical certification from the employee's (or family member's) doctor to determine qualifying nature and frequency/duration of leave.
- Employers are not required to get medical certification if they have sufficient information to determine that leave is FMLA-qualifying.
- Employer Notice: DOL provides forms for required employer notices

**EMPLOYEE RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT**  
THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

**LEAVE ENTITLEMENTS**

- You are entitled to be paid for FMLA leave as if you were not on leave.
- You are entitled to be reinstated to the same or an equivalent position upon your return.
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**BENEFITS & PROTECTIONS**

- You are entitled to continue to accrue seniority and other benefits during FMLA leave.
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**ELIGIBILITY REQUIREMENTS**

- You must have worked for the employer for at least 12 months.
- You must have worked for the employer for at least 12 months.
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**REQUESTING LEAVE**

- You must give your employer notice of your need for FMLA leave as soon as practicable.
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**EMPLOYER RESPONSIBILITIES**

- You must provide your employees with information about FMLA leave.
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**ENFORCEMENT**

- You can file a complaint with the U.S. Department of Labor.
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For additional information or to file a complaint:  
**1-866-4-USWAGE**  
(1-866-487-2843) TTY: 1-877-889-9697  
**WWW.WAGEHOUR.DOL.GOV**  
U.S. Department of Labor | Wage and Hour Division



## — Other Laws Governing Medical Leave

- State and local sick leave laws (paid and unpaid).
  - State and local leave laws may provide broad coverage for pregnancy-related needs.
  - States/cities may amend laws to specifically protect leave for abortions and abortion-related travel.
- State mini-FMLA laws.
- State and local parental leave laws.
- State disability benefits, but many provide for pay but not leave

# — Employer Policies

- Creating new abortion-specific leave policies.
  - Limits on the policy
  - Employee relations
  - Employment discrimination
  - Government funding

## — Policy Considerations

- Is your existing PTO policy broad enough to cover abortion-related leave?
- How will you manage employee relations and respond to employees who have personal objections to the policy?
- Will a new policy only apply to the employee receiving the abortion? Will unmarried partners or parents of adult children be eligible for leave?
- What documentation is required?
- Is the policy limited to abortion? Or will the leave benefit extend to any medical care that is not available in the state where the employee is based?

# — Policy Considerations

## Abortion Specific Policies

- Providing leave benefits exclusively to people who experience pregnancy may be permissible, depending on the terms and scope of leave.
  - EEOC Guidance on parental leave policies provides that “[l]eave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions. However, parental leave must be provided to similarly situated men and women on the same terms”.

# Employee Relations

## Conscientious Objectors

- Similar to other benefits, any leave benefit provided for employees seeking an abortion would be administered by HR or a third party administrator.
- Staff within that office may not support the right to abortion and therefore refuse to take any role, processing the paperwork for an employee seeking an abortion.
- Some states protect health care providers who object to performing abortions— **but, this type of protection is not extended to staff, who are only involved with accepting medical documentation and approving an employee's leave request.**

# Employee Relations

## Elements of Protected Concerted Activity (PCA)

- Section 7 of the NLRA protects employees' rights to **“engage in other concerted activities for the purpose of...mutual aid or protection.”**
- “Mutual aid or protection” includes employee efforts to:
  - Improve (any) terms and conditions of employment (not just wages and traditional benefits such as health insurance), or
  - Improve their lot as employees through channels outside the employee-employer relationship.
- Concerted activity includes circumstances where individual employees seek to initiate group action and where they bring group complaints to the attention of management even when acting alone.

# — Employee Relations

## Elements of Protected Concerted Activity (PCA)

- Employees may have strong feelings about the employer's response to the *Dobbs* decision and any benefits offered to employees.
- Certain conversations or responses from employees about abortion leave policies (including complaints) may be considered PCA.

# Employee Relations

## Religious Discrimination

- *Carter v. Transport Workers Union of America Local 556*
  - Anti-abortion Christian flight attendant sent messages to union president and posted on message boards denouncing the union's participation in the women's march.
  - She called the president "despicable" and said abortion was murder and sent a video of purportedly aborted fetuses. The president reported the communication to the airline and the flight attendant was later fired.
- **Issue:** Title VII religious discrimination claim- alleged that the airline terminated her because of her religious beliefs, and failed to accommodate her religious beliefs.
- **Verdict:** The Texas jury found in favor of the Plaintiff and Defendant was ordered to pay a total of \$4.15 million for lost wages, lost benefits, past and future pain and suffering, and punitive damages (punitive damages portion was \$3.5 million).



## — Pregnancy Discrimination

- Discriminating against employees because they had an abortion, are seeking an abortion, or are choosing not to have an abortion is unlawful.
- The Pregnancy Discrimination Act (PDA), an amendment to Title VII, prohibits pregnancy-related discrimination.
  - The statute does not reference abortion, but according to EEOC Guidance, “Title VII protects women from being fired for having an abortion or contemplating having an abortion.”

# — Pregnancy Discrimination

- Federal Courts have also interpreted Title VII as protecting employees who have had or contemplated having an abortion or not having an abortion.
  - *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008), cert. denied, 129 S. Ct. 576 (2008) (PDA prohibits employer from discriminating against female employee because she had an abortion)
  - *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (terminating a pregnant employee because she considered an abortion violated the PDA)
  - *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007) (declaration by a female employee that she was encouraged by a manager to get an abortion was anecdotal evidence supporting a class claim of pregnancy discrimination).

# Government Contractors- Implications for State & Federal Funding

- Can the state prohibit employers from bidding on a state contract if it provides travel benefits or reimbursement for abortion services? **Unlikely.**
  - Generally, the government cannot condition an entity's eligibility for public funding on a waiver of the entity's First Amendment rights unless the state have a compelling governmental interest and the condition is narrowly tailored to further the compelling governmental interest.

# — Application of Criminal Law

# Aiding and Abetting - Agenda

- The issue: abortion ban states may seek to impose aiding and abetting liability for abortions that occur outside those states' borders.

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- Current legal landscape of states' aiding and abetting laws.
- Extraterritorial application of state criminal law.



# Aiding and Abetting – the Framework

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- Who counts as a principal?
- **Depends on what the state law criminalizes.**

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- Who counts as a principal?
- Depends on what the state law criminalizes.
- **Generally, state laws target abortion providers, not patients.**

# Aiding and Abetting

- **Example, Mississippi:** “Any person, **except the pregnant woman**, who purposefully, knowingly or recklessly performs or attempts to **perform or induce** an abortion in the State of Mississippi, ... shall be punished by imprisonment ... for not less than one (1) year nor more than ten (10) years.” MS Code § 41-41-45.

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- Under Mississippi’s law, prosecution would have to show the aidor and abettor assisted the abortion provider, not the patient.



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- What counts as an “offense?”
- Can an abortion performed in a state in which it is legal count as an “offense” in the state in which it is illegal?

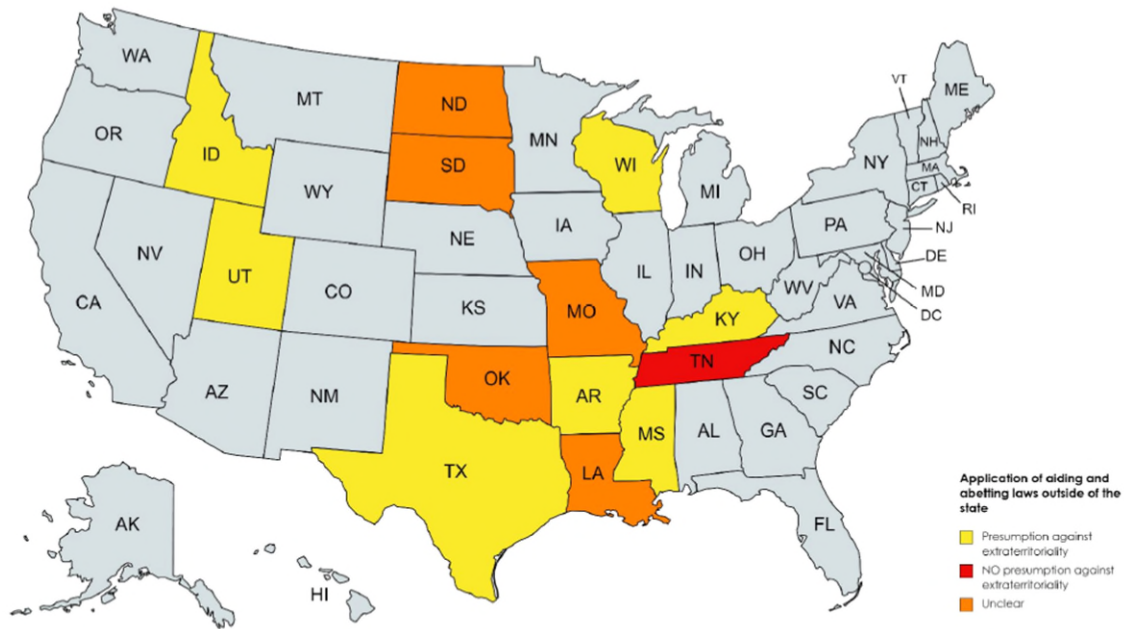
# Aiding and Abetting

- Extraterritorial application of state criminal law.

# Aiding and Abetting

- Extraterritorial application of state criminal law.
- State-by-state question of whether a state presumes that its laws apply outside its borders.

# Aiding and Abetting



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# Aiding and Abetting

- Shifting legal landscape.

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- “[I]t shall be unlawful for any person to perform or induce, or to attempt to perform or induce, an abortion on a resident or citizen of Missouri, **or to aid or abet, or attempt to aid or abet**, an abortion performed or induced on a resident or citizen of Missouri, **regardless of where the abortion is or will be performed.**”

# Aiding and Abetting

- Shifting legal landscape
- Missouri introduced legislation – HB 1854
- “[I]t shall be unlawful for any person to perform or induce, or to attempt to perform or induce, an abortion on a resident or citizen of Missouri, **or to aid or abet, or attempt to aid or abet,** an abortion performed or induced on a resident or citizen of Missouri, **regardless of where the abortion is or will be performed.**
- Bill contains a litany of ways in which one can aid and abet.

# Aiding and Abetting

- **Criminalizing conduct outside state borders raises Constitutional issues.**

# Aiding and Abetting

- Criminalizing conduct outside state borders raises Constitutional issues.
- *Dobbs*, Kavanaugh, J., concurring: “[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”

# Aiding and Abetting

- *Bigelow v. Virginia*, 421 U.S. 809 (1975).
  - Virginia outlawed publication of advertisements referring people to New York abortion providers. Newspaper editor convicted for violating that statute.
  - SCOTUS struck statute down on 1A grounds.
  - Virginia not permitted to “prevent its residents from travelling to New York to obtain those services or ... prosecute them for going there.”
  - “A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.”

# — Access to Information

# — Privacy protections and their limits

## Health Information Portability and Accountability Act (HIPAA)

- HIPAA prohibits covered entities, including health plans and most health care providers, from disclosing protected health information except as HIPAA expressly requires or permits.
- HIPAA permits disclosures when required by law and in certain circumstances involving law enforcement.
- Recent HHS guidance provides for a narrow interpretation of these exceptions:
  - Actual legal mandate
  - Enforceability by court
  - Disclosure of only what is needed to comply with that demand.

# — Privacy protections and their limits

## Americans with Disabilities Act (ACA)

- The ADA requires that medical information be treated confidentially and maintained separately from the employee's personnel file.
- These records can be shared with certain parties, including supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the Act. *See* 42 U.S.C. 12112(d)(3)(B); and 42 U.S.C. 12112(d)(4)(C).
- The ADA does not have the same limitations on disclosure of medical information without a court order that HIPAA does.



# Subpoena Compliance - Agenda

- Identify the subpoena issue.
- Discuss statutory scheme.
- States' responses/Constitutional issues.

# Subpoena Compliance

- The issue: complying with out-of-state subpoenas seeking abortion-related records.
  - For instance, Texas AG issues a subpoena to a NY-based employer. The subpoena seeks records relating to the employer's payment of employees' travel from Texas to NY to obtain a legal abortion. Must the employer comply?

# Subpoena Compliance

- Complying with out-of-state subpoenas.
  - Subpoenas are court orders, limited to jurisdiction in which they are issued.  
A subpoena from Texas would need to be enforced by a Texas court.

# Subpoena Compliance

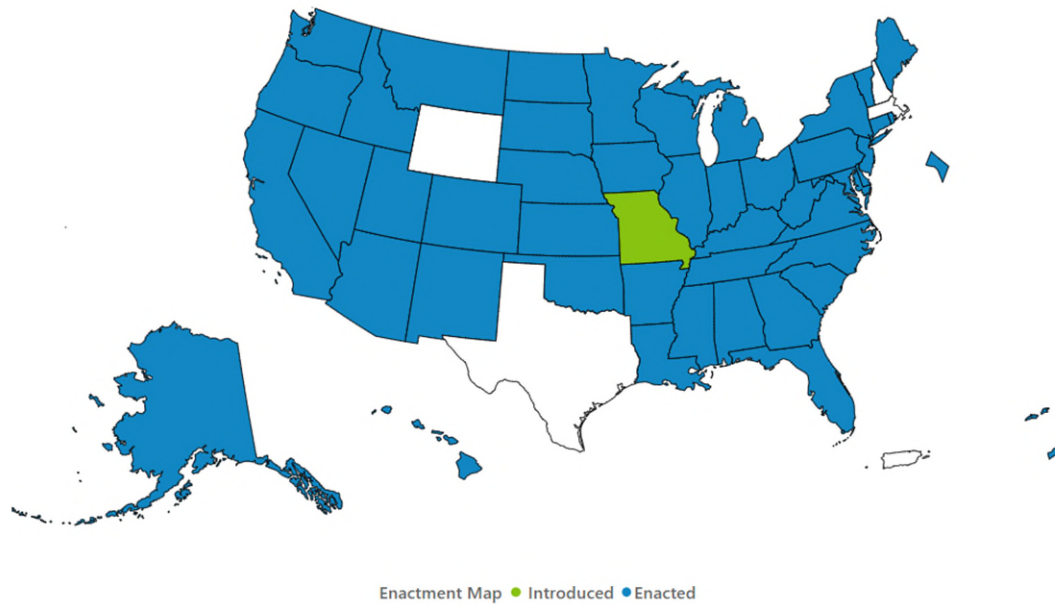
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- Complying with out-of-state subpoenas.
  - Subpoenas are court orders, limited to jurisdiction in which they are issued. A subpoena from Texas would need to be enforced by a Texas court.
  - To address enforcement issues arising from interstate subpoenas, 45 states have signed the Uniform Interstate Depositions and Discovery Act (“UIDDA”).
  - Formalizes and streamlines the domestication of out of state subpoenas.
  - This process would permit the Texas AG to have NY courts re-issue its subpoena under NY authority and jurisdiction.

# Subpoena Compliance

- Complying with out-of-state subpoenas – UIDDA enactment.



Credit: Uniform Law Commission, <https://my.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35>

# Subpoena Compliance

- Complying with out-of-state subpoenas con't.
  - UIDDA does not contain a provision that permits the receiving state from not recognizing the subpoena on the basis that the state disagrees with the investigation.
  - UIDDA-bound states, therefore, are open targets for investigating states to issue subpoenas and seek abortion-related records.

# Subpoena Compliance

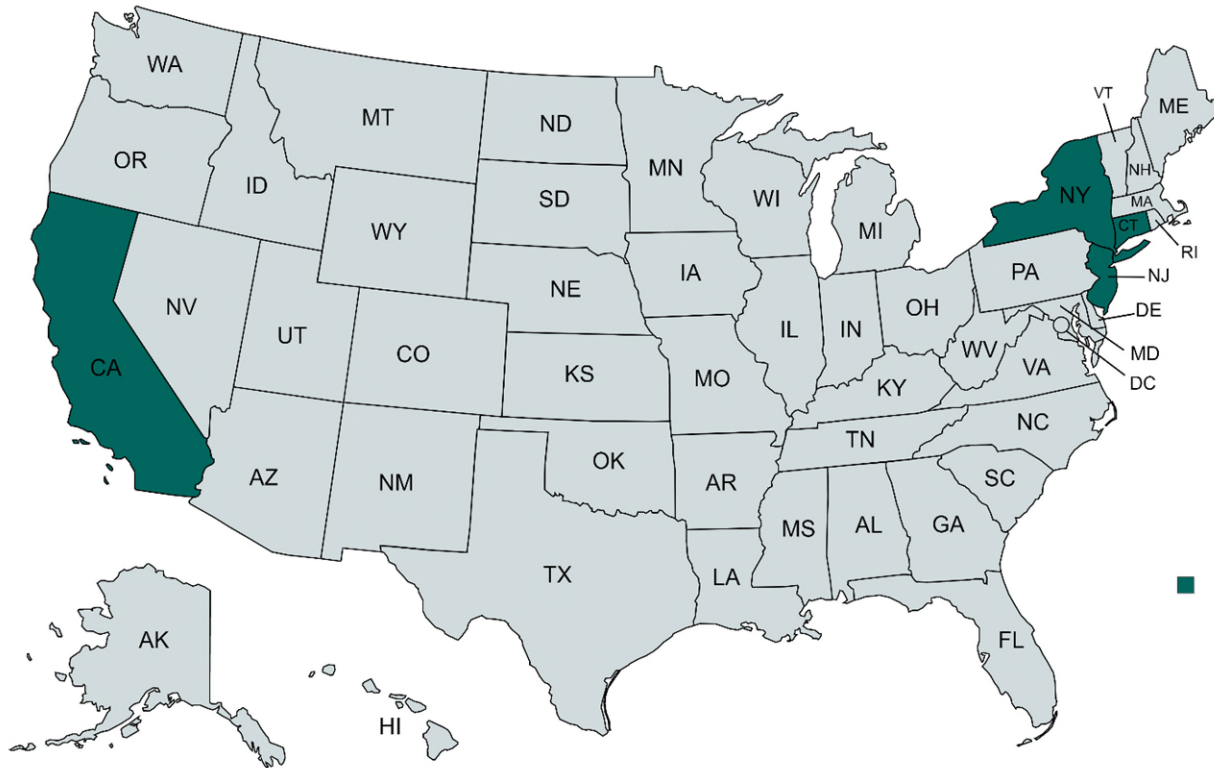
- Constitutional Issues/States' responses.
  - Full Faith and Credit Clause.
  - Requires recognition of out-of-state judgments.
  - Debatable whether FFCC applies to subpoenas, which are not judgments.



# Subpoena Compliance

- Constitutional Issues/States' responses.
  - UIDDA does not contain a provision that permits the receiving state from not recognizing the subpoena on the basis that the state disagrees with the investigation.
  - UIDDA-bound states, therefore, are open targets for investigating states to issue subpoenas and seek abortion-related records.
  - A number of states have passed legislation that addresses this loophole. NY and others refuse to enforce such subpoenas and exempt themselves from UIDDA for out-of-state, abortion-related subpoenas.

# States with protections against out of state subpoenas for abortion services.



# — What Now / What's Next

thank  
you