

Post-Dobbs Update - What Every Employer Needs to Know Now

September 7, 2022
Presented by Benesch Post-Dobbs Task Force

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Post-Dobbs Task Force

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Agenda

- Opinion
- Labor & Employment
- ERISA/Benefits
- Government Affairs
- Privacy
- Healthcare



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Labor & Employment

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Dobbs v. Jackson Women's Health Organization

- 6-3 decision: Justice Alito wrote the majority opinion, with separate concurrences from Justices Thomas, Kavanaugh, and Roberts, and dissent by Justices Breyer, Sotomayor, and Kagan.
- Held that there is no constitutional protection for abortion, overturning *Roe v. Wade* and *Planned Parenthood v. Casey*.

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Dobbs Decision

- Laws regulating abortion are entitled to a “strong presumption of validity” and will be upheld unless there is no “rational basis on which the legislature could have thought [the law] would serve legitimate state interests.”
- Kicks the power to regulate abortion back to Congress (which is not acting right now) and the states (which are actively enacting legislation).

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Concurrences

- Kavanaugh Concurrence: Argued that it would still be unconstitutional to prohibit travel to another state to seek an abortion, and unconstitutional to retroactively punish abortions.
- Thomas Concurrence: Suggested the Court should go further and reconsider other cases granting rights based on substantive due process, including the rights to contraceptives (*Griswold v. Connecticut*) and same sex marriage (*Obergefell v. Hodges*).

Why does the Dobbs decision matter to employers?

Four major legal considerations:

1. Patchwork benefits and compliance
2. Leave laws
3. Discrimination claims
4. Protected activity



Risk to Employers

- None of the current laws explicitly apply to abortions occurring outside of the respective states but some states (TX and OK), have civil style bounty laws permitting individuals to sue someone who aids or abets in provision of abortions in those states.
- Example: Texas Senate Bill 8 allows private citizens to file civil lawsuits against anyone suspected of performing or inducing an abortion, or anyone who “aids and abets” an abortion, with penalties of at least \$10,000 per abortion within four years of the procedure or prohibited action. Oklahoma law is similar.

Risk to Employers

- Employers who provide transportation services or other services that could be viewed as “aiding or abetting” an abortion, will need to take extra caution.
- Rideshare companies such as Uber and Lyft have committed to provide legal expense support for any drivers sued for taking individuals to an abortion clinic.



Risk to Employers

- ERISA preempts state laws, so there is some protection if offering travel benefit under ERISA.
- In current landscape no states have laws prohibiting offering travel benefits - as states attempt to apply laws on extraterritorial basis in other states, it will be an uphill battle for them to enforce those.



Leave Laws

- Americans with Disability Act (“ADA”): Pregnancy itself is not a disability, but if an employee experiences a disability due to a pregnancy or abortion-related condition, they may request an accommodation under the ADA. In that case, employers should follow the normal interactive process.
- Pregnancy Discrimination Act/Title VII: Must provide reasonable accommodations equivalent to what would be afforded to other employees similar in their ability or inability to work.

Leave Laws

- Family and Medical Leave Act (“FMLA”): Pregnancy itself is not a serious health condition as defined in the FMLA, but continuing treatment including any period of incapacity due to pregnancy can qualify as a serious health condition.
- Courts have also held that miscarriage is a serious health condition. See *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108 (W.D.N.Y. 1996).



Leave Laws

- Not decided whether abortion is covered under the FMLA, but medical or surgical abortion may be analogous to a miscarriage. Elective abortion may be a serious health condition if it results in an overnight stay or if there is continuing treatment.
- Applicable to employers with 50+ employees.



Medical Information

- Medical information, including information about pregnancy or abortion, should be treated as a confidential medical record and stored separately from an employee's general employment file, pursuant to the ADA and HIPAA.



Abortion Protected by PDA and Title VII

Pregnancy Discrimination

- 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.



Abortion Protected by PDA and Title VII

- Title VII also makes clear that an employer is not required to pay for health plan benefits for abortion except where (1) the life of the mother would be endangered if the fetus were carried to term, or (2) where medical complications have arisen from an abortion. 42 U.S.C. § 2000e(k).
- But nothing in Title VII precludes an employer from providing abortion benefits.

Abortion Protected by Title VII and PDA

- *Doe v. C.A.R.S. Protection Plus*, 527 F.3d 358 (3d Cir. 2008) - After termination, employee requested a one-week leave period from employment to hold a funeral. Employee was terminated while on leave, and the court determined that a supervisor's remark that the employee "did not want to take responsibility" may raise a reasonable inference that the abortion was a factor in terminating her employment in violation of Title VII.
- The Sixth Circuit has held similarly. See *Turic v. Holland Hospital*, 85 F.3d 1211 (6th Cir. 1996).

Pregnancy Discrimination Examples

- Multi-state employers should ensure that pregnant employees traveling to another state to obtain an abortion are treated the same as other employees traveling out of state for a non-pregnancy reason.



Pregnancy Discrimination Examples

- Dick's Sporting Goods announced it would sponsor staff abortions by providing up to \$4,000 in travel reimbursement to obtain an abortion. Dick's was named in a civil rights complaint filed by America First Legal, asking the EEOC to investigate and claiming that this was a benefit offered to employees who choose an abortion and there was no equivalent benefit to those pregnant employees who did not choose to have an abortion.



Religious Discrimination

- 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.
- Employees with religious objections to abortion may request exemptions from having to provide any contributions to policies that support employee travel or reimbursement for abortion or abortion services.

Religious Discrimination Examples

Carter v. Transportation Workers Union:

- Carter fired after union Transportation Workers Union president reported Facebook messages Carter sent her denouncing the union's participation in the Women's March.
- Eight-day trial held. Jury concluded Southwest retaliated against Carter and unlawfully discriminated against her and that her termination was motivated by her religious beliefs.
- Jury awarded Carter over \$5 million in damages. Southwest intends to appeal the verdict to the Fifth Circuit.



Protected Activity

- Speech in the workplace regarding abortion, including leave and benefit eligibility, 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.
- Could also be protected under state whistleblower laws.



Protected Activity

- 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.



Other Workplace Management Considerations



- Hearing from all the company's stakeholders – investors, employees, managers, customers – which will inform the company's position.
- Authentically stating leadership's views on the decision while seeking to maintain a culture of inclusivity and respect.
- Financial repercussions of the company's messaging could include changes in health care costs, hiring and retention challenges, and customer boycotts.
- Providing support to employees (e.g., EAP services or other mental health resources).

Other Workplace Management Considerations



- Reviewing handbooks, policies and procedures as well as retraining managers and employees on company policies governing codes of conduct and anti-discrimination, harassment and retaliation.
- Ensuring that policies and procedures are applied uniformly and that decision-makers know how to respond
- Running through scenarios with managers and HR:
 - An employee who comes to work with an anti-abortion message on his or her shirt?
 - An employee who tweets out an offer to drive co-workers to get an abortion from a state that has criminalized such actions?



Benefits/ERISA

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Government Relations

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The Need for Vigilance

- Legislative tracking and monitoring
- Legislative calendar assessment
- Political intelligence
- Direct lobbying



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Multi-Layered Approach: Federal

- Executive Orders
- Agency Decisions
- Congressional [in]action



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Multi-Layered Approach: State

- Prohibitions or restrictions
 - Trigger Laws
- Civil and criminal penalties
- Private right of action
- Restrict medication abortion
 - Restrictions on prescribers
- Reporting requirements
- Retraction/prohibition on Medicaid coverage
- Religious refusals
- Telehealth restrictions
- Parental consent
- Protecting the right
- Expand medication abortion
 - Expansion of prescribing authority
- Data protection
- Expansion of Medicaid coverage
- Telehealth expansion
- New funding measures
 - Security, training



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Multi-Layered Approach: Local

- Commitment not to prosecute
- Prohibition on expenditures
- Investigations of crisis pregnancy centers
- Diversion of city funding



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Advocacy Alignment

- Company values
- Workforce/talent strategies
- Customer and supplier relationships
- Risk tolerance
- Bottom line
- Internal and external communications plans
- And many more considerations...



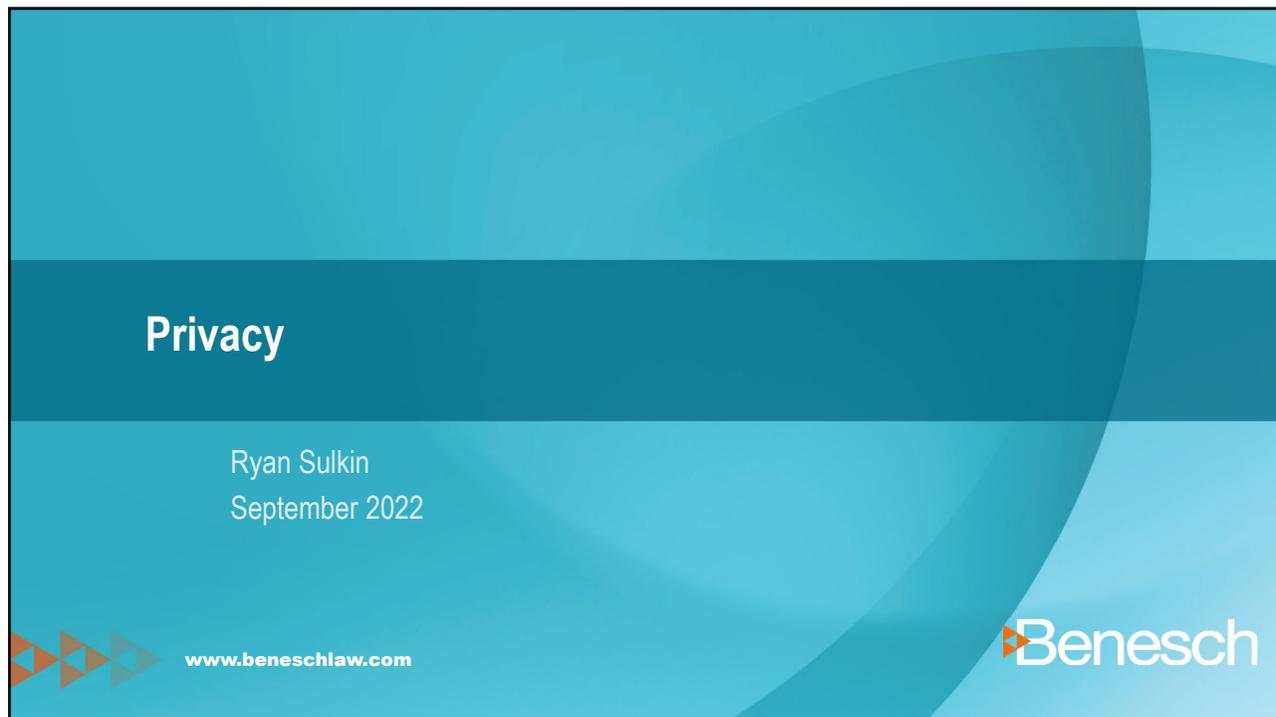
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Final Thoughts

- Verbiage matters!
- Outcome of elections
- Build and strengthen relationships with elected officials



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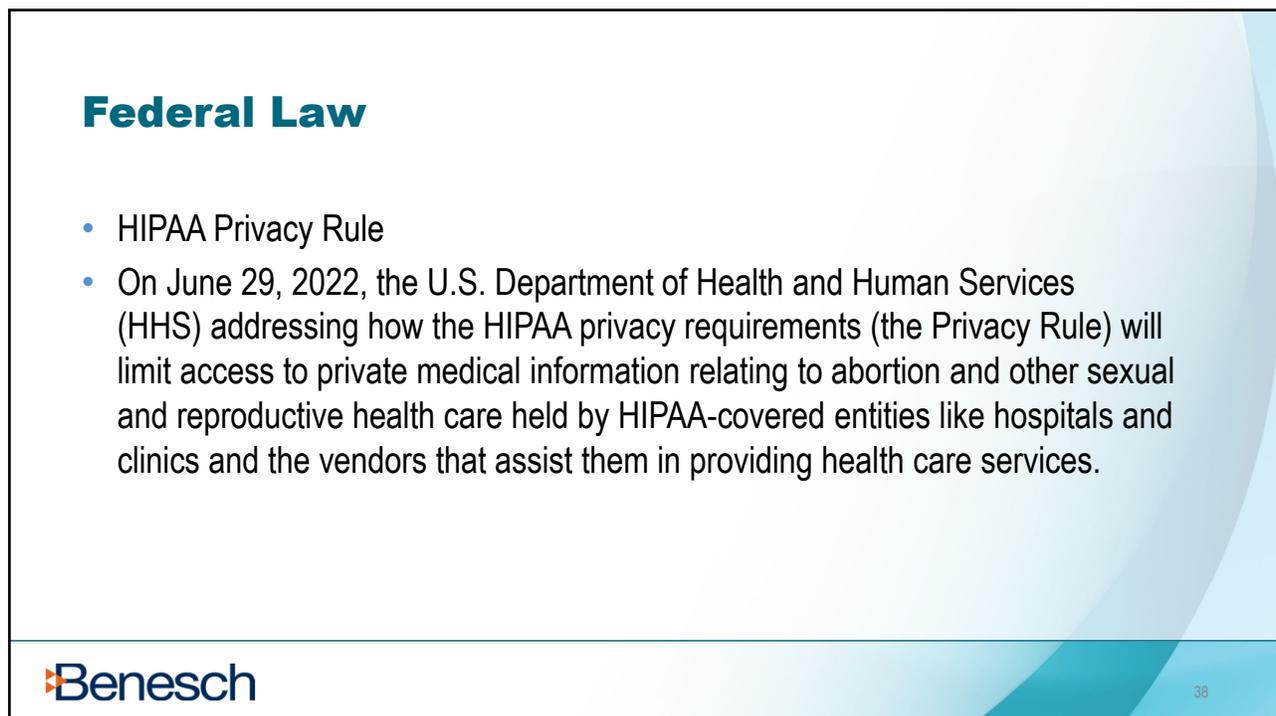
Privacy

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Federal Law

- HIPAA Privacy Rule
- On June 29, 2022, the U.S. Department of Health and Human Services (HHS) addressing how the HIPAA privacy requirements (the Privacy Rule) will limit access to private medical information relating to abortion and other sexual and reproductive health care held by HIPAA-covered entities like hospitals and clinics and the vendors that assist them in providing health care services.

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Some Protections

- The Privacy Rule permits but **does not require** a covered entity, consistent with applicable law and standards of ethical conduct, to disclose PHI if the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and the disclosure is to a person or persons who are reasonably able to prevent or lessen the threat. According to major professional societies, including the American Medical Association and American College of Obstetricians and Gynecologists, it would be inconsistent with professional standards of ethical conduct to make such a disclosure of PHI to law enforcement or others regarding an individual's interest, intent, or prior experience with reproductive health care.

Some Protections

- The Privacy Rule permits but **does not require** covered entities to disclose PHI about an individual, without the individual's authorization, when such disclosure is required by another law and the disclosure complies with the requirements of the other law. This permission to disclose PHI as "required by law" is limited to "a mandate contained in law that compels an entity to make a use or disclosure of PHI and that is enforceable in a court of law." Further, where a disclosure is required by law, the disclosure is limited to the relevant requirements of such law. Disclosures of PHI that do not meet the "required by law" definition in the HIPAA Rules, or that exceed what is required by such law, do not qualify as permissible disclosures.

Inherent Limitations

- "For example, a covered entity may respond to a law enforcement request made through such legal processes as a court order or court-ordered warrant, or a subpoena or summons, by disclosing only the requested PHI, provided that all of the conditions specified in the Privacy Rule for permissible law enforcement disclosures are met."

Inherent Limitations

- Remember, HIPAA will not extend to many forms of tracking conducted through non-HIPAA protected digital mediums:
 - Websites
 - Mobile apps
 - Chat rooms
 - Telecommunications carriers
 - Cookies, cookies, cookies

Additional Considerations

- Use of digital technology creates a permanent record that poses risk
- States will seek to change the playing field in both directions
- As a health care provider:
 - Have a plan and appropriate responses for when patient questions arise
 - Consider recordkeeping obligations

Uncertainty in Healthcare and the Resulting Potential for Investigations & Enforcement Actions

Mark Silberman
September 2022





The Future is Wrought with Uncertainty

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- There is likely to be a flurry of legislation and litigation
- Stay Aware of What is Going On
- Be Cognizant of the Timeline
 - What information was available when you made a decision?
 - Always have a reason for what you are doing
 - Principled objections matter – but know what you are doing – think things through.

Healthcare: Providers / Systems / Patients / Employers

- What is the landscape where you are?
- Are you dealing with multiple jurisdictions?
- Are you putting patients first (as best you can)?

Investigative / Enforcement

- Be prepared to make difficult decisions
- Know who you are going to rely on
- Consider who is investigating you? Do not assume they are there to help.