

Compliance Alert: Roe v. Wade Overturned

On June 24, the U.S. Supreme Court upheld Mississippi's restrictions on abortion, a ruling that may lead some states to enact severe abortion restrictions. Many employers will revise their employee health care benefits.

No Constitutional Right to Abortion

The Mississippi Gestational Age Act provided that "except in a medical emergency or in the case of a severe fetal abnormality," abortion is prohibited "if the probable gestational age of the unborn human being has been determined to be greater than 15 weeks."

In an opinion joined by four justices, Justice Samuel Alito Jr. said, "We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment."

Dissent

Justice Stephen Breyer wrote in a dissent joined by two other justices, "For half a century, Roe v. Wade, 410 U. S. 113 (1973), and Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833 (1992), have protected the liberty and equality of women. Roe held that the Constitution safeguards a woman's right to decide for herself whether to bear a child. Roe held that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life. It could not determine what the woman's future would be."

Breyer continued: "The court's opinion says that from the very moment of fertilization, a woman has no rights to speak of. A state can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the court has often stated, protecting fetal life is rational, states will feel free to enact all manner of restrictions."

Employers grapple for a response

Employers across the country are struggling with what to do about Roe v. Wade being overturned.

Jonathan Segal, an attorney with Duane Morris in Philadelphia and New York City advises "It is generally recommended that employers refrain from giving definitive answers on the impact of the decision on health insurance coverage for abortions. With the specter of not only civil but also criminal liability under state law, coupled with the complexities of ERISA [Employee Retirement Income Security Act], it is reasonable for employers to state the employer is studying the issue and will provide more specific guidance as promptly as possible."

Some Companies Will Cover Abortion-Related Travel Expenses

Some companies may add coverage of travel expenses to obtain medical procedures—including abortions—not available nearby or consider changes to parental leave and caregiving benefits. Self-insured companies are subject to ERISA, rather than state law, and have broad flexibility in structuring health benefits. Fully insured health care plans are subject to state regulations and have less flexibility in benefit design.

It may become common for employers to have some sort of health care access policies in place to help employees travel where needed to obtain medical care. Several major companies have already announced that they will cover abortion-related travel expenses, including Amazon, Citigroup, Apple and Levi Strauss.

Travel expenses should be paid through the employer's group health plan so as not to inadvertently create a new, standalone group health plan. Employers that opt to provide abortion-related travel expenses will want to be clear in what situations travel expenses will be paid. For example, will such expenses be paid only for employees residing in states where abortions become unlawful? Is travel limited to the closest state that allows abortions? Another issue is state laws that may contain restrictions on aiding and abetting abortion, and whether or not companies violate that law by helping individuals travel out of state to obtain a legal abortion. Employers will want to think about these issues and clearly document their travel expense payment policy.

Employers will need to consider where they are located, whether it is important to their workforce that they have such travel policies in place, and whether or not they can withstand any legal or political pushback against their policies.

If you have any questions, please feel free to contact your EBS representative.

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