Unanswered Questions after *Dobbs* Part VI: Employment

Client Update
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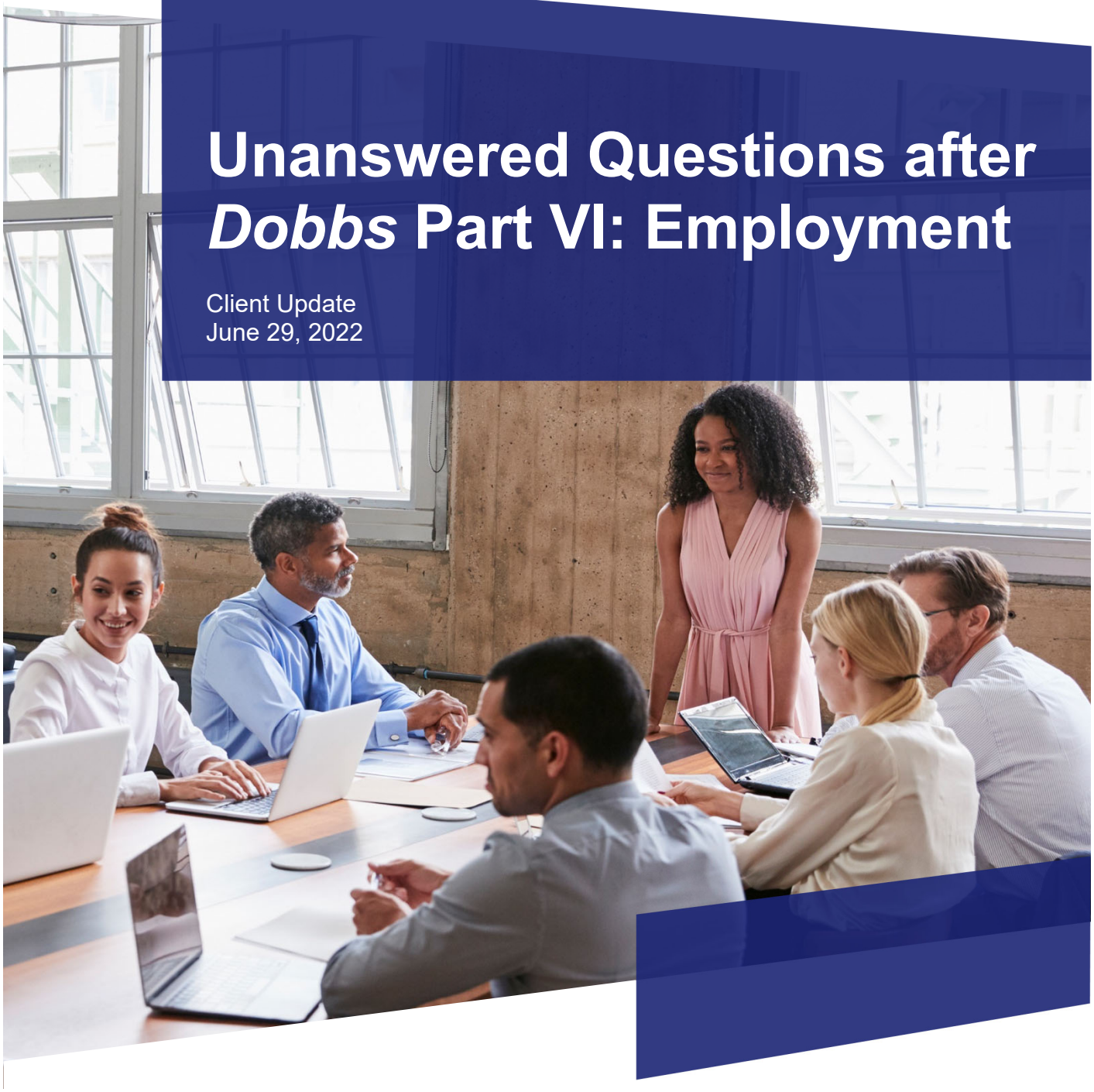

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On June 24, 2022, the Supreme Court released its much-anticipated opinion in *Dobbs v. Jackson Women's Health Organization*, overturning nearly 50 years of precedent. A 6-3 Court reversed its prior rulings in *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) to hold access to abortion is not a constitutional right. In our sixth installment of "Unanswered questions after *Dobbs*," Reed Smith's Reproductive Health Working Group addresses the potential impact of the Dobbs opinion on employers, given that they are not immune from the impacts of the decision. As discussed below, there are a number of difficult questions companies need to consider in the short term.

Should employers take a position?

Many employers are asking if they need to take a position on the decision – whether internally or publicly facing. Even though employers are not legally required to take a position on the social issue of abortion, they may feel pressure from their employees, the board, and other stakeholders to do so. Indeed, a number of employers have already publicly announced that they disagree with the Court's decision and have stated that they will provide support to employees who wish to obtain an abortion. Other employers, however, may not feel comfortable "taking a side" on the issue out of concern of alienating or losing employees and customers who may not share the same view.

Even if an employer does not express a view on the opinion, it should still consider whether an employee-specific communication acknowledging the opinion and how it may impact some people makes sense. Alternatively, the employer can choose simply to allow its policies surrounding the issue to speak for themselves without issuing any type of statement. There is certainly not a one-size-fits-all approach to answering this question.

How should employers manage employee reaction to *Dobbs*?

For many employers, one of the earliest considerations stemming from the opinion will be deciding how best to manage their workforce's reaction to the polarizing opinion. Employers should tread lightly, because there are a number of complicated issues involved. For example, if employees are discussing with their coworkers the employer's response to or its position on the Court's opinion (or the lack of a response or position), they likely are engaging in protected concerted activity under the National Labor Relations Act (NLRA). Similarly, if employees are talking about the company's benefits or policies with their coworkers in light of *Dobbs*, then that behavior is likely protected concerted activity. Note that the NLRA protects both unionized and non-unionized employees' rights to collectively discuss terms and conditions of employment at work, off-duty, and on social media. In comparison, if employees are more generally discussing the Dobbs opinion with their coworkers – with no tie to the workplace – then it is likely not protected concerted activity. However, because the current Biden-appointed NLRB General Counsel has taken an expanded view of topics that are connected to the workplace, this is an issue to be navigated with caution.

Protected concerted activity would probably not include an employee who makes a public comment on the news or on a company's website or social media account that disparages the company for its position on abortion. However, given that this type of activity can quickly turn into protected concerted activity, employers should consider consulting with counsel before taking any adverse employment actions against employees for engaging in this type of activity.

Of course, employers should not discipline a group of employees for reacting to the decision just because those employees are "pro-choice"; nor should an employer discipline employees engaging in the same conduct because they are "pro-life." Additionally, employees should not be permitted to discriminate or harass coworkers based on their view about abortion. Employee complaints about this type of conduct should be investigated thoroughly just as any other discrimination or harassment complaint.

What about claims involving religious and political opinion discrimination after *Dobbs*?

Although the First Amendment right to free speech does not extend to the private workplace, statutes like Title VII and the NLRA may cover some types of employee expression. Religious discrimination claims may arise because the issues of abortion and religion can be intertwined. For example, employees who are anti-abortion based on religious views may try to assert a claim that they are offended by their employer's policies providing support for employees who want to obtain an abortion and that somehow the employer policy creates a hostile work environment. Or a terminated employee might claim that they were discriminated against and terminated for openly disagreeing with the employer's public position on the issue, which was not in line with the employee's religious beliefs. Although there is no "special protection" for employees with certain religious beliefs to speak up that others do not have, these issues may prompt some employees to claim they were discriminated against based on their religion.

Under Title VII, an employer may be held liable for the actions of a supervisor. If a supervisor treats an employee differently or imposes their religious views on an employee, those actions may become the basis for a claim of discrimination and/or a hostile work environment. It is essential that employers take steps to educate supervisors on such workplace issues in light of the Dobbs opinion and as otherwise required by state or local laws. Notably, some states have a lower bar for discrimination than provided for by federal laws.

In addition to religious beliefs, views on abortion are oftentimes rooted in political beliefs. Even though an employee's political beliefs are not protected under federal law, they may be protected under certain state laws. For example, in California, employers are prohibited from adopting a rule or policy that, among other things, controls or directs, or tends to control or direct, the political activities or affiliations of employees. Given the Court's recent decision, there may be a situation in which an employee voices support for a political party or candidate that is aligned with the employee's view on abortion, and the employee could claim that the employer's policies and/or actions restrict their political activities or affiliations.

What policies should companies review?

Employers should consider reviewing their employment policies relating to discrimination, harassment, social media, off-duty conduct, and dress code/uniform. Employers may also consider revising their policies to provide certain benefits to employees seeking an abortion. For additional information, see Unanswered questions after Dobbs Part IV: Employee Benefits.

As noted above, employees whose views on abortion differ from that of their employers may raise religious or political belief discrimination and/or harassment claims. Employees may also turn to social media to discuss their employer's position (or lack thereof) on abortion with their coworkers and the public. Some may even go so far so to make unauthorized statements that appear to be on behalf of the company. Employees may also choose to make their views known by wearing buttons or other types of insignia to work. Employers need to ensure that their policies strike the right balance of managing the workforce while not running afoul of applicable law.

Employers should also consider updating their relocation procedures and policies. An employee may want to relocate temporarily or permanently to a different state based on the employee's state's abortion laws. It is important to have a systematic approach to address these requests to create clarity for employees and to ensure that employees are treated similarly regardless of their views on abortion or their reasons for wanting to relocate.

In addition to reviewing and updating policies, it is important for managers to understand how to avoid, limit, and address possible discrimination claims based on categories such as religion, political beliefs, pregnancy, and caregiver/familial status. Managers, even in workplaces that are not unionized, should be trained regularly on recognizing protected concerted activity. Managers also need to understand confidentiality obligations with respect to employee health records.

Employees understandably may have questions about the impact of *Dobbs* on health benefits or other terms and conditions of employment. Companies should equip all of their key stakeholders – including leadership, corporate communications, and human resources – with tools to manage these communications and respond to inquiries on a consistent basis.

Stay tuned for our next installment of “Unanswered questions after *Dobbs*.” Please reach out to a member of the Reed Smith Reproductive Health Working Group or to the Reed Smith attorneys with whom you regularly work for more information or guidance on these or related issues. Reed Smith will continue to monitor developments and provide updates in response to the *Dobbs* opinion.

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