

Unanswered Questions after *Dobbs* Part VII: Insurance coverage issues

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Unanswered Questions after *Dobbs* Part VII: Insurance coverage issues for policyholders

In our seventh installment of “Unanswered questions after *Dobbs*,” Reed Smith’s Reproductive Health Working Group addresses the potential impact of the *Dobbs* opinion on commercial policyholders.

Following the U.S. Supreme Court’s opinion in *Dobbs*, more companies have stepped up to offer benefits to employees who need to seek reproductive care in other states. Questions and issues will continue to arise that might implicate corporate liability insurance programs, especially as states with restrictive abortion laws threaten to impose civil and criminal penalties on companies seeking to provide benefits to their employees.

This installment provides examples of questions and insurance coverage issues that commercial policyholders and employees may grapple with in the aftermath of the Court’s opinion.

Unanswered Questions post-*Dobbs*

- States with restrictive abortion laws might impose criminal and civil liability on employees seeking to leave the state to receive treatments made illegal in their home states. Will any of those liabilities, including defense costs, be covered under liability insurance available to employees?
- Some state lawmakers are threatening to impose liabilities on businesses that offer benefits for their employees to travel out of state for healthcare services now made illegal in their home states. How might corporate insurance policies respond to such newly created liabilities?
 - To the extent lawsuits assert claims arising from alleged harm to a fetus, or otherwise allege “bodily injury,” would such claims trigger potential coverage under liability policies covering claims for liabilities arising from bodily injuries?
 - Some state lawmakers are considering introducing legislation to authorize shareholders to sue corporations for expending corporate funds on benefits for employees who need to travel out of state for prohibited medical care, such as abortion. How will D&O insurance respond to such claims?
 - Lawmakers have also threatened to pass laws banning companies from doing business in the state if companies provide benefits that help facilitate out-of-state abortion services. If companies provide such benefits and then face a local ban, that could prompt litigation from shareholders and perhaps others who depend on the company’s services in the particular state. For example, if a company is banned from doing business in a state and that company has contractual or other obligations it cannot perform as a result, then the company may face liability arising from that situation. Whether insurance for such liabilities exists would have to be evaluated.
 - Lawmakers have even threatened to pass legislation to prohibit liability insurance companies from providing coverage to corporations in connection with lawsuits relating to the provision of benefits for prohibited medical procedures, such as abortion. Are such laws enforceable? Will they be enforced if a coverage suit is filed in the jurisdiction that permits abortion services?

- Companies that are offering additional benefits for employees to travel out of state may face privacy issues if employees must provide information about their need for such services to employers in order to obtain benefits, or if the state seeks to require those companies to disclose the names of employees seeking such benefits, among other scenarios. Further, to the extent there is any retaliation, harassment, or other adverse consequences against an employee who takes advantage of such benefits or is suspected of doing so, then such conduct might give rise to employee claims that could potentially fall under an employment practices liability policy.
- Should companies proactively address these issues with their insurers/request assurances that insurers will provide coverage for liabilities associated with companies that decide to offer additional benefits for employees to travel out of state?

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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