

## Government Controversies and Public Policy Litigation

# SCOTUS Overrules *Roe v. Wade*:

## Part I: Potentially Wide-Ranging Impact on Companies Navigating Employee Benefits, Privacy Protections, and Law Enforcement Demands

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On June 24, 2022, the Supreme Court issued its [opinion](#) in *Dobbs v. Jackson Women's Health Organization*. Authored by Justice Alito, the decision, which hewed closely to the [draft opinion](#) that was leaked on May 2, 2022, upheld the Mississippi abortion ban at issue (6-3) and further held that the Constitution does not grant a right to abortion (5-4), overturning the landmark decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>[1]</sup> Four justices—Thomas, Gorsuch, Kavanaugh, and Barrett—joined Alito for a 5-4 holding overturning *Roe*. This opinion will have far reaching impact on the “liberty and equality of women” across America, as Justices Breyer, Sotomayor, and Kagan argue in their dissent.<sup>[2]</sup> Additionally, Justice Thomas’s concurring opinion indicates that the Court’s work may not be done with regard to reevaluating its other key substantive due process precedents that read a privacy right into the Constitution, including rights to contraception and same-sex marriage.<sup>[3]</sup>

Immediately, the Court’s *Dobbs* decision means that there is no longer a federal constitutional right to an abortion, and thus abortion procedures and medication will be governed by the laws of each state. Access to abortion is expected to be severely restricted or banned outright in nearly half of the states. In [Part II](#) of this alert, we discuss the status of abortion laws in states across the country.

With this dramatic shift in the legal landscape, many in the private sector have taken steps to protect access to and the privacy of individuals seeking reproductive health care in America. However, those actions are not without legal risk. Companies may face legal or political retribution for such action through the statutes themselves, investigations by state law enforcement officers, subpoenas or data requests, and punitive, retaliatory action in unrelated spheres.

Jenner & Block has supported reproductive rights and the right to an abortion through extensive work on behalf of our clients and in our pro bono work, and is employing that experience, as well as our deep work in investigations and compliance, to advise our corporate clients who are navigating this shift in the law on a myriad of complex issues, including advising:

- A diverse range of companies interested in supplementing their employee benefits to ensure employees have the funds to travel to states to access legal abortion care;
- Companies that may be involved in supporting travelers seeking to obtain safe and legal access to abortion;
- Health care providers who are working to understand whether their continued provision of abortion care or medical consultations, which include information about abortion care, will lead to criminal or civil liability in the states they serve; and
- Technology companies wanting to ensure that the privacy of their users is protected or concerned

that use of their platform could put users at risk of being prosecuted or that use of technology services to provide greater access to care could be alleged to be “aiding and abetting” an abortion.

Below we discuss the risks of which companies should be aware, and provide guidance for how companies can proactively respond to this changing legal landscape.

## I. Risks for which Companies Should Prepare

In the piecemeal and uncertain environment of abortion law in a post-*Dobbs* America, risks for companies can vary significantly even within states with abortion bans. State attorneys general and district attorneys have broad [discretion](#) in how they enforce state abortion statutes. Many state and local law enforcement agencies are primed to take action: Texas Attorney General Ken Paxton, joined by attorneys general from 23 other states,<sup>[4]</sup> filed an [amicus brief](#) in *Dobbs* in support of Mississippi’s abortion ban. These attorneys general may be more likely to take enforcement action when permitted. Local prosecutors in each state will handle most enforcement; some will almost certainly enforce the laws promptly. In fact, Attorney General Paxton issued a [statement](#) indicating that district attorneys could immediately enforce the state’s pre-*Roe* ban.

Conversely, however, some prosecutors in states with abortion bans have publicly stated that they will not enforce state abortion restrictions, including [certain district attorneys](#) in Texas and Louisiana. A list of 70 attorneys general and district attorneys who have vowed not to prosecute abortion offenses is available [here](#).

Within this context, the likely greatest legal risk for companies based on these bans is the threat of being caught up in civil investigations launched by state attorneys general and/or criminal investigations led by district attorneys, and the subpoenas and data requests that may flow from them. However, companies, particularly high-profile companies, may also risk liability from the statutes themselves, or political retaliation from action the companies take to protect the privacy and reproductive health rights of their employees and consumers.

### A. Subpoenas or Civil Investigations from State Attorneys General or Civil Litigants

As prosecutors and civil litigants—who are provided authority to enforce abortion laws under state statutes—seek to build their cases, they will likely seek to gather evidence of health, commercial, and location data through subpoenas or civil investigations. While these investigations may seek to gather information from a wide range of companies, tech companies may provide a particularly attractive target as prosecutors seek internet search histories, location data, and/or health information stored on smartphones, personal computers, or in the cloud. States have used this type of data in abortion-related investigations before, including in [Missouri in 2019](#). Attorneys general might not only pursue information from third-party tech companies who have data about those under investigation, but also potentially consider such companies potential targets who—as discussed further below—aided and abetted conduct prohibited by state restrictions.

#### *Health Data*

Subpoenas or warrants could seek health data stored on an app or device, or information stored by tech companies. For instance, over twenty percent of women use a female health app that can predict pregnancies or track pregnancy progress. Some of these apps have [sold](#) data to third parties and such apps may have different levels of privacy protection. This data could be used to indicate when a woman was, and then was not, pregnant.

#### *Location Data*

Location data will likely be at issue, too, especially as women consider traveling across state lines for abortion care. Location data can [allow](#) law enforcement to determine if a person has visited a clinic or traveled out-of-state to a state where abortion is legal; even when data is anonymized, reporting has found that identification is relatively [simple](#). At least one advertising company has already [used](#) ad-

targeting location technology to send micro-targeted messages at women in abortion clinics. Therefore, some activist groups are simply [advising](#) people seeking an abortion to leave their smartphones at home.

### *Travel Records*

Similarly, law enforcement could use travel records as a proxy for location data: by seeking information from credit card companies or travel companies such as hotels, buses, and airlines, they could determine when and where a woman traveled, raising similar risks as location data.

### *Internet History and Activity*

Information from those who clicked on ads or other links on an abortion providers' website, or even the website of organizations providing information about how to seek an abortion, could be claimed by prosecutors as evidence that an individual is seeking an abortion. Information of this nature could be shared with or in the possession of tech companies through normal data collection and ad processes. Prosecutors could also seek information such as [search histories](#), payment histories, or messaging or email information in order to identify people seeking an abortion or who assisted them in doing so.

Law enforcement and civil litigants exercising "private attorney general powers" could access this information in several ways. Data brokers already [sell](#) all of this data, and information on abortion clinic visitors particularly—and since this information is sold on the open market (i.e., no subpoena required), private individuals can report on other people's abortions for financial gain. This practice is now [incentivized](#) in Texas, which provides a right to sue clinics, doctors, nurses, and those that drive a woman to get an abortion for at least \$10,000.

Law enforcement—and, to a lesser extent, civil litigants—could also issue subpoenas or warrants to gather such information. Law enforcement warrants could [include](#) geofence warrants and keyword search warrants, both of which request information on every device that fits a certain criteria (i.e., location at a certain place or time, or who searched for a certain term). Again, tech companies will be particularly attractive targets.

### B. Aiding and Abetting Liability

As noted above, attorneys general and others may also seek to hold companies liable as aiding and abetting violations of state abortion prohibitions. Generally, a person incurs aiding and abetting liability when he or she assists in the violation of an action that would give rise to criminal or civil liability. An individual can be liable for criminal aiding and abetting liability, civil aiding and abetting liability, or both, depending on the state. The authority for charging or suing someone for aiding and abetting can arise from either general state laws that prohibit aiding and abetting a criminal or civil offense, or specific state laws that prohibit aiding and abetting an unlawful abortion.

In states that have banned abortion, companies that help their employees travel to obtain an abortion procedure or otherwise aid in their procurement of abortion-inducing drugs may be accused of being accomplices to unlawful abortion. The potential for such liability will be highly dependent on state law. Under current law, it remains lawful to assist a person in traveling to obtain an abortion in a state where abortions are legal. However this landscape could quickly shift. If states criminalize out-of-state travel for abortions, as discussed in [Part II](#) of this alert, companies' payment for travel may raise new risks, with the issue noted in Justice Kavanaugh's concurrence related to the constitutional right to travel becoming a primary defense for individuals and companies that may have assisted them in out-of-state travel.

### C. Racketeer Influenced and Corrupt Organizations (RICO)

Although no such laws are currently in place, activist groups are [urging](#) states to use Racketeer Influenced and Corrupt Organizations (RICO) statutes to further criminalize those who assist women in seeking an abortion. Other groups are [encouraging](#) states to draft new laws similar to RICO statutes for abortions. These provisions, such as in the [model law](#) drafted by the National Right to Life Committee,

increase aiding and abetting liability to mailing abortion pills or providing a website with guides on how to obtain an abortion, and would create liability for any person or entity that regularly assisted individuals with accessing an abortion.

#### D. Political Retaliation

If a company takes a pro-choice stance, they should be prepared for potential political retaliation. For example, lawmakers in Texas have [promised](#) “swift and decisive action” against businesses that help their employees get abortions in other states in response to Lyft’s pledge to help residents of Oklahoma and Texas seek abortion care in other states. This retaliation could take many forms. In addition to liability like those described above, lawmakers could pass legislation creating business consequences for businesses that support abortion rights, such as [barring](#) corporations from doing business in the state if the company pays for abortions in states where abortion is legal, creating tax consequence, or [passing](#) ostensibly unrelated punitive laws that would affect the company.

#### E. Employee and Shareholder Expectations

As the employee backlash against Disney’s failure to take an immediate, strong stance against Florida’s “Don’t Say Gay” law demonstrated, staying neutral in the face of fundamental privacy and equality rights may lead to a backlash from employees who expect their employers to stand up for their rights, despite the controversy. This is particularly true if a company has previously made value statements on other high-profile issues. Further, potential employees may consider a company’s stance on abortion access, or the practical healthcare coverage of abortions, in determining whether or not to come to a company. In addition, consumers may [expect](#) companies to take a stance on issues, and boycott or avoid companies that do not.

Because almost every company will need to resolve what it will cover in its employee health plan, and will possibly be faced with employees needing to travel out of state for care or being prosecuted for seeking care or aiding and abetting an abortion, it will be very difficult for any company to stay completely on sidelines.

Pressure will not just come from employees and consumers, and those who shed the spotlight on it. It could also stem from shareholders. Shareholder proposals around reproductive rights have [gained traction](#) in recent years at top companies. As such, companies may face shareholder pressure to disclose threats against employees’ reproductive rights. This is particularly true where companies have made affirmative statements about their values that would lead to shareholders expecting the company to be forward leaning in providing access to reproductive health care: shareholders have in recent years begun to demand audits where a company makes certain statements about racial equity values, presumably makes money off the branding of those values, and then do not take actions consistent or sufficient to meet those values. Shareholders could demand similar action in the context of abortion access.

## **II. Proactive Steps Companies Can Take**

Companies can also take affirmative steps to protect their employees, to take a proactive stance on the issue, and to avert employee discontent.

#### A. Steps to Protect Employees

Dozens of major companies have already taken steps to provide access to reproductive health care in the face of this decision.<sup>[5]</sup> Companies may consider taking proactive measures to help their employees who are facing restricted access to reproductive healthcare including:

- Provide employee benefits for out-of-state travel to access abortion providers.
- Provide relocation assistance to employees to move from a state that restricts abortion access to a state that provides abortion access.

- Facilitate access to family planning services.
- Ensure that insurance coverage includes family planning.
- Consider what data the company collects and maintains.
- Support employees in their First Amendment right to assemble and express their views through protest for reproductive health care, including abortion rights.

Companies taking these steps may want to consult with experienced counsel, to consider and mitigate the kind of aiding and abetting risks that these steps—important as they are to the company and its employees—could create.

## B. Steps To Protect Privacy of Consumers

Companies should consider how the data they collect could be used by law enforcement to prosecute or civilly investigate potential violation of state laws banning or restricting abortion, and make a plan for how they will respond to government requests for such information. A company should also think carefully about how it responds to government requests for information that could implicate abortion-related data. How a company handled data used in an abortion-related civil or criminal investigation could become the basis for scrutiny by state attorneys general, Congress, civil litigation, and the company's own employees and shareholders.<sup>[6]</sup>

If authorities request data, companies should inform the individuals under investigation unless otherwise prohibited by law. Companies can also work with their counsel to determine the best policies for responding to such inquiries. For example, a company could decide that it will not comply with any voluntary requests and will only produce data when required by a subpoena. At a minimum, a company should have a well-considered and consistent policy for responding to requests/subpoenas, which could include providing additional process/privacy protections for confidential information, such as health records.

And some companies may want to be ready to go on offense, and be prepared—in the right circumstances—to bring affirmative litigation to enjoin attorneys general or others who might take inappropriate steps to interfere with the rights of the company, its employees, or its consumers.

## **III. Conclusion**

The Supreme Court's decision in *Dobbs* overturned a nearly 50-year-old precedent and ushered in a sea of uncertainty across the states. Major American companies will not be able to avoid becoming involved in this shifting and conflicting legal landscape. Companies will need to consider the risks and issues described above as they determine steps they may want to take to support employees and protect customer privacy.



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[1] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022).

[2] *Dobbs*, 2022 WL 2276808, at \*71 (Breyer, J., Kagan, J., & Sotomayor, J., dissenting).

[3] *Dobbs*, 2022 WL 2276808, at \*58 (Thomas, J., concurring).

[4] Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

[5] See, e.g., Mark Sullivan, *These tech companies are pledging to pay for abortion travel*, FASTCOMPANY (June 24, 2022), <https://www.fastcompany.com/90764437/these-tech-companies-are-pledging-to-pay-for-abortion-travel>; Herb Scribner, *These companies are helping employees access abortion*, AXIOS (June 24, 2022), <https://www.axios.com/2022/05/05/abortion-travel-benefit-uber-apple-amazon-lyft>.

[6] On June 21, 2022, Senator Wyden (D-Oregon) and others introduced a bill called the My Body, My Data Act, which creates a national standard to protect personal reproductive health data and would be enforced by the Federal Trade Commission. Given the composition of the Senate, the bill is not expected to pass. Additionally, Senator Elizabeth Warren (D-Massachusetts) has also introduced the Health and Location Protection Act, which would ban data brokerage firms from selling or transferring location and health data. It similarly is not expected to pass. See Rebecca Klar, *Roe v. Wade reversal spurs Democrats' call for data privacy protections*, THE HILL (June 24, 2022), <https://thehill.com/policy/technology/3536388-roe-v-wade-reversal-spurs-democrats-call-for-data-privacy-protections/>.

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