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Legal Compliance in a Post-*Dobbs* World

E. Pierce Blue

Christina N. Cahill

UT LAW NONPROFIT ORGANIZATIONS INSTITUTE

Legal Compliance in a Post-Dobbs World – January 19, 2023

E. Pierce Blue – Morgan Lewis (pierce.blue@morganlewis.com)
Christina N. Cahill – Polsinelli (ccahill@polsinelli.com)

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Morgan Lewis

INSIGHT

EVOLVING LAWS AND LITIGATION POST-*DOBBS*: THE STATE OF REPRODUCTIVE RIGHTS AS OF JANUARY 2023

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AUTHORS

Sharon Perley Masling, E. Pierce Blue, Saghi Fattahian, Jonathan Zimmerman

The US Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* set off a series of changes in reproductive health law across the country. As we transition to a new year and a new Congress, we provide a summary of where the law stands now and what employers can expect in 2023.

Justice Samuel Alito's majority opinion in *Dobbs* asserted that overturning *Roe* and *Casey* would simplify the law around abortion by removing federal oversight and placing it entirely in the hands of the states. Instead, the immediate practical result of the decision has been increased uncertainty.

The web of state and local laws regulating abortion coupled with extensive litigation created a confusing legal environment that even experts have difficulty tracking. Employers have had to grapple with this uncertainty while also responding to demands from employers and consumers to take action in this area. There is little reason to expect things to improve in 2023, as the law remains in flux and there are plenty of opportunities for further disruption.

STATE OF THE LAW

Laws Restricting Reproductive Rights

Twenty-five states have laws in place that restrict access to abortion beyond the limits created by *Roe* and *Casey* (i.e., earlier than fetal viability). The scope and enforceability of many of those laws remain in question, though, owing to ongoing litigation.

As of this writing, there are 12 states^[1] with criminal laws in force that restrict nearly all forms of abortion. Several of those laws are subject to ongoing legal challenges. Another four states^[2] have similar criminal prohibitions against nearly all abortion, but those statutes are currently subject to temporary injunctions pending the resolution of legal challenges to their constitutionality under state law.

Three states^[3] have criminal laws prohibiting abortion after the detection of a fetal heartbeat, which is roughly six weeks post-fertilization. All three are subject to ongoing litigation and two^[4] are currently enjoined from

enforcement.

Two states[5] have criminal laws prohibiting abortion after 15 weeks. In one of those states, Arizona, there was also a campaign to revive the state's pre-Roe criminal law that banned nearly all forms of abortion. The Arizona Court of Appeals, however, ruled in December 2022 that the 15-week law effectively created an exception to the old ban and therefore the state could not use it to prosecute persons who complied with the terms of the new law. In addition, Arizona's recently elected attorney general pledged in her campaign to not enforce the pre-Roe law.

Four states[6] have criminal laws prohibiting abortion after 20 weeks. Three of those laws are currently in force while one, Montana, is subject to a temporary injunction.

Several of these states have multiple criminal laws in place. Kentucky has both a near-total ban and a six-week ban. Arizona has a 15-week ban and a pre-Roe law against nearly all abortion. North Carolina and Wisconsin have 20-week bans and pre-Roe laws that criminalize nearly all forms of abortion. Whether and how these varying bans will be enforced will depend on litigation outcomes and, in some cases, the political inclinations of prosecutors at the state and local levels.

Oklahoma and Texas remain the only two states with *civil* enforcement laws. The Oklahoma law applies to nearly all forms of abortion. The Texas law applies to abortion after the detection of a fetal heartbeat. These also are the only laws that explicitly classify employer reimbursement of abortion expenses as unlawful aiding and abetting of an abortion.

Litigation brought under both laws has been limited to date. Most activity has occurred in Texas and has been directed against abortion providers. A recent decision holding that the Texas Constitution requires a direct connection between an individual filing suit under the law and the challenged abortion may dampen efforts to file lawsuits there, although we expect that decision to be appealed.

Laws Protecting Reproductive Rights

Eighteen states have active laws or constitutional protections that guarantee a right to abortion at some stage of pregnancy. Twelve[7] of those states protect access through statutes. Three states[8] have binding high court precedent finding there is a right to abortion in state constitutions. Three states—California, Michigan, and Vermont—have constitutional amendments that enshrine the right to reproductive freedom, including abortion. The scope of the protections provided in these states varies but all permit abortion until at least 24 weeks post-fertilization, the "viability" limit recognized by *Casey*.

Seventeen[9] states have also enacted laws or promulgated executive orders designed to "shield" residents and persons who enter these states to receive reproductive health services from extraterritorial laws prohibiting abortion. Nearly all of these laws and orders prohibit state agencies and courts from cooperating with out-of-state investigations into the receipt or provision of reproductive health services, enforcing subpoenas or summonses from out-of-state courts or grand juries related to the receipt of reproductive health services, and honoring requests for extradition when the charge involves the receipt of lawful reproductive health services.

California also recently enacted a law that prohibits California corporations or corporations whose principal executive offices are in California from providing records and data in response to out-of-state subpoenas or court orders relating to the investigation or enforcement of laws prohibiting reproductive health services that are lawful in California.

Federal Actions

Also available as part of the eCourse

[2023 Nonprofit Organizations eConference](#)

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"MASTER CLASS: Legal Compliance Issues in a Post-*Dobbs* World"