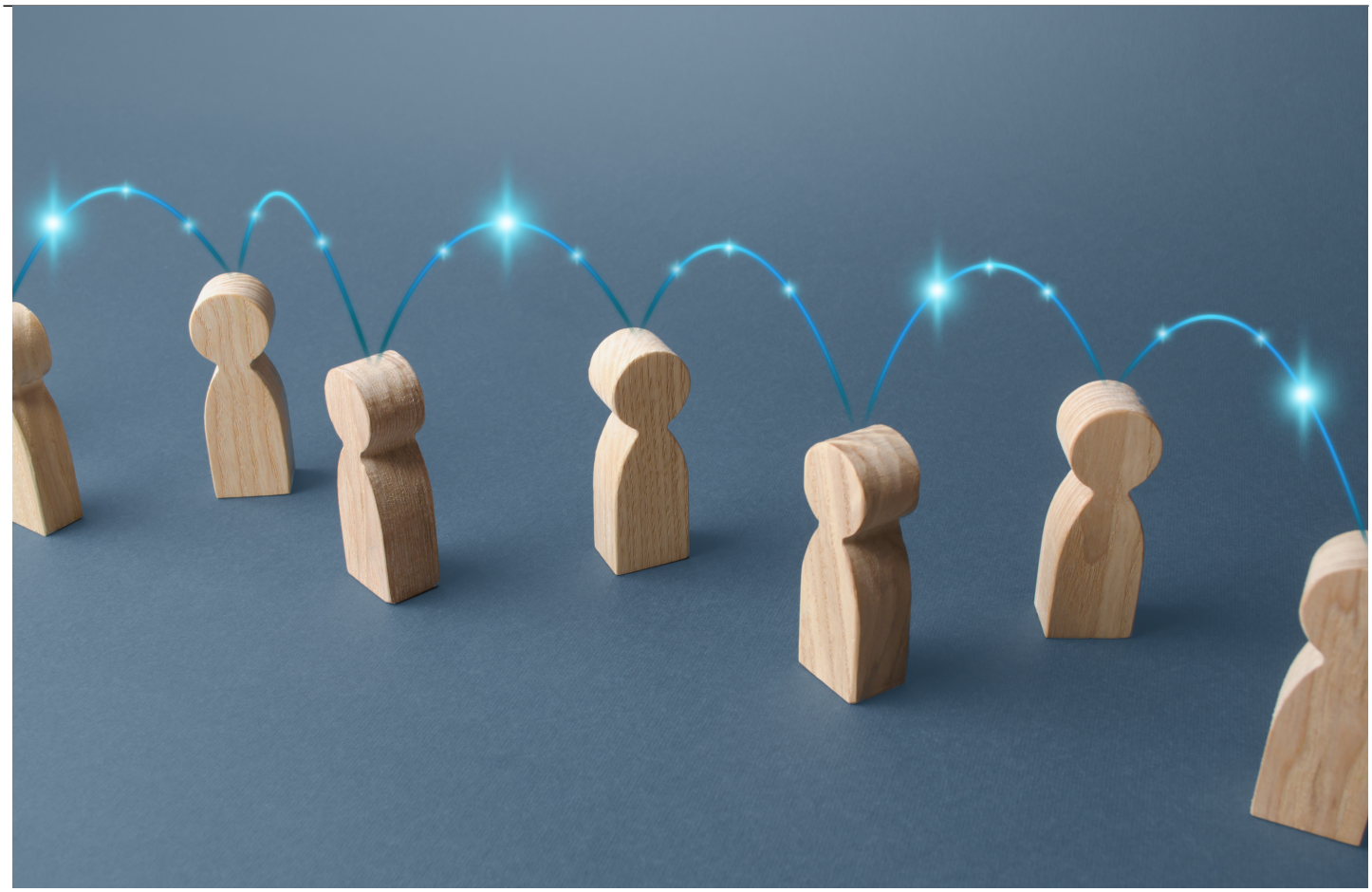


Wisdom of the Crowd: In-house Counsel Discuss Implications of the Dobbs Decision for US Employers

Health Law



The US Supreme Court's decision in Dobbs v. Jackson Women's Health Organization presents many issues for in-house counsel that may not be resolved for some time.

Participants in the ACC July 2022 Wisdom of the Crowd, a virtual peer-to-peer discussion moderated by Morgan Lewis Partner Sharon Perley Masling, examined several implications for US employers.

Issuing company statements to employees

Some companies have issued statements focused on healthcare rights or just benefits. Others have stated that their insurance providers would continue to provide resources to employees who need to travel out of state for reproductive healthcare. Some companies have (so far) abstained from issuing statements because they view the context as too politically charged. Whether to issue a statement is a business decision that is typically made at the highest level of the organization, often utilizing in-house counsel and public relations teams.

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Relocation support

Some companies have supported employees moving from states whose laws restrict abortion to states that permit the procedure. A large company operating in several states allowed employees who were supposed to be transferring to an office in Texas the option to decline if the employee didn't want to move to Texas due to its abortion laws.

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Travel benefits and privacy concerns

Can a company pay for an employee's travel to obtain reproductive healthcare? Some businesses already cover travel costs for medical treatment. And some of them are unsure what, if any, action they should take on the travel issue because it is uncharted territory.

Some organizations prefer travel benefits to be covered under their group healthcare plan. Outside of a healthcare plan, and as part of a travel policy, some are considering offering to cover the cost of travel to the state where the organization's headquarters is located, without asking employees to explain the reason for travel. Employers are evaluating a broad travel benefit for not only travel for abortion, but for other medical conditions. And some are evaluating whether to list travel for abortion as a wellness-related benefit.

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A key concern is employees' privacy. Some employers may prefer abortion-related benefits to be covered by their group health insurance. One reason for this approach is they wish the related personal information to be covered by privacy rules under the US Health Insurance Portability and Accountability Act (HIPAA). Some point out that this option may limit the risk of liability for the company itself, by having insurance and pharmacy benefits administrators handle sensitive employee health information. While HIPAA doesn't protect an employer's records, it protects the records of a healthcare provider or insurance plan. However, there are exceptions to that protection, notably if a court order requests a record, in which case there are still ways to protect the information partially, but not fully.

Concerns regarding potential exposure for aiding and abetting

A question employers are facing is: If a company covers travel costs for its employees, does that mean that the company and/or its management who issued the policy change, can be charged with criminally aiding and abetting illegal abortions?

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This is another area of uncertainty. In the past, companies have usually not been accused of violating aiding and abetting laws. Employers' assessments are even more difficult because state legislatures

are working on changing abortion laws. In addition, political authorities in certain states have announced their intention not to enforce abortion-restrictive laws that pre-date the Supreme Court's Roe v. Wade decision but are still in effect. Many of the aiding and abetting laws relating to abortion are being (or expected to be) challenged on constitutional grounds.

Some companies are assessing whether to hire outside counsel in the state with the restrictive laws to advise employees. A question is whether states might try to hold such law firms liable.

Civil liability concerns

Directors' and officers' insurance typically doesn't cover criminal conduct. In addition, some in-house lawyers are concerned that companies that offer travel benefits regarding abortion may face civil lawsuits.

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Listening to the workforce

One thing businesses should do is make a point of listening to employees, keeping in mind that not all employees share the same view. This can be a challenge particularly as companies often have geographically dispersed workforce with remote employees.

More resources on dealing with the abortion decision are available in the ACC Legal Resources Library.

Collaborate with your colleages and learn more from ACC by joining now.

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