Dobbs Decision: Bargaining Access to Women's Reproductive Healthcare Today

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Dobbs v. Jackson Women's Health Organization

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- Reversed prior SCOTUS decision *Roe v. Wade* (1973, guaranteed abortion access as a matter of constitutional right)

- FACTS: Challenge to Mississippi law passed in 2018, which prohibited majority of abortions after 15 weeks. Applied penalties to abortion providers.

  Jackson Women's Health challenged constitutionality of the law. Thomas Dobbs was a Mississippi state health officer. Petitioned the Supreme Court, which decided to take the case.

Dobbs v. Jackson Women's Health Organization

- ARGUMENTS:
  - Mississippi, through Dobbs, argued that the Constitution does not provide a right to abortion.
  - Jackson's Women's Health Organization argued that the Constitution, through the Fourteenth Amendment, does provide this right because physical autonomy and body integrity are "essential elements of liberty protected by the Due Process Clause."
  - Women's Health also argued that abortion, or the right of a person to have possession of their own body is important in the common law tradition. Furthermore, Women's Health pointed out that federal courts have uniformly applied the viability line.

Dobbs v. Jackson Women's Health Organization

- DECISION:

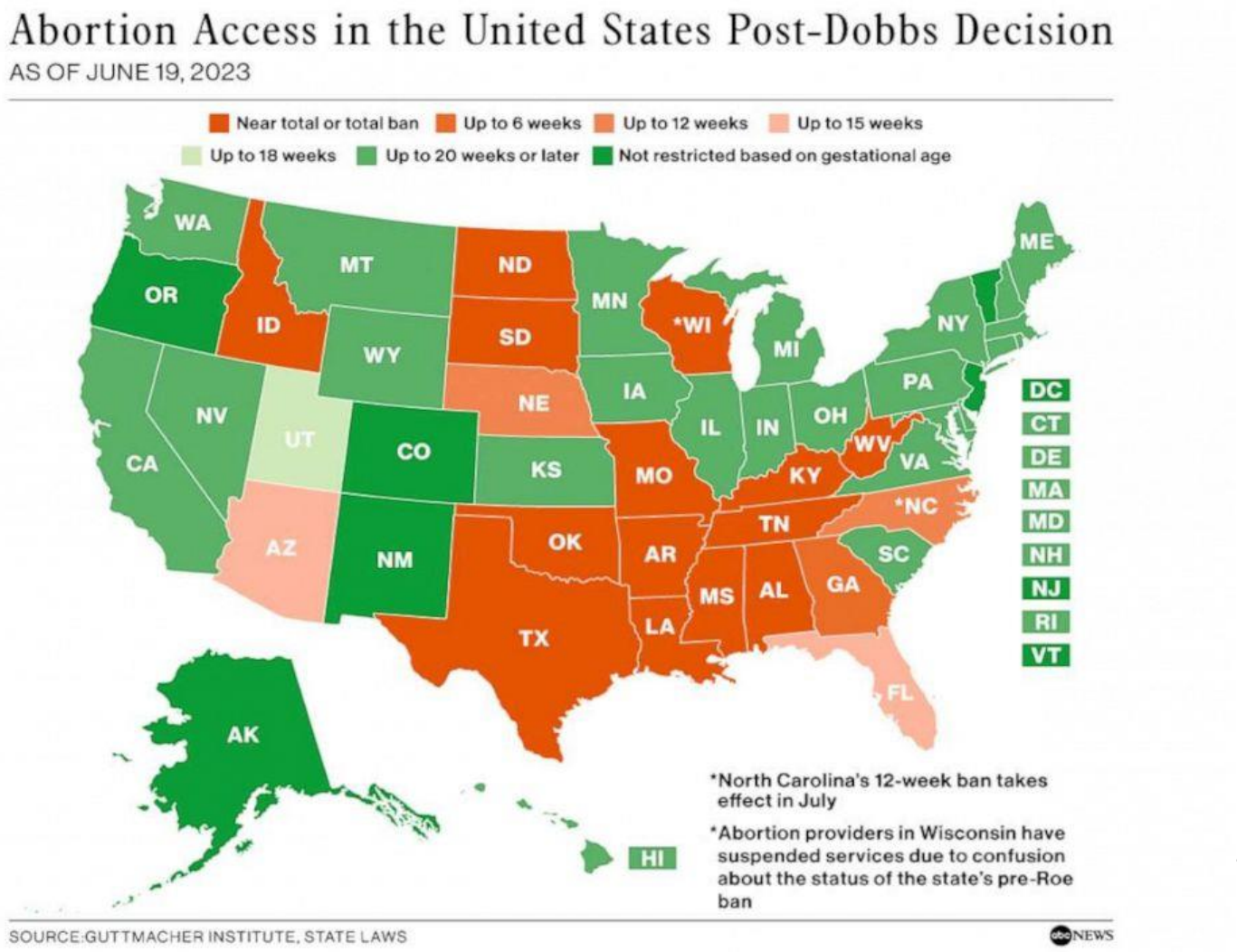
- The Constitution makes no express references to abortion.
- The Due Process Clause protects rights that are deemed fundamental. Abortion is not a fundamental right.

Dobbs v. Jackson Women's Health Organization

- RESULT:

  Now that abortion is not awarded the status of a fundamental right, rational-basis review is the standard used when looking at state abortion regulations that undergo a constitutional challenge. Essentially, States may regulate abortion "for legitimate reasons" and if those laws are challenged under the Constitution, they are entitled to "a strong presumption of validity."

Approximately 22 million women and girls of reproductive age in the US now live in states where abortion access is heavily restricted



Ripple Effect

- Fetal personhood
- Contraceptive access
- Mifepristone case
- Pregnant Workers Fairness Act
- Emergency Medical Treatment and Active Labor Act (EMTALA)
- IVF in Alabama

Why do we care?

- As workers?
- As citizens?
- As union representatives?

What can we do?

- While the obstacles raised by abortion bans may appear staggering, collective bargaining may assist members seeking continued access to abortion care on fair economic terms.
- Many issues involving abortion access are mandatory subjects of bargaining:
  - Scope of medical services covered by insurance, both in-network and out-of-network, including abortion care
  - Whether medical services available only out-of-network (e.g., out-of-state) will be subject to more favorable “in-network” structure
  - Travel expenses for covered medical services
  - Paid leave time, on short notice
  - Medical privacy
  - Employment discrimination

What can we do: Ask questions

Educate members with the facts. Start with information requests!

- Understanding the current plan benefits:
  - Does the current plan provide for abortion or abortion related services?
  - Is it self funded by the Employer or fully insured?
  - What state do participants reside in?
- How does the current plan work:
  - How is reproductive healthcare defined?
  - Are dependents eligible?
  - Will travel be covered?
- How will the Employer ensure the privacy of employees?
  - Who keeps the records and how long are they retained?

What can we do: Speak out

Engage in Protected Concerted Activity

- The National Labor Relations Act gives employees the right to take collective action with their coworkers in an effort to improve working conditions. This generally includes the right to talk with coworkers about issues at work, and share collective concerns with the public
  - Speak collectively
  - Connect the message to working conditions
  - Double check the CBA for restrictions – like social media posting

What can we do: Bargain!

Expanded Leave Benefits

- FMLA: Union negotiators should not depend on FMLA unpaid leave because it requires a “serious medical condition” and an abortion without medical complications may not qualify.

- Bargaining enhanced personal or sick leave benefits would be most effective
  - Leave benefits should be available on short notice
  - Enhanced paid parental leave, particularly in states restricting reproductive care

What can we do: Bargain!

Privacy Protections

- HIPAA privacy regulations restrict how employer-sponsored plans can use, access, or disclose health information.
  - Union negotiators should bargain for travel and lodging benefits, coverage options, or leave provisions that are offered through a health insurance plan, then the information provided to that program would be protected under HIPAA's privacy rules.
  - HIPAA privacy protections generally do not apply to the employer itself
- Other Confidentiality Provisions
  - Since HIPAA's privacy regulations generally do not extend to employers, negotiators should consider bargaining for robust confidentiality provisions within the CBA that would restrict the employer's use and disclosure of health information

What can we do: Bargain!

Non- Discrimination and Prohibition on Retaliation

- Bargain for clear contractual provisions that prohibit employers from taking any adverse actions against members who seek reproductive care, whether instate or out-of-state.

What can we do: Bargain!

Insurance Coverage

- In self-insured plans, bargain provisions allowing members seeking reproductive health care services out-of-state to receive in-network coverage
  - Ensure insurance coverage for reproductive care.
  - Require employers to provide a rider if there is a state law that restricts coverage for reproductive care.
  - If a rider cannot be provided, require employers to maintain a fund (administered by a third-party) to cover the difference in cost between the co-pay and cost of services.
- Many states have imposed strict bans that prevent insurance plans from covering abortions except in very narrow circumstances (e.g., necessary to save the life of the mother). These restrictions would therefore prevent the insurance plans from providing for out-of-state abortion coverage, as well. However, these restrictions would generally only apply to fully-insured plans, not self-insured plans.

What can we do: Bargain!

Travel and Lodging

- Negotiate for expanded travel and lodging reimbursement provisions.
  - These do not need to be limited to reproductive healthcare, and can conceivably cover almost any medical care that is unavailable within a certain geographic distance
- Travel and lodging benefits can be provided as a coverage options directly through a self-insured plan.
  - Alternatively, Flexible Spending Accounts, Health Reimbursement Accounts, or Health Savings Accounts can be integrated with the employer's insurance plan, and can allow for reimbursement for travel necessary to obtain reproductive healthcare.

What can we do: Bargain!

Severability Language

- Given the evolving state of the law surrounding reproductive healthcare, negotiators may consider bargaining severability language that would protect negotiated benefits should any aspects later be found to be unlawful.

Additional Considerations

- Contact your staff representative and the legal department for assistance.
- Changes to state laws being considered across the USA include but are not limited to:
  - i. “Trigger laws” restricting all abortion access post-Dobbs
  - ii. Lifting state reproductive health care restriction bans
  - iii. Restricting private insurance plan abortion coverage by limiting coverage only to when the patient’s life would be endangered by carrying the pregnancy to term.
  - iv. Restricting abortion coverage in health insurance plans for public employees
  - v. Restricting abortion access at the point of the “first detectable heartbeat”
  - vi. State constitutional amendment explicitly declaring that the constitution does not secure or protect the right to abortion or allow the use of public funds for abortion
  - vii. Online data privacy concerns related to GPS and menstrual cycle tracking
  - viii. Contact the legal department for assistance with this review.

Thank you for coming to this workshop!

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