AN EMPLOYMENT LAWYER'S PERSPECTIVE ON *DOBBS V. JACKSON*

By: Danny DeVoe

Most employers have probably heard about the landmark decision in *Dobbs v. Jackson Women's Health Organization*, *142 S.Ct. 2228 (2022)*, and are contemplating how they, as an employer, should respond. Before putting pen to paper to re-write your employee handbooks and health insurance policies, one must first understand what *Dobbs* did and did not do. More particularly, *Dobbs* did not make abortion illegal, but rather disagreed with the holdings in *Roe v. Wade*, *93 S.Ct. 705 (1973)*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *112 S.Ct. 2791 (1992)*, that there was an inherent right to choose rooted in the due process clause of the Fourteenth Amendment. As the *Dobbs* Court rejected the premise that such inherent right to abortion was found in the United States Constitution, it left the decision up to the states under the Tenth Amendment's reservation clause.

Since the *Dobbs* decision was officially published on June 24, 2022, employers have had to decide whether to amend their employee handbooks and health insurance policies as a result of this decision and due to employee demand. Indeed, after a copy of the decision was leaked in February, employers like Amazon began receiving open letters from employees demanding that they take action to protect a woman's right to choose by ensuring that abortion coverage remained in their health insurance plans and demanding that Amazon cease doing business in any state where abortion was outlawed. Some companies, such as Netflix, Tesla, Amazon, Apple, Yelp and Citi have already implemented policies wherein they will cover the travel costs for employees to obtain out-of-state abortions and/or have amended their existing benefits program to include abortion related costs.

What are some of the potential pitfalls of amending your policies as a result of *Dobbs*? Probably the most prominent statute to consider when deciding whether to amend your employee benefits plan is Title VII's prohibition against treating individuals differently based solely upon gender. One could argue that a carefully drafted policy that permits abortion leave to both male and female employees equally will successfully circumvent a Title VII challenge. Another aspect of Title VII for an employer to consider when deciding whether to implement a new policy is not discriminating against those employees whose religious beliefs oppose abortion. Some employers like Netflix have implemented

policies that take both gender and religion into consideration by having a more expansive policy which covers travel and expense reimbursement for cancer treatment, transplants and gender-affirming care in addition to abortions. Apple and Tesla's policies are even more inclusive wherein they provide travel and lodging support for those who need to seek healthcare services that are unavailable in their home state regardless of what those services entail. Similarly, Amazon advised its employees that it would cover up to $4,000.00 per year in travel costs related to "non-life threatening medical treatments, including elective abortion."

What if an employer wants to remove abortion coverage from their health insurance plan or terminate an employee for obtaining an abortion? The Pregnancy Discrimination Act of 1978 ("PDA") protects employees from discrimination because of their pregnancy or related medical conditions. On June 25, 2015, the Equal Employment Opportunity Commission confirmed that the PDA prohibits discrimination against anyone who considers or obtains an abortion. As the Supremacy Clause contained in Article VI, Paragraph 2, of the Constitution provides that federal laws take precedent over state laws, it could be argued that the PDA trumps any state law ban on abortion and prohibits an employer from having such a policy. On the other hand, the precedent set in the Hobby Lobby case could be utilized to argue that requiring an employer to provide for abortions in its health plan would infringe upon the employer's religious freedoms. *See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).* Thus, an employer should take caution before implementing such a policy and do so with the express understanding that such a policy may entangle them in the next case going up to the United States Supreme Court.

What are some other employer related concerns that could stem from the *Dobbs* decision? I am sure that some employers want to implement a policy banning employees from discussing the *Dobbs* decision at work due to how polarizing the issue is. Implementing such a policy would likely run afoul of the National Labor Relations Act that was enacted in 1935 to encourage collective bargaining by protecting workers' full freedom of association, including the right to collectively bargain for such things as healthcare coverage for abortions. Thus, employers should steer clear from implementing such a policy. Based upon the foregoing considerations, every employer should use caution before rushing to amend its personnel policies as a result of the *Dobbs* decision and should only do so after consulting with a skilled employment law attorney to ensure that its proposed new policies are in compliance with the local, state and federal labor laws.