

Labor & Employment Alert
June 29, 2022

**Dobbs v. Jackson Women’s Health Organization: The Supreme Court
Overrules Roe v. Wade and Planned Parenthood v. Casey**

On June 24, 2022, the United States Supreme Court overruled the landmark constitutional case *Roe v. Wade* and the key subsequent decision *Planned Parenthood v. Casey* in a majority opinion authored by Justice Samuel Alito. The Court held that “[t]he Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives.”

Case Overview

Dobbs involved a challenge to Mississippi’s Gestational Age Act which provided that “[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.” The Court granted certiorari to consider “whether ‘all pre-viability prohibitions on elective abortions are unconstitutional,’” and stated from the outset that the central issue would be whether to “reaffirm or overrule *Roe* and *Casey*.”

The majority opinion focused its analysis on three sub-issues: (1) whether the Constitution confers a right to abortion; (2) whether *stare decisis* requires continued acceptance of *Roe* and *Casey*; and (3) whether *Casey*’s argument that “the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*” indicated that *Roe* should not be overruled.

As to the first point, the Court focused primarily on the Due Process Clause of the Fourteenth Amendment and asked, “whether the right was ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’” Finding little to no support for that right in either history or legal precedent, the Court concluded that the Fourteenth Amendment did not implicitly protect the right to abortion.

Noting that “the controlling opinion in *Casey* reaffirmed *Roe*’s ‘central holding’ based solely on the doctrine of *stare decisis*,” the Court next addressed that doctrine. The Court concluded that “five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of law, and the absence of concrete reliance.” The Court sharply criticized both cases on each of these factors, as evidenced by its descriptions of *Roe* as “egregiously wrong” and “[standing] on exceptionally weak grounds.”

Lastly, the Court addressed the obvious political, social, and cultural ramifications of its decision to overrule *Roe* and *Casey*. In doing so, it found fault in *Casey*’s consideration of public opinion

Labor & Employment Alert **June 29, 2022**

as well as the Court's power to shape it. The Court summarized its reasoning on that point as such: "We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly."

Potential Impact on Other Constitutional Rights

Throughout the majority opinion, the Court endeavored to limit the holding of *Dobbs* to abortion and abortion alone by attempting to distinguish that right from other fundamental rights such as interracial marriage, same-sex marriage, access to contraceptives, and same-sex conduct. Despite these reassurances by the majority, both the dissenting opinion in *Dobbs* as well as public discourse in the aftermath of the decision reflect real concern that this decision could mark the beginning of a curtailment of other fundamental rights if similar reasoning were applied to them. Cases such as *Loving v. Virginia* (interracial marriage), *Griswold v. Connecticut* (access to contraceptives), *Lawrence v. Texas* (same-sex conduct), and *Obergefell v. Hodges* (same-sex marriage) could be affected in future decisions.

It should also be noted that Justice Clarence Thomas wrote a concurring opinion and explicitly called for a reexamination of substantive due process in its entirety, a concept Thomas described as "an oxymoron that 'lack[s] any basis in the Constitution.'" In his concurrence, Thomas straightforwardly wrote that "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."

For now, it remains unclear just how *Dobbs* might ultimately impact those and other rights currently guaranteed by the Due Process Clause of the Fourteenth Amendment.

Effect on Massachusetts and its Businesses, Employers, and Employees

As for the immediate impact of *Dobbs*, for the most part, it appears that little will change when it comes to employers operating entirely within Massachusetts. The Commonwealth provides its own legal protections for abortion above and beyond what was guaranteed by the Federal Constitution. And Governor Charlie Baker recently reinforced that fact by issuing an executive order protecting access to reproductive health care services for all women in Massachusetts, regardless of their state of residence. That order protects providers and professionals who perform reproductive health services, prohibits Massachusetts executive agencies and law enforcement officials from assisting in investigations by other states, and largely mandates the denial of extradition requests based upon alleged violations concerning reproductive health care services.

Employers should nevertheless take care to keep abreast of legal developments which may affect health insurance and other benefits they provide to their employees, especially if those employees

Labor & Employment Alert
June 29, 2022

live in a state that has banned abortion in most cases. Some companies, such as Amazon and JPMorgan Chase, have already stated that they will cover travel expenses for employees who need to travel out-of-state for an abortion. And some organizations are pressing the Massachusetts legislature to mandate insurance coverage for abortions. Six states already require abortion coverage on private plans. It would not be surprising to see Massachusetts to follow in their lead and issue a similar mandate. The interaction between the Court's ruling, state laws restricting or protecting abortion, and ERISA's preemption of certain state laws regulating employer-sponsored benefit plans will likely be subject to extensive litigation over the next few years.

Overall, rapid developments in this area are expected to be forthcoming. Employers should pay close attention to such developments and seek legal counsel prior to implementing any changes to the insurance and benefits they provide their employees or adopting any other policies intended to address the impact of the Court's decision.

This Client Alert was prepared by Attorney Joseph W. Proctor, with assistance from James Donnelly, and was reviewed by Attorneys Kier Wachterhauser, Nan O'Neill, and Rachel Millette. If you have any questions about this issue, please contact the attorney assigned to your account or call (617) 479-5000.

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