THE POST-*DOBBS* LANDSCAPE: EMPLOYER-PROVIDED COVERAGE FOR ABORTIONS

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INTRODUCTION

For nearly fifty years, those living in the United States enjoyed the fundamental right to privacy in making reproductive health decisions. In *Roe v. Wade*, the Supreme Court recognized abortion under the constitutional right to privacy.[1] In the years that followed, the Court recognized and upheld this fundamental right to abortion services.[2] However, the Court overturned *Roe v. Wade* and these subsequent decisions when it decided *Dobbs v. Jackson Women's Health Organization* in June 2022.[3]

When the Court upended federal protection of reproductive freedom for women and gender-nonconforming people, the legality of abortion services was left to the individual states. The decision was met with opposition from millions of Americans who now faced significant uncertainty and insecurity over their ability to control their reproductive futures.[4] Companies nationwide responded to the *Dobbs* decision with commitments to help their employees gain access to reproductive healthcare services, regardless of where they lived.[5] As employers embark on the uncharted post-*Dobbs* waters, it has become essential to consider the efficacy of these policies and the potential legal ramifications. Employers must thoughtfully design these policies to protect employee privacy and generate equitable outcomes.

I. THE LEGAL BACKGROUND OF EMPLOYER-BASED HEALTHCARE

During World War II, the United States was facing a labor shortage, and economists feared that employers would repeatedly increase wages to compete for the scarce labor, which would cause inflation to spiral out of control.[6] In response, Congress passed the Stabilization Act of 1942 ("Stabilization Act"), which authorized and directed former President

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[1] Roe v. Wade, 410 U.S. 113, 154 (1973).

[2] *See generally* Doe v. Bolton, 410 U.S. 179 (1973); Colautti v. Franklin, 439 U.S. 379 (1979); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

[3] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[4] Sun-Times Staff, *Dobbs Decision: Reactions to the End of* Roe v. Wade, CHI. SUN-TIMES (June 24, 2022, 6:53 PM), http://chicago.suntimes.com/2022/6/24/23181663/dobbs-decision-roe-v-wade-reaction-supreme-court-2022 [https://perma.cc/E7G8-KLWX].

[5] Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), http://www.nytimes.com/article/abortion-companies-travel-expenses.html [https://perma.cc/4WGK-YG5S].

[6] Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. TIMES (Sept. 5, 2017), http://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html. [https://perma.cc/M9BP-PUTS].

Eisenhower to pass Executive Order 9250, effectively freezing wages.[7] The Stabilization Act prevented employers from raising pay to attract workers but enabled employers to provide other benefits, including health insurance.[8] The Internal Revenue Service ("IRS") further encouraged this practice by deciding that employer-based health insurance was exempt from taxation, which was later codified in law.[9] Employer-based health insurance became an effective asset for labor unions to advocate for in their collective bargaining agreements. As this benefit spread, millions of Americans gained access to health insurance.

Thirty years later, Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"), which fundamentally changed the division of state and federal regulatory authority.[10] While ERISA primarily addressed employer pension plans, it also regulates employer-provided welfare benefits, including medical, surgical, and other health coverage.[11] The Supreme Court has repeatedly held that ERISA preempts state regulations that impact employer-provided health insurance.[12]

The Patient Protection and Affordable Care Act ("ACA") expanded employer-based health coverage by mandating that all employers with fifty or more employees either provide employees with "minimum essential coverage" that is "affordable" and provides "minimum value" to full-time employees.[13] Additionally, these employers are required to report information regarding the minimum essential coverage that is offered to employees.[14] The information must be shared with employees and the IRS.[15]

A. THE EXISTING FRAMEWORK OF EMPLOYER-PROVIDED HEALTH COVERAGE

Employer-based health insurance is an incredibly large and expensive industry. Employer-based health insurance is the largest tax expenditure in the United States.[16] The structure of employer-provided health coverage is largely dependent upon the employer's size. There are three main models that U.S. employers have adopted: self-insured, fully-insured, and level-funded.

Large employers (those with more than one hundred employees) are generally self-insured.[17] Under this model, employers effectively serve as the insurance company and directly pay or reimburse the actual medical

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[7] Stabilization Act of 1942, 50 U.S.C. §§ 961–71, (1942) (repealed 1956); Exec. Order No. 9250, 7 Fed. Reg. 7871 (Oct. 6, 1942).

[8] 50 U.S.C. §§ 961–71.

[9] I.R.C. § 106 (West 2020); Internal Revenue Code of 1954, 68 Stat. 730 (1954).

[10] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461; *see also* CONGRESSIONAL RESEARCH SERVICE, SUPREME COURT DECISION SHEDS LIGHT ON STATE AUTHORITY TO REGULATE HEALTH CARE COSTS (Mar. 26, 2021).

[11] 29 U.S.C. § 1003.

[12] *Id.*; *see* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995); Cal. Div. of Labor Standards Enf't v. Dillingham Constr., 519 U.S. 316 (1997); Egelhoff v. Egelhoff, 532 U.S. 141 (2001).

[13] Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001–18122.

[14] *Id.* § 18014(b).

[15] *Id.* § 18014(b).

[16] Carroll, *supra* note 6.

[17] *2022 Employer Health Benefits Survey*, KFF (Oct. 27, 2022), http://www.kff.org/report-section/ehbs-2022-summary-of-findings/ [https://perma.cc/2C3K-CQCV].

expenses.[18] Additionally, employers providing self-insured coverage assume the risks associated with funding and managing, including paying employee claims and ensuring security.[19] Since these risks can create immense pressure and strain on the company, employers that provide self-insured coverage can hire third-party administrators ("TPAs") to process claims, manage enrollment, and contract with provider networks.[20] Importantly, TPAs ensure that the plan complies with applicable federal laws.[21]

Self-insured plans are regulated by the federal government.[22] This approach is particularly attractive for large employers because the plans are free from state oversight.[23] Self-insured plans are generally not subject to the ACA's "essential health benefits" requirements or state insurance regulations.[24] They are subject to regulation by ERISA since these plans are maintained by the employer.[25] Additionally, ERISA's "deemer clause" provides that employee benefit plans may not be deemed to be in the business of insurance and therefore regulated by state laws.[26] As such, employers have flexibility in structuring their health benefits and coverage plans.

Other employers—generally smaller businesses with fewer than fifty employees—choose to adopt a fully-insured health plan under which they pay premiums to a third-party insurance company.[27] Employers that provide a fully-insured health plan are generally subject to greater regulation since their coverage is governed by both state laws and the ACA.[28] However, the fully-insured health plans are more predictable in costs and allow the employer to avoid administrative burdens, such as claims handling and legal compliance expenses.[29]

Finally, some employers choose a level-funded plan, which is akin to a hybrid model between fully-insured and self-insured plans.[30] Under the level-funded plan, the employer pays a set monthly payment to the health carrier to cover expected claims and administrative costs.[31] Since the plan is sold to employers as a self-funded plan, the plan is not subject to state law.[32]

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[18] Jim Chapman, *Tax Consequences of Employer-Provided Abortion Travel Benefits*, THOMSON REUTERS (July 21, 2022), http://tax.thomsonreuters.com/blog/tax-consequences-of-employer-provided-abortion-travel-benefits/ [https://perma.cc/YW7L-LG5T].

[19] Barbara C. Neff, *What's the Difference Between Fully-Insured and Self-Insured Health Plans*, GUSTO (Sept. 19, 2022), http://gusto.com/blog/health-insurance/self-insured-vs-fully-insured-health-plans [https://perma.cc/X7YW-869Y].

[20] *Id.*

[21] *Id.*

[22] Melissa Jeltsen, *The Problem with Companies Promising to Pay for Abortion Travel*, THE ATLANTIC (Aug. 18, 2022), http://www.theatlantic.com/family/archive/2022/08/companies-paying-for-abortion-travel-expenses/671174/ [https://perma.cc/JUH3-LZKT].

[23] *Id.*

[24] 29 U.S.C. § 1144; *see also* Neff, *supra* note 19.

[25] 29 U.S.C. §§ 1003, 1144(a).

[26] 29 U.S.C. § 1144(b)(2)(B); *see* FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) ("Under the deemer clause, an employee benefit plan governed by ERISA shall not be 'deemed' an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws 'purporting to regulate' insurance companies or insurance contracts."); *see also* Ky. Ass'n of Health Plans v. Miller, 538 U.S. 329, 336 n.1 (2003) (stating that the deemer clause effects "state laws saved from pre-emption by § 1144(b)(2)(A) that would, in the absence of § 1144(b)(2)(B), be allowed to regulate self-insured employee benefit plans").

[27] Jeltsen, *supra* note 22.

[28] Neff, *supra* note 19.

[29] *Id.*

[30] KFF, *supra* note 17.

[31] *Id.*

[32] *Id.*

These plans offer employers predictability in payments but do not allow flexibility over the benefit plan design.[33]

B. A SHIFT IN REPRODUCTIVE HEALTH CARE: THE *DOBBS* DECISION

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, and effectively unraveled decades of protections for women and gender-nonconforming people to receive abortions regardless of where they lived.[34] The Court held that the right to an abortion was neither "implicitly protected by any constitutional provision," "deeply rooted in the Nation's history and tradition," nor "implicit in the concept of ordered liberty."[35] In *Dobbs*, the issue of abortion was returned "to the people's elected representatives" and, in the absence of federal legislation, left the issue of abortion and women's reproductive rights for the states to decide.[36] In his concurrence, Justice Kavanaugh acknowledged that the *Dobbs* decision left many unanswered legal questions, including whether a state may "bar a resident of that state from traveling to another state to obtain an abortion."[37] Justice Kavanaugh expressed his view that the answer was clearly "no" based on the constitutional right to travel.[38] He also stressed that *Dobbs* did not outlaw abortion throughout the country, so states were free to allow or strictly limit abortion as they wished.[39] Beyond the legal questions, there were practical considerations, including how low-income or marginalized people could realistically access abortion services when their home states prohibited such medical services.[40]

Companies were increasingly offering coverage for reproductive services before the *Dobbs* decision.[41] During the COVID-19 pandemic, an estimated 1.1 million women left the workforce, which accounted for over 63% of the overall job loss.[42] In response to this tightened labor market, companies developed strategies to encourage women and families to return. Among such strategies, employers like Amazon and Walmart, began expanding health coverage to include family-planning benefits—including assisted reproduction, surrogacy, and adoption services—to their workers.[43]

In May 2022, when a draft of the *Dobbs* decision was leaked to the public, some employers began proactively offering a solution: travel

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[33] Mike Roche, *The Four Best Benefits of Choosing a Level Funded Health Plan*, THE ALLIANCE (July 11, 2022), http://the-alliance.org/the-four-best-benefits-of-choosing-a-level-funded-health-plan [https://perma.cc/RSV5-HPP2].

[34] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[35] *Id.*

[36] *Id.* at 2247.

[37] *Id.* at 2309 (Kavanaugh, J., concurring).

[38] *Id.*

[39] *Id.* at 2305.

[40] *See id.* at 2345 (Kagan, J., concurring) ("In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place.").

[41] *See Benefits Overview for U.S. Amazon Employees Excluding CT, IL, IN, MD, NC, PA, UT, & WI*, AMAZON JOBS, http://www.amazon.jobs/en/landing_pages/benefitsoverview-us [https://perma.cc/CFP4-XR8F].

[42] Oriana González & Arielle Dreher, *Employers expand reproductive health benefits amid tight labor market*, AXIOS (Oct. 11, 2022), https://www.axios.com/2022/10/11/fertility-benefit-reproductive-health-labor [https://perma.cc/JUX8-WXVN].

[43] *Id.*; AMAZON JOBS, *supra* note 41; Gigi Sukin, *Walmart to Offer Fertility Treatments as Employee Benefit*, AXIOS (Sept. 27, 2022) https://www.axios.com/2022/09/27/walmart-fertility-treatments-insurance-employees [https://perma.cc/X3DQ-ARAH].

vouchers for abortion services.[44] These companies began to develop policies to cover travel expenses for employees who needed abortions.[45] These initiatives grew after the *Dobbs* decision was officially released, with employers demonstrating a commitment to protect the reproductive rights of their workforce.[46] To support their employees' access to healthcare services that they may not be able to obtain in their home states, companies committed to covering travel expenses for abortions, either through stipends or travel expense reimbursements.[47]

II. TRAVEL VOUCHERS FOR ABORTION SERVICES

The commitment by employers to cover travel expenses for abortion services is a critical step in the search for equitable solutions in a post-*Dobbs* America. These programs alleviate some of the socioeconomic and practical barriers that prevent women and gender-nonconforming people from accessing reproductive care after the *Dobbs* decision revoked this essential right. Employers committed to covering expenses associated with these services, including transportation, meals, lodging, and the medical care itself.[48] However, employers must thoughtfully and properly design these programs to avoid adverse legal liability and protect employee privacy. Specifically, employers will need to consider cost, eligibility, administration, taxation, and health information privacy.[49]

A. STRUCTURING EMPLOYER-PROVIDED HEALTH COVERAGE: THE AFFORDABLE CARE ACT AND MEDICAL TRAVEL BENEFITS

In designing their travel coverage, employers must comply with federal laws governing healthcare, including the ACA, the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), and ERISA.[50] Additionally, employers may also be subject to state and local restrictions on their coverage, depending upon the structure of their health coverage plans and how federal courts will interpret the *Dobbs* decision moving forward.

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[44] Goldberg, *supra* note 5.

[45] *Id.*; Alisha Haridasani Gupta & Lauren Hirsch, *Yelp Will Pay for Employees to Travel for Abortion Access*, N.Y. TIMES (Apr. 12, 2022), https://www.nytimes.com/2022/04/12/business/yelp-abortion-employees.html [https://perma.cc/H9ND-LJXC], Andrew Ross Sorkin & Lauren Hirsch, *Tesla Will Cover Transportation Costs for Employee Abortions*, N.Y. TIMES (May 6, 2022), https://www.nytimes.com/2022/05/06/business/tesla-abortion-costs-texas.html [https://perma.cc/LXQ5-MB57]; Goldberg, *supra* note 5.

[46] Goldberg, *supra* note 5; *see also Citigroup Inc. 2022 Notice of Annual Meeting and Proxy Statement*, CITIGROUP 1, 20 (Apr. 26, 2022), https://www.citigroup.com/citi/investor/quarterly/2022/ar22p.pdf?ieNocache=923 [perma.cc/54NK-F4MC]; Dina Bass & Nick Turner, *Microsoft to Help Cover Workers' Travel Costs for Abortions*, BLOOMBERG NEWS (May 9, 2022), https://www.bloomberg.com/news/articles/2022-05-09/microsoft-to-cover-costs-if-workers-have-to-travel-for-abortions [https:/perma.cc/8L7D-W4RB].

[47] Goldberg, *supra* note 5.

[48] Jeltsen, *supra* note 22.

[49] Juliana Reno & Ryann M. Aaron, *Medical Travel Benefits: What Employers Need to Know*, VENABLE LLP (July 20, 2022), https://www.venable.com/insights/publications/2022/07/medical-travel-benefits-what-employers-need-to [https://perma.cc/9WJX-VFL5].

[50] 42 U.S.C. §§ 18001–18122.; 29 U.S.C. § 1161; 29 U.S.C. §§ 1001–1461.

1. Company Size & the Plan Offered

The ACA generally favors broad-based health coverage plans and disfavors single-benefit plans.[51] Therefore, if employers wish to cover travel for abortion services, they must structure the program to either be added to an existing major medical plan or be offered as a stand-alone benefit.[52] If added to an existing plan, then the employer's travel coverage for abortion services would generally be nontaxable under IRS regulations.[53] For employers who already offer travel reimbursements for medical services, the eligible procedures could be amended to include abortion and other reproductive health services. If provided as a stand-alone program, the travel benefit for abortions could be available to: (1) employees enrolled in the company's major medical plan, (2) employees who are eligible for the medical plan, regardless of whether they have enrolled, or (3) all employees, if there are not "substantial benefits in the nature of medical care" offered in the program.[54]

The abortion travel benefits model that an employer adopts largely depends upon the size of the company. Since larger companies are more likely to be self-insured, they are more likely to add travel coverage for abortions to their existing health insurance plan.[55] Companies that have fully-insured plans are governed by state laws and may be restricted in the structure that they can adopt, especially if they are in states that have outlawed or criminalized abortion.[56] If an employer with a fully-insured plan were to offer abortion travel benefits in one of these states, then they may face serious legal challenges.[57]

B. THE LEGALITY OF INTERSTATE TRAVEL AND EMPLOYER-PROVIDED ABORTION TRAVEL COVERAGE

Historically, patients have been able to freely travel throughout the United States to access medical services and procedures. This ability to freely access health care in other states has been repeatedly protected by employer-provided health benefits as well. The right to travel and freedom for employers to cover healthcare across state lines has been repeatedly recognized in the U.S. Constitution and federal laws.[58] It is critical for employers to understand the nuances of these laws and potential limitations to protect themselves and their employees from litigation or criminal charges.

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[51] 42 U.S.C. § 18022.
[52] Reno & Aaron, *supra* note 49; *see also* 42 U.S.C. § 18001(a)–(g).
[53] I.R.C. § 106 (West 2020).
[54] *Id.*
[55] Jeltsen, *supra* note 23.
[56] *Id.*
[57] *Id.*
[58] U.S. CONST. art. IV, § 1; U.S. CONST. amends. XIV, XV; 29 U.S.C. §§ 1001–1461; 49 U.S.C. § 40103(a)(2).

1. Constitutional Rights to Travel: The Supremacy, Commerce, Full Faith & Credit, and Due Process Clauses

a. The "Right to Travel"

Before examining relevant federal laws, it is important to understand the constitutional powers granted to the federal government, the states, and the citizens, because these powers may conflict with the regulation of healthcare and employer-provided benefits. The "right to travel" includes three distinct rights: (1) the right to move freely between the states; (2) the right of a citizen of one state to enjoy the "Privileges and Immunities" of a citizen of another state when visiting that other state; and (3) the right to enjoy the same rights and benefits of state citizens upon becoming a citizen in that state.[59]

The first component of the "right to travel," the right to freely move between states, does not have a definite doctrinal basis but has been widely recognized as essential to our nation's founding.[60] In the creation of this new nation, the Founders recognized the importance of allowing citizens to easily move between the states.[61] Article IV of the Articles of Confederation expressly establishes a right to travel.[62] Though the Constitution does not expressly mention the right to travel, this principle has been repeatedly acknowledged in subsequent Supreme Court cases because it was considered embedded in our nation's history and traditions.[63]

The second component, the right of citizens of one state to enjoy the "Privileges and Immunities" of another state when visiting, does have textual support in the Constitution. Article IV of the Constitution provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[64] This provision ensures that nonresidents who enter a state are placed on equal footing with citizens of that state.[65] It also removes "from the citizens of each State the disabilities of alienage in other States."[66] The Court has similarly recognized this component of the

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[59] Saenz v. Roe, 526 U.S. 489, 500 (1999).

[60] *Amdt.14.S1.8.13.2 Interstate Travel as a Fundamental Right*, LIBR. OF CONG., https://constitution.congress.gov/browse/essay/amdt14-S1-8-13-2/ALDE_00000840 [https://perma.cc/Q8BB-CGFW].

[61] ARTICLES OF CONFEDERATION of 1781, art. IV; *see* U.S. CONST. amends. V, XIV.

[62] Art. IV of the Articles of Confederation provided: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union . . . shall be entitled to all privileges and immunities of free citizens in the several states, and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce." ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

[63] *See* United States v. Guest, 383 U.S. 745, 758 (1966) ("A right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."); *see also* Edwards v. California, 314 U.S. 160 (1941); Saenz, 526 U.S. at 501; Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (discussing that the right to travel is "a right broadly assertable against private interference as well as governmental action […] it is a virtually unconditional personal right, guaranteed by the Constitution to us all"); Paul, 75 U.S. 168 (1869); Smith v. Turner, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states.").

[64] U.S. CONST. art. IV, § 2.

[65] Paul, 75 U.S. at 180.

[66] *Id.*

right to travel in several cases.[67] In particular, the Court has acknowledged that this protection extends to medical services, including abortions, in other states.[68] In *Doe v. Bolton*, the Court struck down a state statute that outlawed abortions, except those performed on its residents.[69] The Court recognized that a state may not limit general medical care, both public and private, to its own residents.[70]

The right to travel, especially the two aforementioned components of this right, enables citizens to move freely to other states and obtain legal abortions in those states, even if their home state has outlawed or criminalized the procedure at any stage. The third component of the right to travel may impact abortion access indirectly. Durational requirements could involve laws restricting access to abortions based on the length of the pregnancy or waiting periods between a medical visit and an abortion procedure. However, these requirements currently do not affect nonresidents differently than citizens of a state.

b. The Fourteenth Amendment: The Privileges and Immunities and Due Process Clauses

Supreme Court decisions have also interpreted a right to travel through the Fourteenth Amendment to the Constitution, specifically in the Privileges or Immunities and Due Process Clauses.[71] The Fourteenth Amendment protects citizens from the creation or enforcement of any law that "shall abridge the privileges or immunities of the citizens of the United States."[72] Further, the Due Process Clause of the Fourteenth Amendment prohibits any state from depriving any person of "life, liberty, or property, without due process of the law."[73] These provisions are essential to protecting citizens from state infringement, including when making medical or family decisions.

In determining whether a right is protected under the Due Process Clause if not expressly mentioned in the Constitution, it must pass the *Glucksberg* test: it must (1) be "deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty."[74] In the *Dobbs* ruling, the Court held that the right to abortion failed when subjected to this test.[75] Therefore, the extension of the Due Process Clause to abortion was unconstitutional. However, in 1908, the Court recognized in *Twinning v. New Jersey* that the right to pass freely from state to state was "among the rights and privileges" of national citizenship.[76] Further, in *Crutcher v. Kentucky*,

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[67] *See* Guest, 383 U.S. 745 (1966); Saenz, 526 U.S. 489, 501–02 (1999); Shapiro, 394 U.S. 618 (1969); Paul, 75 U.S. 168 (1869) (recognizing that without constitutional protection against "removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists").

[68] Doe v. Bolton, 410 U.S. 179, 200 (1973).

[69] *Id.*

[70] *Id.* (recognizing that the Privileges and Immunities Clause "must [] protect persons who enter [a state] seeking the medical services that are available there").

[71] U.S. CONST. amend. XIV, § 1.

[72] *Id.*

[73] *Id.*

[74] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[75] Dobbs, 142 S. Ct. at 2243.

[76] Twining v. New Jersey, 211 U.S. 78, 97 (1908).

the Court acknowledged the right of every citizen to carry on interstate commerce as one guaranteed by the Constitution.[77] Therefore, the right to travel to obtain an abortion should pass the *Glucksberg* test and deserve protection under the Due Process Clause because it is a foundational right recognized in the Constitution.

2. Constitutional Grants of Authority: The Supremacy, Full Faith and Credit, and Commerce Clauses

a. Conflicts Between Federal and State Laws: The Supremacy and Commerce Clauses

The Constitution establishes that the Constitution, federal laws made pursuant to it, and treaties made under it are "the supreme Law of the Land."[78] Federal laws that abide by constitutional power preempt state laws where state laws conflict. Notably, when a state tries to regulate in an area with a history of significant federal presence, federal law preempts state law.[79]

Employers should be protected by laws that are made under Congress's Commerce Clause powers and affect areas of interstate and intrastate commerce. In Article I, the Constitution establishes that Congress shall have the power "to regulate commerce . . . among the several States."[80] The Supreme Court has long recognized the authority of Congress to create laws governing and pertaining to commerce regulation. In *Gibbons v. Ogden*, the Court recognized that the federal government may regulate interstate commerce and federal law is supreme when in conflict with state laws regarding interstate commerce conflict.[81] In effect, *Gibbons* established the precedent that the constitutional grant of power to Congress included interstate commerce.[82]

The federal government's exercise of the Commerce Clause has an indirect effect on state governments.[83] In what is known as the dormant Commerce Clause, the Commerce Clause implicitly prohibits states from passing legislation that significantly burdens interstate commerce.[84] For example, Congress may criminalize discriminatory conduct where it has direct and adverse effects on the free flow of interstate commerce.[85] The

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[77] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[78] U.S. CONST. art. VI, cl. 2.

[79] United States v. Locke, 529 U.S. 89, 108 (2000) ("An 'assumption' of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

[80] U.S. CONST. art. I, § 8, cl. 3.

[81] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196, 199–200 (1824).

[82] *Id.* at 195–96.

[83] *See* Dennis v. Higgins, 498 U.S. 439, 448 (1991) (finding that the dormant Commerce Clause allows the American people to "engage in interstate trade free from restrictive state legislation"); Cooley v. Bd. of Wardens, 53 U.S. 299,319 (1851); The Passenger Cases, 48 U.S. 283 (1849).

[84] Greer A. Clem & Jennifer B. Rubin, *Managing State Law Risks of Employer-Sponsored Abortion-Related Travel Benefits Post-Dobbs*, MINTZ (Aug. 8, 2022), https://www.mintz.com/insights-center/viewpoints/2226/2022-08-08-managing-state-law-risks-employer-sponsored-abortion [https://perma.cc/86NS-25SR].

[85] *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964), Perez v. United States, 402 U.S. 146 (1971).

commerce power has also been interpreted to reach intrastate activity where the activity has an aggregate effect on interstate power.[86]

However, there are recognized limits on the reach of the commerce power, especially in areas that are traditionally under state control or do not impact interstate commerce. Namely, the state can regulate strictly local activities, such as exercising its police power.[87] This may limit the federal government's ability to restrict the state from criminalizing abortion services and employers from providing access to those services in other states. Regarding healthcare, the Court recognized that the medical and insurance market is an area of commercial activity that can be regulated by the federal government, though Congress cannot compel individuals to participate in the market.[88]

b. Conflicting State Laws: The Full Faith and Credit Clause

The Constitution also addresses the interrelationships of states, especially when faced with conflicting laws. In Article IV, the Constitution states that each state shall be given, "Full Faith and Credit . . . to the public acts, records, and judicial proceedings of every other state."[89] In effect, the Constitution allowed each state to maintain its own government and respect the legislative acts, judicial proceedings, and public records of every other state.[90] This ensures that court rulings in one state will be respected in other states, which is important to the enforcement of judgments and prevents states from reaching into other states and attempting to exert their influence.[91]

3. State Responses to the *Dobbs* Decision

a. Texas and California

This protection becomes especially important when examining different state responses to the *Dobbs* decision. Two notable states—Texas and California—enacted laws that may have drastic and different effects on the ability of employers to provide travel coverage for abortion and protect the privacy of that information.

In September 2021, Texas Senate Bill 8 ("SB 8") took effect and outlawed abortion around four to six weeks of gestation, even in cases of rape and incest.[92] Through SB 8, an individual can sue anyone who "aids or abets" an abortion and receive a ten thousand dollar reward.[93] Texas also passed a "trigger law" in 2021, House Bill 1280 ("HB 1280"), that

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[86] Gonzales v. Raich, 545 U.S. 1, 31 (2005).

[87] *See generally* United States v. Lopez, 514 U.S. 549 (1995); Nat'l Fed'n of Indep. Bus. v. Sebelius, 565 U.S. 519 (2012).

[88] Nat'l Fed'n of Indep. Bus., 565 U.S. 519, 521–22 (2012).

[89] U.S. CONST. art. IV, § 1.

[90] Clem, & Rubin, *supra* note 84.

[91] *Id.*

[92] S.B. 8, 2021 Leg., 87th Sess. (Tex. 2021).

[93] *Id.*; Chris Marr, Andrea Vittorio & Justin Wise, *Workers' Abortion Privacy at Risk as Texas Targets Employer Aid*, BLOOMBERG LAW (July 15, 2022, 8:17 AM), http://news.bloomberglaw.com/daily-labor-report/workers-abortion-privacy-at-risk-as-texas-targets-employer-aid [https://perma.cc/QQ98-D8FH].

criminalized performing an abortion "from the moment of fertilization" unless the patient is facing "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy."[94] The Texas trigger law went into effect thirty days after the release of the *Dobbs* decision.[95] Any violations of HB 1280 are punishable by up to life in prison and subject to a civil penalty of at least one hundred thousand dollars.[96]

This decision is especially important for employers that offer travel coverage for abortions. While the Texas legislation exempts pregnant patients from criminal prosecutions,[97] the employer may be liable for aiding and abetting an abortion through these benefits. These concerns are more than hypothetical. In July 2022, the Texas Freedom Caucus accused Sidley Austin LLP of being "complicit in illegal abortions" and warned the firm to "preserve and retain all documents, data, and electronically stored information" related to the abortions.[98]

California also passed legislation responding to the *Dobbs* decision that may affect employer-provided travel coverage for abortions. In September 2022, the California legislature passed thirteen bills to protect abortion rights in California.[99] The legislation aims to establish California as a safe haven for abortion care.[100] California Assembly Bill 1242 ("AB 1242") prohibits California law enforcement officials from assisting or cooperating with other states' investigations into abortion procedures.[101] The law also prohibits technology companies in California from sharing digital information with out-of-state law enforcement officials who seek to enforce their state's abortion ban.[102]

The California legislation may protect employers from evidentiary disclosures if states like Texas seek to bring criminal charges or civil lawsuits. The legislation may also protect employees who seek to circumvent laws criminalizing abortion from states like Texas. Considering the reach of the Texas and California legislation, it is likely to be a source of heated litigation. As employers balance the competing interests between providing their employees with equitable healthcare and avoiding criminal or civil suits, it is important to consider the applicability of federal laws and constitutional protections.

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[94] H.B 1280, Leg., 87th Sess. (Tex. 2021).; *see also*, Eleanor Klibanoff, *Texans Who Perform Abortions Now Face up to Life in Prison, $100,000 Fine*, THE TEXAS TRIBUNE (Aug. 25, 2022), http://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/ [https://perma.cc/39RK-8992].

[95] *Id.*

[96] *Id.*

[97] TEX. HEALTH & SAFETY CODE § 171.048(b).

[98] Letter from Rep. Mayes Middleton, Chairman, Tex. Freedom Caucus, to Yvette Ostolaza, Chair of the Mgmt. Comm., Sidley Austin (July 7, 2022) (on file at http://www.freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf [https://perma.cc/RRK7-2TNC]).

[99] Sharon Bernstein, *California Lawmakers Pass Slate of Bills Protecting Abortion Access*, REUTERS (Sept. 1, 2022), http://www.reuters.com/world/us/california-lawmakers-pass-slate-bills-protecting-abortion-access-2022-09-01/ [https://perma.cc/YZ8Y-WQFZ].

[100] *Id.*

[101] Assemb. B. 1242, 2021-2022 Reg. Sess. (Cal. 2022); Veronica Stracqualursi, *California Gov. Gavin Newsom Signs Legislative Package Protecting and Expanding Abortion Access into Law*, CNN (Sept. 27, 2022, 10:50 PM), https://www.cnn.com/2022/09/27/politics/california-abortion-protection-package-signed-law-newsom [https://perma.cc/6K94-JR2P].

[102] *Id.*

b. State Restrictions: Surgical vs. Medical Abortions

As the Texas and California examples reflect,[103] states have been examining a plethora of legal avenues to either expand or limit access to abortion. There are two main types of abortions: surgical and medical abortions. When designing health benefit plans to cover abortion services, an employer needs to consider the unique aspects of each procedure and understand how each is impacted by state laws.

State laws that target travel coverage for abortions primarily affect abortions that are conducted by medical professionals in person, also known as surgical abortions. Surgical abortions by suction curettage involve vacuum aspiration and can be performed from five to twenty-four weeks of pregnancy.[104] Considering the range of time that surgical abortions can be performed, access to this procedure is incredibly important, especially for later pregnancies that are no longer viable or when there are complications that affect the carrier's life.[105] A surgical abortion is more widely applicable and is used to terminate a significant number of pregnancies because it takes a shorter amount of time and is more effective than medical abortions for later pregnancies.[106]

Medical abortions involve taking a regimen of two medications (mifepristone and misoprostol) to end a pregnancy.[107] A patient can sometimes get access to a medical abortion through a telehealth appointment with a certified prescriber, so patients do not need to travel to a clinic or doctor's office to receive the treatment.[108] A medical abortion can be used from the earliest weeks until about ten weeks of pregnancy.[109] This treatment is more effective than a surgical abortion if performed earlier than six weeks.[110] Access to medical abortions is important for those with greater travel or resource restrictions, including those who are impoverished, lack access to quality medical care, or have physical disabilities. In fact, over half of all abortions in the United States were medical abortions in 2021.[111]

After the *Dobbs* decision was released, state legislatures without existing laws regulating abortion procedures endeavored to either legalize or restrict access to this reproductive care. Without more recent statutes, the laws in existence before *Roe v. Wade* became the default standards. Some statutes primarily affect surgical abortions in the state since the statutory language in effect does not encompass abortion by pills. Even in states that have an outright abortion ban, medication is more difficult to regulate.[112] Throughout

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[103] *See infra* note 115.

[104] *Medical vs. Surgical Abortion*, UCLA HEALTH, http://www.uclahealth.org/medical-services/obgyn/family-planning/patient-resources/medical-vs-surgical-abortion [https://perma.cc/JK8B-TP49].

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin & Marielle Kirstein, *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST. (Feb. 24, 2022), http://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions [https://perma.cc/M9RT-5AG8].

[112] David W. Chen, *A New Goal for Abortion Bills: Punish or Protect Doctors*, N.Y. TIMES (Feb. 16, 2023), http://www.nytimes.com/2023/02/16/us/abortion-bills-doctors.html [https://perma.cc/MBS6-DLZC].

the country, states are endeavoring to either strengthen or further restrict access to abortion services.[113] There were more ballot proposals pertaining to abortion in the 2022 midterm elections than in any previous year.[114] In three states, voters chose to add explicit protections to their respective constitutions.[115] In two other states, voters rejected proposals to restrict access to abortion.[116]

Despite these ballot initiatives, states are enacting laws that are specifically designed to restrict or ban access to medical abortions.[117] In March 2023, Wyoming became the first state to explicitly ban medical abortions.[118] This law made it illegal to "prescribe, dispense, distribute, sell or use any drug for the purpose of procuring or performing an abortion."[119] However, the law explicitly exempted pregnant patients from charges and penalties.[120] This indicates that while the patient would not be penalized, employer-provided abortion coverage that covers medical abortions could subject the employer to civil penalties or criminal charges.

An employer's liability under these laws is untested. Given the recency of these restrictions and employer-provided abortion coverage, the law has not yet faced this issue. Doctors and other health care providers are the primary targets of this law and similar legislation throughout the country.[121] However, for employee health benefit plans, liability for medical abortions would likely depend upon numerous factors, including the structure of the health policy and where the employee was located when taking the medication. If the plan is subject to state restrictions, such as a fully-insured model, then the employer would be subject to the state laws and could be prohibited from aiding access to abortion medication. Even a self-insured plan could subject the employer to liability if the state frames the employer as aiding and abetting a crime.

If the employer-provided health plan covered medication abortions and was used by the employee to access the medication, then the employee's location when using the abortion medication may be another factor for liability. For example, if the employee used the abortion medication when in Wyoming or another state prohibiting use, then this would be used to favor liability. The state may allege that the employer facilitated the employee's access. However, if the employee obtained and used the medication while in a state that legalizes abortion, then the employer would likely be covered from liability under the Constitution and federal statutes.

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[113] *Id.* (explaining that legislation restricting access to abortion is currently pending in Iowa, Hawaii, New Hampshire, Idaho, Nebraska, and Montana, among others.).

[114] *Abortion on the Ballot*, N.Y. TIMES (last updated Dec. 20, 2022), http://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html [https://perma.cc/U8HE-6MKY].

[115] *Id.* (illustrating that California, Michigan, and Vermont voters all passed ballot proposals to protect abortion coverage).

[116] *Id.* (illustrating that Montana and Kentucky ballot initiatives aimed at restricting abortions failed).

[117] David W. Chen & Pam Belluck, *Wyoming Becomes First State to Outlaw the Use of Pills for Abortion*, N.Y. TIMES (Mar. 17, 2023), http://www.nytimes.com/2023/03/17/us/wyoming-abortion-pills-ban.html [https://perma.cc/9QYE-CH96].

[118] *Id.*

[119] WYO. STAT. ANN. § 35-6-120(a) (West).

[120] *Id.* § 35-6-120(d).

[121] Chen, *supra* note 112.

Though Wyoming was the first state to pass such restrictive legislation, other states have introduced similar measures that are likely to pass.[122] In Texas, for example, a bill was introduced that endeavors to close off any access to medical abortions, including by blocking medication abortion websites to prevent those in Texas from accessing them.[123] Examining the potential for liability is essential for employers who endeavor to provide equitable reproductive health coverage for their employees.

4. Federal Statutes and Responses to the Dobbs Decision

a. A Federal Response to Dobbs: Congressional & Administrative Action

In the two years since the landmark *Dobbs* decision, the legal parameters around abortion and employer-provided insurance to cover abortion services continue to be in a state of flux. At the federal level, Congress is deadlocked on how to approach federal legislation over abortion and reproductive health.[124] Though the Republican-led House of Representatives passed two anti-abortion bills on its first day of formal legislating, these failed to pass in the Democratic-controlled Senate and White House.[125] Since there is no present indication of federal legislation regarding abortion coverage, employers are increasingly turning to the White House and independent administrative agencies for guidance.[126]

After the *Dobbs* decision was released, two employer business groups sent letters seeking help from the Departments of Health and Human Services ("HHS"), Labor, and Treasury.[127] Since these letters, President Biden has been taking some action. Administrative agencies have also been exploring how the *Dobbs* decision impacts their authority and the respective industries that they cover. In July 2022, President Biden signed an executive order directing the Secretary of HHS to submit a report outlining efforts to protect access to reproductive health services, including access to medical abortions and emergency medical care.[128]

Following this order, HHS announced new guidance and communication to providers regarding emergency medical services.[129] The guidance advised

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[122] Chen & Belluck, *supra* note 117.

[123] *Id.*

[124] Julie Rovner, *Abortion Debate Ramps Up in States as Congress Deadlocks*, KFF HEALTH NEWS (Jan. 23, 2023), http://khn.org/news/article/abortion-debate-ramps-up-in-states-as-congress-deadlocks/ [https://perma.cc/YZR7-EC4P].

[125] *Id.*

[126] Sara Hansard, *Employers Offering Abortion Coverage Seek Agencies' Protection*, BLOOMBERG LAW (July 22, 2022), http://news.bloomberglaw.com/employee-benefits/employers-offering-abortion-coverage-seek-agencies-protection [https://perma.cc/76NR-96EW].

[127] Letter from D. Mark Wilson, Health & Emp. Pol'y Vice President and Chatrane Birbal, Gov. Rels. Vice President, HR Pol'y Assoc. to Hon. Xavier Becerra, Sec'y, Dep't of Health & Hum. Servs., Hon. Martin Walsh, Sec'y, Dep't of Lab., Hon. Janet Yellen, Sec'y, Dep't of the Treasury (July 14, 2022), http://www.hrpolicy.org/getmedia/9b28c988-6f73-4d67-a089-f8e7fc8bf22d/22-32-Tri-Agency-Travel-Benefits-Letter.pdf [https://perma.cc/P47E-UCPF]; Letter from Ellen Kelsay, President & CEO, Bus. Group on Health to Hon. Xavier Becerra, Sec'y, Dep't of Health & Hum. Servs., Hon. Martin Walsh, Sec'y, Dep't of Lab., Hon. Janet Yellen, Sec'y, Dep't of the Treasury (July 6, 2022), http://aboutblaw.com/34N [https://perma.cc/J3VZ-EXZP].

[128] Exec. Order No. 14,076, 87 Fed. Reg. 42053 (July 13, 2022).

[129] Memorandum Summary from Dirs., Quality, Safety & Oversight Grp. and Surv. & Operations Grp., Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs. to State Surv. Agency Dirs. (July 11, 2022), http://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/ETL7-8S9E]; Letter from Xavier Becerra, Sec'y, Dep't of Health & Hum. Servs. To Health Care Providers (July

that the Emergency Medical Treatment and Active Labor Act ("EMTALA") protected providers when exercising their clinical judgment and actions they may take to provide stabilizing medical treatment to their pregnant patients, including abortion care.[130] The guidance also stated that hospitals and physicians who fail to comply with the federal mandate could face civil fines and termination from Medicare and Medicaid programs because EMTALA supersedes state laws prohibiting abortion.[131] However, these efforts were halted when Texas and Idaho filed lawsuits to enjoin HHS and the Biden Administration from extending EMTALA's provisions to abortion care in hospitals that receive Medicare and Medicaid funding.[132] A preliminary injunction was later issued enjoining HHS from enforcing the interpretations in the guidance and letter.[133] If HHS's interpretation of EMTALA is correct, then employee benefit plans may be able to cover some abortion procedures even in states that prohibit abortions. However, these cases may be too rare for the employer to make a significant impact on securing access to abortion coverage for employees.

In August 2022, President Biden signed another order directing HHS to consider action to support patients traveling out of their home state for reproductive health care services and ensure that health care providers comply with federal nondiscrimination law.[134] The order also established the interagency Task Force on Reproductive Health Care Access to coordinate efforts to defend reproductive rights and protect access to reproductive health services.[135] HHS released the requested report in January 2023, though there is no information regarding support for patients traveling out of their state for abortion care.[136] The only guidance for employers regarded protecting access to birth control through employee benefit plans, without mention of abortion care coverage.[137]

Though HHS and other federal agencies have worked to protect access to abortion care after *Dobbs*, some agency officials are working to prevent an employer's ability to provide health coverage for abortions. In November 2022, information was released that U.S. Equal Employment Opportunity Commission ("EEOC") Commissioner Andrea Lucas has been quietly deploying discrimination probes against employers that provide travel

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11, 2022), http://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf [https://perma.cc/CYD7-SBJS].

[130] *Id.*

[131] Harris Meyer, *Hospital Investigated for Allegedly Denying an Emergency Abortion After Patient's Water Broke*, KFF (Nov. 1, 2022), http://khn.org/news/article/emtala-missouri-hospital-investigated-emergency-abortion/ [https://perma.cc/KV5B-4GRE].

[132] Ian Lopez, *Texas Targets Biden Abortion Pill Access Initiative*, BLOOMBERG LAW (Feb. 8, 2023), http://news.bloomberglaw.com/health-law-and-business/texas-targets-biden-abortion-pill-access-initiative [https://perma.cc/Q2QE-RLFJ]; Idaho v. U.S. 603 U.S. ___ (2024).

[133] *See* Memorandum Survey from Dirs., Quality, Safety & Oversight Grp. and Surv. & Operations Grp., Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs. to State Surv. Agency Dirs. (Aug. 25, 2022), http://www.hhs.gov/guidance/document/preliminary-injunction-texas-v-becerra-no-522-cv-185-h-nd-tex [https://perma.cc/AL8P-ST4V].

[134] Exec. Order No. 14,079, 87 Fed. Reg. 49505 (Aug. 11, 2022).

[135] *Id.* (The Task Force includes offices across the White House and the following Federal agencies: the Dep't of Health & Hum. Servs.; Dep't of Def.; Dep't of Educ.; Dep't of Homeland Sec., Dep't of Just., Dep't of Lab.; Dep't of the Treasury; Dep't of Transp.; Dep't of Veterans Affs.; Fed. Commc'ns Comm'n; Fed. Trade Comm'n; Off. of Mgmt. & Budget; Off. of Pers. Mgmt.).

[136] *See* DEP'T OF HEALTH & HUM. SERVS., MARKING THE 50TH ANNIVERSARY OF ROE: BIDEN-HARRIS ADMINISTRATION EFFORTS TO PROTECT REPRODUCTIVE HEALTH CARE, (2023), http://www.hhs.gov/sites/default/files/roe-report.pdf [https://perma.cc/BUG7-LTDH].

[137] *See id.*

coverage for abortion.[138] Lucas filed at least three charges against such employers, claiming that the policy favors workers seeking abortions and discriminates against pregnant and disabled workers.[139] The charges rest on the theory that pregnant workers, under Title VII of the Civil Rights Act of 1964 ("Title VII"), and disabled workers, under the Americans with Disabilities Act of 1990 ("ADA"), are being discriminated against because their employers are not offering equivalent benefits for their medical needs.[140] Additionally, Lucas contends that travel benefits for abortion amount to religious discrimination against those who choose to carry a child to term for religious reasons.[141] These charges are alarming to employers who seek to provide travel benefits and further support their employees' reproductive freedoms.[142] While Lucas's contentions against abortion policies as discriminatory have not yet been raised in federal court, these arguments have been cited by some attorneys targeting these employer policies.[143] This may indicate a broader legal strategy by groups adverse to travel benefits for abortion.[144] Employers can prepare for potential litigation and protect the policies by ensuring that travel benefits extend to other medical procedures.[145] By drafting travel benefit policies that cover all procedures that are otherwise unavailable in an employee's home state, an employer can undermine these types of discrimination claims while supporting equitable access to medical services.[146]

b. A National Threat to Medical Abortions

The scope of liability is especially relevant considering an attempted lawsuit challenging the U.S. Food and Drug Administration's ("FDA") approval of mifepristone. Medical abortion through mifepristone first became available when the FDA approved the drug in 2000.[147] Access was expanded in 2019 when the FDA approved a generic version of the drug.[148] In 2021, the FDA decided to permanently allow patients to access abortion medications by mail.[149] In November 2022, the Alliance for Hippocratic Medicine ("AHM"), an anti-abortion coalition, sued the FDA. The lawsuit seeks to overturn the agency's approval of mifepristone and misoprostol as

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[138] J. Edward Moreno, *EEOC Official Quietly Targets Companies Over Abortion Travel*, BLOOMBERG LAW (Nov. 14, 2022), http://news.bloomberglaw.com/daily-labor-report/eeoc-official-quietly-targets-companies-over-abortion-travel-20 [https://perma.cc/C384-MJ3X].

[139] *Id.*

[140] Rachel B. Cowen & Sarah G. Raaii, *Employers Seek Clarity on Reproductive Healthcare Benefits Litigation Following EEOC Commissioner Filing*, MCDERMOTT WILL & EMERY (Nov. 28, 2022), http://www.mwe.com/insights/employers-seek-clarity-on-reproductive-healthcare-benefits-litigation-following-eeoc-commissioner-filing/ [https://perma.cc/N2G2-AHPC].

[141] *Id.*

[142] *Id.*

[143] Moreno, *supra* note 138, at 3.

[144] Cowen & Raaii, *supra* note 140.

[145] *Id.*

[146] *Id.*

[147] *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (last updated Jan. 4, 2023), http://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation [https://perma.cc/G8TU-A5XC].

[148] *Id.*

[149] Pam Belluck, *F.D.A. Will Permanently Allow Abortion Pills by Mail*, N.Y. TIMES (Dec. 16, 2021), http://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html [https://perma.cc/C68F-NRYV].

chemical abortion drugs and the decision to remove in-person requirements, which allowed access to the medications by mail.[150]

In Washington, the FDA is facing a different lawsuit brought in February 2023 by the Attorneys General of twelve states.[151] These states claim that the FDA's limits on mifepristone are too strict.[152] In particular, the FDA requires that providing pharmacies obtain special certification.[153] Additionally, patients and providers must sign an agreement stating that the drugs will be used to end a pregnancy.[154] These states allege that the documentation is unnecessarily burdensome because mifepristone does not contain the same risks as other drugs that require the documentation.[155] Additionally, this documentation allegedly "puts both patients and providers in danger of violence, harassment, and threats of liability amid the growing criminalization and outlawing of abortion in other states.[156]" The lawsuit could bring to the forefront a battle between states seeking to provide abortion against those seeking to restrict abortion since the *Dobbs* decision was released.[157] While the Supreme Court dismissed a recent attempt to restrict access to medical abortions for lack of standing,[158] a case could soon be brought before the Court with the right plaintiffs.[159] Such a decision would impact an employer's ability to cover medical abortions because the revocation of FDA approval would restrict accessibility to mifepristone throughout the country. In effect, employer-provided travel coverage for abortions would become even more important for equitable access to surgical abortions regardless of an employee's home state laws.

c. Federal Statutes and Coverage for Abortions

The Federal Employee Retirement Income Security Act of 1974 ("ERISA") also protects the right to travel by prohibiting states from enforcing state laws against private-sector employer-provided health plans.[160] ERISA expressly states that it preempts "any and all [s]tate laws insofar as they may now or hereafter relate to any employee benefit plan.[161]" Since employers that offer self-insured healthcare coverage are not considered insurance companies under ERISA § 1144(b)(2)(B), these plans cannot be regulated by state insurance law and are regulated by ERISA.[162]

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[150] Devan Cole, *What to Know About the Lawsuit Aiming to Ban Medication Abortion Drug Mifepristone*, CNN (Mar. 13, 2023), http://www.cnn.com/2023/02/10/politics/fda-medication-abortion-lawsuit-mifepristone/index.html [https://perma.cc/E9HJ-9NN7].

[151] Complaint at 6–13, Washington v. Food & Drug Admin., No. 1:23-cv-03026 (E.D. Wash. Feb. 23, 2023), ECF No. 1 (The states bringing the lawsuit are: Washington, Oregon, Arizona, Colorado, Connecticut, Delaware, Illinois, Michigan, Nevada, New Mexico, Rhode Island, and Vermont.).

[152] *Id.* at 4.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Dan Berman & Devan Cole, *12 Blue States Sue FDA, Saying It's Too Strict In Limiting Abortion Drugs as Legal Battle Over Mifepristone Heats Up*, CNN (Feb. 24, 2023), http://www.cnn.com/2023/02/24/politics/mifepristone-abortion-lawsuit-blue-states-texas/index.html [https://perma.cc/7ARK-GD85].

[158] FDA v. Alliance for Hippocratic Medicine, 602 U.S. ___ (2024).

[159] Berman & Cole, *supra* note 157.

[160] CAL. HEALTHCARE FOUND., REGULATORY OVERSIGHT OF HEALTH INSURANCE IN CALIFORNIA 1, 1 (June 2003).

[161] 29 U.S.C. § 1144(a).

[162] *Id.* § 1144(b)(2)–(4); *see* Gobeille v. Liberty Mutual Ins., 577 U.S. 312, 317, 327 (2016).

ERISA laws are much more flexible and less far-reaching than state regulations, allowing employers greater freedom in the structure of their plans and benefits provided.[163] However, employers that adopt a fully-insured plan are not protected by ERISA preemption because the employers purchase coverage from a state-regulated insurance carrier.[164] For employers who adopt a self-insured plan, ERISA preempts state regulation. This exemption is also found support in case law. In *FMC Corp. v. Holliday*, the Court acknowledged that ERISA preemption extended to self-insured plans, even if the employer-provided benefits offered were similar to those that a fully-insured plan would have offered.[165] It is unclear whether employers that adopt a hybrid model, like a level-funded plan, for health coverage would be protected by ERISA preemption because the Department of Labor has not clearly defined "self-insurance" for the purposes of the act.[166] ERISA preemption is essential to employer-provided travel benefits because for employers to cover employee abortions outside of their state, the employer must be free from the regulatory oversight of the states that outlaw abortion.

5. Understanding the Legality of Employer-Provided Benefits for Abortions

Conflicting state laws may be the subject of litigation at the state and federal levels. The Court may ultimately have to rule on these conflicts as they pertain to employer-provided travel benefits for abortion services. Employers who offer fully-insured plans would be subject to the regulations of the state in which they are insured. This is primarily relevant for employers who are fully-insured and operating in states that have outlawed abortion because these employers would be subject to the regulations prohibiting them from covering abortion services. Self-insured employers would likely be exempt from civil litigation prohibiting them from covering travel for abortions. Since employers who offer self-insured plans are protected by ERISA, it is improbable that Texas could prohibit self-insured employers from providing travel vouchers for abortions. ERISA would preempt Texas's attempts to regulate the employer's travel benefits, as long the employer was self-insured, especially because ERISA specifically includes a provision for actions brought against a breach of fiduciary duty.[167] This is further supported by the Supremacy Clause and dormant Commerce Clause of the Constitution.

However, ERISA would not protect self-insured employers from criminal charges if a state like Texas began criminalizing employers in the state offering these benefits. ERISA's preemption provision explicitly exempts the preemption from applying to "any generally applicable criminal law of [a] state."[168] ERISA does not define "generally applicable criminal law," and there is very little case law examining this section of the Act.[169]

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[163] CAL. HEALTHCARE FOUND., *supra* note 167, at 1–2.
[164] *Id.*
[165] 498 U.S. 52, 61 (1990).
[166] CAL. HEALTHCARE FOUND., *supra* note 167, at 3.
[167] 29 U.S.C. §§ 1101–1114, 1144(a).
[168] 29 U.S.C. § 1144(b)(4).
[169] Thomas C. Hardy & Harneet Kaur, *'Generally Applicable Criminal Law': ERISA's Little-Known Exception to Preemption and its Impact in a Post-Roe World*, REUTERS (Aug. 26, 2022), http://www.reuters.com/legal/litigation/generally-applicable-criminal-law-erisas-little-known-exception-preemption-its-2022-08-26/ [https://perma.cc/YYM8-J89W].

The Department of Labor has offered some guidance that suggests that states may enforce criminal laws against plans, administrators, and employers if the laws do not specifically target plans.[170] Since the Texas law is broadly aimed at anyone who aids and abets an abortion, it is unlikely that the ERISA preemption would protect employers from criminal liability. Although, employers may be protected against discovery if these procedures were largely conducted in states like California with legislative protections against aiding out-of-state law enforcement. California providers, law enforcement officials, and data companies would be prohibited from providing any assistance to officials in Texas.[171]

It is unclear whether AB 1242 would be supported by the Full Faith and Credit Clause of the Constitution. The Clause requires states to provide full faith and credit to "judicial proceedings" of other states. A Texas judge's order compelling officials in California to cooperate with Texas law enforcement may be considered a "judicial proceeding" that falls within the scope of the Constitution. On the other hand, a court would likely recognize that California AB 1242 falls within "public acts" of the Clause because the Court has held that a statute is a "public Act" within the meaning of the Clause.[172] Additionally, the Court has recognized some exceptions to the Full Faith and Credit Clause, including when the laws in one state violate public policy in another state.[173] Therefore, where the Texas and California legislation conflicts, it is likely that neither could supersede the other to compel performance.

III. ABORTION TRAVEL AND PATIENT PRIVACY CONSIDERATIONS

A. THE LEGAL LANDSCAPE OF PATIENT PRIVACY

Considering that states have already begun targeting employer-provided travel coverage for abortions, it is important for employers and employees alike to maintain the privacy of protected health information and understand the scope of protections. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") provides federal protection for

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[170] Letter from Louis J. Campagna, Chief Div. of Fiduciary Interpretations, U.S. Dep't of Labor, to Julie A. Spezio, Senior Vice President & Gen. Counsel, Am. Council of Life Insurers (Dec. 4, 2018) (on file at http://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/12-04-2018)[https://perma.cc/AVX5-JMAS]); Letter from Lisa M. Alexander, Chief, Div. of Coverage, Reporting & Disclosure, U.S. Dep't of Labor to Eugene Scalia, Esq., Gibson, Dunn & Crutcher LLP (Feb. 8, 2008) (on file at http://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2008-02 [https://perma.cc/PX4N-M73S]); Letter from Robert J. Doyle, Dir. Of Regulations and Interpretations, to J. Stephen Mikita, Office of the Att'y Gen., State of Utah (Feb. 10, 1989) (on file at http://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1989-01a.pdf [https://perma.cc/TEV7-UTGB]).

[171] Assemb. B. 1242, 2021-2022 Reg. Sess. (Cal. 2022).

[172] Franchise Tax Bd. v. Hyatt, 578 U.S. 171 (2016) (holding that a statute is a 'public Act' within the meaning of the Full Faith and Credit Clause); *see also* 28 U.S.C. § 1738 (referring to "[t]he Acts of the legislature" in the full faith and credit context).

[173] *See* McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230 (1934); Nevada v. Hall, 440 U.S. 410 (1979); Hanson v. Denckla, 357 U.S. 235 (1958) (holding that a state is under no obligation to give full faith and credit to a judgment of a sister state which is invalid in the state where rendered because it offends the due process clause of the Fourteenth Amendment); Adam Beam, *New California Abortion Laws Set Up Clash with Other States*, AP NEWS (Sept. 27, 2022), http://apnews.com/article/abortion-us-supreme-court-health-california-df6dd40a7e2af65a1c6a4042e4ffa485 [https://perma.cc/2G7L-SSGB].

sensitive patient health information ("PHI") from being disclosed without patient consent or knowledge.[174]

The HIPAA Privacy Rule was later issued by the Department of Health and Human Services to implement HIPAA requirements and protect against the use and disclosure of PHI.[175] The Privacy Rule protects PHI while allowing the flow of necessary health information to provide quality healthcare.[176] HIPAA privacy restrictions only apply to "covered entities," which include health care providers, health plans, healthcare clearinghouses, and business associates.[177] Therefore, HIPAA applies to employer-provided health plans and administrators of those plans.[178]

Since abortion is a highly sensitive topic and is subject to intense debate, patient information regarding abortions must be protected. HIPAA allows a covered entity to use and disclose PHI without patient authorization in limited situations.[179] The covered entity may disclose PHI (1) to the patient; (2) for treatment, payment, and healthcare operations; (3) with patient permission; (4) to a limited dataset for research, public health, or healthcare operations; or (5) for public interest and benefit activities.[180] The last situation is especially important for employer-provided benefits.

The Privacy Rule allows the disclosure and use of PHI for twelve "national priority purposes," even without the patient's authorization or consent.[181] Among these purposes, PHI may be disclosed when required by law, in judicial and administrative proceedings, for workers' compensation, or when compelled by law enforcement.[182] Therefore, employers may disclose this information as essential to the functioning of their health plans and maintain the privacy of their employee's PHI from external actors. Employers may be limited in protecting PHI against law enforcement or judicial proceedings. However, the HIPAA exception is permissive and does not mandate disclosure; the employer may be limited in its ability to protect this information against a court order, warrant, or subpoena.[183]

The privacy of PHI in employer-provided abortion coverage may depend upon how courts apply these exceptions.[184] Some courts may prioritize public policy interests in protecting PHI and the employer's right to provide abortion coverage without legal repercussions, while other courts may prioritize law enforcement interests in bringing criminal charges against any employer who "aids and abets" an abortion.

B. POTENTIAL REPERCUSSIONS OF PRIVACY VIOLATIONS

If federal courts determine that PHI is not secure against law enforcement efforts to criminalize abortion providers and, potentially, those receiving abortion care, this will have significant repercussions for

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[174] Health Insurance Portability and Accountability Act of 1996, 110 Stat. 1936 § 264; 45 C.F.R. §§ 160–64 (2023).
[175] 45 C.F.R. § 160 (2023).
[176] *Id.*
[177] *Id.* § 160.103.
[178] *Id.*
[179] 45 C.F.R. § 164.502(a)(1).
[180] *Id.*
[181] 45 C.F.R. § 164.512.
[182] *Id.*
[183] *Id.* § 164.512(e).
[184] *Id.*

employer-provided abortion coverage and patients themselves. The prioritization of state efforts to criminalize these reproductive medical procedures would significantly weaken the scope of employer-provided health coverage. This would alter an employer's right to structure their health benefits as they find appropriate, violating the spirit of ERISA preemption. It would also undermine the ERISA protections that are afforded to employers that provide health care in multiple states. Additionally, this would weaken the employer's ability to compete for workers in a competitive labor market by offering reproductive health coverage.

Allowing law enforcement to search self-insured employer health records would subject the employer to multiple different standards in different states. This would create confusion, cause significant delays in reimbursing employees, and significantly limit the largest health care providers as a result, violating the privacy of PHI in employer-provided abortion coverage would undermine the employer's federal protections through ERISA while hindering the employer's ability to compete for talented labor and grow economically. Without strong protections around PHI in employer-provided health coverage, the employee's constitutional rights and trust in health care will be significantly undermined. If employer-provided abortion coverage is subject to state interference and an employee seeks reimbursement through their employer, this may infringe upon the employee's constitutional rights to travel and freely engage in interstate commerce. The privacy violations may also violate the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment. However, since *Dobbs* expressly denied the extension of the right to privacy to abortion services, this may not be upheld.[185] It largely depends upon whether the privacy right asserted is the right to have the procedure or the right for PHI to be protected from state infringement.

IV. EXAMINING ABORTION TRAVEL THROUGH AN EQUITABLE LENS

While the legality of these programs is important, the equitability and efficacy of employer-provided abortion coverage are essential to achieve the program's intended purpose. The employer could prioritize equity of access and experience for employees when they design and implement their travel plan for abortion. Among the various considerations in designing a health plan, the employer should prioritize health information privacy, ease of access, speedy reimbursement, and scope of services covered. These competing interests must be carefully balanced to achieve the best outcomes for the greatest number of recipients.

A. EMPLOYEE PRIVACY MAY BE CENTRAL TO THE ABORTION TRAVEL BENEFIT DESIGN

First, the employer could design a plan to prevent any sensitive employee health information from being shared with any unnecessary members of the company, including supervisors or coworkers. Securing PHI protects the employee from stigmatization or potential employment

[185] *Dobbs*, 142 S. Ct. at 2242.

implications from receiving an abortion, which would also protect the employer against wrongful termination or discrimination lawsuits if the employee were to face unjust treatment.

Since HIPAA covers employer-provided plans, an employee's PHI is secured against their employer, even if the employer is self-insured. The privacy of this information is one key advantage to the abortion benefit work through the medical plan. However, as noted above, there are some limitations to these protections. To protect this information and avoid law enforcement officials from targeting their programs, the employer could provide abortion coverage under an umbrella reproductive services package. Coverage for reproductive services has become increasingly popular, so employers could extend an existing package to cover abortion care.

If the employer cannot add the coverage to an existing medical plan, it may be able to cover travel and medical expenses through health reimbursement arrangements ("HRAs"), employee assistance programs ("EAPs"), or taxable reimbursements.[186] Through HRAs, employers reimburse employees tax-free for qualified medical expenses up to a fixed amount per year.[187] EAPs are employer-funded programs that help employees resolve personal problems that may be adversely affecting their job performance.[188] These models may also be beneficial if the employer seeks to cover more employees than are covered under the existing health plan.[189] However, taxable reimbursements may not be subject to HIPAA, depending on how they are structured. To protect employee privacy, the employer should structure them as a health plan.[190] Taxable reimbursements may be subject to ACA reporting requirements and the employer may not be able to secure the information against the IRS or government officials.[191]

Additionally, the employer could hire third-party administrators or nonprofit organizations to manage the administration of these reproductive benefits, which Match Group, Inc.[192] has done.[193] This would substantially reduce record sharing and any potential leaks. If the employer were to hire administrators in California, it may provide further protection against out-of-state criminal charges because the administrators would be covered under the non-disclosure rules of California AB 1242.

B. THE EMPLOYER COULD ENDEAVOR TO LIMIT OUT-OF-POCKET COSTS AND MAXIMIZE REIMBURSEMENTS

One of the greatest barriers to equitable reproductive and childcare is cost. Low-income patients comprise about three-quarters of abortions in the

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[186] Tami Luhby, *If You Use Your Company's Abortion Travel Benefits, Will Your Boss Find Out?*, CNN (July 6, 2022), http://www.cnn.com/2022/07/06/success/companies-abortion-travel-policy/index.html [https://perma.cc/FBN4-885W].

[187] *Health Reimbursement Arrangement (HRA)*, HEALTHCARE.GOV, http://www.healthcare.gov/glossary/health-reimbursement-account-hra/ [https://perma.cc/U5BS-M4YW].

[188] *What Is an Employee Assistance Program (EAP)?*, SHRM, http://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whatisaneap.aspx [https://perma.cc/CES2-U92B].

[189] Luhby, *supra* note 193.

[190] 45 C.F.R. § 164.502(a)(1).

[191] 42 U.S.C. §§ 18001, 18013; Luhby, *supra* note 193.

[192] Match Group owns and operates the largest portfolio of online dating services. *Our Company*, MATCH GROUP, http://mtch.com/ourcompany [https://perma.cc/7CAE-YXAR].

[193] Luhby, *supra* note 193.

United States.[194] The need to travel to other states to obtain abortions creates further financial and practical barriers for patients. These barriers may be too prohibitive and further impoverish already vulnerable patients. To further improve the accessibility of these programs, the employer could cover as much of these costs as legally permitted. The employer also could lobby for legislative reform for the federal government to legalize abortion, cover the costs of abortion services, or participate in a cost-sharing model with employers to shift some of the costs of reproductive care. Further, the employer could make these benefits available to all employees, not merely the executives or a certain class of employees. Restricting abortion travel benefits to limited groups of employees would likely result in the coverage losing one intended advantage: providing access to abortion services regardless of income.

To reduce out-of-pocket expenditures by employees, employers can review their health plans and deductible levels.[195] If the plan has a high deductible and requires employees to satisfy that annual deductible before reimbursing the travel expenses, then this may disqualify coverage for time-sensitive abortion services.[196] The employer should amend these requirements for reproductive services to reduce these barriers and prevent employees from incurring costs for which they cannot be reimbursed. Considering the share of abortion services that are received by low-income patients, the employer should ensure that claims are processed quickly. Low-income individuals are often living paycheck-to-paycheck and cannot afford delays in travel reimbursement. Employers could encourage timely processing by increasing administrative support teams and encouraging clear communication with employees.

The employer can consider the limitations on taxable reimbursements. The IRS limits lodging reimbursements to fifty dollars per day (or one hundred dollars per day if traveling with a companion).[197] The IRS allows deductions for transportation for medical care, though it limits the medical mileage rate to sixteen cents per mile.[198] Additionally, the IRS generally prohibits reimbursement for meals unless the expenses are for "meals at a hospital or similar institution" and are "part of inpatient care.[199]" In crafting their travel coverage for abortions, employers should thoughtfully structure the plan to prioritize the accessibility of services without requiring the patient to incur out-of-pocket expenses that are not reimbursable.

Above all, the employer can endeavor to be transparent and clearly communicate the travel expenses that will be covered, the process for reimbursement, and the security of PHI. By structuring these travel programs for abortion services through an equitable lens, the employer will encourage employee use of medical benefits, improve health outcomes, and may lead to greater employee satisfaction. An employer that emphasizes equitable

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[194] Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46, 47 (2016).

[195] Judith Wethall & Sarah G. Raaii, *Employers Explore Abortion Coverage Continuation*, MCDERMOTT WILL & EMERY (May 31, 2022), http://www.mwe.com/de/insights/employers-explore-abortion-coverage-continuation/ [https://perma.cc/7VYF-R46W].

[196] *Id.*

[197] I.R.C. § 213.

[198] *Id.*

[199] *Id.*

outcomes in their medical benefits demonstrates that the employee's experience is prioritized.

CONCLUSION

In the aftermath of the *Dobbs* decision, employers increasingly offer travel coverage for abortion services. When offering these benefits, employers must consider the potential civil and criminal liability that they may incur. Through the ACA and ERISA, the employer would likely be free from civil liability or investigations by state agents that attempt to restrict abortion coverage. While it is unclear whether states will be successful in bringing criminal charges against employers, employers would find additional support in Supreme Court precedent and the Constitution under the Supremacy, Commerce, Full Faith and Credit, and Due Process Clauses. To ensure the safety and security of employees, the employer should prioritize privacy and equity in structuring these plans by clearly communicating covered expenses and quickly providing reimbursements.