Published on *The National Law Review* https://natlawreview.com

# Preparing for The Demise of Roe v. Wade and The Criminalization of Abortion in Some US States: Practical Considerations for A Post-Roe World

Article By:

David Quinn Gacioch

Stacey L. Callaghan

Dana M. McSherry

Caroline Reignley

Paul M. Thompson

Sarah G. Raaii

**OVERVIEW**

Sometime in the next several weeks, the Supreme Court of the United States will issue its decision in *Dobbs v. Jackson Women's Health Organization (Dobbs)*. Based on the draft majority opinion authored by Justice Samuel Alito that was leaked to *Politico* in early May, there is a significant chance that the Court will overrule *Roe v. Wade (Roe)* and *Planned Parenthood v. Casey (Casey)* by holding that there is no federal constitutional right to obtain an abortion and leaving individual states free to substantially restrict abortion or prohibit abortion altogether.

The effect of this likely decision on US companies would be substantial. Every US healthcare provider whose services include ***any*** aspect of family planning should give serious thought to how this likely new post-*Roe* reality will affect its offerings and operations. This includes not only those that provide pregnancy termination services (via surgical or pharmaceutical means, whether brick-and-mortar or telehealth/virtual), but also potentially those providing in vitro fertilization services, and conceivably even some contraceptive providers at some point down the line.

Even companies that do not directly provide family planning or pregnancy termination services may be impacted by the likely demise of *Roe*, including:

- Service providers and business associates of healthcare providers that furnish family planning or pregnancy termination services;

- Anyone who provides abortion-related information or resources even outside of a patient-provider relationship (for example, companies that provide information regarding abortion access to employees or to the public);
- Insurers who provide coverage for family-planning services;
- Employers, health benefit plans, and plan administrators, as we recently noted; and
- Individuals and entities who invest in any of the above companies.

There will continue to be a considerable degree of uncertainty about the reach of post-*Roe* abortion restrictions, given the lack of any recent enforcement history or judicial interpretation of many anti-abortion laws and the presence of competing laws in other states. It is also extremely likely that there will be further state legislation that could result in a wide variety of additional restrictions, which would meaningfully affect any risk analysis. In light of such uncertainty, organizations will want to stay in close touch with knowledgeable legal counsel to decide how to structure their operations, personnel and data going forward—especially if they currently (or intend to) provide or facilitate access to family planning services and do business or have personnel in any state that will further restrict or prohibit abortion in the wake of *Dobbs*.

The right plan for a post-*Roe* reality will be different for each individual and organization that touches abortion or family planning services in any way.

## IN-DEPTH

### WHAT TO EXPECT

Presently, *Roe* and *Casey* and their progeny prohibit state enforcement of any outright ban on abortion and any other measure that would create an "undue burden" on abortion access. If, as seems likely, those two decisions are fully overruled in the *Dobbs* decision, states largely will be free to restrict and/or prohibit abortion as their legislatures and governors choose—subject to any abortion-related provisions in their individual state constitutions.

Many states have "trigger" or "zombie" abortion laws already on the books—prohibitions (or significantly tighter restrictions on abortions) that presently cannot be enforced but will spring (back) to life as soon as *Roe* and *Casey* are overturned. In some cases, enforcement of these statutes has explicitly been enjoined, but the issuance of a Supreme Court decision overturning *Roe* and *Casey* would instantaneously result in their (renewed) enforceability. Some other trigger laws include provisions that would slightly delay their effective dates (and enforceability) either by a specified number of days after a Supreme Court decision overruling *Roe* or until a state government actor (*e.g.*, the state attorney general) certifies that *Roe* has been overruled. Where they exist, such provisions provide for some delay in enforcement but are measured in days or weeks rather than months or years. For example, Mississippi has a statute that requires the state's Attorney General to determine whether the state's trigger law would be considered constitutional following a Supreme Court decision overruling *Roe* before that law takes effect. And several other state legislatures are currently working on or have recently passed new legislation to prohibit or restrict abortion in a post-*Roe* world.

**A Texas Case Study:** Texas is a high-profile example of a state with significant restrictions on

abortion already in place as well as a trigger law that will spring to life if *Roe* and *Casey* are overturned. As many readers will know, Texas already has in place a unique "bounty" law that penalizes essentially all abortions after the existence of a detectable fetal "heartbeat" through the imposition of civil monetary damages (at least $10,000 per prohibited abortion, plus recovery of attorneys' fees and other litigation costs)—but it can only be enforced by private litigants, not by government personnel. *See* Texas Health & Safety Code § 171. The Supreme Court declined to stay enforcement of this law in a "shadow docket" order earlier this term.

Texas ***also*** has passed a trigger law that is extremely broad and provides plainly that "[a] person may not knowingly perform, induce, or attempt an abortion," period (with a narrow exception where an abortion is necessary to prevent the death or significant health impairment of the pregnant woman, but no exceptions for, *e.g.*, rape or incest situations). *See* Texas Health & Safety Code § 170A. "Abortion" for this purpose includes ***basically any means*** of intentionally "caus[ing] the death of an unborn child," and ***"unborn child" is defined to include living embryo/fetus "from fertilization until birth."*** *See* id. §§ 170A.001(1), 170A.001(5), 245.002(1) (emphasis added). In short, once an egg is fertilized, nearly anything done intentionally to prevent that fertilized egg from reaching live birth constitutes an abortion (although "birth control devices" and "oral contraceptives" are specifically excluded).

Notably, Texas's trigger law will have sharper teeth than its "bounty" law currently does. The plain language of the state's trigger statute provides that, without *Roe* and *Casey* in place, any "perform[ance], induce[ment], or attempt" of a prohibited abortion in Texas could result in:

- **Criminal prosecution** by the Attorney General or any one of the state's 254 county district attorneys—for a first-degree felony if the abortion is successful, and a second-degree felony if it is unsuccessful (*see* Texas Health & Safety Code § 170A.004); ***plus***

- **Civil enforcement** by the Attorney General—seeking a civil penalty of at least $100,000 per unlawful abortion (plus recovery of attorneys' fees and other litigation costs) (*see* id. § 170A.005); ***plus***

- **Mandatory revocation** of any "license, permit, registration, certificate, or other authority" held by a defendant physician or other health professional who violates the law (*see* id. § 170A.007).

Under Texas criminal law, anyone who doesn't personally perform, induce or attempt an unlawful abortion but **causes, aids, conspires, solicits, *etc.*, such conduct by someone else** may also be at risk of felony prosecution. *See* Texas Penal Code §§ 7.02, 15.01-15.03. The question of how broadly Texas courts will define actions that may be considered to "induce" abortions also remains open. (Note that the law specifically exempts abortion patients, themselves, from being prosecuted or facing civil enforcement.)

Post-*Roe,* these prohibitions clearly will apply to surgical abortions performed within Texas, and to the prescription, dispensing and administration of abortifacient medication if all occur within Texas. Their application to activities that occur outside of Texas is less clear, but individuals and organizations who provide abortion-related services to Texas residents from anywhere should seek counsel to determine whether, or in what way, these laws may be applied to their operations.

***

Texas is just one such example among many states that will impose additional restrictions on abortions if *Roe* falls. At least 26 states have laws that could be used to restrict the legal status of abortion to various degrees and/or are generally viewed as being at high-risk for imposing additional restrictions post-*Roe*: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin and Wyoming. The same is true of Puerto Rico and several other US territories. Kansas lawmakers also have expressed an intent to restrict abortion. For the rest of this article, we will collectively refer to these states as "**Restrictive States**." *See, e.g.*, "Abortion Policy in the Absence of Roe," Guttmacher Institute, June 1, 2022; "What if Roe Fell?" Center for Reproductive Rights, last accessed June 10, 2022.

Restrictive States' laws carry a variety of potential risks for providers and those that facilitate access to or payment for family planning treatment, including (as illustrated in the Texas example above) the following: (1) risks to individual providers' licenses, including revocation which could create a number of additional actions if that provider is licensed in multiple states; (2) civil penalties, which can include significant penalties per violation of the statute; and (3) criminal penalties, including felony treatment of some activities, which could result in imprisonment and criminal fines. As noted above, these penalties can, in some states, extend to individuals or companies that facilitate or pay for the treatment provided.

On the other hand, some states have laws on the books that offer explicit protection to people seeking or providing access to abortion treatment or otherwise have codified a person's right to privacy in such circumstances. This includes both state statutes and, in some instances, state constitutional protections. We will refer to states such as California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island and Washington, which have enacted varying degrees of state constitutional and statutory protections for abortion access, as "**Protective States**." Specific post-*Roe* shield law efforts are also underway in many such Protective States, such as California, Connecticut, Massachusetts, and New York.

**HOW TO PREPARE**

Individuals and organizations that provide or facilitate abortion services, or other services that have the impact of preventing fertilized eggs from reaching birth, and those that invest in, service, compensate, or otherwise interact with such individuals or organizations, should monitor this situation very closely. It is changing rapidly and will continue to do so. In at least some of the Restrictive States, abortion will be outlawed (and potentially criminalized) the moment a Supreme Court decision overturning *Roe* and *Casey* is issued—*i.e.*, likely around 10 am EDT on a weekday still to be determined in late June or early July.

While each individual's and organization's situation will vary, here are some general ideas to consider:

1. There will continue to be a considerable degree of uncertainty about the reach of post-*Roe* abortion restrictions, given the lack of any recent enforcement history or judicial interpretation and the presence of competing laws in other states. It is also extremely likely that there will be further state legislation in Restrictive States that could result in a wide variety of additional restrictions which would meaningfully affect any risk analysis. In light of such uncertainty, organizations should stay in close touch with knowledgeable legal counsel to

decide how to structure their conduct going forward—especially if they currently (or intend to) provide or facilitate access to family-planning services and do business or have employees in any of the Restricted States. Employment/benefits, privacy, healthcare regulations, subpoena response, and litigation/enforcement defense will be among several areas of law that will be relevant to such planning.

2. Regardless of your company's goals and risk appetite, consult counsel to consider risk mitigation and management strategies, particularly in Restrictive States where providing or facilitating abortions will be criminalized. This may include reducing ties to Restrictive States and considering what level of legal shields may be available in Protective States for individuals, corporate entities, assets, and data.

3. Some organizations that are headquartered or incorporated in Protective States may be required under the Protective States' laws to provide certain benefits and coverages even for those employees living in Restrictive States. Any such obligations should be confirmed and tracked closely.

4. Carefully consider what information or data you collect and maintain that may be abortion-related. Organizations with information about patients who obtain abortion-related services or about individuals who provide or facilitate such services should be prepared for increased scrutiny of such data, including additional subpoenas and other requests. Similarly, it is worth reviewing all privacy-related policies, procedures, notices, and disclosures to ensure current factual accuracy and to ensure the company is prepared to handle subpoenas and other information requests when they arrive. Companies should also consider whether internal policies, procedures, and training for personnel should be modified or implemented related to the consequences of disclosing confidential company information and the potential consequences of non-compliance with company policies and procedures.

5. Companies are strongly encouraged to involve in-house or outside counsel directly in strategy and planning discussions so they are protected by the attorney-client privilege as much as possible. Companies should also be thoughtful about public statements (internally or externally).



National Law Review, Volumess XII, Number 166

Source URL:https://natlawreview.com/article/preparing-demise-roe-v-wade-and-criminalization-abortion-some-us-states-practical