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COMMENTARY

Employers Forced to Confront Employee's Demand for Access to Abortion

As businesses confront abortion and reproductive rights, one thing is clear. The vast majority of employees under the age of 40 want to work for a company that supports access to abortion.

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Employment Law

By Jeffrey Campolongo | October 20, 2022 at 11:47 AM

The fallout from the U.S. Supreme Court decision to overturn *Roe v. Wade* and 50 years of established precedent is being felt far and wide. It was reasonable to speculate that a new, emboldened conservative majority on the nation's highest court would consider tighter restrictions on abortion. A complete overhaul? That was a stretch, even for the current composition of the court.

As recently as January, this column explored the high court's balance between government control and bodily autonomy in the context of mandatory vaccination regulations. At that time, we wrote: "The current construct of the majority on the high court has demonstrated a commitment to protecting private businesses from overreach by the government. One could even say that striking down the vaccine mandate is a pivotal win for individual rights, personal liberty and body autonomy. It will be very interesting to see how those same principles play out when these same justices are asked to opine in a different context involving overreach by the government. Will fundamental rights carry the day? Or will we see a much different approach to how the government controls the individual choices we make with our bodies?"

So what changed in just six months? What could prompt the SCOTUS majority to reject body autonomy and end the constitutional right to abortion in more than half of the states in the country? Unfortunately, that question is beyond the scope of this column. What is within the scope of this column, though, is how the *Dobbs v. Jackson Women's Health Organization* decision may impact businesses, and in particular, businesses that provide benefits to employees looking to travel to obtain an abortion.

Most Women Under Age 40 Want to Work for a Company That Supports Access to Abortion

A new study from LeanIn.Org, taken after the *Dobbs* decision, reveals that most employees under age 40, regardless of their political affiliation, want to work for a company that supports safe, affordable access to abortion. The key findings of the study reveal:

- 76% of women are concerned that the overturn of *Roe* will negatively impact women's ability to advance in the workforce. This sentiment is even stronger among certain groups of women—for example, 84% of women under 40 and 82% of women of color are concerned.
- 82% of women say that having control over whether and when they have a child is critical to pursuing their career goals.

The overwhelming data from the study shows that women want to work for companies that support access to abortion. Among working women under age 40, 81% say that supporting access to reproductive health care (including abortion) demonstrates an organization's commitment to supporting and advancing women; 76% are more likely to want to work for a company that supports abortion access; and 78% think their employer should take action to protect abortion access in response to the Supreme Court decision overturning *Roe*.

Interestingly, the study shows that access to abortion is important to a vast majority of women regardless of political affiliation. A majority of Republicans (63%), Democrats (84%), and Independents (77%) are more likely to work for a company that supports access to abortion, per the report.

Businesses Stepping Up to Help Employees Get Access to Reproductive Care

Since the leaked draft of the *Dobbs* opinion in early May, more and more companies have announced measures intended to help employees who need abortion services and reproductive health care, regardless of where they reside. In May, Forbes published a list of businesses that have committed to providing employees with access to abortion, as well as other expanded benefits. Many of the listed companies have adopted a travel reimbursement policy for any employee and their dependents to travel out of state for the purpose of reproductive health care. Other companies have created a relief fund for women and people across the gender spectrum affected by legislation in states restricting access to abortion.

Ride-sharing companies like Uber and Lyft also developed policies in response to (and anticipation of) the *Dobbs* decision. In addition to offering health insurance coverage for "a range of reproductive health benefits, including pregnancy termination," Uber offered to pay legal expenses for any driver sued under state law for providing transportation to a clinic. Lyft, which had previously said it would cover travel expenses for abortions, announced that it was expanding its "legal defense commitment" to protecting drivers who may be sued for taking people to clinics.

Other companies have shown a commitment to reproductive health by offering to pay for expenses associated with medical procedures and expanding pregnancy loss leave to cover employees who get abortions. Walmart, the nation's largest private employer with over 1.6

million workers, said on Aug. 19 that it would expand its health care plans to cover abortion and related travel expenses.

One of the businesses to react swiftly to the Supreme Court overturning *Roe* was Dick's Sporting Goods. In the hours after the decision, CEO Lauren Hobart declared that Dick's will provide up to \$4,000 in reimbursement for employees to travel to the nearest location where abortions are legally available. She said the benefit will extend to employees' spouses or dependents enrolled in the company's medical plan, along "with one support person."

Dick's Accused of Violating Title VII for Not Offering Equivalent Maternity Benefit

Just two weeks after the *Dobbs* decision and the foregoing support from Dick's Sporting Goods, a conservative legal group led by Trump adviser, Stephen Miller, asked the Equal Employment Opportunity Commission (EEOC) to open an investigation into Dick's for "engaging in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964." In a July 13 letter submitted to the EEOC, America First Legal claimed that Dick's policy discriminates against pregnant women who opt not to abort.

Title VII, as amended by the Pregnancy Discrimination Act of 1978, prohibits discrimination with respect to compensation, terms, conditions or privileges of employment because of childbirth. The company's decision to provide the travel benefit—which is properly classified both as compensation or as a privilege of employment—to a pregnant woman who chooses to abort her child, while denying any equivalent compensation or benefit to a pregnant woman who chooses life, facially violates the statute.

Efforts like this by conservative groups like America First Legal would appear to be a push for the extension of reverse discrimination laws, unlike the traditional employment law setting where a historically disadvantaged group is provided with protection from discrimination. The fallacy in this argument is that the EEOC has already pronounced that the Pregnancy Discrimination Act protects people from being fired for having an abortion or contemplating having an abortion, as well as protecting employees who choose not to have an abortion from adverse consequences. Policies that support reproductive rights are not facially invalid. To the contrary, they would appear to be facially neutral.

In other efforts to thwart businesses from espousing a purportedly "woke" agenda, some states are looking to ban companies from doing business in the state. In May, a group of Texas state representatives sent an open letter to the CEO of Lyft, announcing they would introduce legislation to bar corporations from doing business in Texas "if they pay for elective abortions or reimburse abortion-related expenses." Other legislators have vowed to criminally prosecute any person or business that aids and abets another person in obtaining an abortion.

As businesses confront abortion and reproductive rights, one thing is clear. The vast majority of employees under the age of 40 want to work for a company that supports access to abortion. An overwhelming majority also want to work for a company that will take action to protect abortion rights in response to the *Dobbs* decision. Businesses, and the free market in

general, are typically very adept at course correction. The sheer number of businesses that are making efforts to support employees who want access to abortion is a likely indication that a course correction may already be underway.

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