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Employee Benefit Plan Review

Abortion-Related Time Off After *Dobbs:* How the Family and Medical Leave Act and Other Laws Might Apply

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The U.S. Supreme Court's decision in Dobbs v. Jackson Women's Health Organization,[1] overturning Roe v. Wade and Casey v. Planned Parenthood and leaving the legality of abortion up to each state, inevitably will increase the number of individuals who seek to travel to receive abortion services and, in turn, request time off from work.

Employers must therefore address the question of whether they are required to provide time off for abortion-related care, including possible requisite travel time, under federal laws, such as the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and the Pregnancy Discrimination Act (PDA) (part of Title VII of the Civil Rights Act of 1964 (Title VII)), or under comparable state and local laws. While the legal landscape is anything but clear, there are certainly arguments that abortions (even if elective), and any accompanying travel time, could be the basis for leaves under one or more of these laws.

FMLA

Under the FMLA, eligible employees with sufficient service working for employers with 50 or more employees are entitled to an unpaid, job-protected leave of absence of up to 12 weeks in a 12-month period for various reasons related to caregiving and medical issues. With respect to one's own health conditions, medical leave is permitted only for a "serious health condition" that, as the statute specifically states, "makes the employee unable to perform"[2] the essential functions of their job. The FMLA also provides that time off to care for a spouse, son, daughter, or parent who has a serious health condition is among the qualifying reasons for leave.[3]

Time Taken Due to a Serious Health Condition

The FMLA defines "serious health condition" as an "illness, injury, impairment, or physical or mental condition that involves *inpatient care* . . . or *continuing treatment* by a health care provider."[4]

Inpatient Care

The governing regulations provide that "inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity . . . or any subsequent treatment in connection with such inpatient care."[5] As most abortion procedures do not involve an overnight hospital

stay, they may not qualify for FMLA coverage on the basis of the "inpatient care" provision.

Continuing Treatment by a Health Care Provider

The definition of the term "continuing treatment" in the FMLA includes two specific examples that potentially could be met by obtaining an abortion: "incapacity due to pregnancy" and "prenatal care."

More generally, however, continuing treatment[6] by a health care provider includes a period of incapacity and treatment, which is as follows:

A period of incapacity of more than three consecutive full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

1. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
2. Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
3. The requirement in paragraphs [(1)[7]and (2)[8]above] for treatment by a health care provider means an in-person visit [the meaning of which has evolved in recent years] to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.
4. Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

Thus, although neither the FMLA nor its regulations mention abortion, the law could apply to an employee's (or their family member's) abortion-related care, depending on the type of treatment and length of the continuing treatment regimen.

The DOL

The U.S. Department of Labor (DOL), the agency that enforces the FMLA, has yet to provide any direct guidance on the question of whether obtaining an abortion – including travel across state lines when necessary – qualifies for FMLA protection.

Nevertheless, the DOL has issued detailed guidance[9] with examples of common medical conditions that could qualify as a "serious health condition" under the FMLA. In one example, the guidance explains that even a cold or the flu can qualify when an "individual is incapacitated for more than three consecutive calendar days and receives continuing treatment by a health care provider." This continuing treatment could be in the form of a diagnostic visit followed by a regimen of care, such as prescription drugs like antibiotics. Note, however, that this guidance letter, issued in 1996 (before the rise of the internet, telemedicine, and virtual office visits), asserts that a telephone consultation with a health care provider would not qualify as "treatment."

More recently, updated DOL FAQs[10] and a field assistance bulletin[11] have made clear that telemedicine visits can be sufficient to establish a serious health condition in some situations.

The same 1996 guidance letter also recounts some of the legislative history behind the FMLA, including public comments submitted during the rulemaking stage, noting that the meaning of "serious health condition" is "broad and intended to cover various types of physical and mental conditions" and "is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery." Similar standards apply to a child, spouse, or parent of the employee. The DOL's intention for the FMLA to be interpreted broadly may provide support for an employee's assertion that their seeking an abortion (or assisting a family member with same) qualifies for FMLA protection.

It is also notable that the legislative history of the FMLA includes miscarriage as a possible serious health condition, which arguably supports the position that the FMLA protects time off to obtain an abortion. Specifically, the House and Senate Committee Reports included a non-exhaustive list of the types of illnesses and conditions that would likely qualify as serious health conditions:

> Examples . . . include but are not limited to . . . ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.[12]

It certainly seems possible that employees may seek to draw parallels between, on the one hand, abortions and miscarriages and, on the other hand, recovery from childbirth and recovery from an abortion.

Courts have also broadly interpreted what constitutes a "treatment" and a "serious health condition" under the FMLA. In the few cases that have probed these concepts, a mere physical examination and blood draw was enough to qualify as a "treatment," even in the absence of a diagnosis or medication. Seemingly ordinary illnesses, such as the flu, can be a "serious health condition" if an employee is unable to perform job functions for more than three consecutive days.[13]

Accordingly, there is clear support for a broad interpretation of what constitutes "treatment" under the FMLA, such that an abortion

procedure and subsequent treatment may qualify.

Mental Health Effects of Abortions as a Justification for FMLA Leave

The FMLA's definition of "serious health condition" explicitly includes "mental conditions" that require inpatient care or continuing treatment by a health care provider. An employee might present a certification from their health care provider stating that FMLA leave is needed for continuing treatment related to potential abortion services because being pregnant or having obtained an abortion is causing the employee depression (or other mental health issues, such as anxiety or emotional distress) and, in such instances, the employee could present a plausible argument that the FMLA would apply.

Time Taken for Travel Associated with a Serious Health Condition

There is also some support from case law that the FMLA may cover travel time when travel is intertwined with the medical care, treatment, or procedure that is covered by the FMLA. In Michaels v. City of McPherson,[14] the U.S. District Court for the District of Kansas denied an employer's motion for summary judgment seeking to dismiss an FMLA interference claim, finding an issue of fact as to whether time an employee spent traveling out of town to take his stepdaughter for a medical procedure (a sleep-deprived electroencephalogram or EEG) that was scheduled for the next day was time needed to "care for" a family member under the FMLA. In this case, the employer had granted the employee FMLA leave for the day of the procedure but denied FMLA leave for the day prior, when the employee would be driving his stepdaughter out of town to the site of the procedure. The employee argued that the travel time was medically necessary as part of the pre-procedure protocol, while the employer argued – unsuccessfully – that the travel time was merely an issue of convenience.

Protected leave may cover travel time for the provision of physical and psychological care of a family member, even if intertwined with leisure activities.

Protected leave may cover travel time for the provision of physical and psychological care of a family member, even if intertwined with leisure activities. In Ballard v. Chicago Park Dist.,[15] the U.S. Court of Appeals for the Seventh Circuit held that an employee's trip to Las Vegas to care for her mother, who had a serious health condition, was protected under FMLA. The court reasoned that the FMLA statute does not include a geographical limit in the definition of care. Indeed, courts have declined to grant summary judgment even where an employee's extended travel abroad involving care for a family member was viewed skeptically by the employer.[16]

Further, the FMLA regulations provide that travel in connection with an adoption or foster care placement is, indeed, covered by the FMLA:

> Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, *or travel to another country to complete an adoption.*[17]

As such, it appears reasonable to argue that travel in connection with a serious health condition would also be covered.

These cases may be instructive in a post-*Dobbs* world where employees seek to use FMLA leave for travel time for out-of-state abortions (for themselves or for a family member).

State Leave Laws

In addition to the FMLA, many states (and some cities) maintain their own family/medical leave laws. Therefore, employers should consider whether such current laws require an employer to provide protected leave to an employee or family member for abortion-related reasons.

Further, some states have proposed laws that would clearly support protected leave for these purposes. For example, the New York State Senate is considering a bill[18] that would provide paid family leave to mothers, non-birthing parents, and family members of a person affected by the result of any pregnancy outcome, including a stillbirth, miscarriage, or abortion, to properly cope with potential emotions from such events.

Illinois recently expanded its Child Bereavement Act to include various assisted reproduction and pregnancy loss circumstances as qualifying reasons for protected leave from work. That law, which took effect on January 1, 2023, will permit leave for miscarriages and stillbirths but does not explicitly include procedures such as elective abortions.

California law also provides for protected leave[19] for a pregnancy-related disability, which does not expressly cover abortion. However, since the law would apply to recovery from a miscarriage, there is an argument that it would likewise apply to recovery from an abortion.

From a practical perspective, New York, Illinois and California employees are arguably less likely to have to travel to obtain abortion services.

Nonetheless, employees in these states could seek to use these laws in connection with the care of relatives in other states that do require travel for abortion services.

Some cities, such as Austin and Dallas in Texas, and St. Louis, Missouri, have paid parental leave programs, but none expressly cover abortion-related leave.

The ADA

Employers with 15 or more employees are covered by the ADA. While normal pregnancy alone is not considered a disability under the ADA, pregnant employees may have pregnancy-related impairments that qualify as disabilities under the ADA. In order to qualify, a pregnancy-related impairment must substantially limit a major life activity (which includes, for example, walking, standing, or lifting) or a major bodily function, and, where such impairment is present, an employee might seek leave as a reasonable accommodation to obtain an abortion.[20]

Alternatively, employees may have complications following abortions, which may fall under the ADA's definition of "disability." Therefore, employees who obtain an abortion might seek a reasonable accommodation, which might include a leave of absence or a temporary modified schedule.

When an employer is faced with an employee seeking time off or other accommodation related to abortion services that is not otherwise covered by the FMLA (or other leave laws), employers should be prepared to engage in the interactive process if it's a situation where the ADA could apply. Moreover, some state and local anti-discrimination laws also require employers to engage in the interactive process and provide reasonable accommodations to employees with disabilities who request them. Documentation of this process may also be required.

A variety of state and local laws[21] also require reasonable accommodations for pregnant workers. For example, California requires that employers grant an employee's request for reasonable accommodations for a condition related to pregnancy, childbirth, or related medical conditions, upon the advice of the employee's physician. In New York City, employers are required to reasonably accommodate the needs of an employee due to pregnancy, childbirth, or related medical conditions, regardless of whether any of these things are accompanied by a period of disability, unless doing so would impose an undue hardship on the employer.

The PDA

Employers should also consider protections available under the PDA, a 1978 amendment to Title VII that was enacted to include discrimination based on pregnancy, childbirth, and related medical conditions within Title VII's definition of "sex discrimination." The PDA does not just protect pregnant employees from discrimination; it also requires that pregnant employees be treated the same as non-pregnant employees who are similar in their ability or inability to work. In other words, a pregnant employee who is temporarily disabled due to pregnancy is entitled to leave "to the same extent that other employees who are similar in their ability or inability to work are allowed to do so."

Case law exists supporting the proposition that the PDA covers abortion.

Case law exists supporting the proposition that the PDA covers abortion. For example, in Doe v. C.A.R.S. Protection Plus, Inc.,[22] the U.S. Court of Appeals for the Third Circuit reversed the grant of summary judgment to an employer that allegedly terminated an employee for having an abortion. The C.A.R.S. Protection Plus court held that the term "related medical conditions" under the PDA includes abortion and that protections generally afforded pregnant women under the PDA also extend to women who have elected to terminate their pregnancies. In so holding, the court gave "a high degree of deference" to the Equal Employment Opportunity Commission's guidance, stating: "The basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work."[23]

It is important to note, however, that Title VII has an exception for religiously affiliated organizations, given the rights of churches and other religious institutions under the First Amendment to decide matters of church government, faith, and doctrine without government interference. In addition, under what is known as the "ministerial exception," courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.[24]

Additionally, in Burwell v. Hobby Lobby Stores, Inc.,[25] the U.S. Supreme Court held that First Amendment protections can protect closely held corporations and for-profit institutions with strong religious views.

Therefore, religiously affiliated organizations, and possibly closely held corporations and for-profit institutions with strong religious views, should consider whether this exception might apply if faced with an employee leave request related to abortion care.

What Employers Should Do Now

Given the lack of substantial authority on the intersection between leave and accommodation laws and abortion, and the impact Dobbs is likely to have on individuals seeking abortions (many of whom may now

seek to travel to receive abortion services), employers may be faced with increased and novel issues related to requests for leaves of absence or accommodations in connection with abortion services. Therefore, employers may want to be proactive and begin to consider how to respond to an employee who requests job-protected leave under the FMLA or state/local laws to obtain an abortion or to care for a family member who seeks or has had an abortion (and who now may need time off to travel to obtain such care or for recovery).

Employers should also consider taking the following actions:

- Be prepared to engage in the interactive process (when appropriate) if an employee who seeks time off to obtain an abortion or for post-abortion complications asserts that they are covered by the ADA or state/local disability laws and/or the FMLA or comparable state/local leave laws.
- Treat documentation in support of leave requests for abortion-related reasons as you would medical documentation provided for any other reason, including maintaining the confidentiality of the employee's medical information and assuring such records are kept separately and securely.
- If you are not exempt from coverage under the PDA, treat abortion-related requests for leave the same as other non-abortion-related leave requests.
- Train management and human resources personnel about how to properly address employee requests for leave and how to avoid discrimination claims where the request relates to abortion services or recovery.

Notes

1. https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.
2. https://uscode.house.gov/view.xhtml?path=/prelim@title29/chapter28&edition=prelim.
3. https://www.ecfr.gov/current/title-29/section-825.112.
4. https://www.govinfo.gov/content/pkg/USCODE-2020-title29/pdf/USCODE-2020-title29-chap28-subchapI-sec2611.pdf. (Emphasis added.)
5. https://www.ecfr.gov/current/title-29/section-825.114.
6. https://www.ecfr.gov/current/title-29/section-825.115.
7. https://www.ecfr.gov/current/title-29/section-825.115#p-825.115(a)(1).
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10. https://www.dol.gov/agencies/whd/fmla/pandemic.
11. https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_8.pdf.
12. S. Rep. No. 103-8, at 40 (1993); S. Rep. No. 103-3, at 29 (1993).
13. See, e.g., Krenzke v. Alexandria Motor Cars, Inc., 289 F. App'x 629, 630 (4th Cir. 2008) (https://www.govinfo.gov/content/pkg/USCOURTS-ca4-07-01561/pdf/USCOURTS-ca4-07-01561-0.pdf); Miller v. AT & T Corp., 250 F.3d 820, 833 (4th Cir. 2001) (https://www.ca4.uscourts.gov/opinions/Published/001277.P.pdf); and Wheeler v. Pioneer Developmental Services, Inc., 349 F. Supp. 2d 158, 160 (D. Mass. 2004) (https://scholar.google.com/scholar_case?case=6612336839197496603&q=Wheeler+v.+Pioneer+Developmental+Services,+Inc.&hl=en&as_sdt=6,44&as_vis=1).
14. 71 F. Supp. 3d 1257, 1258 (D. Kan. 2014) (https://www.govinfo.gov/content/pkg/USCOURTS-ksd-6_13-cv-01128/pdf/USCOURTS-ksd-6_13-cv-01128-0.pdf).
15. 741 F.3d 838 (7th Cir., 2014).
16. See, e.g., Edusei v. Adventist Healthcare, Inc., No. CIV.A. DKC 13-0157, 2014 WL 3345051, at *8 (D. Md. July 7, 2014).
17. https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-C/part-825/subpart-A/section-825.121. (Emphasis added.)
18. https://www.nysenate.gov/legislation/bills/2021/S7308.
19. https://calcivilrights.ca.gov/employment/pdl-bonding-guide/.
20. https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IIB.
21. https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf.
22. 527 F.3d 358, 361 (3d Cir.), order clarified, 543 F.3d 178 (3d Cir. 2008).
23. See also Appendix 29 C.F.R. pt. 1604 App. (1978)(https://www.govinfo.gov/app/details/CFR-2014-title29-vol4/CFR-2014-title29-vol4-part1604-app-id667/summary), and Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 app., Question 34 (1978) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion.") (https://www.law.cornell.edu/cfr/text/29/appendix-to_part_1604).
24. Our Lady of Guadalupe v. Morrissey-Berru, 140 S.Ct. 2049 (2020).
25. 573 U.S. 682 (2014).

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