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The eradication of a constitutional right and the legal minefield for employers in a post-*Roe* era

By Kathryn T. Lundy, Esq., Freeborn & Peters LLP

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On June 24, 2022, the United States Supreme Court overturned 50 years of precedent and, for the first time, eliminated a previously Court-granted constitutional right by holding that "the Constitution does not confer a right to abortion ... and the authority to regulate abortion is returned to the people and their elected representatives."[1]

The far-reaching implications of this decision are complex and abundantly unknown. Currently, 13 states have already passed "trigger bans" on abortion rights which automatically took effect, or will do so in the coming weeks (though some laws are currently subject to temporary restraints by court order). It is anticipated more states will follow.

The Pregnancy Discrimination Act of 1978 amended Title VII to prohibit sex discrimination on the basis of pregnancy.

As employers begin to navigate through a post-*Roe* era, a minefield of legal issues, conflicts and potential liability lie ahead. Among them is whether the Pregnancy Discrimination Act of 1978 and Title VII of the Civil Rights Act of 1964 will continue to serve as protection from adverse employment actions arising from state laws that prohibit, or even criminalize, abortion.

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of sex. The Pregnancy Discrimination Act of 1978 (the PDA) amended Title VII to prohibit sex discrimination on the basis of pregnancy.

Specifically, the PDA extended the definition of "on the basis of sex" to include, among other things, pregnancy, childbirth or related medical conditions.[2] In enacting the PDA, Congress intended to prohibit discrimination based on "the whole range of matters concerning the childbearing process"[3] and gave women "the right ... to be financially and legally protected before, during and after their pregnancies."[4] By its basic language, Title VII, as amended by the PDA, has been interpreted to cover "decisions by women who chose to terminate their pregnancies."[5]

Among the many questions for employers in this post-*Roe* era is whether the PDA continues to provide protection against adverse employment actions for female employees who obtain abortions in states that now prohibit such actions.

Take this scenario: a pregnant employee chooses to obtain an abortion but she works and resides in a state that prohibits them. As a result, the employee utilizes paid time off from work and travels to another state to receive an abortion.

Upon returning to work, the employer learns of the employee's decision and, as a result, terminates her employment, citing to its policy that prohibits illegal activity. Is the employer susceptible to a civil cause of action by the former employee under the PDA? Would the analysis change if the employee worked remotely in a jurisdiction that permits abortion?

The EEOC has not yet provided post-*Dobbs* guidance concerning these questions, nor has this issue yet been presented to any court for determination. For the employee residing in a jurisdiction that prohibits abortion, an employer could potentially argue the decision to terminate the employee was not due to her decision to obtain an abortion, *per se*, but rather the company's "legitimate interest" to consistently enforce its policies and ensure lawful activity amongst its employees.

In turn, the employee could argue the employer's explanation is merely pretext — since the decision to terminate her employment (i.e., violation of company policy) was inextricably linked to her decision to terminate her pregnancy.

Conversely, the employee residing in a state that protects the right to abortion would likely continue to receive protection under the PDA, without an employer's ability to rely on existing policy.

While we wait for the dust to settle, employers will undoubtedly be required to piece together applicable precedent, guidelines and policy to ensure they are appropriately considering their legal and business responses to this unprecedented event.

As this occurs, we will pay attention to the growing number of companies, like JPMorgan, Starbucks and Netflix, who have made the business decision to support their employees even in the face of potential civil and criminal liability.

Notes

[1] *See Dobbs v. Jackson Women's Health Organization et al.*, No. 19-1392 (June 24, 2022).

[2] *See* 42 U.S.C. § 2000e(k).

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[3] *See* H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5, *reprinted in* 5 U.S.C.C.A.N. 4749, at 4753 (1978).

[4] *See* 124 Cong. Rec. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

[5] *See* H.R. Conf. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749 at 4766; *see also*, 29 C.F.R. Appendix to Part 1604, Question 34 (1978) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion."); *Doe v. C.A.R.S. Protection Plus*, 527 F.3d 358 (3d Cir. 2008) (the protections of the PDA extend to women who have elected to terminate their pregnancies); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996) (an employer discriminating against a female employee because she has exercised her right to have abortion violates the PDA).

About the author

Kathryn Lundy is a partner in the litigation and labor & employment practice groups at **Freeborn & Peters LLP**. Based in the firm's New York City office, she advises employers on a range of complex workplace issues and represents them in high-stakes disputes. Lundy can be reached at klundy@freeborn.com.

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