

3 Ways the Roe v. Wade Ruling Will Impact Canadian Employers



Ramp up your anti-harassment policies and assess your liability risks if you operate in the U.S.

The U.S. Supreme Court's ruling to revoke the *Roe v. Wade* decision recognizing a woman's constitutional right to abortion has potential implications for Canadian companies. That is particularly but not exclusively true for companies that have employees and operations in the U.S.

Could It Happen in Canada?

Technically, the U.S. Supreme Court decision has changed nothing in Canada. Abortion remains legal in all parts of the country. And unlike in the U.S., it's covered by public health insurance. But what happened with *Roe v. Wade* should also be a reminder to guard against complacency. The basis for legal abortion in Canada is legislation—the *Canada Health Act* and human rights codes that ban discrimination on the basis of pregnancy—not the constitution. Provinces also have and may continue to adopt laws and policies to limit abortion rights and access within their boundaries.

1. U.S. Employees May Effectively Lose Their Reproductive Benefits

Overturning of *Roe v. Wade* may directly affect Canadian companies that offer medical plans covering employees' reproductive health, including abortion services to their U.S. employees. The first problem is that the employees who live in the 13 U.S. states that have already adopted anti-abortion laws—Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah and Wyoming—will no longer be able to use those benefits unless they travel to Canada or a state where abortion is still legal. The problem is likely to get worse as 13 more states consider abortion bans.

Response: Several Canadian companies with U.S. operations, including Shopify, Scotiabank, CIBC and Sun Life have stepped up by expanding their benefits packages to cover the costs of employees who need to travel out of state to access reproductive health services. Companies can also support their employees by offering them legal

assistance and/or allowing them to [telecommute](#) from states that still recognize abortion rights.

2. Reproductive Benefits Policies May Now Be Illegal

Implication: The really scary prospect for Canadian employers that provide reproductive benefits to U.S. employers via a group health plan in anti-abortion states is the risk of criminal liability and prosecution. The saving grace is that a U.S. federal law called the *Employee Retirement Income Security Act* (ERISA) may preempt the state law banning reproductive benefits. But ERISA preemption will protect only group health plans that are self-insured, i.e., those in which the employer pays for its employees' health claims out-of-pocket. By contrast, fully-insured plans that employers purchase from an insurance carrier are regulated by state insurance laws.

Response: Companies offering reproductive benefits via group health plans in the U.S. must assess their liability risks based on:

- Whether the state in which they operate bans abortion benefits; and
- Whether the group plan is self-insured or fully-insured.

The other problem is that ERISA preemption applies to state insurance but not criminal laws. As a result, even providers of self-insured group health plans may face risk of prosecution under state criminal abortion laws.

3. Workplace Harassment Risks May Increase

Implication: One risk that all Canadian companies face, regardless of whether they operate in the U.S., is that the Supreme Court ruling will embolden employees to voice their views on abortion rights. While all individuals are entitled to their opinions, abortion is an emotionally explosive issue and the workplace isn't the appropriate forum to debate it. Open discussion on abortion can easily devolve into abuse and poison the work environment, exposing you to potential liability for [constructive dismissal](#) and sexual and other forms of harassment.

Response: Caution employees to refrain from making disrespectful comments or engaging in disrespectful conduct with co-workers based on their views on abortion, whatever those views happen to be, and ensure that you have a workplace [anti-harassment policy](#) in case they don't heed