

Law360

GCs Wrangling With Tangled Fallout Of Roe's Demise

By [Sue Reisinger](#) · [Listen to article](#)

Law360 (June 27, 2022, 4:36 PM EDT) -- The [U.S. Supreme Court's](#) decision to allow states to ban abortions — fraught with all the raw emotions attached to this issue — is also fraught with a multitude of legal risks for general counsel and their companies, ranging from possible criminal prosecution to civil suits to high-pressure proxy fights over political spending.

The uncertainty for companies and their general counsel is further complicated by the varied laws that states are passing, according to Robin Fretwell Wilson, a law professor at the University of Illinois and director of its Institute of Government and Public Affairs. Wilson stressed that she was speaking Monday to Law360 Pulse as a law professor and expert on health care law, and not on behalf of the institute or the university.

Utah, for example, makes it a crime punishable by 15 years in prison to perform an abortion. So if a company doing business in Utah offers insurance to employees that covers an abortion, or offers to pay transportation fees to another state to have an abortion, is that company aiding and abetting a crime?

"Well, that's going to be the question, isn't it?" Wilson said. "We know that companies can be held criminally liable in general, and that there are racketeering and other ways to throw a large net around conduct."

She also cited Texas abortion law, passed last year, which empowers private citizens to bring a civil suit against anyone who "aids or abets" an abortion after about six weeks of pregnancy. Wilson said so far seven other states have adopted laws copying the Texas approach.

"Employers could have a civil suit risk for aiding and abetting," Wilson said. "Whether they can constrain travel is a question to be answered."

And companies need the answers, she said. "We have to go to the statehouses and say, at the very least, give clarity to companies on whether what was legal yesterday is not aiding and abetting today."

The [Associated Press](#) reports that some Republican lawmakers in Texas want to go further and enact a law to punish companies that help their Texas-based employees get abortions elsewhere.

Wilson said states with growing economies like Utah and Texas "might be super-motivated" not to punish companies that help their employees.

So far dozens of big companies including [Macy's](#), [Starbucks](#) and [JPMorgan Chase](#) have said they would cover travel expenses for abortions if employees work in states that ban the procedure. Other employers, such as Disney, reassured employees they have health care coverage even if they leave the state.

Most companies did not issue any statements around the polarizing issue. Justin Klein, director of the Weinberg Center for Corporate Governance at the University of Delaware, told Law360 that it's too soon for his organization to gauge the impact of the ruling on companies.

Dave Fleet, the head of global digital crisis at the consulting firm Edelman, told The [New York Times Friday](#): "Executives are feeling some trepidation around this. They're concerned about backlash because they know there's no way to please everyone."

Still another significant risk for companies lies in how they handle their political spending. It is a topic that has already been brought to a boil by such issues as gun control, climate change and the Jan. 6 insurrection, where many companies were found to have donated money to the Republican groups that financed the minority viewpoints, even though the companies publicly espoused different views.

The Center for Political Accountability calls it "conflicted spending," and now the abortion decision has the political spending pot boiling over.

Bruce Freed, president of the center, told Law360 Monday that the abortion ruling has brought "tremendous pressure [on companies], at the highest point it's been, in part

because of the raw emotion of this intensely personal issue."

Freed said many companies donated money to the Republican Governors Association and the Republican Attorneys General Association, which led the abortion fight to the Supreme Court. These groups also have funded the Republican governor and state legislature candidates in Texas, Florida and Mississippi, among other states, which have passed abortion-restricting laws. Friday's Supreme Court ruling was based on a Mississippi case.

That ruling, in *Dobbs v. Jackson Women's Health*, struck down the constitutional right to abortion established in 1973's *Roe v. Wade*.

"This needs to be driven home," Freed said. "Companies are associated with and share major responsibility for the outcomes — the anti-abortion laws and the lawsuits that culminated in [the Supreme Court] decision."

As a result, the ruling has created a "crisis for companies over the issue of conflicted spending," he said. "There are internal morale problems and disaffected employees. We will see consumers shift their buying patterns to avoid certain companies. These are bottom-line consequences."

Freed predicted "for 2023, there will be many, many more shareholder resolutions addressing the issue" of aligning a company's public stated values with its financial donations.

At the center, he said, "we are preparing a new resolution that calls on companies to require third-party groups [to which they donate] to report where that money ends up, and what risks the company may face from that."