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Healthcare Alert

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Key considerations for telehealth providers following the *Dobbs* decision

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Telehealth providers must strategize how to deliver care on a multi-state basis in light of *Dobbs* and related state legislation.

What's the Impact?

- The provision of telehealth services has always been a state-law issue—*Dobbs* has created additional challenges to access and cross-border compliance for reproductive healthcare

On June 24, 2022, the U.S. Supreme Court issued a decision in *Dobbs v. Jackson Women's Health* that overturned precedent established by *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, holding that abortion is not a right that affords constitutional protection. The absence of the federal protection of a patient's ability to obtain an abortion means that the authority to regulate abortions (and related services) now resides with the states, resulting in a wide range of consequences across the country already evident by state "trigger" and "zombie" laws. State-imposed limitations and the state criminalization of access to abortion have expanded the country's abortion and reproductive healthcare services deserts, magnifying the critical need for multi-state care delivery systems that enable patients to access critical and necessary healthcare services across state lines, particularly via telehealth.

Telehealth services, long touted as a way to expand access to care, have exploded over the past years, particularly in response to needs arising during the COVID-19 pandemic. Telehealth services have traditionally included the delivery of a wide range of reproductive healthcare services such as contraception, medication abortions, erectile dysfunction treatment, and sexually transmitted infection care. During the pandemic, federal and state governments and enforcement agencies looked to telehealth as a way to expand much-needed access to all types of care. However, a number of these measures are coming to an end without permanent solutions in place, coinciding with the rise of restrictions aimed at limiting the provision of selective reproductive healthcare services via telehealth by some states. As a result, healthcare providers, particularly those delivering care via telehealth modalities, must now understand the scope of state laws that apply to the provision of reproductive healthcare and related services, extending from medication abortion to the prescribing of medications that impact fetal health.

Undoubtedly, the *Dobbs* decision and subsequent actions by federal and state governments impact telehealth providers that provide reproductive healthcare services, and further amplify the legal and regulatory challenges and opportunities for all telehealth companies in delivering care across state lines. Below are key considerations for telehealth providers in mapping out how to deliver care on a multi-state basis in light of the *Dobbs* decision and related state legislation.

Cross-state care delivery

Legal and regulatory requirements, which vary on a state-by-state basis, drive the delivery of healthcare services by telehealth companies and dictate how these companies are structured. As telehealth providers expand into new states and provide reproductive care services to patients located in these states, the following should be vetted:

- Whether the state has a corporate practice of medicine (CPOM) prohibition—if so, parameters on ownership and entities that qualify to provide medical services in the state;
- Requirements for licensure or other registration with state licensing authorities to provide telehealth services, based on where the patient is located, both for the individual practitioner providing care, as well as for the entity employing or contracting with the practitioner(s);
- Limitations and requirements to prescribe medication via telehealth, including new state legislation that impacts medical abortion (e.g., whether an initial in-person visit is required, form of patient consent, and modality of communication permitted);
- State law reporting and disclosure requirements regarding patient diagnosis and treatment;
- Reimbursement for telehealth services; and
- Potential litigation and criminal enforcement exposure in a particular jurisdiction.

Corporate Practice of Medicine

In order to deliver healthcare services on a multi-state basis, telehealth companies must comply with the regulatory framework of each state where the company provides services (meaning the state where the patient is located). This requires the company to have a legal structure that fits within the parameters of each state's CPOM prohibition, which defines the type of entity that

may provide professional medical services in the state, as well as who may own these entities. Although the specific requirements vary across states, the CPOM prohibition generally prohibits a lay person or entity, such as a general business corporation, from owning an interest in a medical practice or employing physicians to provide medical services. These laws are aimed at preventing non-clinicians from interfering with or influencing the physician's professional medical judgment.

To avoid violating state CPOM prohibitions, many companies use a "PC/MSO" model. Under this model, a professional corporation (PC) owned by a physician employs the healthcare clinicians and contracts with a management service organization (MSO) that provides management services to the practice. If permissible by state law, the physician-owner is subject to a stock transfer restriction agreement that typically only permits the owner to transfer its equity to an individual selected by the MSO, and binds the owner to other ongoing covenants. While there are various iterations of these agreements, in part arising from each state's particular parameters, this overarching arrangement provides a significant level of contractual control over the business operations to the MSO without infringing on the clinical judgment of the physicians.

In light of the CPOM parameters, telehealth companies often deploy services through a PC/MSO model, housing all business operations under an MSO entity to support the professional entities providing medical services on a cross-state basis. Importantly, this model should be evaluated on a state-by-state basis as telehealth providers practice medicine and provide access to reproductive healthcare services.

Licensure

In addition to structural considerations arising from CPOM prohibitions, state licensure issues may present barriers for telehealth companies, particularly because telehealth practitioners are often physically located outside of the state where the patient is located. Although a primary objective of delivering care through telehealth modalities is to enable providers to render care across state lines, many states have specific licensing or registration requirements for the provision of telehealth services. These laws require providers to be licensed or registered with the applicable state licensing authority in the state in which the patient is located. Understanding these licensure constraints is critical for the provision of telehealth services in light of the *Dobbs* decision as a greater number of patients seek care across state lines.

Added complexity to licensure questions arises because over the pandemic, in an effort to increase access to services to patients located across the country, many states relaxed state licensure laws or granted temporary licenses to out-of-state providers. Some states have taken steps to create more permanent pathways to telehealth licensing after recognizing its advantages for facilitating access to quality healthcare. For example, there is growing support and adoption by states of interstate compacts, which create an expedited path to licensure for providers in participating states, making it easier for providers to render telehealth services across state lines. That said, it will be critical to pay particular attention to states participating in interstate licensure compacts that ban abortion, as there is a potential for these states to revoke

interstate medical compacts and licensing reciprocity agreements in an effort to limit access to medication abortion. Moreover, state licensure requirements for telehealth providers still remains an open question in some states in the post-pandemic world, and state licensure should be carefully vetted.

Dobbs-fueled legislation raises additional concerns for providers who are licensed in multiple states. Notwithstanding federal attempts to protect providers when offering legally-mandated, life- or health-saving abortion services in emergency situations, state laws that criminalize assisting a patient in obtaining an abortion may put the provider's license at risk if the provider provides medical abortion services via telehealth. Certain state licensing authorities now have the ability to pursue disciplinary action against a provider if that provider performs a legal abortion in another state. Further, new state laws permit state licensing agencies to initiate disciplinary procedures against a provider based on disciplinary action taken against that provider in *another* state.

As a result, guidance and legislation arising from the pre-pandemic, pandemic, and *Dobbs*-eras need to be reconciled on a state-by-state basis to ensure that telehealth providers are acting within the licensure framework of the state where the patient is based.

Prescribing medication via telehealth

The *Dobbs* decision and subsequent state legislation raised additional implications for providers and pharmacies that prescribe and furnish medications for reproductive and related healthcare services.

Telehealth providers that prescribe abortion medication and reproductive healthcare drugs must work within the state legal framework of the state in which their patients are located, and be aware of whether these drugs are prohibited or limited in any way. Importantly, prescribing providers must be licensed in the state where the patient resides. In addition, there are often specific conditions governing the informed consent process imposed upon providing healthcare services, which may include heightened requirements for abortion services, and vary across states. With respect to medication abortion, in December 2021, the U.S. Food and Drug Administration removed the in-person requirement to obtain medication abortion (a two-drug regimen of mifepristone and misoprostol to terminate a pregnancy before 10 weeks of gestation). Notwithstanding, at least 19 states require a clinician providing a medication abortion to be physically present when the medication is administered, effectively prohibiting the use of telehealth to provide abortion services. Other states have passed legislation that limit the ability to provide abortion services solely to physicians, meaning that allied health professionals who would otherwise be able to perform these services are now prevented from doing so in those jurisdictions.

Moreover, the trigger laws and other post-*Dobbs* legislation will broaden the field of those against whom abortion restrictions can be enforced, including pharmacies that are seen as aiding, abetting, or facilitating abortion. The U.S. Department of Health and Human Services (HHS) issued guidance to US retail pharmacies, reminding them of their obligations under

federal civil rights laws and making clear that as recipients of federal financial assistance, including Medicare and Medicaid payments, pharmacies are prohibited under law from engaging in discriminatory practices when furnishing medication. HHS's guidance may provide some assurance to national pharmacy providers when distributing reproductive healthcare drugs, but the enforcement landscape remains uncertain at this point.

Reimbursement

Historically, a significant barrier to use and access of telehealth services has been a lack of reimbursement by both public and private insurance plans for telehealth, particularly with respect to reproductive healthcare services. Insurance coverage for abortion is regulated at both the federal and state level—the federal Hyde Amendment, enacted in 1977, bans the use of any federal funds for abortion (including via medication), unless the pregnancy is a result of rape, incest, or if it is determined to endanger the woman's life. Further, even though at least 32 states have mandated telehealth payment parity across public and private health plans, a number of states have not directly addressed this issue.

The inconsistency and unavailability of coverage across states for reproductive healthcare services provided through telehealth may be further exacerbated by new state legislation aimed at curtailing reimbursement for abortion and related services. It will be critical for telehealth providers to understand the impact of new state legislation on reimbursement for telehealth services in light of changing coverage for reproductive healthcare services.

Data privacy

As discussed in depth in Nixon Peabody's Health Care & Data Privacy Alert, *Roe*'s reversal further disrupts settled expectations regarding the privacy of patient health information—and the role of healthcare practitioners, app developers, and cell phone providers in protecting it. As we continue to learn the extent to which law enforcement will seek protected health information and personal information to enforce these bans, companies should keep up to date on federal and state laws and guidance related to the application of their current policies, including their privacy policies and data management policies, and entities should take proactive steps to protect user information.

Potential litigation and criminal enforcement exposure

The post-*Dobbs* landscape will be rife with litigation over the scope, meaning, application, and constitutionality of state laws restricting or banning abortion, which will result in an unsettled and shifting legal framework that providers will need to monitor. Because *Dobbs* dealt only with Mississippi's law banning abortion after fifteen weeks, it is unclear whether more restrictive laws, such as those banning abortion in all circumstances, would be upheld by the Supreme Court. We anticipate that states will engage in a legislative "race to the bottom" to determine where the new line of constitutionality resides. Many state laws banning abortion are extremely broadly worded, and have seemingly unintended consequences in their application, such as banning certain healthcare procedures after a woman naturally miscarries. Relevant to telehealth providers, some laws are so expansively worded that there is disagreement about whether they

permit a provider to counsel regarding abortion, refer patients for services out-of-state, or contact out-of-state providers and give them information about patients. The application and scope of state laws will be fiercely litigated over the coming years.

Possible criminal liability for providers in the post-*Dobbs* world remains unclear. Because criminal prosecutions of women seeking abortion care are considered by many to be politically unpopular, we anticipate that states banning or restricting abortion will focus on bringing enforcement actions against providers who "assist" state residents in obtaining abortion care. For example, Texas has articulated very broad penal jurisdiction, including over "conduct outside this state constitutes an attempt to commit an offense inside this state." Texas Penal Code § 1.04. The question of whether a state has jurisdiction over an out-of-state provider will be heavily litigated. In addition, some states, such as Texas, permit private attorneys general to bring enforcement actions. Therefore, providers should expect to confront attempts by private litigants to enforce state laws restricting abortion against them. Finally, there may be circumstances where a provider needs to pro-actively engage in litigation, for example by seeking a declaratory judgment from a court confirming that certain procedure or provider action does not violate a state statute.

The litigation exposure created by the application of state laws should be carefully considered by any provider treating patients who reside in another state.

Looking ahead

The aftermath of the *Dobbs* decision saw immediate reactions and steps taken by federal and state governments. The impact of these actions creates space in the telehealth industry to address issues of access, which has been a longstanding tenet of telehealth providers. As telehealth companies expand and strategize on delivering care across state lines, the ever-present legal and regulatory considerations will likely continue to evolve for licensure, reimbursement, privacy, and related aspects of healthcare regulations.

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