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‘A Legal Morass’: Big Law Builds New Groups for Abortion Legal Landscape

Hit with client questions, firms such as Jenner & Block, Foley Hoag and ArentFox Schiff are now assembling and marketing reproductive health care groups.

BY ANDREW MALONEY

What You Need to Know

- Law firms are meeting a surge of inquiries about the post-Roe legal landscape with large, multi-disciplinary teams.
- Reproductive health care groups are often women-led, and feature lawyers who are expert in benefits, investigations, litigation and other areas.
- Common questions relate to employee privacy, the scope of state laws and conflicts with federal guidance.

Several big law firms, hit with client inquiries over the overturning of *Roe v. Wade*, are now devoting significant time and resources to whole teams revolving around the legal landscape of abortion.

Law firm partners in these groups say they have client matters now as a result of the U.S. Supreme Court’s ruling last month and they anticipate more to come. Law firms such as Jenner & Block, Foley Hoag and ArentFox Schiff are assembling and marketing reproductive health care groups with specialists in employer



Photo: Jacquelyn Martin/AP

Protesters gather outside the Supreme Court in Washington.

benefits, investigations, data privacy, telehealth and several other disciplines to handle corporate client questions.

The mostly women-led groups are aimed at both legacy and potential clients. They usually consist of dozens of lawyers across multiple offices, and many are still growing as the blanket federal protection for abortion unwinds to reveal more of a patchwork of local laws and as companies try to understand their corporate liabilities and risks.

For instance, Jenner & Block’s task force consists of more than two-dozen lawyers, many with government experience and spanning practices like government

controversies and investigations to media and entertainment.

Jenner group leaders said this week they’re working “around the clock” for clients in the technology, financial services and entertainment sectors and for large employers such as universities. They’re pitching clients on the firm’s familiarity with counseling in investigations at all levels as well as on strategic and crisis issue management.

“We also deeply understand the politics of reproductive rights and policy, and that it’s not going to be an entirely legal battle,” said Ann O’Leary, a partner at the firm and steering member of the task force. “There will be political retaliation

that will impact businesses. This will play out in the media. This will be very messy for some companies, for some time.”

Steering members of the group also include partners Anne Perry, Shoba Pillay, Dawn Smalls and Alison Stein. While the firm officially lists about 27 task force members, the group estimated there may be around twice as many lawyers as that working on related matters.

Corporate Liability

Employers are concerned about their own policies running afoul of state laws or getting tied up in litigation related to abortion protections.

“This is a legal morass,” said Jill Steinberg, partner in the health care practice at ArentFox Schiff and one of the leaders of the firm’s new reproductive health task force, which is generally geared toward employer policies on reproductive health, including ERISA plans, HIPAA policies, and tax issues. It also caters specifically to businesses in the health care industry and advises on constitutional litigation and data privacy, among other topics.

“Because everything has changed,” she said, “when you do one thing, you don’t understand or see everything immediately.”

She pointed to the Biden administration’s notice that doctors are allowed to perform abortions if necessary in a medical emergency. The state of Texas immediately sued over that directive, and other states could have different views of what qualifies as an emergency, she said.

She added that religious hospitals may have questions about how the

guidance affects their abortion policies. “Are they being told they have to provide it in case of emergency?” Steinberg said. “Those are legal issues that came up really in the past week that didn’t exist two or three weeks ago when the opinion came out.”

Plenty of corporations and Big Law firms themselves announced their health plans would foot the bill if a worker needed to travel to a different state to get an abortion. A common concern, perhaps, is to what extent that information would be shielded within the organization.

The scope and reach of state bans on the procedure, as well as civil and criminal liability, are also issues these groups are working to understand and address.

Leaders at Foley Hoag said the decision could implicate conflicting state laws as well as international rules. The firm is advising on “the extent to which the *Dobbs* ruling will have an effect on various human rights treaties,” said partner Shrutih Tewarie, who co-chairs the firm’s trade sanctions and export controls practice and is helping lead the firm’s reproductive health care practice group.

She said that group is well-poised to handle questions that might arise if, say, a U.S. citizen from a state that limits the procedure travels outside the country to seek an abortion or related care.

“Is there any potential liability there for health care providers or other entities outside the U.S.? It’s recognizing that there’s going to be interstate but also international travel related to *Dobbs*, and

individuals seeking reproductive health care services.”

Big Law Differences

While there are similarities in the firms’ approaches to the practices, there are key differences in their pitches, too. Steinberg, of ArentFox Schiff, touted the group’s FDA practice, among others, and said there are “few firms better situated to bring it all together.”

Tewarie, of Foley Hoag, noted that the firm created a practice group rather than a task force, and “part of that is to recognize the *Dobbs* decision will have a long-lasting, unprecedented impact on organizations across the country.”

And while Steinberg noted ArentFox Schiff’s group has a “decidedly apolitical” approach, Foley and Jenner’s leaders were quick to note they had years of experience doing pro bono work and advocacy on reproductive rights.

“None of us are hiding from who we are, which is a group of lawyers deeply committed to equality in this country, and have been on the front lines of this fight. So it’s important to recognize that,” said O’Leary, of Jenner & Block.

She said most of the clients hiring the firm are taking a proactive stance and “want to protect their employees and give them access to reproductive health care, and understand risks and liabilities they may face as they go forward.”

That said, she said the firm has clients that want to remain neutral and those clients “want to understand how to be respectful of different viewpoints,” she said.