

“Fetal Personhood Trend Amplifies Employer Health Plan Liability,” *Bloomberg Law*

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In an article for *Bloomberg Law*, Partner Katie Johnson and Associates Illyana Green and Mary Marshall provide insight into the new legal debate over fetal personhood in Alabama following the state’s Supreme Court’s ruling that frozen embryos have the same rights as people.

With the recent turmoil over fetal personhood in Alabama—just as when *Roe v. Wade* was overturned in 2022—employers are again uncertain how the ever-changing reproductive rights landscape affects their operations, employees, and legal risk.

Events in Alabama have launched a new legal debate that also impacts employee health-care provisions. In February, the Alabama Supreme Court held that frozen embryos have the same rights as people, temporarily halting in vitro fertilization care in the state. The decision highlights how existing and proposed laws in several states could be expansively interpreted by state courts to further develop the concept of fetal personhood.

Although IVF care has resumed in Alabama after the state legislature shielded IVF providers from liability, the ruling illustrates the power of these laws in regulating reproductive care.

In wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, which repealed *Roe v. Wade*, fetal personhood—or the idea that the fetus is a legal person entitled to the same rights as a child—has quickly gone from a marginal theory to a mainstream project.

Currently, at least 11 states have such broad definitions of “person” in their state laws that reproductive rights activists have warned they could arguably be read to grant rights to fetuses. Missouri law, for example, requires that “unborn children at every stage of development” be afforded “all the rights, privileges, and immunities available to other persons, citizens, and residents of” the state. Fourteen more states are considering personhood bills, demonstrating the wide reach of the entities pushing for these changes.

The Alabama decision may catalyze prosecutors, state officials, and private litigants in the 11 states with fetal personhood laws to capitalize on the potential to expand application of state criminal laws.

They could move to curtail access not only to abortion care, but also to medical care for pregnancy loss, IVF, and even some forms of contraception.

Although fetal personhood bills pose no direct threat to IVF care (outside of Alabama) or birth control yet, the Alabama case makes clear that such a threat could develop quickly. These issues were raised at an April 26 Senate Judiciary Committee hearing where witnesses expressed concern over the effects on reproductive health choices, especially regarding IVF access, in the 11 states with fetal personhood laws.

Employers should think carefully about employer health plan options, because the Alabama decision underscores that theories of accomplice liability applied to abortion could similarly be applied in the IVF context to impose liability on employers.

Activist state attorneys general may argue that companies with health-care plans that cover IVF procedures have aided and abetted in the destruction of embryos (which frequently occurs as part of the IVF process). This mimics the arguments some state attorneys general made about employer liability when companies began to cover travel costs for employees who were forced to leave their home states to obtain abortion care.

Employers also should think carefully about the location of genetic material in terms of their health plans. Certain states could require all viable embryos to be stored and maintained, even after IVF treatment is complete—either expressly or by implication of its personhood law.

As an example, a Louisiana law makes it illegal to “intentionally” destroy a “viable in vitro fertilized human ovum,” which the law defines as a “juridical person.” If a company’s benefit plan covers IVF, this could have significant cost implications.

Employers should continue monitoring proposed bills and state enforcement actions and closely review their health plan policies to ensure compliance. Though measures to protect IVF have been proposed at the national level, and the topic has become a major issue in congressional campaigns, no federal bill has gained traction. This indicates reproductive rights likely will continue to be regulated by a patchwork of state laws.

Employers also will have to monitor court developments. On April 1, the Florida Supreme Court allowed a 6-week abortion ban to go forward on grounds that undermine privacy protections and pave the way for states to further intrude on IVF and contraception usage.

Despite activity in recent weeks, it is important to keep in mind that the fetal personhood movement is just the start of a long-term project. After *Roe*, there was a similar piecemeal retrenchment that culminated in its repeal almost 50 years after it became law.

Political fallout from the Alabama decision is as noteworthy as the decision itself. The backlash was swift. Within weeks of the Alabama Supreme Court’s decision, the state legislature passed a bill

providing civil and criminal immunity for IVF to service providers and receivers. The governor signed it into law within an hour of it passing in the Alabama Senate.

Even with quick action from state legislators, on March 26, Marilyn Lands, a Democrat who campaigned on reproductive rights, won a special election and flipped a seat in the Alabama House. Lands' success at the polls has been widely attributed to the court's decision.

While there is a concerted effort to expand fetal personhood, it has for the moment proven to be electorally unpopular. We expect this to limit its expansion during the 2024 election season.

But in the same way that abortion restrictions have expanded at the state level—despite polling indicating strong support for abortion—the political unpopularity of fetal personhood may not halt its rise.

The case is *LePage v. Ctr. for Reprod. Med. PC, Ala., No. SC-2022-0515, 2/16/24.*

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