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Biden's Order On Abortion Compounds GCs' Confusion

By **Michele Gorman**



Law360 (July 13, 2022, 4:42 PM EDT) -- While President Joe Biden's recent executive order on reproductive health services is largely symbolic in the wake of the recent U.S. Supreme Court decision allowing states to ban abortions, legal experts said general counsel grappling with how to respond should pay close attention to future guidance from federal agencies — and advise their companies to act carefully.

The **order Biden signed Friday** instructs federal agencies on how to safeguard access to abortion-related care across the country. Biden directed his top health official at the U.S. Department of Health and Human Services to beef up efforts to ensure people have the ability to receive medication abortions and learn about their options for abortion access.

The president also called for HHS to step up reproductive health services such as access to contraception and family planning providers.

"In thinking about the executive order, there are just so

many moving pieces that it's not the type of thing that's going to give people a whole lot of clarity on how they would move forward," said Daniel Rubens, an Orrick Herrington & Sutcliffe LLP partner who focuses on appellate litigation.

The order was part of the Biden administration's response to the Supreme Court's **June 24 decision** in **Dobbs v. Jackson Women's Health Organization**  unraveling 50 years of precedent under **Roe v. Wade** , which had guaranteed the right to safe and legal abortion care.

It also calls for the administration to work on convening a cadre of pro bono attorneys, public interest groups and other volunteers to encourage representation of people trying to get legal abortions and of those offering to legally perform the services throughout the U.S.

Some states had so-called trigger laws on the books to take effect either automatically or by quick legislative action to ban abortion the moment Roe was overturned.

As general counsel and their companies face risks — from possible criminal prosecution, to liabilities related to workers' health and discrimination protections — outside counsel said they're advising corporate clients to proceed with caution in their actions and messaging, both to prevent employees from potentially violating a criminal statute and to avoid alienating any workers.

"Most employers are trying to take a wait-and-see [approach] to get a better understanding of the legal landscape that they're going to face, and the legal risk they face, because we really are in uncharted waters here," said Phillip Schreiber, a partner in the labor and employment practice at Holland & Knight LLP.

In her practice, ArentFox Schiff LLP labor and employment

partner Nancy Puleo has been fielding questions from in-house counsel about how much financial and other support companies can give employees to travel to obtain an abortion.

"It's navigating whether [and] to what extent you can provide this assistance without necessarily making yourself a target for enforcement actions," she said. As of this week, Puleo co-leads ArentFox's new reproductive health task force, which the firm created to address legal issues in the wake of the Dobbs decision.

The uncertainty already is playing out for some businesses. In a **letter last week**, the chair of the Texas Freedom Caucus warned Sidley Austin LLP that under legislation planned introduce for next session, the firm could face criminal liability and its attorneys could be disbarred for aiding employees who need abortions.

Another aspect that experts think general counsel should consider is the context and tone of any internal and external communication about the subject. It's unclear how employees might react to any action or inaction by their employer, Schreiber said.

"The challenge is employers that are in all parts of the country, so their workforce in any given facility may tilt strongly one way or the other," he said. "How do you handle that messaging?"

Schreiber said one of his clients wanted to outwardly support women by sharing online links to third-party resources.

"My advice was to put a caveat on that that says you have to do your own research and make your own decisions; we're not endorsing any third parties," he said.

Macy's, Starbucks and JPMorgan Chase are among the dozens of **prominent U.S. businesses** that have said they would cover travel expenses for abortions for employees who work in states that ban the procedure. Other companies, such as Disney, reassured employees they have health care coverage even if they leave the state.

"I'm sure even more of them are doing it outside of the public eye, and probably even more of them are considering doing it outside the public eye," Puleo said.

Biden's order also addresses patient privacy, such as how sensitive data from patients is protected. Thora Johnson, co-chair of Orrick's life sciences group who concentrates on cybersecurity, privacy and health care regulatory matters, said she is counseling clients to consider why and for how long their companies collect and retain information.

She added that she's been telling lawyers to pay attention to any upcoming reports, announcements or guidance issued by HHS and other federal agencies.

"The tentacles of this decision," Johnson said, "I think are just coming to the surface."

--Additional reporting by Adam Lidgett, Jimmy Hoover, Dave Simpson and Sue Reisinger. Editing by Kelly Duncan and Alanna Weissman.