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I. INTRODUCTION

On June 24, 2022, the United States Supreme Court released *Dobbs v. Jackson Women's Health Organization*.[1] In the following days, many states' so-called "trigger-laws" took effect, imposing varying degrees of restrictions on access to abortion.[2] As the nation adjusts to a post-*Roe* landscape, many questions remain unanswered regarding access to abortions, interstate travel, and reproductive health funding.[3] In response

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1. *See generally* 142 S. Ct. 2228 (2022).

2. Devan Cole & Tierney Sneed, *Where Abortion 'Trigger Laws' and Other Restrictions Stand After the Supreme Court Overturned* Roe v. Wade, CNN POLS. (July 4, 2022, 8:20 PM), https://www.cnn.com/2022/06/27/politics/states-abortion-trigger-laws-roe-v-wade-supreme-court/index.html.

3. *See* Lydia Wheeler & Patricia Hurtado, *Abortion-Travel Bans Are 'Next Frontier' with* Roe *Set to Topple*, BLOOMBERG HEALTH L. & BUS. (May 4, 2022, 5:35 AM), https://news.bloomberglaw.com/health-law-and-business/abortion-travel-bans-emerge-as-next-frontier-after-roes-end; *see also* Caroline Kitchener & Devlin Barrett,

to *Dobbs*, many well-known companies announced plans to expand their healthcare benefits to cover out-of-state reproductive healthcare.[4]

Dobbs did not ban abortions, nor did it directly place any restriction on a woman's right to choose.[5] It simply gave states the ability to regulate abortions as they saw fit, and some states immediately used that ability.[6] Many states were waiting for the Supreme Court to release the *Dobbs* decision so that they could further restrict when abortions can be performed.[7]

Promptly after the release of *Dobbs*, several state laws were triggered imposing major restrictions or total bans on abortion access.[8] Six states, Alabama, Arkansas, Florida, Ohio, Oklahoma, and Texas ("the States"), introduced aiding and abetting clauses in their proposed or enacted legislation.[9] These clauses prohibit the aiding and abetting of "the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise," creating liability for businesses who offer coverage of abortion travel expenses.[10] Due to the provisions in the state statutes, businesses risk exposure to civil liability when providing funds for abortion access to their employees.[11]

The aiding and abetting clauses allow residents of the state to bring a

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Antiabortion Lawmakers Want to Block Patients from Crossing State Lines, WASH. POST (June 30, 2022, 8:30 AM), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/; Adam Liptak, *The Right to Travel in a Post-*Roe *World*, N.Y. TIMES (July 11, 2022), https://www.nytimes.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html.

4. *See* Emma Goldberg, *Companies Scramble to Work Out Policies Related to Employee Abortions*, N.Y. TIMES (June 27, 2022), https://www.nytimes.com/2022/06/27/business/abortion-employee-benefits.html.

5. *See generally Dobbs*, 142 S. Ct. 2228.

6. *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007); Cole & Sneed, *supra* note 2 (stating that many laws took effect within days of their state actors certifying that *Roe v. Wade* was overturned). *See generally id.*

7. *See generally* H.B. 23, 2022 Leg., Reg. Sess. (Ala. 2022); S.R. 12, 93d Gen. Assemb., Fiscal Sess. (Ark. 2022); H.B. 167, 124th Leg., Reg. Sess. (Fla. 2022); H.B. 480, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 4327, 58th Leg., Reg. Sess. (Okla. 2022); S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

8. *See* Cole & Sneed, *supra* note 2.

9. *See* sources cited *supra* note 7.

10. *See* sources cited *supra* note 7.

11. *See* Ala. H.B. 23 (stating that if the plaintiff prevails in the lawsuit, they are entitled to a minimum of $10,000 in damages per violation); *see also* Ark. S. Res. 12; Fla. H.B. 167; Ohio H.B. 480; Okla. H.B. 4327; Tex. S.B. 8.

civil action against anyone who knowingly performs or helps to perform an abortion, including funding the procedure.[12] The clauses specify that reimbursing the costs of the procedure through medical insurance or similar mechanisms is prohibited.[13] Therefore, the States have created a cause of action against any company who provides benefits to their employees to receive abortions through their insurance programs, even if they did not know that the abortion would be in violation of the existing abortion bans.[14]

States are attempting to prohibit companies from providing any abortion care benefits.[15] However, there are federal laws which may preempt the state abortion bans, thus shielding companies from liability when funding abortion expenses through their benefits plans.[16] This Note looks at the mechanisms of liability in the state laws and determines whether federal laws will protect businesses.

This Note analyzes the various types of state abortion bans, focusing on those with aiding and abetting clauses. These bans impose civil liability for anyone, including companies providing abortion access benefits, who help a pregnant person gain access to abortion.[17] Additionally, this Note analyzes federal legislation to determine if any retaliatory actions taken against companies violate federal law. This legislation includes the Employee Retirement Income Security Act ("ERISA") which creates uniformity in insurance and benefits coverage by superseding any state law that references or relates to an ERISA plan.[18] Many advocates believe that ERISA is a company's greatest defense to civil liability under state abortion laws.[19]

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12. *See* sources cited *supra* note 7; *see also* Nadine El-Bawab & Mary Kekatos, *Texas Court Dismisses Case Against Doctor Who Violated State's Abortion Ban*, ABCNEWS (Dec. 8, 2022, 5:29 PM), https://abcnews.go.com/US/texas-court-dismisses-case-doctor-violated-states-abortion/story?id=94796642.

13. *See* Ala. H.B. 23; Ark. S. Res. 12; *see also* Fla. H.B. 167 (stating that "paying for or reimbursing the costs of an abortion through insurance or otherwise" is prohibited); Ohio H.B. 480; Okla. H.B. 4327; Tex. S.B. 8.

14. *See* sources cited *supra* note 7.

15. *See* sources cited *supra* note 7.

16. *See generally* Employee Retirement Income Security Program, 29 U.S.C. §§ 1001–1461.

17. *See* sources cited *supra* note 7.

18. *See* 29 U.S.C. § 1001; *see also* René E. Thorne et al., *Novel ERISA Preemption Questions Presented by U.S. Supreme Court's* Dobbs *Decision*, AM. BAR ASS'N (Nov. 28, 2022), https://www.americanbar.org/groups/labor_law/publications/ebc_news_archive/fall-2022-ebc-newsletter/novel-erisa-preemption-questions-presented-by-dobbs-decision/.

19. *See* Anne Sanchez LaWer, *Impacts of the* Dobbs *Decision on Employer Benefit*

This Note argues that the aiding and abetting clauses within the state laws are preempted by ERISA. This is due to the type of state law creating the liability and the methods companies can use to provide abortion care benefits. Finally, this Note concludes that ERISA protects from some liability but not all. Therefore, this Note recommends that Congress pass additional legislation to protect the right of companies to provide reproductive healthcare benefits to their employees without the risk of lawsuits being filed against them.

II. ERISA'S POTENTIAL TO SUPERSEDE STATE ABORTION BANS

Companies such as Citigroup, Yelp, Uber, Amazon, and Starbucks have released statements announcing that they will provide benefits that allow their employees to travel out of state to seek reproductive healthcare.[20] New and changing requirements for healthcare benefits are not new for businesses.[21] However, the States' abortion legislation created a novel issue that businesses must be aware of if they intend to provide reproductive healthcare benefits to their employees.[22]

ERISA supersedes any state law that imposes a punishment on companies due to their healthcare benefits.[23] This Act created a minimum standard that employers must meet when providing benefits to their employees.[24] The goal of ERISA is to minimize conflicting requirements at local and state levels and to create "uniform administration of employee

Plans, LITTLER MENDELSON (June 24, 2022), https://www.littler.com/publication-press/publication/impacts-dobbs-decision-employer-benefit-plans; Thorne et al., *supra* note 18; Amy A. Ciepluch et al., *Key Considerations When Offering Abortion Coverage Under a Group Health Plan*, FOLEY & LARDNER (July 20, 2022), https://www.foley.com/en/insights/publications/2022/07/key-considerations-abortion-coverage-group-health.

20. Coral Murphy Marcos, *Texas Lawmaker Warns Citigroup Against Paying for Out-of-State Abortions*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/business/citigroup-abortion-texas-warning.html; *see* Lauren Rosenblatt, *Amazon has Promised to Help Workers get Abortions. Some Workers Say it Hasn't Gone Far Enough*, SEATTLE TIMES (July 1, 2022, 6:17 PM), https://www.seattletimes.com/business/amazon-has-promised-to-help-workers-get-abortions-some-workers-say-it-hasnt-gone-far-enough/ ("Amazon announced in May it would offer up to $4,000 for travel if care is not available virtually or within 100 miles of an employee's home.").

21. 29 U.S.C. § 1001.

22. *See* sources cited *supra* note 7.

23. *See* 29 U.S.C. § 1001.

24. *See* Donovan v. Dillingham, 688 F.2d 1367, 1370 (11th Cir. 1982) (citing H.R. Rep. No. 93-533, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 4639).

benefits."[25]

The benefit plan must be one that is "established or maintained" by an employer, employee organization, or both to be an ERISA plan.[26] ERISA will likely preempt any civil liability a company may face for "self-funded ERISA health plan[s]" due to the preemption clause within the Act because most self-funded plans are categorized as ERISA plans.[27] However, ERISA may not preempt any criminal liability that states may impose in their legislation.[28]

ERISA's preemption clause was created to simplify and consolidate the responsibilities of fiduciaries and prevent conflicts between state and local requirements.[29] For ERISA to protect companies against civil litigation resulting from the state abortion laws, the state laws must be the type of law that ERISA was intended to preempt.[30] Courts have two major tests to determine what state laws would be preempted by ERISA.[31]

The court in *Coyne & Delany Co. v. Selman*[32] created a three-part independent considerations test to determine what elements a state law must satisfy to be preempted by ERISA.[33] The law must relate to an employee benefit plan, create an enforcement mechanism, or restrict what benefits an employer can provide.[34] Otherwise, the state law may create conflicting requirements between local and state insurance laws to be

25. *See* Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1470 (4th Cir. 1996) (quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)).

26. *See* 29 U.S.C. § 1002(1), (4) (stating that an employee organization "means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose . . . of dealing with employers concerning an employee benefit plan . . . or any employees' beneficiary association organized for the purpose . . . of establishing such a plan").

27. *See* Ciepluch et al., *supra* note 19.

28. *See id.*; *see also* LaWer, *supra* note 19.

29. *See* Thorne et al., *supra* note 18.

30. *See Coyne & Delany Co.*, 98 F.3d at 1468–69.

31. *See id.*; *see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97–98 (1983); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990); Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 48 (1987); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 649 (1995).

32. 98 F.3d 1457 (4th Cir. 1996).

33. *See* BERTRAM HARNETT & IRVING LESNICK, THE LAW OF LIFE AND HEALTH INSURANCE § 1A.02 (2023); *see also Coyne & Delany Co.*, 98 F.3d at 1468–69.

34. *See* HARNETT & LESNICK, *supra* note 33 § 1A.02; *see also Coyne & Delany Co.*, 98 F.3d at 1468–69.

preempted by ERISA.[35] The term "relates to" is not sufficiently defined to determine if a state law would be preempted, so courts have looked to the canons of construction and other methods to determine its meaning.[36] Additionally, courts have looked to the congressional intent and the legislative history to determine its meaning.[37] Further, the drafters of ERISA intended the Act to be the only mechanism for civil enforcement of insurance practices, preempting any state law that provides an alternative mechanism for enforcement.[38]

Not all benefit plans fall within the scope of ERISA.[39] The court in *Buehler Limited v. Home Life Insurance*[40] created a five-part test which outlined the elements that a plan must meet to be covered by ERISA.[41] For a plan to be covered by ERISA, the employee benefit plan must be provided or maintained by an employer to cover various types of medical care or time off from work due to illness, bereavement, or vacation.[42]

The Department of Labor further clarified the requirements of an ERISA benefits plan, stating that the business must make contributions to the plan, the plan cannot be entirely voluntary, it must be created to do more than allow the business to collect the deductions, and the business must collect some consideration for providing such benefits.[43] ERISA also contains a "savings clause," which states that any state law "purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies" shall not be preempted by ERISA.[44] While the term "relates to" should be viewed broadly, the term "regulates" should be applied narrowly.[45]

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35. *See* HARNETT & LESNICK, *supra* note 33 § 1A.02; *see also Coyne & Delany Co.*, 98 F.3d at 1468–69.

36. *See Shaw*, 463 U.S. at 97.

37. *See id.* at 98.

38. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990) (citing Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 48 (1987)); *see also Coyne & Delany Co.*, 98 F.3d at 1471.

39. *See* Buehler, Ltd. v. Home Life Ins., 722 F. Supp. 1554, 1558 (N.D. Ill. 1989).

40. 722 F. Supp. 1554 (N.D. Ill. 1989).

41. *See id*. at 1558.

42. *See id*.; *see also* Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).

43. *See* Kanne v. Conn. Gen. Life Ins., 867 F.2d 489, 492 (9th Cir. 1988) (per curiam).

44. *See* Employee Retirement Income Security Program, 29 U.S.C. § 1144(b)(2)(B); *see also* HARNETT & LESNICK, *supra* note 33 § 1A.01 (quoting Taggart Corp. v. Life & Health Benefits Admin., Inc., 617 F.2d 1208 (5th Cir. 1980)).

45. *See* HARNETT & LESNICK, *supra* note 33 § 1A.02 (stating that "a state law which affects insurance companies or policies does not 'regulate' them unless it is

Much of the current legislation that imposes civil liability will be preempted by ERISA.[46] It is unlikely that ERISA will preempt criminal liability because the state law must not be "generally applicable."[47] However, it is likely that any civil liability will be preempted by ERISA, protecting companies that provide reproductive healthcare benefits.[48]

III. FEDERAL PROTECTIONS FOR COMPANIES FACING LEGAL ACTION

In an ERISA analysis, it must be determined whether the benefit plan is an ERISA plan, if the state legislation "relates to" an ERISA plan, and if the legislation would be protected by the Savings Clause. *Buehler* and *Kanne v. Connecticut General Life Insurance, Co.*,[49] when combined, created a nine-element test to determine if a benefit plan is covered by ERISA.[50] Additionally, if the law "regulates insurance," it will not be preempted by ERISA.[51] Therefore, it must be determined if the state law is protected by the Savings Clause.[52]

A. Reproductive Healthcare Benefits as an ERISA Plan

For the purposes of ERISA, a plan, fund, or program requires benefits, beneficiaries, a financial source, and a mechanism for employees to apply for benefits.[53] For the purposes of qualifying as an ERISA benefit plan, the

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limited to them").

46. *See* 29 U.S.C. § 1001.

47. *See* Thorne et al., *supra* note 18 (providing two ways to argue that criminal state abortion laws are not generally applicable: (1) the laws only apply to some because they target women and (2) enforcement of such state laws "could be a direct impediment to the uniform administration of benefits within that state's border").

48. *See* 29 U.S.C. § 1001(b).

49. 867 F.2d 489 (9th Cir. 1988) (per curiam).

50. *See* Buehler Ltd. v. Home Life Ins., 722 F. Supp. 1554, 1558 (N.D. Ill. 1989) (stating that to fulfill the "plan requirement, there must be '(1) a plan, fund or program, (2) established or maintained, (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, . . . (5) to participants or their beneficiaries'" (quoting Ed Miniat, Inc. v. Globe Life Ins. Grp., 805 F.2d 732, 738 (7th Cir. 1986))); *see also id.* at 492 (stating that to fulfill the plan requirement, the business must make contributions to the plan, the program must not be completely voluntary, the functions of the plan must go beyond a benefit to publicize and collect premiums, and the employer must receive consideration for providing the benefit plan); 29 C.F.R. § 2510.3-1(j) (1987).

51. *See* 29 U.S.C. § 1144(b)(2)(A).

52. *See generally id.* § 1144(b)(2)(B).

53. *See* Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).

plan does not need to be in writing.[54] Further, in order to "establish" a plan, the company must only decide to provide the benefits.[55] A reasonable person standard is used to determine if a plan qualifies as an ERISA plan.[56] To qualify, it must be determined that a reasonable person has the ability to "ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits."[57] Additionally, the benefit plan must fall under one of the intended categories; relevant here is the health and disability categories.[58] The definitions for parts three through five are provided in ERISA or are based on common definitions for the terms and phrases.[59]

In *Brundage-Peterson v. Compcare Health Services Insurance Corp.*,[60] the employer provided their employees with an option between two insurance plans.[61] In this case, the plan consisted of a contract between the employer and the two insurance companies, an eligibility requirement, and the beneficiary's contributions to the insurance premiums.[62] The court determined that giving employees an option between two insurance benefits plans is a "plan" covered by ERISA.[63]

B. State Legislation Relating to an ERISA Plan

The state abortion laws create a right of action for anyone to "bring a civil [suit] against" anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise."[64]

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54. *See id*. at 1372–73.

55. *See id.* at 1372 (ERISA does not require a particular or formal process of adopting or establishing a new employee benefit plan to qualify as an ERISA plan).

56. *See id.* at 1373.

57. *See id*.

58. *See id.* ("To be an employee welfare benefit plan, the intended benefits must be health, accident, death, disability, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services, or severance benefits," to be considered an ERISA plan).

59. *See id.* at 1371.

60. 877 F.2d 509 (7th Cir. 1989).

61. *See id.* at 510 (noting that this plan was between an employer allowing them to shop for their own insurance, which is not covered by ERISA, and an employer proving their employees with benefits directly, which is covered by ERISA).

62. *See id*.

63. *See id.* at 511; *see also* Buehler, Ltd. v. Home Life Ins., 722 F. Supp. 1554, 1561 (N.D. Ill. 1989) (determining that a group life insurance plan is considered an ERISA plan).

64. *See* sources cited *supra* note 7.

In *Coyne*, the Fourth Circuit determined that the state law must relate to an employee benefit plan, create an enforcement mechanism, or restrict what benefits an employer can provide or create conflicting requirements between local and state insurance laws.[65] If one of the three elements is violated, then ERISA can preempt the state law.[66]

Regarding the consideration of the analysis, the court in *Coyne* determined that the *Shaw* analysis showed how the New York State law mandated employee benefit structures.[67] To determine the meaning of "relates to," courts have looked at the congressional intent and legislative history of ERISA.[68] The first consideration is the plain meaning of the phrase "relates to," but the plain meaning does not provide clear direction as to what specifically the law must relate to in order to "relate to" an ERISA benefit plan.[69] Second, Congress clearly intended to have a broad application of the phrase, as reflected in the legislative history.[70] Originally, the proposed bill that later became ERISA contained more restrictions on what state laws needed to do to "relate to" an ERISA plan.[71] In the enacted legislation, there are no specific restrictions, which shows that Congress intended to have a broad application of the preemption clause.[72] In a Senate debate, Senator Williams emphasized the importance of broadly applying the phrase.[73]

In *Shaw*, a New York antidiscrimination statute required employers to offer a benefit plan to their employees that included benefits for

65. *See* HARNETT & LESNICK, *supra* note 33 § 1A.02; *see also* Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1468–69 (4th Cir. 1996).

66. *See Coyne & Delany Co.*, 98 F.3d at 1468–69.

67. *See id.* at 1468 (noting that "absent preemption, benefit plans would have been subjected to conflicting directives from one state to the next").

68. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).

69. *See id*.

70. *See id*. at 98 ("The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA.").

71. *See id.*

72. *See id*.

73. *See id.* at 99 (Senator Williams stated that "[i]t should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law" (quoting 120 CONG. REC. 29933 (1974))).

"nonoccupational injuries or illness," such as pregnancy.[74] The plaintiff argued, and the New York Court of Appeals agreed, that "a private employer whose employee benefits plan treats pregnancy differently from other nonoccupational disabilities engages in sex discrimination" within the scope of the New York antidiscrimination statute.[75] The New York law effectively changed the requirements of what an employer needs to provide to their employees through their benefit plan.[76] Therefore, the Supreme Court, in comparing the statute to the plain meaning of "relates to" in § 514(a), determined that the New York law related to an employee benefit plan.[77]

Regarding the second element of the analysis, the Court in *Ingersoll-Rand Co. v. McClendon*[78] explained that § 502(a) of ERISA is meant to be the only mechanism for civil enforcement.[79] Therefore, ERISA preempts any state legislation that provides an alternative mechanism for civil enforcement.[80] In *Ingersoll-Rand*, the Court held that "a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA" is expressly preempted.[81] Further, in *Pilot Life Insurance v. Dedeaux*,[82] the plaintiff's claims were filed under state laws that sought to enforce what employees should receive benefits, something covered in ERISA's civil enforcement clause.[83]

Regarding the third element of the test, the court in *Coyne* determined that the *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance*[84] analysis is to be used to determine if the state law

74. *See id.* at 89, 92.

75. *See id.* at 88.

76. *See id*. at 97.

77. *See id.* at 100.

78. 498 U.S. 133 (1990).

79. *See id.* at 144; *see also* Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1471 (4th Cir. 1996) (explaining that ERISA does not preempt the Virginia law specifically because the Virginia law does not enforce requirements for benefit systems, plan terms, kinds of benefits, information disclosure for employees, or managers' conformity to plan policies; the Virginia law provides no means for employees to enforce their rights to ERISA benefits, and the Virginia law instead applies generally to professional malpractice).

80. *See Ingersoll-Rand Co.*, 498 U.S. at 144.

81. *See id.* at 135, 145.

82. 481 U.S. 41 (1987).

83. *See id.* at 48; *see also Coyne & Delany Co.*, 98 F.3d at 1468–69.

84. 514 U.S. 645 (1995).

seeks "to bind a plan administrator to particular choices or preclude uniform administrative practices."[85] In this case, the court examined a New York statute that "regulate[d] hospital rates for all in-patient care, except for services provided to Medicare beneficiaries."[86] The court decided that having an indirect economic influence is not enough to bind plan administrators.[87]

In applying the first element of the *Coyne* test, the current state abortion bans relate to employee benefit plans in the same way that the New York law related to the benefit plans in *Shaw*.[88] While the New York law created an additional requirement for the employers, the current state laws create a restriction on what coverage employers can provide to their employees.[89] State laws prohibit anyone from funding any person's abortion procedure, including travel, in any way, such as through insurance or an employee benefit program.[90] Therefore, the state abortion laws relate to "an employee benefit plan" under the plain meaning of § 514(a) of ERISA.[91]

The state abortion laws do not create alternative enforcement mechanisms, unlike the state laws in *Ingersoll-Rand* and *Dedeaux*.[92] The state laws here do not provide a mechanism for beneficiaries to use in order to receive the proper benefits under ERISA.[93] The laws have the opposite function; they provide a civil remedy for nonbeneficiaries to receive damages due to the funding of an abortion.[94] Therefore, the state abortion laws do not satisfy the second prong of the *Coyne* test.[95]

In applying the third element of the *Coyne* test, the state abortion laws do not have the same effect as the laws in *Travelers*.[96] The state laws create a

85. *Coyne & Delany Co.*, 98 F.3d at 1471.

86. *See Travelers Ins.*, 514 U.S. at 649.

87. *See id.* at 659.

88. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).

89. *See id.*; *see also* sources cited *supra* note 7.

90. *See* sources cited *supra* note 7.

91. *See Shaw*, 463 U.S. at 100; *see also* EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM, 29 U.S.C. § 1144(a).

92. *See* sources cited *supra* note 7; *see also* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 135 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47–48 (1987) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)).

93. *See* sources cited *supra* note 7.

94. *See* sources cited *supra* note 7.

95. *See* Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1468 (4th Cir. 1996).

96. *See* sources cited *supra* note 7; *see also* N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 649 (1995) (holding that ERISA did not preempt a state law that subjected "certain health maintenance organizations to surcharges" which are covered by ERISA).

differing standard to apply ERISA due to the prohibition of abortion coverage, frustrating the purpose of ERISA.[97] This "precludes uniform administrative practice" by creating differing standards for employers depending on their state.[98] Further, the state laws prevent employers from deciding what types of benefits to add to their existing plans, therefore binding "employers or plan administrators to particular choices."[99] The state laws violate the third element of the *Coyne* test because it creates a conflicting standard of what benefits a business must provide their employees in the benefit plans.[100]

The state laws relate to an employee benefit plan, satisfying the first element.[101] The state laws do not create their own enforcement mechanism, violating the second element.[102] Finally, the state laws create a differing standard in the application of ERISA, violating the third element.[103] Therefore, the state laws violate at least one of the *Coyne* elements, and they are able to be preempted by ERISA.[104]

C. The Savings Clause

The Court's test in *Metro Life Ins. v. Massachusetts*[105] first asked if the state law regulates insurance in a "common sense" understanding.[106] In the second prong of the *Metro Life* analysis, the court applied the McCarran-Ferguson Act.[107] The McCarran-Ferguson Act created a three-part test to determine if a law "regulates insurance."[108] The first element is whether

97. *See* sources cited *supra* note 7.

98. *See* sources cited *supra* note 7; *see also Coyne & Delany Co.*, 98 F.3d at 1468.

99. *See* sources cited *supra* note 7; *see also Coyne & Delany Co.*, 98 F.3d at 1468.

100. *See Coyne & Delany Co.*, 98 F.3d at 1468–69.

101. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983); *see also* sources cited *supra* note 7.

102. *See* sources cited *supra* note 7; *see also* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 135–36 (1990); Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 48 (1987).

103. *See* sources cited *supra* note 7; *see also* N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 649 (1995).

104. *See Coyne & Delany Co.*, 98 F.3d at 1468–69; *see also Travelers*, 514 U.S. at 649; *Ingersoll-Rand Co.*, 498 U.S. at 144.

105. 471 U.S. 724 (1985).

106. *See id.* at 740 (1985); *see also* HARNETT & LESNICK, *supra* note 33 § 1A.02.

107. *See Metro. Life Ins. Co.*, 471 U.S. at 743 (quoting Union Labor Life Ins. v. Pireno, 458 U.S. 119 (1982)).

108. *See id.*; *see also* Buehler, Ltd. v. Home Life Ins., 722 F. Supp. 1554, 1559 (N.D. Ill. 1989) (quoting *Union Labor Life Ins.*, 458 U.S. 119 (1982)); Kentucky Ass'n of Health Plans v. Miller, 538 U.S. 329, 333 (2003) (quoting *Union Labor Life Ins.*, 458 U.S. 119 (1982)).

the policyholder's risk is transferred by the state law.[109] The second element is "whether the practice is an integral part of the policy relationship between the insurer and the insured."[110] Finally, the third element is whether the law regulates something that affects only entities in the insurance industry.[111]

In *Kentucky Association of Health Plans Inc. v. Miller*,[112] the lower court determined that the statutes "regulated insurance," which should save the law from the preemption clause.[113] The Court explained that the lower court erred in using the McCarran-Ferguson Act, as the test in the Act concerns "how to characterize conduct undertaken by private actors," not with state laws themselves.[114] The Court created a new two-prong test to determine if state laws regulate insurance.[115] For the law to regulate insurance, it "must be specifically directed toward entities engaged in insurance" and it "must substantially affect the risk pooling arrangement between the insurer and the insured."[116]

IV. CONCLUSION

Dobbs v. Jackson Women's Health Organization created confusion for many citizens and companies.[117] After its release, state abortion bans took effect, banning most abortions and creating liability for anyone who aids and abets the abortion procedures.[118] Many major companies released statements notifying the public that they intend on expanding the benefits they offer to include coverage for reproductive healthcare and travel expenses, should their employees need to travel to receive abortion care.[119]

ERISA, a federal statute, preempts any state law that attempts to change insurance procedures or creates an alternative enforcement mechanism.[120]

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109. *See Buehler*, 722 F. Supp. at 1559 (quoting *Union Labor Life Ins.*, 458 U.S. 119 (1982)).

110. *Id.*

111. *Id.*

112. 538 U.S. 329 (2003).

113. *See id.* at 333.

114. *See id*. at 337.

115. *See id*. at 341–42.

116. *Id*. at 342.

117. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

118. *See* sources cited *supra* note 7.

119. *See* Murphy Marcos, *supra* note 20; *see also* Rosenblatt, *supra* note 20.

120. *See* Thorne et al., *supra* note 18; *see also* Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1468–69 (4th Cir. 1996).

The law must relate to an employee benefit plan, create an enforcement mechanism, or restrict what benefits an employer can provide.[121] Otherwise, the state law may create conflicting requirements between local and state insurance laws to be preempted by ERISA.[122] The States' abortion laws relate to ERISA plans according to the test provided in *Coyne*.[123]

For a plan to be covered by ERISA, the employee benefit plan must be provided or maintained by an employer to cover various types of medical care or time off from work due to illness, bereavement, or vacation.[124] Other courts have provided further clarification on what each of the five steps entails. ERISA would preempt any state law that creates civil liability for companies that cover abortion care in the benefits packages offered to employees, so long as the benefits package is an ERISA plan.[125] ERISA covers the state abortion laws. Therefore, ERISA provides companies with a weapon against any civil lawsuits that may be filed against them.[126] Without it, companies could be ordered to pay damages of at least ten thousand dollars per plaintiff.[127] Although there is still a significant chance that plaintiffs will file lawsuits against anyone who aids and abets an abortion, companies should be confident in their ability to provide abortion benefits without fear of impending judgments against them.

However, there is concern that states will make it a felony to give financial support of any kind for an abortion.[128] Company representatives

121. *See* HARNETT & LESNICK, *supra* note 33 § 1A.02; *see also Coyne & Delany Co.*, 98 F.3d at 1468–69.

122. *See* HARNETT & LESNICK, *supra* note 33 § 1A.02; *see also Coyne & Delany Co.*, 98 F.3d at 1468–69.

123. *See Coyne & Delany Co.*, 98 F.3d at 1468–69.

124. *See id*.

125. *See id.*; *see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990); Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 54 (1987).

126. *See Coyne & Delany Co.*, 98 F.3d at 1468–69; *see also Shaw*, 463 U.S. at 97.

127. *See* sources cited *supra* note 7.

128. *See* Press Release, Briscoe Cain, Rep., State Representative Briscoe Cain Sends Cease-and-Desist Letters to Citigroup (Mar. 18, 2021), https://www.documentcloud.org/documents/21607643-briscoe-cain-letter-to-citigroup; *see also* Zach Despart, *Businesses that Help Employees Get Abortions Could be Next Target of Texas Lawmakers if* Roe v. Wade *is Overturned*, TEX. TRIBUNE (May 23, 2022, 5:00 AM CT), https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions/; Paige McGlauflin, *Companies Offering Abortion Benefits Should Look Out for These Legal Risks after Supreme Court's* Roe v. Wade *Ruling*, FORTUNE (June 23, 2022, 11:26 AM), https://fortune.com/2022/06/23/companies-offer-travel-abortion-

and employees may be prosecuted because of this type of legislation. ERISA does not preempt criminal liability, leaving companies and individuals vulnerable to state prosecution.[129] Congressional action could protect those who fall through the gaps left by ERISA.

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129. *See* Employee Retirement Income Security Program, 29 U.S.C. § 1001.