Labor Law's Impact on the Post-*Dobbs* Workplace

By Jeffrey M. Hirsch*

Abstract

The Supreme Court's Dobbs *decision has left many workers, especially in states with restrictive abortion-related laws, in a precarious position. Labor laws and unions, however, provide one avenue for providing these workers with more protections. Unions can demand bargaining to protect or expand health care, leave, and other terms of employment that give workers with means to obtain abortion-related care. Unions can also provide members legal defense and other support if they face prosecutions. Additionally, both union and non-union workers who make up the vast majority of workers in states with restrictive laws may have labor law protection for discussing and pushing for abortion-related benefits from their employers. Finally, these federal labor rights raise questions of preemption when they conflict with state abortion laws that attempt to restrict employer-provided abortion benefits.*

I. INTRODUCTION

As soon as a mere draft of *Dobbs v. Jackson Women's Health Organization*[1] was leaked, showing that the Supreme Court was going to overturn the nearly fifty-year old *Roe v. Wade*[2] precedent, there was a significant heightening of attention to what the new legal landscape would mean for individuals who wanted abortion-related health services.[3] Although the decision to seek an abortion is often an

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[1] 579 U.S. 2228 (2022).

[2] 410 U.S. 113 (1973).

[3] *See, e.g.*, Mary Ann Pazanowski, *State Abortion Rulings Post-*Dobbs *Begin Defining Scope of Rights*, BLOOMBERG L. (Jan. 17, 2023, 4:00 AM),

extremely personal one, the ability to carry through with that choice depends upon a wide variety of actors, both public and private. States' decisions to impose limits or protections for abortion access have justifiably received most of the public's attention.[4] However, individuals' abilities to navigate the new state abortion landscape will be aided or hindered by other actors. Among the most significant of these other players are employers.

Access to abortion and other health care depends on employers to an unappreciated degree. The most direct impact arises because most health insurance in the United States is provided through work.[5] Therefore, especially for employees who cannot afford out-of-pocket health expenses, their ability to obtain abortion-related care depends on whether their workplace offers health insurance and whether it covers abortions. Beyond insurance though, employment policies significantly impact employees' ability to access health care, even if cost is not a factor. Employment policies such as leave and scheduling[6] can be the difference between an individual being able to realistically obtain an abortion or having to decide between an abortion and their job.[7]

The importance of workplace benefits to abortion access raises questions about the legal protections for workers seeking benefits and policies from their employers that expand, protect, or restrict access to abortion care. This article focuses on labor law protections—primarily via the National Labor Relations Act[8] (NLRA or Act), which covers most private-sector workplaces—for employees seeking abortion-related measures from their employers. Labor law is most

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https://news.bloomberglaw.com/litigation/state-abortion-rulings-post-dobbs-begin-defining-scope-of-rights.

[4] *See, e.g.*, Liz Reid, *In Wake of* Dobbs *Decision Newsrooms Expand Coverage of Reproductive Health*, CURRENT (Aug. 5, 2022), https://current.org/2022/08/in-wake-of-dobbs-decision-newsrooms-expand-coverage-of-reproductive-health.

[5] *See* KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE U.S.: 2021, at 2–3 (2022), https://www.census.gov/content/dam/Census/library/publications/2022/demo/p60-278.pdf (survey showing that employer-sponsored health insurance was the most common (covering 54.3% of the civilian, non-incarcerated population, compared to the next biggest, Medicaid (18.9%) and Medicare (18.4%).

[6] *See infra* Part II.B.2.

[7] Even if the worker chooses their job over an abortion, they will still likely face the consequences of having a new child, which could end up jeopardizing their job or wages in the future.

[8] 29 U.S.C. §§ 151–159.

associated with unions, which have numerous opportunities and resources to promote employees' desires for abortion benefits. Unions can demand bargaining over health insurance, leave, and reimbursements related to abortion care. They can also ensure that what benefits do exist are provided in a fair manner that protects employees' privacy. Labor law isn't limited to unions, however. Non-union employees also possess labor rights to act together to seek workplace benefits without fear of retaliation from their employers. Indeed, many employees and unions have already begun to pressure employers over abortion benefits, and labor law is an important safeguard for these attempts. There is a caveat hovering over this discussion, however: questions about the extent to which these labor protections can survive attempts by states to prevent workplace abortion benefits.

This article begins in Part II by discussing the legal protections for non-union employees to seek abortion-related workplace benefits such as health insurance, leave, travel reimbursements, privacy protections, and political-related measures. Part III explores the labor rights of unionized employees, especially the right to bargain over abortion benefits and unions' advantage in negotiating and enforcing these rights. Finally, Part IV describes what is an open question: the extent to which labor law might preempt state prohibitions against workplace abortion benefits.

II. LABOR LAW PROTECTIONS FOR NON-UNION EMPLOYEES SEEKING ABORTION-RELATED WORKPLACE CHANGES

The NLRA may be the most powerful, yet underestimated, legal tool for employees to push their employers for, or against, abortion-related benefits. Although not widely known, the Act provides employees the right to act together to make changes in their work conditions.[9] This right applies even if the employees are not unionized or trying to unionize.[10] The National Labor Relations Board (NLRB or Board) has consistently interpreted this right quite broadly, protecting even as few as two employees (or only one under certain circumstances) merely discussing workplace desires or complaints.[11] As a result, section 7 could provide job protections for employees who seek abortion-related work conditions.

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[9] *Id.* § 157.

[10] NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–15 (1962).

[11] *E.g.*, Hoodview Vending Co., 359 N.L.R.B. 355, 358 (2012).

An important caveat to this protection is that workers must be classified as "employees" under the NLRA.[12] If they aren't—usually because they are considered independent contractors[13] or supervisors[14]—then the NLRA doesn't apply to them. That said, the NLRA doesn't prevent these workers, or even colleagues who are classified as employees, from seeking abortion-related benefits.[15] For instance, shortly after the release of *Dobbs*, Google announced various abortion-related benefits available to employees such as health insurance coverage for out-of-state medical care and the ability to request relocation to a different state without a reason.[16] Google employees—in conjunction with the Alphabet Workers Union, the minority union[17] representing some Google employees—then submitted a petition to the company demanding that it extend these benefits to its approximately 100,000 independent contractors.[18]

If workers are classified as employees under the NLRA, what protections do they have when they seek workplace changes related to abortion? For employees not represented by a union, the core labor right is section 7 of the NLRA, which protects employees "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

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[12] 29 U.S.C. § 152(3) (defining "employee"); *id.* § 158(a)(1) (making it unlawful for an employer to interfere, coerce, or restrain "employees'" section 7 rights).

[13] *See* Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1737 (2018).

[14] *See* 29 U.S.C. § 152(11) (excluding supervisors).

[15] Hirsch & Seiner, *supra* note 13, at 1766.

[16] Jennifer Elias, *Google Workers Demand Equal Abortion Benefits as State Bans Go into Effect*, CNBC (Aug. 18, 2022, 9:00 AM), https://www.cnbc.com/2022/08/18/google-workers-petition-management-for-equal-abortion-benefits.html.

[17] *Id.* A "minority union" is one that, because it does not have support from a majority of employees, lacks the right to bargain with the employer. *See* 29 U.S.C. § 159(a) (granting right to collective bargaining to representative designated or selected "by the majority" of employees); *see also* Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 737–38 (1961) (holding that employer violates NLRA by bargaining with minority union on behalf of larger unit of employees). However, minority unions can still advocate on behalf of their members. *See* Hirsch & Seiner, *supra* note 13, at 1754–55.

[18] Elias, *supra* note 16 (noting that the petition also sought seven additional sick leave days to account for abortion-care-related travel).

bargaining or other mutual aid or protection . . . ."[19] A key aspect of section 7 is the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." This is the provision that gives non-union employees their often unknown labor rights.

A. What is Concerted and Protected Activity under the NLRA?

1. What is Concerted Activity?

Whether employees are engaging in "concerted activities for the purpose of . . . mutual aid or protection" is often referred to as a "concerted and protected" issue. The first step is to determine if there was "concerted" activity. That is, was there group action potentially covered by section 7? Or was there merely individual-focused activity, which does not fall under section 7.

At its most simplest form, concerted activity involves two or more employees acting together.[20] The most common forms of concerted action include employees discussing issues among themselves, whether in person, via social media, or other similar discussions.[21] In certain situations, an individual employee can engage in actions or make comments that qualify as concerted, such as when an employee tries to enforce a right contained in a collective-bargaining agreement,[22] tries to induce group action among other employees,[23] or acts on other employees' behalf.[24] Even complaining in the presence of other employees will typically be considered "concerted."[25]

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[19] 29 U.S.C. § 157. Section 7 is enforced via section 8(a)(1), which provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of their section 7 rights. *Id.* § 158(a)(1).

[20] NLRB v. Washington Aluminum, 370 U.S. 9, 14–17 (1962).

[21] *See, e.g.*, Triple Play Sports Bar & Grille, 361 N.L.R.B. 308 (2014) (concluding that an employee liking another employee's Facebook post was concerted activity). *See generally* Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921, 934–42 (2015) (discussing application of section 7 to electronic communications).

[22] *See, e.g.*, NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984) (enforcing safety provision in collective-bargaining agreement).

[23] *See* Hoodview Vending Co., 362 N.L.R.B. 690, 690 n.1 (2015); Belle of Sioux City, 333 N.L.R.B. 98, 105 (2001).

[24] *See*, *e.g.*, Meyers Indus., 281 N.L.R.B. 882 (1986) (activity "on the authority of" other employees), *enf'd sub nom*. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987).

[25] Avery Leasing, 315 N.L.R.B. 576, 580 n.5 (1994).

Moreover, the NLRB has also determined that advocacy on certain topics is "inherently concerted."[26] The inherently concerted classification gives employees more leeway to gain NLRA protection; however, some courts have rejected the doctrine.[27] Under the inherently concerted doctrine, when a single employee speaks about certain core concerns to another employee who merely listens, the Board will consider the action to be concerted, even absent an attempt to induce group action.[28] In essence, these topics—such as compensation, job security and work schedules—go to such a vital area of concern to all employees that the topic itself is considered concerted. Although the provision or loss of health benefits, which would presumably include demands for abortion-related health care benefits, is an area that hasn't been fully analyzed under the inherently concerted doctrine, a Board that applied the doctrine would likely find health care to be a "core concern."[29]

2. What is Protected Activity?

If employees have acted in concert, then the next step is to determine whether they acted together in a way that is protected by section 7 of the NLRA.[30] That section applies only to activity that is "for the purpose of collective bargaining or other mutual aid and protection."[31] For non-union employees, the focus is protected activity

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[26] *See, e.g.*, Hoodview Vending Co., 359 N.L.R.B. 355, 358 (2012) (employee speaking about job security); *see also* NLRB GEN. COUNS. MEMO. GC 21–03, EFFECTUATION OF THE NATIONAL LABOR RELATIONS ACT THROUGH VIGOROUS ENFORCEMENT OF THE MUTUAL AID OR PROTECTION AND INHERENTLY CONCERTED DOCTRINES 3–4 (2021).

[27] *See* Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB, 81 F.3d 209, 214 (D.C. Cir. 1996) (noting lack of evidence that employee intended to induce group action); Trayco of S.C., Inc. v. NLRB, 927 F.2d 597 (4th Cir. 1991) (unpublished table decision) (same).

[28] *Hoodview Vending*, 359 N.L.R.B. at 357–58.

[29] *Cf.* N. W. Rural Elec. Coop., 366 N.L.R.B. No. 132, slip op. at 1 n.1 (July 19, 2018) (affirming ALJ without deciding whether ALJ's finding safety concerns were inherently concerted); NLRB Div. of Advice Memo., North West Rural Electric Coop., 18-CA-150605 (Sept. 21, 2015) (arguing that health and safety issues should be considered inherently concerted).

[30] 29 U.S.C. § 157.

[31] *Id.* ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

that is for the employees' "mutual aid and protection," which most commonly involve workplace issues such as compensation, scheduling, benefits, and other terms and conditions of employment.[32] However, the NLRB has stressed that protected activity is to be defined more broadly than the hours, wages, and conditions of employment that trigger the duty to bargain.[33] Thus, if employees' concerted activity "might reasonably be expected to affect terms or conditions of employment," then the activity will typically be considered protected.[34]

Although protected activity is defined broadly, employees must be mindful of how they engage in such activity. Employees could lose section 7 protection for what would otherwise be concerted and protected activity if the manner in which they engage in that activity is improper. The Board has not given a clear definition of what conduct goes too far for section 7 purposes, as the inquiry is very fact-intensive, but common examples include employee activity that violates state criminal, tort, or property law;[35] breaches a collective-bargaining agreement;[36] harasses or threatens;[37] or exhibits disloyalty to the employer.[38] As a result, employees need to be careful to advocate for workplace changes in a manner that, while perhaps unruly, remains within some loosely defined set of norms.

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bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .").

[32] *See* PAUL M. SECUNDA, ANNE MARIE LOFASO, JOSEPH E. SLATER & JEFFREY M. HIRSCH, MASTERING LABOR LAW 61 (2014).

[33] G & W Elec. Specialty Co., 154 N.L.R.B. 1136, 1137–38 (1965); *see infra* Part III.A (discussing mandatory duty to bargain).

[34] Brown & Root, Inc. v. NLRB, 634 F.2d 816, 818 (5th Cir. 1981).

[35] *See, e.g.*, Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) (work stoppage violated federal criminal statute).

[36] *See, e.g.*, Mohave Elec. Co-op., Inc. v. NLRB, 206 F.3d 1183, 1190–91 (D.C. Cir. 2000).

[37] *See, e.g.*, Hispanics United of Buffalo, Inc., 359 N.L.R.B. 368 (2012) (allegations of online harassment); Clear Pine Mouldings, 268 N.L.R.B. 1044 (1984) (threatening non-strikers).

[38] *See, e.g.*, NLRB v. Loc. 1229, IBEW (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953).

3. Consequence of Employees Engaging in Concerted and Protected Activity

So what follows if employees' actions are "concerted and protected" by section 7? In most cases, section 7 coverage prohibits an employer from retaliating against such activity, for instance by firing an employee because they pushed for abortion benefits.[39] It also prohibits an employer from trying to prevent such activity, such as a gag rule barring employees from discussing employee benefits at work[40] or monitoring employees who are engaging in protected activity.[41] In short, although section 7 does not require an employer to provide any items that employees seek, it does protect employees' right to work together to convince the employer to act—and with enough pressure or a sympathetic employer, this right can result in meaningful change. Indeed, we saw the impact of workplace collective action soon after *Dobbs* was released. In response to employees' post-*Dobbs* demands,[42] Google changed the results provided by Google Maps to inquiries about "abortion clinics near me" to default to results that include only abortion providers, filtering out entities that don't provide abortions and may actively seek to prevent women from having the procedure.[43]

B. Types of Concerted and Protected Activity Seeking Abortion-Related Benefits or Other Employer Actions

How might employees use their section 7 rights to obtain better abortion-related work terms? Because abortion-related treatment can take many forms and impact individuals in many different ways, employees can act together to seek a wide variety of abortion-related changes in their workplace. Many changes—such as the need for

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[39] *See* CGLM, Inc., 350 N.L.R.B. 974, 979 (2007).

[40] *See* The Boeing Co., 365 N.L.R.B. No. 154, at *4 (Dec. 14, 2017) (reaffirming, in case that gave employers more leeway to establish workplace policies, that rules prohibiting employee discussions about benefits is per se unlawful), *overruled on other grounds by* Stericycle Inc., 372 N.L.R.B. No. 113 (Aug. 2, 2023).

[41] *See* F.W. Woolworth Co., 310 N.L.R.B. 1197, 1197 (1993).

[42] *See supra* notes 16–17 and accompanying text.

[43] *See* Max Zahn, *Google Workers Battle Company Over "Life and Death" Abortion Policies*, ABC News (Sept. 7, 2022, 11:46 AM), https://abcnews.go.com/Business/google-workers-battle-company-life-death-abortion-policies/story?id=89046352.

abortion-related accommodations for disabled employees[44]—are important, but the most common involve health insurance coverage, leave, travel benefits, and privacy protections related to abortion care.

1. Employer Insurance Coverage for Abortion-Related Medical Care and Contraception

Among the top abortion-related workplace concerns for employees has been the availability of health insurance coverage for abortion services. Prior to *Dobbs*, most workplace health insurance plans covered abortion services, including elective abortions whose purpose went beyond protecting the health of the pregnant employee.[45] And immediately after the *Dobbs* draft was released, several companies affirmatively announced that they would provide employees with new benefits related to abortion care.[46] On the other hand, some employers explicitly exclude abortion services from their health care plans and there is a genuine risk that more employers could follow suit, especially in states that have outlawed abortion.[47] As a result, health insurance coverage for abortion-related care will be a significant issue

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[44] *See* Nicole Buonocore Porter, *Symposium Introduction: The Effect of* Dobbs *on Work Law*, 27 EMP. RTS. & EMP. POL'Y J. 56, 80–82 (2024).

[45] For instance, one survey found that a large majority of employers with offer health insurance coverage for abortion care. *See More U.S. Employers to Offer Travel Benefits for Abortion Services in Wake of* Dobbs *Decision, WTW Survey Finds*, WTW (Aug. 11, 2022) [hereinafter *WTW Survey*], https://www.wtwco.com/en-US/News/2022/08/more-us-employers-to-offer-travel-benefits-for-abortion-services-in-wake-of-dobbs-decision-wtw (finding that, of 305 surveyed employers, 93 percent of fully insured plans intended to over elective abortions in 2023 and 82 percent of self-insured plans covered elective abortions).

[46] Russell Falcon, *LIST: Companies Covering Abortion Travel Costs for Employees*, NEXSTAR MEDIA WIRE (May 9, 2022, 2:42 PM), https://kfor.com/news/list-companies-covering-abortion-travel-costs-for-employees (noting travel benefits from employees such as Amazon, Levi Strauss, Citigroup, and Lyft).

[47] One 2019 survey found in a survey of approximately 2,000 private-sector firms that 10 percent of workers in the survey worked at firms that limit abortion coverage; 4 percent exclude coverage of abortions under all circumstances and 6 percent exclude coverage under certain circumstances. *See* Michelle Long, Matthew Rae & Alina Salganicoff, *Exclusion of Abortion Coverage from Employer-Sponsored Health Plans*, KAISER FAM. FOUND. (May 12, 2020), https://www.kff.org/womens-health-policy/issue-brief/exclusion-of-abortion-coverage-from-employer-sponsored-health-plans.

for many employees, who may well push for expanded coverage from their employers.

If employees push their employers for expanded health insurance coverage for abortion care, would such activity be considered protected under section 7? The answer is almost certainly "yes." Assuming the employees acted together and didn't do so in a manner that loses protection,[48] seeking changes to health insurance coverage would be considered "mutual aid and protection" under section 7. Because health insurance is part of employees' compensation, the NLRB treats attempts to expand such benefits as section 7 activity.[49]

2. Leave for Abortion-Related Health Care

Employees' access to job leave to obtain medical services related to abortion has been high on the list of post-*Dobbs* concerns. As more states ban abortion, employees will often have to travel to obtain abortion care, sometimes several states away.[50] Such travel takes time. In addition, abortion is a medical procedure—one that often requires out- or in-patient surgery—that can require time off work for both the procedure and recovery period. Consequently, meaningful access to abortion often hinges on whether employees can take time off without losing their jobs or income. Indeed, leave, especially paid leave, can be particularly effective at promoting access to abortion care because it can often be used for any purpose, thereby obviating the privacy concerns that surround many abortion-related benefits.[51]

Some employees already have leave rights under their employers' leave policies or laws like the Family and Medical Leave Act (FMLA).[52] But many employees aren't entitled to any, or much, leave under their employer's policies. Others may not be entitled to FMLA leave because they're not covered by the law or their abortion care is

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[48] *See supra* Part II.A.

[49] EF Int'l Language Sch., Inc., 363 N.L.R.B. 199, 209 (2015); Hahner, Foreman & Harness, Inc., 343 N.L.R.B. 1423, 1424 (2004).

[50] *See infra* Part II.A.3.

[51] Elizabeth C. Tippett, *Abortion Benefits: Companies Have Simple Way to Aid Workers in Anti-Abortion States—Expand Paid Time Off*, THE CONVERSATION (June 30, 2022, 2:18 PM), https://theconversation.com/abortion-benefits-companies-have-a-simple-and-legal-way-to-help-their-workers-living-in-anti-abortion-states-expand-paid-time-off-185917 (advocating paid leave for employers that want to assist workers in anti-abortion states to seek abortion care); *infra* Part II.A.4.

[52] 29 U.S.C. §§ 2601–2654.

not a "serious medical condition" qualifying for leave under the statute.[53] *Dobbs*, therefore, has created additional demand both for employees with some work-provided leave who now need more and for employees who currently lack the right to leave work. Thus, in the wake of *Dobbs*, employees have already begun pressing their employers for new or expanded abortion-related leave.[54]

Employees who act together to seek from their employers additional leave, whether paid or unpaid, would be protected by section 7 as long as they didn't do so in a manner that lost protection. The ability to take days off of work, especially while still being paid, are part of employees "terms and conditions" of work and therefore falls under section 7.[55] Thus, employees pushing for additional abortion-related leave have a right to engage in this activity free from employer retaliation.

3. Employer Reimbursement of Travel to Seek Abortion-Related Healthcare

In addition to the critical issue of having time off to seek abortion care, the costs associated with travel required to obtain this care are a new hurdle for employees in the states that have outlawed abortion after *Dobbs*. By allowing states to severely restrict abortion or ban the procedure outright, *Dobbs* has made it far more difficult and time-consuming for employees in the states that have taken advantage of *Dobbs* to seek abortion care. Even before *Dobbs*, approximately 10 percent of individuals who had an abortion did so in a different state than where they lived.[56] Moreover, prior to the *Dobbs* leak, some

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[53] *See* 29 C.F.R. § 825.113(a) (defining "serious health condition" as requiring either overnight inpatient care or continuing care after a period of incapacity for three or more consecutive days).

[54] *See* Emma Goldberg, *When Where You Work Determines if You Can Get an Abortion*, N.Y. TIMES (Jul. 2, 2022), https://www.nytimes.com/2022/07/02/business/economy/abortion-employer-support.html (describing employees' concern for travel and abortion-related benefits when considering whether to join or stay with an employer); Elias, *supra* note 16 (noting that Google employees, working with the Alphabet Workers Union, sought at least seven additional days of sick leave to account for travel time required for out-of-state abortion services).

[55] *See* Hilburn Elec. Serv. Co., 313 N.L.R.B. 372, 373 (1993) (maternity leave); Massachusetts Coastal Seafoods, 293 N.L.R.B. 496, 525 (1989) (sick leave); Judd Valve Co., 250 N.L.R.B. 472 (1980) (funeral leave).

[56] Christine Vestal, *Privacy, Stigma May Keep Workers from using Abortion Travel Benefits*, STATELINE (Oct. 3, 2022, 12:00 AM),

employers were already providing or considering providing travel benefits to offset state restrictions on abortion access.[57] Although we don't yet have data post-*Dobbs*, the fact that thirteen states have already enacted complete bans of abortion[58] will almost certainly lead to a sharp rise in the number of individuals who will have to travel out of state—often several states away—to seek abortion care. Indeed, after Texas enacted its abortion ban in 2021 interstate travel for abortions increased by over a factor of ten, and this was while the ban was still being challenged in court.[59] Moreover, the need for travel is especially acute in the five states that require patients to have an in-person visit with a physician before receiving a prescription for mifepristone or misoprostol, the drugs used for medical abortions.[60]

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https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/10/03/privacy-stigma-may-keep-workers-from-using-abortion-travel-benefits (noting model legislation targeting companies providing abortion travel benefits).

[57] Julie Campbell & Katherine Marshall, *SCOTUS Overturns* Roe*: Understanding the Impact on Your Benefit Plans*, MERCER HEALTH NEWS (June 23, 2022), https://www.mercer.us/our-thinking/healthcare/scotus-overturns-roe-understanding-the-impact-on-your-benefit-plans.html (describing survey launched in May 2022, in which 14 percent of employers with over 20,000 employees already provide travel benefits and 25 percent said they were considering doing so; for employer with fewer than 500 employees, 3 percent provided travel benefits and 18 percent were considering doing so).

[58] *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (July 1, 2023), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

[59] KARI WHITE, ASHA DANE'EL, ELSA VIZCARRA, LAURA DIXON, KLAIRA LERMA, ANITRA BEASLEY, JOSEPH E. POTTER & TONY OGBURN, TEX. POL'Y EVALUATION PROJECT, UNIV. TEX. AT AUSTIN, RESEARCH BRIEF: OUT-OF-STATE TRAVEL FOR ABORTION FOLLOWING IMPLEMENTATION OF TEXAS SENATE BILL 8, at 1 (2022), https://sites.utexas.edu/txpep/files/2022/03/TxPEP-out-of-state-SB8.pdf (finding an increase in interstate travel by Texans' obtain an abortion from 514 individuals between September-December in 2019 to 5,574 during the same period in 2021); *see also* Elizabeth Nash, Jonathon Bearak, Naomi Li, & Lauren Cross, *Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, GUTTMACHER INST., https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion (Sept. 15, 2021) (finding that the average distance Texans had to travel to obtain an abortion increased from seventeen to 247 miles after the enactment of S.B. 8).

[60] *Medication Abortion*, GUTTMACHER INST. (Oct. 31, 2023), https://www.guttmacher.org/state-policy/explore/medication-abortion (noting that four of those laws have been temporarily or permanently blocked by a court order). Idaho has also criminalized providing a minor with an abortion-inducing

Given the post-*Dobbs* landscape, it's unsurprising that there has been a heightened focus on the often significant cost of travel, which can include meals and lodging, for abortion care. Immediately after *Dobbs*, some employers voluntarily offered reimbursement for abortion-related travel expenses.[61] And one survey of employers after *Dobbs* estimated that the number of employers that provide travel benefits for abortion services will double in a few years following the decision.[62] However, employees at other companies have needed to demand travel reimbursements, arguing among other things that it is unfair that they have to face an additional cost for health care just because they live in a certain state. Google employees, for example, sought a $100 increase in the company's preexisting daily travel health reimbursements for out-of-state abortion care.[63]

Much like abortion-related health care and leave, concerted activity seeking travel reimbursements should also be protected under section 7. Travel benefits are a form of compensation provided by an employer, which falls squarely within section 7's compensation and terms and conditions of employment.[64] That said, employee attempts to seek travel benefits for out-of-state abortion care does raise other issues.

One issue that has already drawn the attention of some anti-abortion states is the tension between employer-provided travel benefits and state laws banning abortion.[65] States with abortion bans

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drug by recruiting, harboring or transporting the minor with the intent to conceal the abortion from parents. H.B. 242 § 1(1) (Idaho 2023).

[61] *See* Falcon, *supra* note 46; 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; *see also* Samantha J. Prince, *Deducting* Dobbs*: The Tax Treatment of Abortion-Related Travel Benefits*, 98 TUL. L. REV. 1, 13–27 (2023) (discussing the need for abortion-related travel benefits and the reasons some companies decide to provide them).

[62] *See WTW Survey*, *supra* note 45 (finding that 35 percent of 305 surveyed employers currently offer travel and lodging benefits; 16 percent are considering offering travel benefits in 2023; 21 percent are considering such benefits in the future).

[63] *See* Elias, *supra* note 16 (seeking increase to $150/day from $50/day).

[64] *See* Interns4hire.com, 370 N.L.R.B. No. 77 (Feb. 10, 2021) (unlawful termination in retaliation for, among other things complaints about the lack of employer reimbursement for travel costs).

[65] *See, e.g.*, Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST,

do not like the idea that employers are reimbursing their citizens who go to a different state for abortion care. As a result, some states have contemplated explicit bans on out-of-state travel for abortion care,[66] with Idaho actually enacting a law in 2023 that criminalizes any transportation assistance to a minor for the purpose of obtaining an abortion without parental consent.[67] This is a constitutionally dubious ban,[68] but one that could hinder employers' willingness to provide such benefits.[69] In particular, employers may hesitate providing abortion-related travel if doing so risks legal liability. That risk-aversion was the likely motive of the Equal Employment Opportunity Commission's (EEOC) former General Counsel who, in late 2022—acting after she had already left the agency—warned employers that the EEOC may file charges against employers who provide abortion-travel benefits on the theory that such benefits constitute pregnancy discrimination.[70] Although the EEOC discounted this threat

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https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines (June 30, 2022, 8:30 AM EDT).

[66] *See id*. (describing model legislation being circulated to allow suits against those who help others obtain abortions out-of-state); Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow*, POLITICO (Mar. 19, 2022, 7:00 AM), https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539.

[67] 2023 Idaho Sess. Laws 947, H.B. 242 § 1(1) (Idaho 2023) ("An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion . . . or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking."). Proving parental consent is the burden of the defendant. *Id.* § 1(2). It seems clear the law was written with the intent of avoiding constitutional problems with a state restricting interstate travel; however, given that Idaho has banned virtually all abortions starting at conception, the law would only be effective against someone who transports a minor within Idaho as part of interstate travel to obtain an abortion in a different state.

[68] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) ("[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.").

[69] *See infra* Part IV (discussing preemption issues).

[70] Rebecca Rainey & J. Edward Moreno, *Law Firm Calls Out Ex-EEOC Counsel's Note on Abortion Travel*, BLOOMBERG L., https://news.bloomberglaw.com/daily-labor-report/law-firm-calls-foul-on-ex-eeoc-counsels-note-on-abortion-travel (Oct. 25, 1:29 AM).

publicly,[71] simply raising the specter of liability may chill some employers.[72] Employees, on the other hand, may have valid concerns about keeping private their use of abortion-related travel reimbursements, which can hinder their ability to take advantage of this benefit. This additional issue, as well as other privacy concerns, are discussed next.

4. Privacy Concerns

Even when employees successfully push for abortion-related benefits or an employer provides them voluntarily, hurdles remain. One hurdle involves the privacy concerns surrounding employee attempts to use any abortion-related benefits. Many employees already feel a stigma attached to having an abortion, which increases the costs of making that choice.[73] That potential stigma combines with concerns about the release of other highly personal information related to abortion and other health matters to present a potentially serious hurdle to employees' actually using abortion-related workplace benefits. For instance, an employee considering using such benefits may fear that information related to their abortion would be obtained by their boss, co-workers, or even state authorities hostile to abortion.[74] This effect will be especially strong in workplaces where

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[71] J. Edward Moreno, *EEOC Rejects Ex-Official's Abortion Travel Letter as Agency View*, BLOOMBERG L. (Oct. 31, 2022, 11:59 AM), https://news.bloomberglaw.com/daily-labor-report/eeoc-rejects-ex-officials-abortion-travel-letter-as-agency-view.

[72] *See* Sarah Hansard, *Employers Offering Abortion Coverage See Agencies' Protection*, BLOOMBERG L. (July 22, 2023, 4:25 AM), https://news.bloomberglaw.com/employee-benefits/employers-offering-abortion-coverage-seek-agencies-protection (noting that potential state civil or criminal liability is a "big worry" for employers).

[73] *See* Kimberly Cataudella, *Is Your Privacy Protected is Your Employer Pays for Abortion-Related Travel Expenses?*, RALEIGH NEWS & OBSERVER, https://www.newsobserver.com/living/article263107653.html (July 5, 2022, 1:31 PM).

[74] *See* Vestal, *supra* note 56; Chris Marr, Andrea Vittorio, & Justin Wise, *Workers' Abortion Privacy at Risk as Texas Targets Employer Aid*, BLOOMBERG L. (July 15, 2022, 10:15 AM), https://news.bloomberglaw.com/daily-labor-report/workers-abortion-privacy-at-risk-as-texas-targets-employer-aid (describing ability of states to access abortion-related information in criminal and civil legal proceedings); Darius Tahir, *Big Employers Are Offering Abortion Benefits. Will the Information Stay Safe?*, KAISER HEALTH NEWS (July 1, 2022), https://khn.org/news/article/employer-abortion-benefits-privacy-confidentiality.

actual privacy violations occur, as other employees who want to keep this medical information private will be chilled from seeking these benefits. One sign of the significance of this issue is that the AFL-CIO has published model collective-bargaining agreement language for abortion benefits that includes an explicit provision protecting the privacy of employees' medical information.[75] In addition to general language about the confidentiality of employee medical information, the provision guarantees that any workplace documentation not contain any information about a diagnosis or type of treatment, as well as a requirement that the employee must be notified if the employer receives a subpoena or other legal demand for employee health information.[76]

For some employers that provide health care, the Health Insurance Portability and Accountability Act (HIPAA) provides reasonably strong privacy protection for information that might reveal that an employee is obtaining abortion-related medical care.[77] However, most employers are not considered "covered entities" under HIPAA.[78] For employees of non-HIPAA covered employers, privacy is far more of a gamble. Some companies have taken steps to protect the privacy of employees seeking travel or other abortion-related benefits,[79] but many seem reluctant to grapple with the concern.[80] For employees at companies that fail to take their privacy seriously, the fear that abortion-related information will get out remains very real.

Because of basic concerns about medical privacy, as well as the negative impact that potential privacy breaches have on the use of

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[75] *See* AFL-CIO, ABORTION MODEL COLLECTIVE BARGAINING AGREEMENT LANGUAGE (2022), https://aflcio.org/sites/default/files/2022-09/Abortion%20Model%20CBA%20Language.pdf.

[76] *Id.* at 2.

[77] *See HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care*, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 29, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html.

[78] HIPAA defines "covered entities" as health plans, health care clearinghouses, and certain healthcare providers. 42 U.S.C. § 1320(d)(1). HIPAA is triggered, however, when an employer requests information from a covered entity. 42 C.F.R. § 164.502 (2023).

[79] *See* Goldberg, *supra* note 61 (noting steps such as using a third-party provider to handle claims).

[80] *See* Tahir, *supra* note 74 (noting companies' unwillingness to respond to, or to answer with any detail, questions about privacy measures for their abortion-related benefits).

abortion benefits, privacy will likely be a significant issue for employees who care about workplace abortion benefits. Indeed, Google employees have gone as far as petitioning the company for a variety of measures aimed at protecting the privacy of *users* seeking information on Google for abortion-related services.[81]

As discussed below, unionized employees have more avenues to ensure their privacy than non-union employees, as unions can establish privacy rules through collective bargaining and are better equipped to enforce those rules.[82] Non-union employees lack the experience and bargaining obligation that unions possess, so they must resort to concerted and protected activity if they want their employer to establish privacy protections for the use of abortion benefits. The question, then, is whether section 7 would protect concerted activity to establish privacy measures. In virtually all cases related to the use of abortion benefits, seeking privacy safeguards would be protected. Because the lack of privacy directly deters employees from using workplace benefits, activity seeking more privacy falls easily within the definition of "mutual aid and protection." Little caselaw directly explores whether seeking privacy protections falls under section 7, but related cases establish that filing an invasion of privacy lawsuit is section 7 activity,[83] and seeking privacy measures that impact work conditions is a mandatory subject of bargaining[84]—which is a narrower category than section 7 activity.[85] Accordingly, just as section 7 protects the attempt to obtain abortion-related workplace benefits, so too will it protect attempts to safeguard employees' privacy while using those benefits.

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[81] Zoe Schiffer, *Google Employees Circulate Petition Demanding Abortion Benefits for Contractors*, THE VERGE (Aug. 18, 2022, 8:00 AM), https://www.theverge.com/2022/8/18/23308694/google-employees-petition-abortion-benefits-contractors-alphabet-workers-union (noting demands such as Google not saving or turning over to law enforcement user data related to health).

[82] *See infra* Part III.

[83] *See* Miami Health Care Ctr., 282 N.L.R.B. 214, 221 (1986).

[84] *See infra* notes 140–45 and accompanying text.

[85] *See* Hendricks Cnty. Rural Elec. Membership Corp. v. NLRB, 603 F.2d 25, 27 n.2 (7th Cir. 1979).

C. Concerted and Protected Activity Seeking Employer Public Support

Dobbs is very much a political issue. Many people care deeply about abortion access, both in support and against, and will often act on that concern.[86] It is unsurprising, then, that this concern can manifest itself in the workplace. For example, in the wake of *Dobbs*, Google employees requested that the company address problems with its abortion-related search results, which would often list anti-abortion centers in response to searches for abortion care.[87] The employees' petition also demanded that Google stop political lobbying, which the employees stated was linked to the appointment of Supreme Court Justices who voted to overturn *Roe*.[88] Other companies quickly faced scrutiny over political donations to groups that were seen as supportive of *Dobbs*, prompting attempts to mitigate the view that they didn't support abortion rights.[89] Employees could also pressure employers not to do business in states that ban abortions or refuse to work in such states.[90]

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[86] *See September 2022 Times/Sienna Poll: Cross-Tabs for All Respondents*, N.Y. TIMES (Sept. 16, 2022), https://www.nytimes.com/interactive/2022/09/16/upshot/september-2022-times-siena-poll-crosstabs.html (poll finding that 19 percent of registered voters "strongly support" *Dobbs* while 52 percent "strongly oppose" *Dobbs*; "somewhat" support or oppose were each around 10 percent).

[87] *See* Elias, *supra* note 16.

[88] *See* Schiffer, *supra* note 81 (demanding also that Google stop working with publishers of abortion-related disinformation and providing information to advertisers regarding ad revenue sharing to prevent inadvertent support of organizations that have contrary missions).

[89] *See* Goldberg, *supra* note 61 (describing Match Group's creating of fund to support Planned Parenthood after reports of its donation to the Republican Attorneys General Association was made public).

[90] The use of a strike or certain other types of pressure for partly political reasons raises the possibility that, if a union is involved, it could violate the NLRA's prohibition against "secondary" pressure—that is, a strike or other threatening conduct that targets a neutral employer. 29 U.S.C. § 158(b)(4); *see* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982) (holding that union boycott of Soviet goods, in protest of Afghanistan invasion, violated section 8(b)(4); Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 126–30 (2007) (noting that *Allied* could be read to apply to strikes or other efforts that are aimed at getting the government to do something, rather than employers).

The most well-known case on politically related speech under the NLRA is the Supreme Court's 1978 decision in *Eastex, Inc. v. NLRB*.[91] In *Eastex*, the employer refused to allow union employees to distribute a newsletter that, among other things, encouraged employees to write legislators to oppose a state right-to-work constitutional provision and criticized the President's veto of an increase in the federal minimum wage.[92] The Court held that both of these aims were "mutual aid and protection" under section 7 because they furthered employees' interests generally, even if they didn't directly impact the relationship with their employer.[93] The reasoning for this coverage was that these political goals promoted the employees' interests generally.[94] Importantly, under *Eastex*, section 7 activity is not limited to attempts to get the employer to improve work conditions; appeals to other actors or in other fora may also be considered protected under section 7.[95] The classification of protected activity under *Eastex* was not without limits, however. The Court made a special point of warning that the connection between the concerted activity and employees' workplace interests may become too "attenuated" to fall under section 7.[96] Where the line is drawn is not entirely clear, but the Court stressed the need for a case-by-case analysis that examines the connection between political activity and the concerns of "employees as employees."[97]

Eastex leaves the door open for employee conduct that seeks to expand access to job-related abortion benefits at the governmental level.[98] NLRB decisions in the wake of *Eastex* give some, albeit limited, guidance on the line between protected and unprotected political activity.[99] On one end of the spectrum is activity that is

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[91] 437 U.S. 556 (1978).

[92] *Id.* at 559–60.

[93] *Id.* at 566, 569–70. Moreover, the NLRA explicitly states that an "employee" under the Act "shall not be limited to the employees of a particular employer." 29 U.S.C. § 152(3).

[94] *Eastex*, 437 U.S. at 566, 569–70.

[95] *Id.* at 565–66.

[96] *Id.* at 567.

[97] *Id.* at 570.

[98] *See* Paul E. Bateman, *Concerted Activity: The Intersection Between Political Activity and Section 7 Rights*, 23 LAB. LAW. 41, 56 (2007) (stating that advocacy on behalf of a particular candidate or party would not be protected by Section 7, but appealing to legislators for general workplace issues would be protected).

[99] *See generally id.* at 46–53 (describing history of NLRA jurisprudence regarding politically related conduct).

almost entirely political in nature, such as promoting political candidates.[100] At the other end is activity that, while political in nature, is directly aimed at improving working conditions[101]—much like in *Eastex*. But a significant middle ground exists where employee activity involves both political and workplace concerns, which can lead to disparate views.[102]

One example of the murky middle ground for politically related activity is the Google Thanksgiving Four. In 2019, Google fired four employees on Thanksgiving. Google said the terminations were for violations of internal company policies, but the employees alleged it was in retaliation for their role in protesting Google's ethics, including its work with U.S. Customs and Border Protection;[103] the Department of Defense; and a special, censored Chinese search engine.[104] The employees then filed charges with the NLRB, alleging that their terminations were in retaliation for activity protected by section 7.[105]

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[100] *See*, *e.g.*, Firestone Steel Prods. Co., 244 N.L.R.B. 826, 827 (1979) (leaflet supporting candidates with limited mention of employment concerns), *enforced sub nom.* Loc. 174, UAW v. NLRB, 645 F.2d 1151, 1154–55 (D.C. Cir. 1981).

[101] *See*, *e.g.*, GHR Energy Corp., 294 N.L.R.B. 1011, 1014 (1989) (employee testimony to U.S. Senate committee about environmental laws that directly affected employees who worked with covered toxic materials), *enforced*, 924 F.2d 1055 (5th Cir. 1991); Union Carbide Co., 259 N.L.R.B. 974, 977 (1981) (petition against employer's use of government funding for anti-union activities), *enforced in relevant part*, 714 F.2d 657, 663 (6th Cir. 1983).

[102] *See*, *e.g.*, Motorola, Inc., 305 N.L.R.B. 580, 585–86 (1991) (document to city council that argued against proposed drug testing provision included references to employer drug testing), *enforcement denied*, 991 F.2d 278, 285 (5th Cir. 1993); Fun Striders, Inc. v. NLRB, 686 F.2d 659, 662 (9th Cir. 1981) (holding that where "leaflets contain non-political matter as well as political matter related to employee interests, distribution is protected"), *amended sub nom.* Fun Striders, Inc. v. NLRB (9th Cir. 1981).

[103] Shirin Ghaffary, *Google Fired an Employee Who Questioned its Work with Customs and Border Protection*, VOX (Nov. 25, 2019, 7:30 PM), https://www.vox.com/recode/2019/11/25/20982649/google-fired-rebecca-rivers-employee-questioned-work-customs-and-border-protection.

[104] Colin Lecher, *Fired Google Employees Will Charge the Company with Unfair Labor Practices*, THE VERGE (Dec. 3, 2019, 8:00 AM), https://www.theverge.com/2019/12/3/20991989/fired-google-activism-labor-charges; *see also* Google Walkout for Real Change, *Google Fired Us for Organizing. We're Fighting Back.*, MEDIUM (Dec. 3, 2019), https://googlewalkout.medium.com/google-fired-us-for-organizing-were-fighting-back-d0daa8113aed (statement by Thanksgiving Four, Laurence Berland, Paul Duke, Rebecca Rivers, and Sophie Waldman).

[105] NLRB, Case Nos. 20-CA-252802, -252902, -252957, -253105, -253464.

The NLRB's Trump-era General Counsel's office dismissed the complaints based on employees' opposition to Google's work with the U.S. Customs and Border Protection.[106] However, Biden's new Acting General Counsel reversed that decision, stating that their terminations "arguably" violated the NLRA.[107] The case was eventually settled.[108]

A similar question has arisen with the periodic "A Day Without Immigrant" protests, in which employees walked off their jobs to protest various federal immigration policies, including proposals that would significantly decrease the hiring of undocumented and potentially documented immigrants.[109] The NLRB hasn't yet decided the issue, but two different General Counsels have concluded that employees who refuse to work in order to join Day Without Immigrant protests are protected by section 7 because the protests were focused on legislative proposals to limit the hiring of immigrants, which could directly affect job opportunities and security.[110] The General Counsels stressed that the subject matter of employees' activity need not be

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[106] Josh Eidelson, *Biden Labor Board Counsel Revives Fired Googlers' Claims*, BLOOMBERG L. (May 5, 2021, 5:47 PM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XFSVHJG4000000.

[107] *Id.*

[108] Emma Roth, *Google Settles with Engineers Who Said They Were Fired for Trying to Organize*, THE VERGE (Mar. 21, 2022, 5:06 PM), https://www.theverge.com/2022/3/21/22989683/google-fired-engineers-union-settlement-lawsuit-project-vivian.

[109] *See* NLRB, GEN. COUNS. MEMO. GC 08-10, GUIDELINE MEMORANDUM CONCERNING UNFAIR LABOR PRACTICE CHARGES INVOLVING POLITICAL ACTIVITY 7–8 (2008).

[110] *See* NLRB Off. of Gen. Couns. Advice Memo., EZ Indus. Sols., LLC, 07-CA-193475 (2017) (stressing that protests were related to policies that impacted employees including increased deportations which deprived deported immigrants work opportunities and made it harder to enforce labor and employment standards); NLRB GEN. COUNS. MEMO. GC 08-10, *supra* note 109, at 8 (noting that non-immigrant employees were also covered because they were "mak[ing] cause with" fellow employees); *see also* NLRB v. Kaiser Eng'rs, 538 F.2d 1379 (9th Cir. 1976) (employee letter protesting employer's attempt to hire more foreign engineers was covered by Section 7). Because only the Board itself can set official NLRB policy, the General Counsel's opinions are not official agency policy. However, because of the General Counsel's prosecutorial power, that opinion can be quite important and is often persuasive when issues come before the Board.

explicitly or obviously connected to work, as long as the connection existed.[111]

So what does this all mean for employee attempts to seek abortion-related political change? It's not entirely clear, but a common thread is that the employee activity must have some sort of "work nexus."[112] That is, the NLRA does not protect employee conduct, such as a strike or other protest, aimed solely at a political issue. However, if that conduct, even if political in nature, also aims to improve work conditions—even indirectly—then protection is much more likely.[113] For instance, Google employees' demand that their employer stop certain political lobbying is unlikely to be considered protected.[114] On the other hand, if employees make political demands that impact work conditions, such as support for legislation mandating that employee health plans include contraception coverage, the work nexus will be present. But other post-*Dobbs* demands, like seeking changes to the Google search engine[115] or pressuring employers not to do business in anti-abortion states,[116] are far murkier. A pro-labor NLRB may well find that such conduct is related enough to where and how employees are working to conclude that it's protected. But other Boards and the courts are unlikely to take such a broad view, concluding instead that the work nexus is lacking. Moreover, the Supreme Court in the duty to bargain context has stressed that business decisions such as the scope of work are solely within the employer's control and not deserving of NLRA protection.[117] That line of cases, in addition to skepticism of labor rights in general, puts employees engaging in this sort of conduct on shaky ground.

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[111] NLRB Off. of Gen. Couns. Advice Memo., *supra* note 110, at 12–13.

[112] *Id.* at 12*;* Duff, *supra* note 90, at 142.

[113] NLRB Gen. Couns. Advice Memo., *supra* note 110, at 12–13.

[114] *See* Schiffer *supra* note 81 (demanding that Google stop working with publishers of abortion-related disinformation and providing information to advertisers regarding ad revenue sharing to prevent inadvertent support of organizations that have contrary missions).

[115] *See* Elias, *supra* note 16.

[116] *See supra* note 90 and accompanying text.

[117] *See infra* Part III.A.

D. Concerted and Protected Activity for Employer Anti-Abortion Measures

Although most of the post-*Dobbs* focus has understandably been on employee attempts to obtain abortion-related benefits, some employees opposed to abortion might seek to restrict or prevent employer-provided benefits. Such employees would be equally protected by the NLRA. Because restricting work benefits is still related to the terms and conditions of work, labor law would protect anti-abortion employee collective action the same as pro-choice employee collective action.

III. LABOR LAW PROTECTIONS FOR UNION EMPLOYEES SEEKING ABORTION-RELATED WORKPLACE CHANGES

Although only a small part of the private-sector workforce,[118] unionized employees have more leverage to expand (or theoretically restrict) abortion-related work benefits than their non-union counterparts. This advantage is due in part to labor law requirements for unionized firms. However, the more significant difference may be the experience and clout of the union.

Unionized employees enjoy the same section 7 rights as do non-union employees; thus, concerted activity that seeks abortion-related benefits will typically be protected whether or not a union is involved. One important caveat, however, is that unionized employees do not have a right to bargain independently with the employer on behalf of other unionized employees—that's the union's exclusive role.[119] The Supreme Court has long made clear that, although employees can request benefits on behalf of others, the employer has no duty to entertain such requests and could even violate the law if it bargains without the union's involvement.[120] In short, unionized employees can express the desire for benefits, and even engage in discussions with

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[118] In 2022, 6 percent of private-sector workers were union members. This data is available for download at BARRY T. HIRSCH, DAVID A. MACPHERSON, & WILLIAM E. EVAN, UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CPS (2023), https://www.unionstats.com.

[119] Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 53–64 (1975).

[120] *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332, 336 (1944).

the employer if only discussing their own circumstances, but bargaining on behalf of the group must go through the union.[121]

Unions can also provide their own benefits to members. For instance, one benefit that unions often provide members is a litigation benefit.[122] Typically, this benefit applies to work-related disputes. However, a union could provide litigation benefits to members who face prosecutions resulting from abortion care or other attempts to use abortion-related benefits.

A. Bargaining Rights for Abortion-Related Benefits and Other Related Work Conditions

The union's role as employees' exclusive bargaining representative is accompanied by one of the more important labor rights that unionized employees enjoy: the right to bargain. When this right is triggered, the union or employer can demand that the other side engage in good-faith negotiations to reach an agreement. This right applies for not only broad-based collective-bargaining agreements, but also one-off issues, such as a new demand for travel benefits related to abortion care. The NLRA does not require that an employer ultimately reach an agreement with the union. Yet, unlike the non-union context in which an employer can simply say "no" and refuse to engage further with employees, a unionized employer must engage in good-faith bargaining with the union—a requirement that is far more likely to achieve some gains for employees. Unions are well aware of this right's importance and have already begun pushing employers to expand abortion benefits and to ensure the privacy of employees who take advantage of those benefits.[123]

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[121] Because unions are democratic institutions that must be attuned to their membership's sentiments, this system usually works well, as there is significant alignment between union bargaining and employees' workplace goals. *See* Martin H. Malin, *Alt Labor? Why We Still Need Traditional Labor*, 95 CHI.-KENT L. REV. 157, 164 (2020). However, it is possible that a union could be out of alignment with some of its members—for instance if a minority of members want fewer abortion benefits while the union is seeking more, or vice versa. In such a case, albeit rare, unionized employees might have fewer options for pushing their employers for abortion-related work changes.

[122] *See, e.g.*, *Legal Services*, AFGE, https://www.afge.org/member-benefits/legal/legal-services (last visited Mar. 16, 2024); *Legal Services*, CAL. TEACHERS ASS'N, https://www.cta.org/for-educators/member-benefits/legal-services (last visited Mar. 16, 2024).

[123] *See* AFL-CIO, *supra* note 75.

The right to bargain does not attach to all matters of interest to employees. Rather, the Supreme Court has created three different classifications of bargaining topics, each with its own set of duties and limitations. "Mandatory" bargaining topics are those that both the union and employer must engage in good-faith negotiations over and can lawfully use economic pressure—such as strikes or lockouts—to achieve their goals.[124] Both parties can also insist on their mandatory topic positions, even to the point of holding up reaching an overall agreement assuming they've been bargaining in good faith.[125] The NLRA defines mandatory topics in section 8(d), which requires the parties to "confer in good faith with respect to wages, hours, and other terms and condition of employment."[126] Or, as the Supreme Court has stated, mandatory topics are matters that are "plainly germane to the 'working environment.'"[127] A corollary to the duty to bargain is that an employer cannot unilaterally make changes to mandatory topics; it must first make a good-faith attempt to bargain over a desired change with the union.[128]

The duty to bargain does not attach to the second classification, "permissive" bargaining topics. As the name suggests, the parties may discuss permissive topics, but need not.[129] Moreover, the use of economic pressure to reach agreement on a permissive topic violates the duty to bargain.[130] In other words, a union cannot strike over a permissive topic and the employer cannot implement a lock-out. Similarly, parties cannot insist over permissive topics in a manner that hold up an overall deal, because doing so would violate the duty to bargain in good faith over the mandatory topics being held up. That said, parties can make it known to the other side that a permissive topic is important to them.

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[124] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349–50 (1958).

[125] *Id.*

[126] 29 U.S.C. § 158(d) ("For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."). Section 9(a) also describes unions' representative role as covering "rates of pay, wages, hours of employment, or other conditions of employment." *Id.* § 159(a).

[127] Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979).

[128] NLRB v. Katz, 369 U.S. 736, 747–48 (1962). An employer might eventually be able to unilaterally implement a change if the parties negotiations reach an "impasse." *Id.*

[129] *Borg-Warner*, 356 U.S. at 349–50.

[130] *Id.*

Finally, "illegal" bargaining topics are those that the parties are not allowed to bargain over or use economic pressure for. Disputes over illegal topics are typically rare—especially when the illegality is unrelated to the NLRA[131]—however, as discussed below, this classification will likely be important in states that have bans abortions and a variety of abortion-related benefits that employees may seek bargaining over.

Because of the consequential differences between mandatory and permissive topics—especially the ability to use economic pressure—there has been much litigation regarding the classification of bargaining topics.[132] But in most instances, the inquiry tracks the analysis used for determining whether employees' collective action is protected by section 7.[133] That is, demands that fall within the terms and conditions of work will usually, although not always, be considered mandatory.[134] Accordingly, most attempts by unions to seek abortion-related benefits on behalf of its members will be considered mandatory topics of bargaining.[135] The employer then must bargain with the union, which in turn can threaten or actually call a strike to pressure the employer.[136] Even when they seek

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[131] *See, e.g.*, Indep. Metal Workers Union, Loc. No. 1, 147 N.L.R.B. 1573, 1574 (1964) (discussing illegality of racially discriminatory collective-bargaining agreement).

[132] *See, e.g.*, First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 686–87 (1981) (termination of service contract that resulted in job losses); *Ford Motor Co.*, 441 U.S. at 492–93 (workplace food and beverage service); Fibreboard Paper Prods. Co. v. NLRB, 379 U.S. 203, 215 (1964) (subcontracting); Johnson-Bateman Co. Int'l Assoc. of Machinists, 295 N.L.R.B. 180, 181–82 (1989) (drug and alcohol tests).

[133] *See supra* Part II.A.

[134] Exceptions include an issue like contracting out work. The Supreme Court has held that although contracting out employee work directly impacts the amount of work employees engage in—or whether they have jobs at all—employers' prerogative to make business decisions will often result in contracting decisions being classified as a permissive topic. *First Nat'l Maint., Corp.*, 452 U.S. at 684–87; *see also Fibreboard Paper Prods. Corp.*, 379 U.S. at 214–15.

[135] *See* Great S. Fire Prot., Inc., 325 N.L.R.B. 9, 14 (1997) (discontinuance of travel reimbursements).

[136] For instance, the Writer's Guild of America went on strike in 2023, fulfilling an earlier strike threat, to show its dissatisfaction with contract negotiations and to pressure Hollywood Studies to agree to higher compensation. Grace Moon, Samantha Chery & Anne Branigin, *Writers Begin to Strike in Move that Could Bring Hollywood to a Halt*, WASH. POST (May 2, 2023, 6:32 PM),

something that might be classified as permissive, unions are sophisticated enough to wrap that issue into discussions with other mandatory topics. By doing so, a union can put the employer on notice that they care about a permissive topic, without explicitly insisting on agreement on that topic or engaging in a strike that seems to hinge on that topic.[137] Such attempts to thread the needle do pose a risk to the union if the NLRB later determines that the permissive topic was at the heart of a union's strike or refusal to reach an agreement.

While the duty to bargain over abortion-related health-care benefits, travel benefits, and leave is clear—as they directly impact compensation and work conditions[138]—privacy issues are somewhat less so.[139] The NLRB has typically found privacy concerns to be conditions of employment that trigger the duty to bargain, typically because the privacy violation at issue was tied to a terms or condition of work: possible discipline.[140] Although somewhat different, conditioning employees' ability to take advantage of workplace benefits, like health care or travel benefits, on the disclosure of highly personal information seems "germane to the work environment" and therefore mandatory.[141] Yet other privacy issues are more up in the air. For instance, if an employer required employees to answer abortion-related inquiries—ones that did not trigger disability or pregnancy discrimination violations—could a union require

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https://www.washingtonpost.com/nation/2023/05/02/wga-strike-2023-writers-guild-america.

[137] *See* SECUNDA ET AL., *supra* note 32, at 169.

[138] For instance, the Board has considered health care benefits a mandatory topic of bargaining. *See* W.W. Cross & Co., Inc., 77 N.L.R.B. 1162, 1163 (1948); *see also* Allied Chemical & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 159 (1971); Mid-Continent Concrete, 336 N.L.R.B. 258, 259 (2001).

[139] *See supra* Part II.A.iv.

[140] *See* Colgate-Palmolive Co., 323 N.L.R.B. 515, 515–16 (1997) (installation of video surveillance equipment was mandatory topic because could result in discipline and "directly impacted employee security"); Johnson-Bateman Co. v. Int'l Assoc. of Machinists, 295 N.L.R.B. 180, 183 (1989) (drug testing after workplace injury was mandatory topic because could result in discipline); Medicenter, Mid-South Hosp., 221 N.L.R.B. 670, 675–76 (1975) (polygraph test to find perpetrator of vandalism was mandatory topic because could result in discipline).

[141] Colgate-Palmolive, 323 N.L.R.B. 515, 515 (1997) (dining installation and use of hidden cameras at work to be mandatory topics of bargaining); *cf.* Leroy Mach. Co., Inc., 147 N.L.R.B. 1431, 1432 (1964) (concluding rule that employees with bad absentee records must submit to a physical examination is mandatory subject of bargaining).

bargaining? Possibly not, as the question itself, if not accompanied by any discipline or other work conditions matters, may not be intrusive enough to trigger labor law concerns.[142] Moreover, if state law prohibits certain benefits that a union wants, that topic could conceivably be considered illegal, depending on whether the NLRA preempts the state law.[143]

Union attempts to negotiate other abortion-related issues, such as politically related measures or changes to the type or manner of the company's product also raise questions about whether a duty to bargain exists. Mandatory bargaining topics are a narrower category than protected activity under section 7; consequently, if activity would be unprotected for non-union employees,[144] then it would almost certainly be considered a permissive topic of bargaining. If, however, activity is protected, then further inquiry is necessary. Take, for instance, Google employees' demand that the company change the way the search engine responds to abortion inquiries.[145] If a union wanted to negotiate the same change, it could argue that it is a mandatory topic because it impacts how employees do their job. That, of course, assumes that the union employees' job is tied to search engine requests. But, even if that link exists, the employer could argue that any impact on employee work conditions is outweighed by the need to give employers autonomy over business decisions like what kind of products to offer.

The Supreme Court has required a balancing of interests when a topic directly impacts working conditions but also involves a decision about the direction of the business.[146] A common example is the decision to contract out work, which directly impacts jobs but also implicates more general questions about business operations.[147] In such a case, the Court has held that the decision should be considered permissive unless "the benefit for labor-management relations and the collective-bargaining process[] outweighs the burden placed on the

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[142] *Cf.* NLRB Div. of Advice Memo., United States Postal Serv., No. Case 3-CA-14320(P), at *2 (June 29, 1988) (memo from Division of Advice—which is part of the General Counsel's office and not official Board policy—stating that questions about drug use are different than drug tests and therefore not a mandatory topic of bargaining).

[143] *See infra* Part IV.

[144] *See, e.g.*, *supra* notes 112–17 and accompanying text.

[145] *See* Elias, *supra* note 16.

[146] First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 679 (1981).

[147] *Id.*; *see also* Fibreboard Paper Prods. Corp. v. NLRB, 370 U.S. 203, 222–23 (1964).

conduct of the business."[148] To answer this, the NLRB or courts must determine whether the topic is suitable for collective bargaining, for instance because it is something that employees can make concessions over.[149] On the other side of the balance is whether the decision goes more to the entrepreneurial direction of the company, such as determining capital investments rather than labor investments.[150] Take, for example, a situation in which the decision to contract out work is centered on a genuine decision whether to continue operating in a certain way or engaging in a certain type of business. In such a case, the decision will be a managerial one that "lies at the core of entrepreneurial control,"[151] and is therefore a permissive topic despite the impact on jobs.[152] However, if the contracting decision is more focused on simply reducing labor costs, with no meaningful change to the business, then the decision will be mandatory.[153]

In the case of employees' demand for changes to Google's search engine, a hypothetical union seeking bargaining over this issue is unlikely to be able to successfully argue that it's a mandatory topic of bargaining. Even if those changes affected the work that employees do, that impact is likely to be fairly low. On the other side of the balance, the demand goes to what Google's product looks like—a standard entrepreneurial decision that is typically treated as permissive.[154] But that doesn't mean that bargaining over the issue couldn't occur. Unions are adept at making clear that they care about an issue, even if it's permissive and the employer doesn't have an obligation to bargain.[155] The bigger impact is that the union couldn't strike over the issue or hold up overall bargaining by insisting on changes to the topic.

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[148] *First Nat'l Maint.*, 452 U.S. at 679.

[149] *See* SECUNDA ET AL., *supra* note 32, at 171–72.

[150] *Id.*

[151] Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979).

[152] *First Nat'l Maint.*, 452 U.S. at 679.

[153] *Fibreboard*, 370 U.S. at 215.

[154] *See* Sivalls, Inc., 307 N.L.R.B. 986, 1006 (1992) (finding choice of laboratory for employee drug testing to be mandatory because of impact on employees' rights and lack of impact on the scope of nature of the business); *cf.* Matter of Amoco Petroleum Additives Co., 964 F.2d 706, 710 (7th Cir. 1992) (holding, in case addressing labor preemption, that "[p]rivacy in the workplace . . . is an ordinary subject of bargaining"); The Winchell Co., 315 N.L.R.B. 526, 526 n.2 (1994) (finding introduction of work computers, which resulted in layoffs, to be mandatory because the change in operations was "by degree not kind").

[155] *See* SECUNDA ET AL., *supra* note 32, at 169.

B. Unions' Advocating Advantage

Although section 7 is an important tool for all employees seeking to improve their work conditions, it is no substitute for an effective union. In addition to the right to demand bargaining over mandatory topics, unions possess structural advantages over most groups of unorganized employees. These advantages make it easier to instigate collective action and increase the chances that such actions will result in gains.

Collective action is no easy thing.[156] There are numerous barriers to getting groups of individuals to do something together, much less sustaining the action in a productive manner.[157] Unions, however, have already cleared many of these hurdles by initially organizing a group of employees and obtaining a legal right to act as the group's collective-bargaining representative. This institutional role is significant, as it provides the union a formal platform to consider, instigate, and maintain collective action. Unions also have procedures for including employee input into major decisions, such as whether to strike or accept a collective-bargaining agreement. These procedures help to ensure that a majority of the employees support the collective action.

Unions also have information, experience, and expertise that few non-union employees possess. The NLRA gives unions the right to obtain information from employers relevant to collective representation—information that can help unions better understand what needs employees may have and how they may be realistically achieved.[158] And once a decision has been made to seek certain benefits, such as paid leave and travel for abortion care, a union is better equipped to obtain those benefits. Unions institutionally have substantial experience and expertise negotiating with employers—that's one of the primary jobs of any union. Moreover, unless it is new, a union will already have an established bargaining relationship with an employer, making it easier to start discussing a new demand.

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[156] *See* Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action,* 44 U.C. DAVIS L. REV. 1091, 1095–97 (2011) (discussing collective-action problems).

[157] *Id.*

[158] *Id.* at 1104; Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 260 (2001).

IV. LABOR PREEMPTION OF STATE ANTI-ABORTION BENEFIT REGULATIONS

Union and non-union employees have myriad ways to seek abortion-related workplace benefits. Anti-abortion state legislators are well aware of this and some have already proposed or enacted measures to inhibit the provision of such benefits.[159] This dynamic creates tension between state law and federal labor rights. Typically, this wouldn't be much of a conflict, as the Supreme Court has long read federal labor law preemption broadly.[160] However, there have always been limits to labor preemption—limits that are relevant to the abortion benefit context. Moreover, no matter how broadly the Supreme Court has interpreted labor preemption in the past, there are reasons to question whether that will continue,[161] especially when the state interests at issue are restrictions on abortion access.

Although there haven't yet been widespread state attempts to restrict workplace abortion benefits, at least two states have enacted laws with restrictions that implicate employers, and legislators have threatened further measures. Most notably, in 2021 Texas enacted SB 8 which included a provision that imposes civil liability on an individual who "aids or abets" an abortion, including by paying for the procedure through insurance.[162] A similar measure provides for criminal liability.[163] Moreover, several Texas legislators have indicated an intent to penalize companies that pay for abortion-related care.[164] Similarly, soon after the *Dobbs* draft was leaked,

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[159] *See infra* notes 165–66 and accompanying text.

[160] *See, e.g.*, Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. REG. 355, 356 (1990) (arguing that the Court's labor preemption doctrine is overbroad).

[161] *See* Glacier Nw., Inc. v. Int'l Brotherhood of Teamsters Loc. Union No. 174, 143 S. Ct. 82 (Mem.) (2022) (granting cert. whether unions can be held liable for tort damages resulting from strike in spite of *Garmon* preemption).

[162] SB 8 § 171.208(a)(2), (b)(2), 87th Leg., Gen. Sess. (Tex. 2021) (providing any individual the right to sue to enforce the law and receive $10,000 reward); *see also* Marr, Vittorio & Wise, *supra* note 74 (describing impact of SB 8 and warnings that state legislators have sent to some employers who offer travel or health benefits for abortion care).

[163] TEX. CIV. STAT. art. 4512.1 (covering one who "furnishes the means" for someone to obtain an abortion).

[164] Chris Marr & Robert Iafolla, *Can States Ban Employer Abortion Aid? Post-Roe Limits Explained*, BLOOMBERG L. (June 28, 2022), https://news.bloomberglaw.com/daily-labor-report/can-states-ban-employer-abortion-aid-post-roe-limits-explained (describing May 6, 2022 letter to Lyft).

Oklahoma enacted a statute that explicitly prohibits paying for or reimbursing an abortion, including through health insurance.[165] The statute is not criminal, however, as it only provides for a civil action[166] and remedies, including injunctive relief.[167] Finally, although not as extreme, eleven states have enacted laws that prohibit the inclusion of most abortions from private health insurance plans.[168] The enforceability of these state bans against benefits negotiated with a union or provided via a workplace benefit plan raises serious preemption issues.

Although outside the scope of this article, any state attempt to regulate workplace benefit plans, such as health insurance that covers abortion or abortion-related travel, must deal with potential preemption by the federal Employee Retirement Income Security Act (ERISA).[169] There is a strong argument to be made that ERISA preemption would block laws like those in Texas and Oklahoma from applying to many ERISA-covered plans, but that isn't completely clear.[170] What is even less clear is whether labor preemption could be used to prevent enforcement of these laws.

The labor preemption question is most likely to arise if a union and employer enter into an agreement that provides abortion benefits

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[165] An Act Relating to Abortion, H.B. 4327, §5(A)(2), 58th Leg., 2d Sess. (Okla 2022) (providing for civil action against anyone who "[k]nowingly 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 . . . regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this act").

[166] *Id.*

[167] *Id.* §5(B)(1)

[168] *Regulating Insurance Coverage of Abortion*, GUTTMACHER INST. (Aug. 1, 2023), https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion (states prohibiting most abortion coverage typically allow coverage only in cases where the life of the pregnant individual is at state; some have additional allowances, such as a severe health risk to the pregnant individuals, rape, or incest). Seven states require such coverage in private plans. *Id.*

[169] 29 U.S.C. §§ 1001–1461.

[170] *See* Marr & Iafolla, *supra* note 164; *see also* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 752–53 (1985) (rejecting ERISA preemption of state law requiring minimum level of mental health insurance coverage). *See generally* Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 437–40 (1998) (describing ERISA preemption, including fact that preemption applies to employer self-funded health care plans but not health insurance purchased by another provider).

prohibited by these statutes.[171] Similarly, a preemption inquiry could be triggered if a union demands bargaining over abortion benefits and the employer refuses, citing state law. If an employer or other party attempted to use the state law to preclude bargaining or enforcement of union-negotiated benefits, the NLRB would likely step in to argue that the NLRA preempts the state law's applicability.[172] Whether the preemption argument would succeed, however, is far from certain.

The abortion-benefit situation is relatively novel, so there is no clear answer to whether preemption applies. Although some cases would support preemption of measures like those in Texas and Oklahoma, the outlook for that result is not good. The overriding problem with trying to assert labor preemption is that courts will probably view these laws as being typical state regulatory action that does not target or unduly impact labor rights. This risk is particularly acute should this preemption issue come to the Supreme Court, which has clearly expressed a strong disdain for both abortion rights and unions.[173]

There are three major types of labor law preemption. One type is "section 301" or "collective-bargaining agreement" preemption. Section 301 is the portion of the Labor Management Relations Act that creates a federal cause of action to enforce collective-bargaining agreements.[174] Because it creates a federal common law for collective-bargaining agreement enforcement, the Supreme Court has interpreted section 301 as requiring preemption of state claims that require interpretation of the agreement.[175] Although at first blush section 301 preemption sounds on point to the abortion-benefit issue, as the state laws prohibit collectively negotiated benefits, it's unlikely to apply. Section 301 preemption focuses on the proper entity to

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[171] *See* AFL-CIO, *supra* note 75 (AFL-CIO model abortion benefit contract language).

[172] Typically, preemption issues involving state laws arise when NLRB files a suit challenging the law in question as being preempted by the NLRA. *See, e.g.*, Jamie Ross, *NLRB Sues Arizona Over Union Law*, COURTHOUSE NEWS SERV. (May 10, 2011), https://www.courthousenews.com/nlrb-sues-arizona-over-union-law.

[173] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 579 U.S. 215 (2022), Janus v. AFSCME, Council 31, 585 U.S. 878, 916 (2018) (striking down mandatory union fees in public-sector).

[174] 28 U.S.C. § 185(a).

[175] Lingle v. Norge Div. of Magic Chef, Inc., 386 U.S. 399, 413 (1988) (refusing to preempt state tort claim that could be resolved without interpreting the collective-bargaining agreement).

interpret a collective-bargaining agreement, seeking to ensure that the parties' choice of arbitration is not disturbed by state lawsuits.[176] Thus, the existence of a collectively negotiated right, such as abortion-related travel benefits, that is prohibited by state law would not lead to preemption.[177]

The second type of preemption, "*Garmon* preemption," generally preempts state legislation or lawsuits that involve conduct that is even arguably protected or prohibited by the NLRA.[178] The rationale for *Garmon* preemption is that the NLRB, not the states, is responsible for enforcing and interpreting the rights and prohibitions of the NLRA.[179] *Garmon* preemption is quite broad, and many issues could "arguably" be protected by the NLRA, including those impacting employees' attempt to obtain workplace abortion benefits.[180] In addition to employees acting in concert to demand abortion benefits, the right to engage in collective bargaining via a union is also protected by the NLRA and can trigger *Garmon* preemption.[181] Put another way, the NLRB or a union could argue that state anti-abortion laws prohibiting abortion-related benefits are preempted by the federal NLRA right to collectively bargain for those benefits. But this argument is not airtight.

A defense to *Garmon's* application to state anti-abortion benefits laws preemption would likely center on pre-existing exceptions to the preemption doctrine. One exception to *Garmon* preemption involves actions that touch on traditional areas of state regulation. For instance, *Garmon* will not preempt state claims against unions that, while engaging in otherwise protected conduct, commit intentional torts like violence or mass picketing that blocks access to a worksite.[182] The Supreme Court has stressed that intentional torts and criminal laws are areas in which state interests are particularly strong.[183] This "local interest" exception encompasses instances where

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[176] *Id.* at 409–10.

[177] *See* Befort, *supra* note 170, at 435 (citing *Lingle*, 486 U.S. at 412–13).

[178] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

[179] Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613 (1986).

[180] *See supra* Part II.B.

[181] *See* Befort, *supra* note 170, at 431–32.

[182] *See* Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 207 (1978) (trespass); UAW v. Russell, 356 U.S. 634, 646 (1958) (violence); United Constr. Workers v. Laburnum, 347 U.S. 656, 668–69 (1954) (threat of violence).

[183] *Russell*, 356 U.S. at 648; *Laburnum*, 347 U.S. at 838.

there is a compelling, "deeply rooted" state interest or lack of a strong federal labor concern.[184] Both criminal laws and regulation of insurance have been areas of traditional state regulation.[185] Thus, one could easily imagine a court finding that the labor interests involved are not significant enough to warrant preemption of state limits on abortion benefits, particularly given that these laws do not single out labor rights or union-negotiated benefits.[186]

Finally, "*Machinists* preemption" applies when the NLRA neither protects or prohibits activity.[187] *Machinists* preemption is essentially a dormant preemption that precludes state regulation of areas that federal labor law intends to be unregulated.[188] A typical example is the use of economic pressure—such as a work slowdown—that is not protected by the NLRA, but is not prohibited either.[189] Arguably, *Machinists* preemption could apply to state attempts to interfere with the collective-bargaining relationship, which the NLRA intends parties to work out largely on their own.[190]

Despite the plausibility of an argument that *Machinists* should preempt state regulation of areas that are mandatory topics of bargaining, it may fail against state anti-abortion benefit laws. In

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[184] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243–44 (1959); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 23 (1987) (holding that state law requiring severance payment following plant closing did not infringe on collective-bargaining process and therefore not preempted).

[185] *See* Metro. Life Ins. Co. v. Massachusetts 71 U.S. 724, 758 (1985) (insurance); *Russell*, 356 U.S. at 644 (criminal).

[186] *See* Baker v. Gen. Motors Corp., 478 U.S 621, 637–38 (1986) (refusing to preempt state law that prevented employees from receiving unemployment benefits if the employees helped finance the strike that caused their unemployment; Court reasoned that preemption didn't apply because the employer had done nothing to impair employees' labor rights, unlike in Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 239–40 (1967) (preempting state law that barred unemployment compensation to employees because they filed an unfair labor practice charge against employer).

[187] Lodge 76, Int'l Ass'n of Machinists v. Wisc. Emp. Rels. Comm'n, 427 U.S. 132, 154–55 (1976) (striking down state regulation of work slowdown).

[188] *See* Befort, *supra* note 170, at 433; *see also* Golden St. Transit Corp. v. City of Los Angeles, 475 U.S. 608, 615 (1986).

[189] *See Machinists*, 427 U.S. at 150–51.

[190] *See, e.g.*, Loc. 24 of Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 296 (1959) (preempting, in pre-*Machinists* case, state antitrust claim made against terms of collective-bargaining agreement because state antitrust law "would frustrate the parties' solution of a problem that Congress has required them to negotiate in good faith toward solving").

particular, the Supreme Court typically will not apply labor preemption against general state laws that require minimum benefits to all employees. For instance, in *Metropolitan Life Insurance Co. v. Massachusetts*, the Court refused to preempt a state law mandating a minimum level of mental health insurance benefits.[191] Of particular importance to the Court was that the mental health benefits at issue were unrelated to collective representation and the requirement applied equally to union and non-union employees.[192]

Where does this leave unions and their members in states like Texas and Oklahoma? In a precarious position. Although reasonable arguments favor labor preemption of those states anti-abortion benefit laws—as well as ERISA preemption under certain conditions—it seems more likely that a court will reject preemption. As a result, collectively negotiated abortion benefits could be in jeopardy in these states and any others that enacted similar measures. Other challenges to such laws exist, such as a claim that they violate a constitutional right to interstate travel,[193] but labor law may not provide a safe haven.

V. CONCLUSION

The Supreme Court's *Dobbs* decision has already had enormous consequences, especially in the numerous states that have implemented new, often severe, restrictions on access to abortion. As a result, individuals in these states face significant hurdles to obtaining abortion-related care. Although not a panacea, individuals who are private-sector employees do possess one tool to try to mitigate these burdens: labor law.

Because employers often have the power to provide health care insurance, leave and travel benefits, and privacy protections, employees can act together to use their labor law rights to seek

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[191] 471 U.S. 724, 758 (1985) (also rejecting ERISA preemption).

[192] *Id.* at 755 ("Minimum state labor standards affect union and non-union employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act.").

[193] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) ("[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."); Rebecca E. Zeitlow, *Abortion, Citizenship, and the Right to Travel*, 27 EMP. RTS. & EMP. POL'Y J. 335 (2024).

changes from their employer to increase (or potentially decrease) access to abortion care. Employers need not agree, but with enough pressure, employees will frequently have a genuine opportunity to obtain additional abortion-related benefits. If employees are unionized, then they possess the added advantage of having an experienced union, with the right to require the employer to bargain over demands, in their corner to seek abortion-related benefits. These labor law levers can't reverse *Dobbs*, but they can blunt its impact in many cases.

Despite the promise of labor law in helping employees seek abortion-related workplace benefits, states can and have begun pushing back by trying to prevent the provision of some of these benefits. This creates a conflict between federal law and state power to restrict abortions—a conflict that is likely to favor the states. Thus far, only a small number of states have tried to limit the provision of abortion benefits in a manner that would impact employers, but it remains to be seen whether other states will follow suit. Either way, we should expect to see ongoing litigation to determine how far states can go in restricting abortion-related benefits. No matter where the lines are drawn, however, employees will continue to act together to pressure their employers for abortion-related changes. And in most cases, labor law will continue to give them the right to do so, free from retaliation.