

Benefits + Compensation

Update: Health Plan Considerations in the Wake of *Dobbs v. Jackson Women's Health Organization*

The Bottom Line

- Given *Roe v. Wade* being overturned, plan sponsors should review their plan documents to assess current coverage and discuss potential coverage options with ERISA counsel and with vendors (including insurers, stop-loss carriers and administrators, as applicable), and should monitor future developments.
- In particular, plan sponsors and administrators should consult ERISA counsel to familiarize themselves with the applicability of relevant state laws, tax law implications of travel benefits, and the unique risks and opportunities that their plans may face. Each plan's situation will depend on its particular facts and circumstances, including the state law at hand.

Update

This alert originally published on May 16, 2022, has been updated in light of the Supreme Court decision made on June 24, 2022, which overturned *Roe v. Wade*.

In the wake of the Supreme Court's [opinion](#) in *Dobbs v. Jackson Women's Health Organization*, employers must immediately consider the group health plan implications now that *Roe v. Wade* has been overturned, which removes the federal protection of abortion rights and enables each state to set its own legal requirements regarding abortions. Without *Roe*, an estimated 26 states either already have laws on their books banning or severely restricting access to abortions, or are likely to pass such laws. This means that group health plan coverage of abortions may be available to participants in certain states and not others. The below provides an overview of group health plan considerations that plan sponsors and administrators should review with counsel.

Group Health Plans: Who is Affected

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that expressly preempts state laws related to ERISA-covered employee benefit plans, including group health plans. This means that, in general, state laws related to group health plans are not enforceable against the plan. However, in respect of group health plans, this ERISA preemption principle

only applies to self-insured group health plans (i.e., plans under which the employer pays for its employees' health claims out-of-pocket). In contrast, fully insured group health plans (i.e., when employers buy health insurance for employees through a commercial insurer) remain subject to state law. Therefore, each group health plan's response to *Dobbs*' outcome would be determined, first and foremost, by whether the plan is fully insured or self-insured:

- **Fully Insured Plans** – Post-*Dobbs*, coverage of reproductive services, such as abortion, under a fully insured plan largely depends on state law (generally based on the issued policy's governing state law), which varies by state, with some now prohibiting or restricting plans from covering abortion services (to different degrees and with different consequences) and others requiring group health plans to maintain coverage for these services. Therefore, a careful inventory and analysis of state law is vital to understanding which medical services a fully insured plan may or may not cover, and whether and when such coverage might lapse.
- **Self-Insured Plans** – In contrast, self-insured plans are not subject to state insurance mandates because they are entitled to ERISA preemption. Therefore, unlike fully insured plans, self-insured plans have more autonomy regarding design (including control over coverage); and, because there is no federal prohibition on plan coverage of abortion, self-insured plans can generally choose to offer (or not offer) coverage for abortion services or to limit the coverage to specific circumstances. However, ERISA preemption has generally been interpreted to apply only to civil actions, and not as a shield against criminal liability under state laws. Therefore, state laws that potentially impose criminal liability relating to abortion must still be considered and discussed specifically with legal counsel, as self-funded plans and the employers that sponsor them may remain exposed to state laws in certain instances (particularly as enforcement and penalties under new state laws criminalizing abortion remain uncertain).

Given the above, counsel should be consulted as soon as possible so that plan sponsors can evaluate the extent to which state law may apply and/or limit certain coverage. In particular, plan sponsors of fully insured plans should review their plan documents, carrier policies, and applicable state laws governing their plan documents and insurance policies, and should discuss potential alternatives with their carriers and brokers. Similarly, plan sponsors of self-insured plans should review their plan documents and discuss coverage options with stop-loss carriers and third-party administrators (TPAs). Even if certain plans have the option to provide abortion services, certain coverage decisions may end up influenced by the legal positions and viewpoints of certain vendors.

Medical Travel Reimbursements

Employers have had a few weeks, since the leaked opinion, to analyze avenues for offering travel reimbursements to enable employees to seek medical care for abortion services in states where it would still be accessible and legal post-*Dobbs*. Essentially, the group health plan's coverage of abortion may remain the same, but because access might be limited by where a participant resides, a travel benefit would allow all plan participants to access the same plan coverage. By offering this travel benefit through the plan itself, a participant might be able to receive the reimbursement on a tax-free basis, at least on a federal level, up to certain limits. Self-insured plans, for instance, could provide for medical transportation if certain services are not available where a participant lives and these plans have a great deal of flexibility in crafting such a policy, subject to tax considerations. Most third-party administrators have already rolled out a framework for employers to consider in crafting their preferred travel benefits. Employers with fully insured plans have been initiating similar discussions with their vendors and counsel to discuss expanding travel coverage. However, fully insured benefits are less flexible because they are set by state-level requirements and, even if desired by the plan sponsor, an insurance carrier may be unwilling to administer any such travel benefit in light of *Dobbs*. Employers that utilize professional employer organizations (PEOs) may find themselves with less flexibility than if they would sponsor a plan on their own. Moreover, even if a travel benefit were offered, it would not change the medical coverage available under the plan. Alternatively, to the extent not provided under or in connection with a group health plan, an employer may opt to provide a medical travel reimbursement program or stipend entirely outside, and independent from, the plan (or by vendors separate from the plan, limited to plan participants); however, this may raise a number of administrative issues. Additionally, offering a travel reimbursement program "outside of the plan" (for example, through a health reimbursement arrangement (HRA) available even to those employees not eligible for the employer's medical plan) could create an "employer payment plan," which is subject to certain Affordable Care Act concerns, and may result in significant financial penalties to the employer if it is not "integrated with" a compliant group health plan.

If an employer were to provide medical travel reimbursements, it should consider the implications noted above and a number of other considerations, including the following:

- **Long-Arm State Statutes** – Certain states (e.g., Texas, Oklahoma) have enacted laws barring the aiding and abetting of the performance or inducement of an abortion, which will become effective now that *Roe* is overturned. If interpreted broadly, these statutes could expose plan sponsors and insurers to criminal liability, in some instances, as a result of paying for or reimbursing the costs of abortion services through insurance or otherwise, including, potentially, by offering a travel stipend. The potential extraterritorial application of such state laws with long-arm abortion statutes is yet to be decided.

- Mental Health Parity Considerations** – Under the Mental Health Parity and Addiction Equity Act (MHPAEA), federal law generally prohibits group health plans that provide mental health and substance use disorder benefits from imposing less favorable benefit limitations on those benefits than on medical/surgical coverage. As a result, any plan changes, including any expanded coverage and/or travel reimbursement offerings, should be designed to not run afoul of MHPAEA requirements (which may occur if, for instance, medical travel reimbursements through a plan are limited to abortion services). The Department of Labor has actively been auditing plans for MHPAEA compliance, so plans should proceed cautiously in this respect.

In all events, if medical travel reimbursements are provided for, it would likely be best practice for the policy, program or offering to (1) be facially neutral as to eligible participants and/or medical services, and (2) establish a fixed geographic limit outside of which otherwise inaccessible services may be eligible for transportation reimbursement. For instance, the policy could be available to employees otherwise eligible for health benefits, could cover transportation for medical services and procedures otherwise covered by the health plan, and could apply if the service is not otherwise accessible within a certain distance (e.g., 100 miles) of the employee's residence. However, any such policy, program or offering is not without risk, and employers should consult with their brokers, administrators, carriers and ERISA counsel to weigh such risks and to discuss the best path forward given the particular facts and circumstances.

For More Information

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