



Roe v. Wade Overturned: Implications for Plan Sponsors

JUNE 27, 2022

In a landmark decision, *Dobbs v. Jackson Women’s Health Organization*, a divided Supreme Court of the United States has overturned *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, revoking the constitutional right to an abortion. The impact of this decision returns the right to regulate access to abortion to the states. As a result, access to legal abortion services in at least 22 states will be significantly reduced or entirely prohibited. Given the significance of the ruling, employers are now in the process of analyzing how and whether to provide additional support for employees and their dependents seeking abortion services if they live in states that restrict or prohibit such access and understanding the legal and practical implications of providing such support.

This ruling will impact health plan–covered services within certain states with significant restrictions or bans on abortion. In addition, some states have enacted or are considering laws intending to block patients from traveling across state lines to access abortion clinics and from receiving abortion-inducing pills through the mail or telehealth. ERISA self-insured plans may be able to argue that ERISA preempts certain state civil and insurance laws, but unlikely that ERISA will preempt state criminal laws. Fully insured plans will have to comply with all applicable state insurance, civil and state criminal laws. These state laws will certainly hamper plan participants from accessing abortion care if not preempted by ERISA.

Given the significance of the ruling, employers are now in the process of analyzing how and whether to provide additional support for employees and their dependents seeking abortion services if they live in states that restrict or prohibit such access and understanding the legal and practical implications of providing such support. While not an exhaustive list, below are some of the options employers are considering, each of which has its own unique legal considerations:

1. **Amend existing medical plan to enhance the travel/out-of-area and prescription drug benefits.** Employers with self-insured ERISA group health plans may be able to expand the medical travel benefit under the plan to include travel out of state to network providers in other states where abortion remains legal. Expanding such benefits will need to be discussed and approved by the plan’s third-party administrators. Many employer plans already provide some form of travel benefit, usually for transplants or travel to centers of excellence/preferred medical centers. Options to expand travel benefits include travel for abortion care; travel for services that may be illegal or inaccessible in certain states, such as abortion and gender-affirming care for minors; or travel based on the unavailability of any covered medical service from qualified providers within a certain geographic range. In order

to comply with federal tax laws, plan benefits should be limited to travel for legal medical services performed in compliance with the applicable laws of the state where the medical services are rendered. Additionally, employers with telehealth and prescription-based abortion coverage should engage with their benefit administrators and telehealth providers to confirm that such programs continue to comply with applicable law where the providers are located. In some cases, state limitations on mailing prescription drugs or telehealth may restrict providers and may not be preempted by ERISA. The Kavanaugh concurrence posits that state attempts to regulate citizen activity across state lines would be a violation of the constitutional right to interstate travel, but employers should anticipate that certain states will be creative in this area and this issue will likely be litigated as well. Note that employers with fully insured health plans may be much more limited in what they can do under the medical plan, as health insurance issuers are required to comply with applicable state-mandated benefit laws and such laws are not preempted by ERISA with respect to fully insured health plans. A number of states already significantly limit insurance coverage for abortion care, and insurance restrictions in many states are likely to expand.

2. ***Travel Benefit Through Another Health Plan – Provide a medical travel reimbursement benefit through a nontraditional health program.*** Under this option, an employer could provide a travel reimbursement program outside its medical plan to eligible employees—either through an existing employee assistance program (EAP), telehealth benefit, or health reimbursement arrangement (HRA). This type of program would have to be carefully structured to comply with applicable federal laws, such as ERISA, the Affordable Care Act (ACA), COBRA, and HIPAA. For example, an employer cannot provide a stand-alone HRA to employees without integrating it with ACA-compliant medical coverage and must ensure that any EAP or telehealth benefit remains qualified as an ACA-excepted benefit.
3. ***Travel Benefit Outside a Medical Plan – Establish a separate, stand-alone travel expense reimbursement program or include in an existing taxable-reimbursement program.*** Under this option, an employer could reimburse an employee’s travel expenses on a taxable basis. This would likely not create an ERISA plan as long as no medical services other than transportation and lodging were reimbursed. State-law considerations would still have to be analyzed under this approach. For example, Texas and Oklahoma enable private citizens to bring a civil action against a “person” for aiding and abetting an individual in obtaining a prohibited abortion. And Texas, in particular, has taken the position that its pre-*Roe* criminal laws apply to the aiding-and-abetting law as well. Also, a non-ERISA program could not avail itself of ERISA preemption, and such a program would not be covered by HIPAA; thus, a state could subpoena claim records.
4. ***Travel and/or Lodging Reimbursement Through a Health Savings Account (HSA) or a Health-Care Flexible Spending Account (Health FSA).*** Reasonable travel expenses that are incurred for necessary medical treatment may be reimbursable by an HSA or a Health FSA. Transportation and lodging benefits up to \$50 per night could be provided through a medical plan, including HSAs and Health FSAs, on a tax-free basis, subject to federal tax requirements. Travel cannot be for purely personal reasons to another city for an operation or other medical care, nor can it be for a purpose that is merely for the general improvement of an individual’s health. In addition, certain lodging expenses may be reimbursed up to \$50 or \$100 if the patient is accompanied by a companion. Note that there are proposals in Congress to eliminate the federal tax deduction for abortion services and transportation and lodging expenses associated with such services. While such proposals are not likely to be enacted under the current administration, it is possible that federal tax laws could be amended in the future.

State restrictions on abortion care could potentially impact other reproductive health-care services as well, including certain types of birth control and fertility services.

All employers who provide health benefits to their employees will be impacted by the *Dobbs* decision. Plan sponsors should work with insurers, third-party administrators, pharmacy benefit managers, and legal counsel to review their medical and prescription drug coverage and other benefit offerings to determine applicability of state laws and available options. In addition, HIPAA and state privacy laws should be addressed. Employers should also continue to monitor federal, state, and local developments in this area as the legal landscape changes.

5 Min Read

Authors

[Amy Gordon](#)

[Joanna Kerpen](#)

[Susan Nash](#)

[Jamie Weyeneth](#)

Related Locations

Chicago

Washington, DC

Related Topics

Supreme Court

Related Capabilities

Labor & Employment

Health Care

Related Regions

North America

Related Professionals



[Amy Gordon](#)



[Joanna Kerpen](#)



Susan Nash



Jamie Weyeneth

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.