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Employer-Provided Benefit Options After *Dobbs*

AUGUST 15, 2022

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The US Supreme Court's landmark decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (June 24, 2022) overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), revoking the constitutional right to an abortion. The impact of this decision returned the right to regulate access to abortion to the states.

As a result, many states have introduced new laws, given effect to previously enacted trigger laws and/or have taken the position that pre-Roe laws are automatically reinstated with the effect of reducing or prohibiting a woman's right to seek abortion related care and services.

In response to the Supreme Court's ruling and state action, employers are assessing how and whether to provide additional support for employees and their dependents seeking abortion services and related care if they live in states that restrict or prohibit such access. Since this issue is politically charged on both sides, and there is risk associated with an employer's actions or failure to act, understanding the legal and practical implications is critical.

As discussed more fully below, amid current legal uncertainty, many employers are considering various options to provide abortion-related benefits to their employees, including the adoption of travel benefits in connection with abortion-related services.

options to expand related benefits

Self-Insured Medical Plan

Self-insured medical plans are not subject to state insurance laws, and employers generally have more freedom to design plan benefits and features as long as such plans otherwise comply with applicable federal laws. Thus, if an employer decides to offer abortion care or travel reimbursement to its plan participants, the medical plan can be amended to offer such benefits.

Amending a plan to add such coverage is not a fiduciary act under the Employee Retirement Income Security Act of 1974 (ERISA)—it is settlor in nature. Nevertheless, any such amendment would have to comply with applicable federal law, such as mental health parity, nondiscrimination and tax laws, and adding or expanding such benefits will need to be discussed and negotiated with the plan's third-party administrator(s) (TPAs) to confirm they can and will administer such benefits.

Fully-Insured Medical Plans

Fully-insured medical plans are subject to state laws regulating insurance. Certain states prohibit insurers licensed in the state from issuing insurance policies that provide coverage for medical services associated with abortion. As a result, employers that offer fully-insured medical coverage to employees and their dependents in these states will have less flexibility to make benefit plan changes in response to *Dobbs*.

Thus, if an employer with a fully-insured medical plan decides it wants to offer abortion care or travel reimbursement to its plan participants—and the state law does not permit an insurance policy delivered in the state to cover such care—the employer will be required to look to other sources to provide this coverage. Even in states without restrictive abortion laws, changes to coverage may require review and approval by the state insurance regulators and special underwriting, so employers with insured medical plans may not be able to implement expanded abortion care benefits quickly.

related benefits outside of medical plans

Alternative Health Plans

Employers that choose to offer abortion care or travel reimbursement but are unable to do so through a fully-insured medical plan, or those that want to offer abortion-related benefits to a wider population than employees participating in the company-sponsored medical plan, may seek alternative ways to offer such coverage.

For example, some Employee Assistance Plan (EAP) service providers are offering different types of services to meet the needs of employers. Alternatively, adding or enhancing telehealth benefits or a health reimbursement arrangement (HRA)/excepted benefit HRA (EBHRA) are potential options, albeit with potential legal hurdles. Also, certain fertility service providers are now agreeing to administer abortion travel benefits.

These alternative types of health plans would have to be carefully structured to comply with applicable federal laws, such as ERISA, the Affordable Care Act (ACA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the Internal Revenue Code. For example, an employer cannot provide a stand-alone traditional 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."

Travel Reimbursement Programs

Employers also could consider establishing a stand-alone travel expense reimbursement program. Under this option, an employer could reimburse an employee's travel expenses on a taxable basis. There is some risk that a stand-alone travel reimbursement program could be viewed as an ERISA-covered plan given that the travel benefits are offered in connection with the receipt of medical care, even though the reimbursements are made on an after-tax basis.

If so, the program would have to comply with federal laws applicable to group health plans, such as ERISA, the ACA, COBRA, HIPAA, and the Internal Revenue Code. If a travel benefit were added as part of a general taxable reimbursement program, such as a lifestyle reimbursement account, inclusion of medical travel as an eligible reimbursement expense should not subject the lifestyle reimbursement program to ERISA.

Some employers are assessing whether to hire third-party service providers to administer these programs or administer them in-house. Although a third-party service provider is likely more expensive and may take additional

time to implement, it can add a layer of privacy between an employer and those employees who are accessing these benefits. In addition, if a travel benefit is considered an ERISA group health plan it would be subject to added privacy protections under HIPAA, discussed further below.

Paid Leave or Child Care Benefits

Employers that are considering offering paid leave or child care assistance for employees who need to travel out of state to obtain abortion care are exploring whether to enhance existing paid leave programs or add new ones. Paid leave programs are subject to federal laws, such as FMLA and discrimination laws, and there are also many states and municipalities that regulate paid leave. Any changes to paid leave programs will need to be designed with these legal obligations in mind.

legal risks

Potential Civil or Criminal Liability

Adding or expanding abortion care or travel reimbursement in states that prohibit or restrict abortion access is not without risk. Companies and their boards could face scrutiny, pressure, and liability depending on their actions. Some states have enacted laws that enable private citizens to bring a civil action against a "person" for aiding and abetting an individual in obtaining a prohibited abortion. For example, both Texas and Oklahoma have enacted "bounty hunter" style laws that authorize a private right of action against any person or entity that knowingly engages in conduct that "aids or abets" the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise.

In addition to civil enforcement statutes in Texas and Oklahoma, all states have criminal laws making the act of assisting or aiding the primary actor—e.g., attempt, accessory, conspiracy, or aiding and abetting—a felony. States could theoretically extend—or attempt to extend—their generally applicable aiding and abetting criminal statutes to the abortion context, asserting that reimbursing abortion costs constitutes active participation or assistance in the crime of abortion. Unlike the Texas and Oklahoma civil enforcement laws, however, these activities are not currently codified under the generally applicable aiding and abetting or abortion-specific statutes.

Thus, an employer that offers abortion care or travel reimbursement to its employees and their dependents in these states, either through an ERISA-covered plan or by some other means, may be subject to civil, and in some cases, criminal liability. At this time, it is unclear how these laws will impact employer-sponsored group health plans that provide coverage for abortion and/or transportation and lodging benefits in connection with abortion services in states where such services are legal. Early legal discourse has centered on potential arguments that some of these state laws may be preempted by ERISA, but certain states may be aggressive in trying to regulate in this area.

erisa preemption

Most employer-sponsored employee benefit plans are subject to ERISA, which preempts "any and all state laws insofar as they may now or hereafter relate to" any ERISA benefit plan. A state law "relates to" an ERISA plan for purposes of ERISA preemption if it bears either a "reference to," or a "connection with," the plan. "State laws" include not only state statutes, regulations, and common law, but also the laws of any state administrative agency or political subdivision.

The standard of ERISA preemption has evolved over time, but generally, as currently interpreted by the Supreme Court, ERISA preempts state laws that mandate employee benefit structures or their administration, bind employers or plan administrators to particular choices or preclude uniform administration, or provide alternative enforcement mechanisms to ERISA's civil enforcement provisions.

However, not all state laws are preempted by ERISA, which "saves" from preemption state laws that regulate insurance, banking, or securities. In addition, state criminal laws of general application are not preempted by ERISA.

Thus, the impact of state laws will be different depending on whether an employer sponsors an insured or self-insured group health plan, whether the benefit is subject to ERISA, and whether the law is civil or criminal.

Based on ERISA preemption, there is a good argument that state abortion bans interfere with the uniform administration of ERISA plans and are preempted on that basis. However, ERISA preemption is not absolute. ERISA preemption does not apply to "generally applicable" state criminal laws that do not specifically target employee benefit plans. Less clear is whether state laws similar to those in Texas and Oklahoma that penalize aiding and abetting a criminal activity, such as abortion, would be preempted by ERISA. Ultimately, the strength and breadth of ERISA preemption in this area will need to be litigated in court.

Privacy Considerations

Privacy protection for individuals who avail themselves of abortion care or travel reimbursement is tenuous. States with restrictive abortion laws could attempt to obtain medical and travel records in connection with investigations of purportedly illegal abortions.

Medical plans and other ERISA-governed health plans are subject to federal privacy protection requirements under HIPAA. HIPAA protection is beneficial because it provides a federal law basis for refusing or limiting the response to state government and legal requests that do not meet specified requirements. On June 29, 2022, the Office for Civil Rights (OCR), the agency that administers and enforces HIPAA's privacy rules, provided clarifying guidance to address how HIPAA limits access to protected health information (PHI) relating to reproductive health care, including abortion, maintained by health plans, health care providers, and other covered entities.

The guidance reminds covered entities about rules regarding disclosure of PHI without an individual's authorization in response to law enforcement and other legal requests, and notes that major professional organizations, including the American Medical Association and American College of Obstetricians and Gynecologists, have stated it would be inconsistent with professional standards of ethical conduct to disclose information about an individual's interest, intent, or prior experience with reproductive health care to law enforcement. Under Executive Order 14076 issued by President Joe Biden on July 8, 2022, the US Department of Health and Human Services is directed to "consider actions, including providing guidance under [HIPAA] and any other statutes as appropriate, to strengthen the protection of sensitive information related to reproductive healthcare."

HIPAA does not apply to non-ERISA travel reimbursement programs or lifestyle reimbursement accounts. Thus, a state government or law enforcement official could have broader powers to subpoena claim records under state data privacy laws. In deciding how to offer expanded or enhanced abortion-related benefits, employers will need to balance the potential protections offered by ERISA preemption and the HIPAA privacy rules against the administrative and legal requirements that come with operating an ERISA and HIPAA-covered health plan.

employment discrimination concerns

Travel reimbursement programs will also have to be designed to comply with applicable discrimination laws. Title VII of the Civil Rights Act of 1964 bans employment discrimination based on color, national origin, race, religion, and sex. There are currently no federal laws that protect the right to abortion or that mandate abortion coverage. The Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k), a federal law enacted under Title VII, requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes, including receipt of benefits.

As a result, an employer that provides a health plan/policy for its employees must provide coverage of abortion where the life of the mother would be endangered if the fetus were carried to term, and it must also cover complications related to an abortion, regardless of the reason for the abortion. Employers may provide more generous benefits than those required by the PDA. One could argue that the PDA preempts more stringent state abortion laws that do not have exceptions for the life or health of the mother. However, these issues have not yet been vetted in court.

Tax considerations

Reasonable travel expenses that are incurred for necessary medical treatment may be reimbursed on a tax-free basis by a medical plan, Health Savings Account (HSA), Health Flexible Spending Account (Health FSA), or an HRA. Transportation costs 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 for medical care cannot be for purely personal reasons, nor can it be for a purpose that is merely for the general improvement of an individual's health.

In addition, certain transportation and lodging—up to an additional $50 per night—expenses may be reimbursed tax-free for a medically necessary companion who accompanies the patient. I.R.C. § 213(d); IRS Publication 502: Mental and Dental Expenses.

Note that there are proposals in Congress to eliminate the federal tax deduction for abortion services and the 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. Some anticipate that similar laws will be introduced at the state level. Travel benefits that are provided without adequate substantiation could be subject to tax.

Certain child care assistance benefits can be excluded from an employee's wages. If the child care is being offered through an off-site daycare facility, this falls under the dependent care assistance rules, which allows a family to defer up to $5,000 per year for child care expenses incurred so a person can be gainfully employed. I.R.C. § 129(a).

However, in these circumstances, reimbursing an employee for child care so the employee can seek abortion care or services, would not be a tax-free benefit because the child care expenses are not being incurred so the employee can be gainfully employed. There is no alternative tax mechanism for excluding the cost of employer-provided or reimbursed child care service from an employee's wages. Thus, providing reimbursement for child care to permit an employee to travel for medical care would not be a tax-free benefit.

additional considerations

In addition to the legal compliance issues and state/ERISA concerns discussed above, employers should also evaluate its business nexus with a state, such as contracting with the state for services, or benefitting from special tax status or licensing permits, to determine if there is any additional exposure, as states may start to impose restrictions on employers who do business in the state and also cover abortion in other jurisdictions. Reputational risk must also be assessed. Each employer's approach will be different, based on its corporate culture, employee expectations, risk tolerance, location, and business posture with the state and ability of carriers and vendors to administer benefits.

conclusion

Virtually all employers will be impacted by the *Dobbs* decision. Employers should work with insurers, TPAs, pharmacy benefit managers, and legal counsel to review their medical and prescription drug coverage and other benefit offerings to assess available options and the legal implications. Employers should also continue to monitor federal, state, and local developments in this area as the legal landscape continues to evolve.

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