

The Reversal of Roe: Impact on Employer-sponsored Benefits post-*Dobbs*

On June 24, 2022, the Supreme Court of the United States (the "Court") issued its opinion in *Dobbs v. Jackson Women's Health Organization*¹, overturning the long-standing precedent of *Roe v. Wade*². In its 6-3 decision, the Court found that the U.S. Constitution does not confer a right to abortion, and empowered each state with the right to regulate access to abortion services. As a result, many employers are analyzing their options to provide additional support for employees seeking access to abortion services, specifically, those living in states that severely restrict or prohibit abortion. However, employers who do this will need to navigate a complex interplay of benefits, healthcare, tax and employment law, as well as other potential state law issues in an evolving legislative landscape. In this alert, we discuss several potential approaches that employers may consider if they wish to implement new policies or expand existing benefits related to abortion access for their employees.

Expanding Group Health Plan Benefits

As an initial matter, employers who desire to provide their employees with access to legal abortion services by paying for abortion-related travel expenses (e.g., for travel out of state to obtain a legal abortion in another state) may find it advisable to do so through the employer's existing group health plan, rather than a separate arrangement outside of the group health plan. This is because if an employer maintains a separate program or arrangement that reimburses an employee for medical care (such as abortion-related travel expenses), it may be considered by regulators as a group health plan that fails to meet the market reform requirements under the Affordable Care Act (the "ACA"), and also as a welfare benefit plan subject to a number of legal requirements under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Non-compliance with the ACA and/or ERISA can subject employers to potentially significant penalties (which, in some instances, can be assessed on a per employee per day basis).³ On the other hand, providing the abortion-related travel benefit through an existing group health plan (that is ACA-compliant and satisfies ERISA requirements) can help avoid such non-compliance issues and penalties under the ACA and ERISA. However, employer group health plans that are considering adding coverage for abortion-related travel expenses may need to consider potential mental health parity issues under the Mental Health Parity and Addiction Equity Act that might be implicated. One possible approach that could potentially avoid mental health parity concerns may be to offer travel-related reimbursements for all types of medical procedures or treatments (i.e., not limited to abortion) that are not available in an employee's home state; however, an employer administering a more broadly applicable benefit will face additional costs. Of course, making abortion-related benefits available under an employer's group health plan will generally mean that these benefits are only available to employees who are eligible and enrolled in the group health plan, and any classes or groups of employees that are not eligible⁴ for (or any employees not enrolled in) the group health plan will not be able to take advantage of these benefits.

Employers contemplating the ways in which they can provide their employees with access to legal abortion services may also need to consider issues of non-compliance and liability under state laws (including those laws that incentivize private citizens to bring civil action against anyone who aids or abets the performance of an abortion, such as the laws currently effective in Texas and Oklahoma). There remain open questions, however, in terms of the applicability and magnitude of these state law risks (including whether states that have enacted these laws have the jurisdictional reach to regulate conduct across state lines)⁵ and who at the employer would be liable.⁶

¹ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022)

² *Roe v. Wade*, 410 U.S. 113 (1973)

³ The penalty for not complying with the ACA market reform requirements may trigger an excise tax of up to \$100 for each day the plan is not in compliance with respect to each individual to whom such plan failure relates.

⁴ It is not uncommon for employer health plans to exclude certain classes of employees, such as certain part-time, temporary, seasonal, or special project employees.

⁵ There are additional state legislatures that are considering or moving forward anti-abortion bills that are similar to laws in Texas and Oklahoma.

⁶ State law liability will vary from state to state, but typically directors and officers may be held accountable for the actions of the organization. It may be advisable for employers to review the coverage under any director's and officer's liability insurance policy, with a focus on any exclusions for violations of law.

Self-Insured Plans

Employers with self-insured plans (where benefits are funded from the employer's general assets or a trust), particularly those plans that are governed by ERISA, may have greater flexibility to amend their plans to provide desired benefits (such as access to legal abortion services and related travel costs). ERISA generally preempts any state law⁷ that "relates to" an employee benefit plan. As such, employers with self-insured plans may be able to argue that ERISA preempts any state laws that prohibit insurance coverage for abortion services or related travel costs. Despite this flexibility, employers with self-insured plans should be aware that in implementing changes, it may be necessary to confirm whether its third-party administrator is willing and able to administer these additional benefits. Self-insured employers will also want to discuss with their stop-loss insurance carrier the implications of adding such additional benefits to their plan on any stop-loss policy that might be in place.

Fully-Insured Plans

Employers with fully insured plans (where claims are paid by an insurance carrier to whom an employer pays premiums) may have less flexibility to change plan coverage terms, to the extent abortion services or abortion-related travel are not, or no longer, covered under the plan. This is because the insurance carrier would need to be willing to offer this additional coverage under the fully insured policy and there may be limitations on the carrier's ability (or willingness) to do so due to state laws, which may preclude an insurance company from issuing coverage for abortion services or related travel expenses. To the extent such coverage is not available under a fully insured plan, employers may consider alternative arrangements such as a Health Reimbursement Arrangement (HRA), described below, or potentially transitioning to a self-funded health plan (which may not be financially feasible for all employers).

Medical Expenses Covered Under Section 213(d) of the Code

Group health plans (whether fully insured or self-insured) generally cover only expenses related to medical care within the meaning of Section 213(d) of the Internal Revenue Code (the "Code"), which would include covering an abortion in a state where it is legal (assuming a plan covers procedures in other states⁸), transportation for the participant primarily for and essential to medical care, and non-hospital lodging up to \$50 per night. Under existing IRS guidance,⁹ however, medical care expenses would not include travel expenses of a spouse or partner accompanying the participant who is obtaining the medical procedure, meals provided outside of the hospital (*i.e.*, while traveling), or lodging beyond \$50 per night. Accordingly, employers should be aware that, at least under current rules, not all expenses that an employee might think or assume are related to seeking an abortion could be covered as medical care expenses under a group health plan.

Health Reimbursement Arrangements

Generally, employers may offer a health reimbursement arrangement ("HRA") that reimburses medical costs if it is integrated with the employer's ACA-compliant health plan (such as an employer's group health plan), thus only covering employees enrolled in the group health plan. An HRA that is integrated with the employer's group health plan can be designed to reimburse Section 213(d) travel expenses related to obtaining a legal abortion in another state, as well as the expenses of the abortion procedure itself.¹⁰ However, because eligibility for the HRA would be tied to eligibility for the group health plan, this again means that the HRA benefit would be available only to employees who are enrolled in the employer's group health plan, and employees not enrolled in, or not otherwise eligible for, the group health plan would not receive the abortion travel support that the employer is providing through an integrated HRA.¹¹

⁷ However, ERISA does not preempt (among other things) state laws that regulate insurance, banking, or securities, or generally applicable state criminal laws.

⁸ Some group health plans may restrict out-of-state coverage to emergencies and life-threatening injuries only.

⁹ I.R.S. Publication 502 Medical and Dental Expenses (2021)

¹⁰ Employers should be mindful that if the HRA is integrated with an HSA-eligible high deductible health plan (or if the HRA is an excepted benefit HRA), reimbursement under the HRA prior to the deductible being met will impact a participant's health savings account ("HSA") eligibility.

¹¹ However, as discussed further below, an individual coverage HRA might be a potential option to provide coverage to some of the employees who are not eligible for the employer's group health plan.

In addition, HRAs can only reimburse Code Section 213(d) medical expenses (described above). If an HRA reimburses an ineligible cost in a plan year, it could lead to loss of tax-favored status of the HRA for all participants for that plan year. Employers designing HRAs should also be mindful of the nondiscrimination rules that apply to self-insured plans under Code Section 105(h).

The HRA may be self-administered or administered by a third-party provider. It is possible that some third-party providers may be reluctant to administer these benefits in light of the uncertainty regarding implementation and compliance under state laws, checking with the third-party provider should be an early part of the consideration of this approach. While self-administration may provide an alternative to using a third-party provider, employers should be aware that the staff members administering the HRA would receive information likely to be protected by the Health Insurance Portability and Accountability Act of 1966 ("HIPAA") and various state and federal privacy laws, and adequate compliance controls and procedures must be in place to handle such protected information.

Excepted Benefits HRA

As an alternative to offering an integrated HRA, it may also be possible to structure a reimbursement arrangement as an Excepted Benefit HRA ("EBHRA"), which unlike an integrated HRA, may be offered to anyone eligible for an employer's medical plan and not just to those who are actually enrolled in the employer's plan. EBHRAs are permitted to reimburse up to \$1,800 per year (for 2022)¹² of qualified medical expenses, which include premiums for excepted benefits (such as dental and vision care), as well as non-premium medical care expenses such as cost sharing. Thus, for example, if an employer's group health plan did not cover travel expenses relating to medical procedures, an EBHRA could be designed to cover such travel expenses, to the extent they qualified as Code Section 213(d) medical care expenses (and are not otherwise disallowed by the rules applicable to EBHRAs).

Individual Coverage HRA

Finally, in addition to (and not in lieu of) the foregoing HRAs, an employer could also consider establishing an Individual Coverage HRA ("ICHRA") to provide benefits to employees who are not otherwise eligible for the employer's group health plan, but who have other individual coverage (e.g., marketplace coverage or Medicare). ICHRAs are subject to a number of rules and notice requirements, which are summarized in our [prior alert](#). For employees who are eligible to receive benefits under an ICHRA, the ICHRA can be designed to reimburse Code Section 213(d) medical care expenses (such a travel expenses related to obtaining a medical procedure, including a legal abortion). Thus, the ICHRA may be a potential tool to provide coverage of abortion-related travel expenses for those employees not eligible for the employer's group health plan, but who meet the requirements to participate in an ICHRA.

Other Reimbursement Arrangements

Employers considering providing abortion-related benefits through other arrangements should be aware of potential legal and practical issues that may arise with establishing these arrangements.

Employee Assistance Program

An employee assistance program ("EAP") may appear to be a possible avenue for an employer to provide abortion-related travel benefits because an EAP can be provided to a broader employee population than those employees who participate in the employer's medical plan. However, in order to be exempt from compliance with ACA market reform requirements, an EAP must be designed to meet requirements under Department of Labor rules, including that: (i) the EAP not provide "significant benefits in the nature of medical care"; (ii) the EAP not be coordinated with benefits under a group health plan; and (iii) benefits under the EAP must be available at no cost to the employee. The concern with providing travel benefits for medical procedures (which may be Code Section 213(d) medical care expenses) under an EAP is that it may be treated as providing "significant benefits in the nature of medical care" (particularly when combined with other benefits in the nature of medical care commonly provided under EAPs, such as mental health

¹² I.R.C. § 54.9831-1(c)(3)(viii)(B)(1); Rev. Proc. 2021-25

counseling sessions). Guidance from the regulators on this issue would be helpful for employers. Further, EAPs are generally administered by third-party providers, who would also need to agree to administer an employer's abortion-related benefits. If an employer instead attempts to self-administer their EAP (or the portion of their EAP providing abortion-related benefits to their employees), the employer would face the similar compliance obligations arising under HIPAA and state privacy laws discussed above.

General Taxable Reimbursement Program

Some employers may be attracted to the simplicity of establishing an abortion travel reimbursement policy outside of their group health plan and administering these reimbursements as taxable expenses to their employees. While it is a simple and relatively straight forward option, as noted above, such an arrangement would likely be treated as a group health plan under the ACA and could raise numerous compliance issues (including concerns regarding maintenance of a non-compliant group health plan under the ACA, compliance obligations arising under ERISA, HIPAA, and state privacy laws, as well as state law liability considerations).

Conclusion

The *Dobbs* decision may impact many employers who provide healthcare benefits to their employees located in states where abortion is prohibited or severely restricted under state law. Employers who desire to provide assistance to their employees seeking abortion services should confer with their insurance carriers, third-party administrators, benefits consultants, and legal counsel to review all available options, as well as legal compliance and liability considerations. The legal landscape on this issue is evolving as additional states pass legislation restricting access to abortions, and legal challenges make their way through the state court systems. It is also possible that the current administration may issue guidance in the future that could clarify or potentially liberalize some of the rules governing the provision of abortion-related benefits discussed in this alert.

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