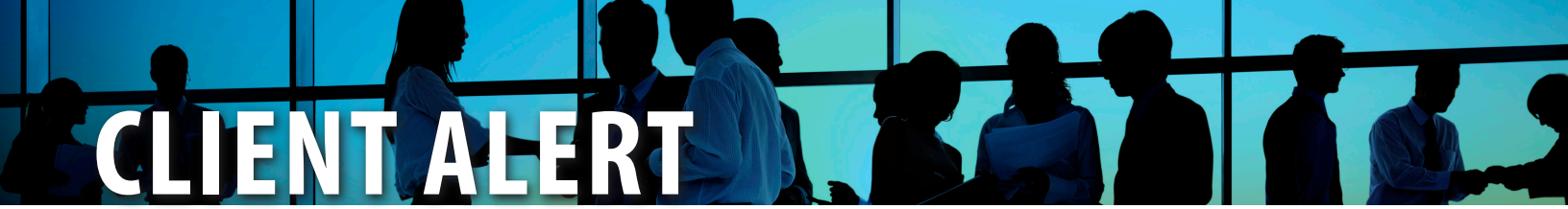


ACTION ITEMS PLAN SPONSORS SHOULD CONSIDER IN THE WAKE OF THE U.S. SUPREME COURT DOBBS DECISION ON ABORTION

by Eric W. Gregory

On June 24, 2022, in *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court ruled that the U.S. Constitution does not protect the right to obtain an abortion. While reactions to the opinion vary widely, employers who sponsor group health plans should consider the potential impact of the ruling soon, as participants may have questions about the scope of abortion coverage under their group health plans and, depending on state law, their ability to legally provide coverage for abortion related services may be limited. Plan sponsors should work with employee benefits counsel to review changes to state law, potential plan document changes, travel and lodging benefits, relocation benefits, privacy and safety concerns, as well as potential new federal guidance.

State Law Changes, ERISA Preemption Unclear

States have widely varying laws concerning abortions, including complete bans, bans that apply a certain time after conception, bans with limited exceptions (such as to save the life of the mother), and bans on abortifacient drugs. Generally speaking, state laws that relate to employee benefits plans are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). However, ERISA generally does not preempt state laws to the extent that they only have an indirect impact on employee benefit plans, or regulate a state's insurance industry.

There may be a good argument that state civil statutes which restricts a group health plan from providing coverage for abortion services may be preempted by ERISA with respect to self-insured group health plans. However, there is a strong possibility that states will enforce civil statutes banning abortion services, which will test ERISA preemption in this case. Fully-insured plans are subject to ERISA's "savings clause," and are generally subject to state insurance coverage mandates (see discussion of California, below) or prohibitions where policies are issued. Therefore, fully-insured plans are likely subject to these insurance mandates and civil statutes. Additionally, plans not subject to ERISA like governmental and many church plans will not be able to rely on ERISA preemption.

While the most obvious employer concern generated by the *Dobbs* ruling involves state laws which make having, providing, or aiding and abetting the provision of abortion a criminal offense, states may also impose requirements in favor of coverage for abortion-related services. For instance, California passed a law in March 2022 that bans group health plans and insurers from imposing co-pay, deductible, or other methods of cost-sharing for all abortion and abortion-related services under policies that are issued, renewed, or delivered after January 1, 2023. Fully-insured group health plans should carefully review whether they are affected by any laws favoring abortion services.

ERISA generally does not preempt criminal laws. Therefore, employers may need to evaluate potential criminal liability if their plans cover abortion-related services for plan participants located in states with criminal statutes. There is risk that criminal conspiracy and/or aiding and abetting laws could be cited against employers with group health plans that cover abortion or abortion services within a state with an abortion prohibition. This will likely be tested in courts.

Action Items for Employers

There are a number of basic steps employers should consider when evaluating the impact of the Dobbs ruling and state abortion related laws.

Plan Document Changes

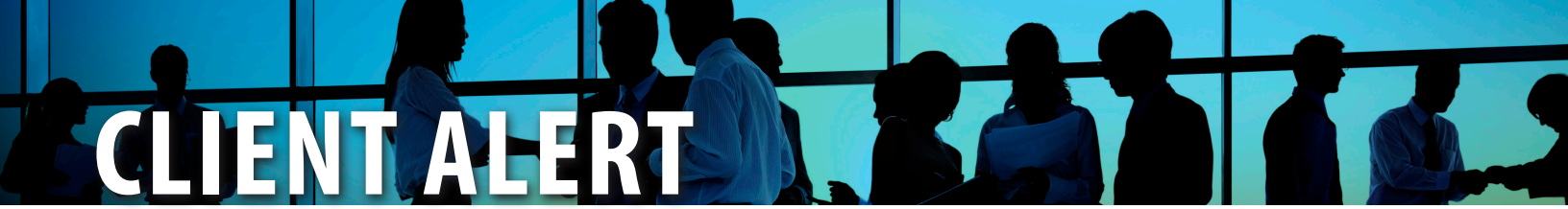
Employers should conduct a census of the states in which their employees work and reside (which has become more challenging in the era of COVID-19 and remote work) and analyze the applicable laws in those states. Plan language that was permissible prior to *Dobbs* may no longer be permissible after *Dobbs*. This may require plan amendments and revisions to summary plan descriptions ("SPDs"). Potential items to review may include abortion services and drugs, exclusions for abortion-related services, as well as general exclusions for "illegal" services.

Employers should also discuss abortion coverage with various providers to their health welfare plan. This includes the pharmacy benefit manager ("PBM") for their plan to find out what type of abortion-related drugs are covered and whether such drugs might be available via mail order to employees in states where abortion has been criminalized. Sponsors should also have similar discussions with their plan's insurer (for insured plans) or claims administrator (for self-insured plans) since regardless of what an employer decides, their carrier or third party administrator will have to agree to and have the administrative processes accommodate the decision.

Subject to state law, group health plans may be designed to include or exclude coverage for reproductive services, such as abortion. The Pregnancy Discrimination Act of 1978 ("PDA") which prohibits sex discrimination on the basis of pregnancy, requires that employer medical plans must cover expenses for pregnancy-related conditions on the same basis as other medical conditions. However, the PDA specifies that insurance coverage for expenses arising from abortion is not required unless the life of the mother is endangered, or medical complications arise from the abortion. Even this limited mandate can have complications—the abortion laws in some states, such as Tennessee, require a medical provider to prove that the mother's life was endangered.

Travel and Lodging Benefits

Some employers already provide some type of travel benefit (usually to address network coverage gaps) for employees seeking medical services. Some employers have a generic travel benefit that may



cover employees who wish to seek abortion services that might not be available in their state. Other employers have announced specific policies to permit travel benefits specifically for abortion services. Each of these methods has its own compliance challenges.

The Mental Health Parity and Addiction Equity Act ("MHPAEA") generally restricts plans from applying annual limits, financial requirements, and treatment limitations to mental health and substance-use disorders that are not applied, or are not as stringently applied, to medical benefits. Therefore, employers must carefully consider whether any plan changes could implicate the MHPAEA. This could occur, for instance, if travel reimbursements are provided under the medical plan, but were limited to abortion services.

Therefore, if an employer wishes to consider providing medical travel reimbursements, it could consider a policy or program that is neutral as to eligibility (i.e., not just women) and medical services covered (i.e., not just abortion). Employers may also consider establishing a geographic limit outside of which services must not be available for eligibility (i.e., the services must not be available to the employee within 100 miles, which may be particularly relevant for employees who live near state borders).

Employers may also want to consider various funding vehicles for such a benefit:

Using an HRA. One option for funding would be through a health reimbursement arrangement ("HRA"). Travel costs related to medical care and abortion services are eligible pre-tax expenses that can be funded through an HRA if the plan permits coverage for such expenses. An HRA is itself a group health plan, and, in general, to satisfy the requirements of the market reforms under the Affordable Care Act, must be integrated with a group health plan. Employers that offer high deductible health plans ("HDHPs") should be mindful that before an HRA can reimburse for abortion services, the minimum required deductible must be met to maintain a participant's status as an eligible individual for contributions to a health savings account ("HSA").

Using an EAP. An employee assistance plan ("EAP") is an employee benefits program provided by a company to assist employees with well-being and mental wellness support. EAPs are not subject to the Affordable Care Act to the extent that they do not offer "significant benefits in the nature of medical care or treatment." The extent to which an EAP could offer travel benefits that relate to medical care or treatment is unclear based on existing guidance. Expanding benefits beyond what is permissible could cause the EAP to run afoul of the Affordable Care Act market reforms.

Using a Taxable Reimbursement. From an Affordable Care Act and ERISA compliance standpoint, simply providing taxable reimbursements to employees for travel expenses may be the most straightforward approach. A downside of such an arrangement is that it creates tax frictions for both the employee and employer. More significantly, a taxable arrangement would not be subject to ERISA, which would mean that there would be no preemption argument for an employer in response to state law abortion restrictions.

Relocation Benefits

In addition to, or instead of, travel benefits, some employers have announced relocation benefits. Under these programs, employees are eligible to be reimbursed for the expenses associated with moving to a different state. For many years, such an expense would be excludable from employee income, but the Tax Cuts and Jobs Act of 2017 suspended this tax treatment through 2025.

Privacy and Safety Concerns

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") applies to group health plans and prohibits, among other things, the unauthorized disclosure of employee protected health information ("PHI"). For instance, PHI cannot be shared with a plan sponsor for the purpose of employment-related actions.

To the extent that abortion-related services are made available to employees outside of a group health plan, HIPAA will not apply and an employer could be legally compelled to provide information on its abortion policies and who has taken advantage of them. Employers should anticipate that employees will be reluctant to share information about abortions or abortion-related services with their employer, particularly when privacy protections do not apply. While employees are protected against discrimination under the PDA, the Family and Medical Leave Act of 1993, as well as some state laws, employees may be more comfortable sharing information about these travel reimbursements with a third party. Employers might consider contracting with a third-party claims administrator to handle these reimbursements (and should carefully review the privacy and security protections provided under that contract).

Potential Federal Regulatory Changes

Finally, employers will need to monitor what will likely be a fast-shifting regulatory environment on the federal level (in addition to the many changes already happening on the state level). President Biden announced that his administration will take regulatory steps to protect abortion access.

While specific guidance related to benefit plans has not been provided from the Internal Revenue Service, Department of Labor, or Health and Human Services, there are some potential areas for relief. This could include: permitting mid-year changes for employees who lose access to abortion services due to state law changes; announcing non-enforcement for provisions under the MHPAEA that would otherwise prevent travel services specifically for abortions; and classification of travel benefits as non-disqualifying for HSAs, even if offered pre-deductible limit.

Recently, the Department of Health and Human Services has issued guidance describing when PHI is required and not required to be disclosed in the abortion context when "required by law."

Conclusion

Employers face an uphill battle in navigating the changes resulting from the *Dobbs* decision, particularly when laws across states conflict. Employers must monitor this situation closely and engage with employee benefits counsel to develop policies to meet their objectives and the needs of their employees. Dickinson Wright's Employee Benefits and Executive Compensation Group has been and will continue to monitor the impact of these changes to advise clients on how to respond to this evolving landscape.

Please contact Eric W. Gregory or any other member of Dickinson Wright's Employee Benefits and Executive Compensation Group if you have any questions about plan design, the scope of permissible coverage, regulatory changes, or other considerations related to the *Dobbs* decision.

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