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Group Health Plan Coverage Considerations for Employers After the Overturning of *Roe v. Wade*

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An Article addressing implications for employer-sponsored group health plans resulting from the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, which overruled the federal right to obtain an abortion the Court had formerly recognized in *Roe v. Wade* and *Planned Parenthood v. Casey*. Among other benefit enhancements in response to Dobbs, some employer/plan sponsors are considering adding or expanding abortion-related travel and lodging benefits (including using employee assistance programs (EAPs) and health reimbursement arrangements (HRAs)).

Few issues have been as closely watched these days as abortion. The right to have an abortion has been litigated and upheld by the US Supreme Court since *Roe v. Wade* (*Roe*), the landmark 1973 decision that legalized abortion nationwide (410 U.S. 113 (1973)). In 1992, the Supreme Court's *Casey* decision reaffirmed *Roe's* central holding regarding the right to abortion, but replaced *Roe's* trimester approach with a rule prohibiting states from adopting regulations that placed an "undue burden" on the right to obtain an abortion (*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). Then, on June 24, 2022, the Supreme Court held in a five-to-four decision that *Roe* and *Casey* must be overruled (*Dobbs v. Jackson Women's Health Org.*, 2022 WL 2276808 (2022)). In many respects (including its main holding), the official *Dobbs* ruling was consistent with an unofficial draft of the ruling leaked to the media in May 2022. (For more information on the Supreme Court's official *Dobbs* ruling, see Legal Update, Supreme Court's Overruling of Roe v. Wade Raises Health Plan and Employment Implications.)

The Mississippi law at issue in *Dobbs* is an example of recurring state-law efforts to restrict access to abortion. Another example is the Texas Heartbeat Act (Tex. Health & Safety Code § 171.208), which bans abortions after the detection of a heartbeat—normally after about six weeks of pregnancy. The Texas law took effect on September 1, 2021, after the Supreme Court denied a request for emergency relief from Texas abortion providers (*Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021)). The Texas Heartbeat Act was the first abortion law to rely solely on enforcement by private individuals rather than state enforcement. Under the law, members of the public can sue anyone who performs or aids and abets an abortion for a minimum of $10,000 in damages.

As the Texas Heartbeat Act went into effect, many employers with a significant footprint in Texas began to consider enhancing group health plan benefits to provide access to abortion benefits for employees residing in Texas. These discussions came to the forefront, however, when the *Dobbs* litigation made its way to the Supreme Court. The Court heard oral arguments in the case in December 2021.

In *Dobbs*, an abortion clinic and one of its doctors challenged a Mississippi law banning abortion after 15 weeks except in cases of medical emergency or severe fetal abnormality (Miss. Code Ann. § 41-41-191 ("Gestational Age Act")). Media attention surrounding the case was significant given the issue and the potential implications of the Supreme Court's decision, especially considering the recent shift in the Court's make-up.

As noted, in early May 2022, for the first time in the Court's history, a working draft of a decision was leaked to the media and the public. The leaked draft, authored by Justice Alito, would have overturned *Roe* and *Casey* after concluding that access to abortion was not a

right protected by the Constitution because it was "not deeply rooted in the Nation's history and traditions." (The majority reached the same conclusion in its official *Dobbs* ruling in June 2022.) The draft opinion sparked renewed debate of the abortion issue at home and at the workplace. The leaked draft also created speculation that other landmark rulings, including those that protect gender rights, same-sex marriage, and access to contraception, may also be jeopardized. (Regarding the Supreme Court's same-sex marriage rulings (*Windsor* and *Obergefell*), see Legal Updates, Supreme Court: DOMA Section 3 is Unconstitutional and Proposition 8 Proponents Lack Standing and Supreme Court's Recognition of Same-Sex Marriage Raises Benefits and Employment Law Issues.) However, the majority in its official *Dobbs* ruling attempted to allay these concerns by emphasizing that its ruling on abortion should not cast doubt on decisions that do not involve abortion.

In light of the leaked and official *Dobbs* rulings, many employers have again begun to consider the impact of abortion bans on their group health plan benefits. Key questions in this regard are:

- How many states impose restrictions on abortion or have "trigger laws" that will go into effect shortly now that *Roe* has been overturned?
- What, if any, actions could employers consider in enhancing group health plan access to abortion benefits?
- What are the potential risks to employers of pursuing those actions?

The balance of this article discusses these issues.

Which States Impose Restrictions on Abortion

Approximately 24 states either:

- Have enacted civil or criminal laws (or both) that currently restrict access to abortion.
- Are poised to ban or severely restrict access to an abortion now that *Roe* has been overturned, either shortly after the official *Dobbs* ruling (trigger laws) or through some action by the state legislature.

Post-*Dobbs*, it is expected that other states led by governors and state legislatures that oppose abortion will enact new or more restrictive abortion laws. As a result, many employers will now have an employee footprint in states restricting access to abortion. This has ignited a discussion on how to respond to these developments and what, if any, action employers can take to enhance group health plan access to abortion.

Possible Employer Actions to Enhance Access to Abortion Benefits Post-Dobbs

How employers can respond to *Roe* being overturned is a complicated analysis. The considerations for employers may reach well beyond the scope of benefits offered under an employer's group health plan. Some of these considerations (for example, employee relations or business needs) are beyond the scope of this article. We focus here on what actions an employer can take to provide continued access to abortion, post-*Dobbs*, by:

- Enhancing or adding benefits under the employer's existing group health plan.
- Other means.

Adding Travel and Lodging Benefits Under an Existing Group Health Plan

To assist access to abortion, an employer may enhance benefits under its self-insured group health plan to cover travel and lodging expenses for participants who cannot access an abortion in their state of residence or within a specified geographic radius.

Many self-insured group health plans cover travel and lodging for Centers of Excellence (COEs). Third-party administrators (TPAs) should be able to build on the current travel and lodging benefit to administer this benefit enhancement with some additional administrative lift. For example, plans and their TPAs will need to address what proof will be required for reimbursement of travel and lodging expenses.

Other design considerations regarding adding travel and lodging benefits are addressed below.

Potential Mental Health Parity Considerations

There is some concern that adding a travel and lodging benefit for abortions may trigger parity concerns regarding mental health benefits offered under the group health plan. It is unclear whether adding travel and lodging benefits for abortions will have parity implications under the Mental Health Parity and Addiction Equity Act (MHPAEA), for example, regarding:

- Lifetime or annual dollar limits.
- Cumulative financial requirements or cumulative quantitative treatment limitations.

- Nonquantitative treatment limitations (see Practice Note, Mental Health Parity: Nonquantitative Treatment Limitations (NQTLs)).

(For more information on MHPAEA compliance, see Mental Health Parity (MHPAEA) Toolkit.)

Offering travel and lodging benefits for COEs has never been a MHPAEA concern for the Department of Labor (DOL). However, if an employer extends these benefits beyond COEs, it remains to be seen whether doing so raises parity issues based on the DOL's interpretation of MHPAEA. Furthermore, regardless of whether offering travel and lodging creates a MHPAEA issue, this does not prevent participants from suing the plan if the same benefit is not offered for mental health access.

Also, an employer that designs its travel and lodging benefit by imposing an annual or lifetime dollar limit (for example a $4,000 lifetime cap) on the benefit may not be able to impose the same annual or lifetime dollar limit on mental health or substance use disorder (MH/SUD) benefits under MHPAEA. Due to the annual and lifetime restrictions imposed under the Affordable Care Act (ACA), a group health plan will likely not impose an aggregate lifetime or limit on more than one-third of all medical/surgical benefits under its plan (see Practice Note, Lifetime Limits, Annual Limits, and Essential Health Benefits Under the ACA). This may lead to a potential parity violation if there is an annual or lifetime limit, such as a cap on travel and lodging benefits, imposed on MH/SUD benefits.

Additional Issues Regarding Travel and Lodging Benefits

The following are additional issues that employers may wish to consider regarding adding travel and lodging benefits:

- To avoid the polarizing nature of adding travel and lodging benefits specific to abortions, an employer may cover travel and lodging for all non-emergency covered services that are not accessible within a certain geographic region.
- Any reimbursement under the group health plan on a tax-favored basis is subject to limitations imposed by the Internal Revenue Code (Code). A plan can reimburse travel and lodging expenses in excess of these limits, but the excess reimbursements must be treated as taxable wages.
- A benefit enhancement under the group health plan covers only employees who elect group health plan coverage. It would not extend to all employees.
- The benefit enhancement analysis for fully insured plans is slightly more complicated, and it may be impossible to include enhanced abortion benefits under fully insured contracts written in states where abortions will become illegal. Employers with a fully insured benefit may consider an integrated health reimbursement arrangement (HRA) that would reimburse for travel and lodging expenses that are not covered under the fully insured arrangement. (Regarding HRA compliance, see Practice Note, Health Reimbursement Arrangements (HRAs): Integration, Nondiscrimination, and Group Health Plan Compliance.)

Other Plan Design/Benefit Enhancement Considerations Under Existing Group Health Plans

This section addresses potential post-*Dobbs* design alternatives for employers regarding their existing benefit arrangements.

Cost of Abortion Coverage

Besides enhancing its group health plan with travel and lodging benefits, an employer may change its plan design and provide abortion coverage at in-network rates under the plan for those participants who will travel to a provider that may be out-of-network. This means the participant will pay the in-network cost to access the abortion, while the group health plan may absorb a greater cost given that the provider is out-of-network. This may not be an issue for plans that have a large network footprint.

Pharmacy Benefit Coverage

With *Roe* overturned, states can now regulate pharmacy benefit managers (PBMs) and PBMs' ability to dispense prescriptions for medical abortions. This means that in states where an abortion will become illegal, a PBM may not be able to dispense prescription drugs that procure an abortion. However, in response to the *Dobbs* decision, President Biden announced that his administration will take steps to protect access to reproductive care, including access to medication (see Legal Update, White House Executive Order Addresses Post-Dobbs Access to Abortion and Contraceptives).

Providing Travel and Lodging Benefits Under an Employer's Existing EAP

Employers that want to offer travel and lodging benefits to all employees (not just participants in its group health plans) could consider offering the benefits under

an existing employee assistance plan (EAP) that is an excepted benefit (see Practice Note, Employee Assistance Program Compliance). Excepted benefits are exempt from ACA marketplace mandates (see Practice Note, Excepted Benefits). To be an excepted benefit the benefit must **not**:

- Provide significant benefits in the nature of medical care or treatment.
- Be coordinated with benefits under another group health plan.
- Charge a premium for participation.
- Require any cost-sharing for offered services.

The first requirement is subjective and requires a facts and circumstances analysis. This creates risk for employers because there is no way to know for certain whether a medical benefit is "significant" (see Practice Note, Excepted Benefits: First Category: Coverage That Is Not Health Coverage). The other three requirements are objective, which makes it easier to assess compliance.

Given that excepted benefits are not subject to the ACA's marketplace mandates, access to the benefit can be offered to employees who are not enrolled in the group health plan. Potential drawbacks to this approach are that it:

- May be too complicated from an administrative standpoint.
- Is not rooted in any clear guidance, but is rather based on regulators' secondary guidance related to COVID-19 testing (see Practice Note, COVID-19 Compliance for Health and Welfare Plans: EAPs and COVID-19 Testing).

HRA Reimbursements

As another alternative, an employer may offer reimbursement through an HRA to reimburse travel and lodging benefits, reimburse the cost of an abortion, or both. HRAs reimburse for medical expenses, as described under Section 213(d) of the Code (26 U.S.C. § 213(d)), either on a pre-tax or taxable basis, creating a group health plan benefit that is subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA). HRAs for an active employee population must be integrated with underlying group health plan coverage and may be one of the limited options for fully insured plans (particularly those fully insured benefits written in states where abortion will become illegal post-*Dobbs*). Because an HRA can only reimburse Code Section 213(d) medical expenses, the HRA cannot reimburse travel or lodging expenses in excess of the Section 213 limits.

Broad Reimbursement Arrangements Not Tied to Any Medical Care

Employers could adopt a taxable reimbursement arrangement for any travel or lodging expense incurred by an employee or, more narrowly, design the benefit for "wellness"-related travel. This type of arrangement probably will be more costly to an employer given that the travel and lodging is not tied to anything specifically. This type of arrangement is not a group health plan benefit and, therefore, is not subject to ERISA or the ACA. This means that, while the benefit may be more costly to the employer, it may protect the employer from any potential civil or criminal liability under state law given that the employer has no knowledge of what the travel or lodging is related to specifically. It is critical to draft this benefit to ensure the employer does not accidently create an HRA by tying the reimbursement specifically to any Section 213 expense.

Leave Current Plan Terms Unchanged

Another option is for the employer to:

- Allow the terms of its current group health plan to remain in effect without change.
- Process claims as it always has under its plan without offering any enhanced travel or lodging benefit to make access to abortion more available to employees.

This approach may work if either:

- The employer has a small footprint in states where abortion will become illegal.
- There is low historical utilization of abortion benefits under the employer's plan in states where abortion will become illegal.

In either situation, as a result, offering enhanced benefits post-*Dobbs* may not be worth:

- The additional administrative complexity.
- The potential risk of criminal or civil liability under state law.

Potential Risks to Employers

With *Roe* overturned, the authority to regulate abortion will fall on each state. It remains to be seen what state laws restricting abortion will be enacted in light of *Dobbs*—or how aggressively each state will enforce these laws. Moreover, many states already have criminal statutes regarding abortions (while others have civil and criminal restrictions on abortions) that may become effective shortly after *Dobbs'* issuance date.

ERISA generally preempts any state laws that relate to an ERISA plan, except for banking, securities, and insurance laws. However, ERISA's preemption statute does not preempt any generally applicable state criminal law. This means that if there is a state civil law restricting abortion it may be preempted by ERISA. However, a state criminal law that is of general applicability may not be preempted by ERISA. This is a complex analysis and whether ERISA preempts such state laws (both civil and criminal) will likely be litigated in court if a state aggressively enforces its state statute on group health plans and plan fiduciaries.

For more information on ERISA preemption, see Practice Notes:

- ERISA Litigation: Preemption of State Laws: Overview.
- ERISA Litigation: Preemption of Select State Laws.

What's Next

Now that *Roe* has been overturned, employers will have to assess group health plan options based on the needs of their employee populations, including any concern regarding what future liberties may be restricted by individual states following *Dobbs*. Post-*Dobbs*, plan fiduciaries may want to connect with their TPAs and analyze options for a benefit enhancement, if any, and review potential legal pitfalls including potential civil and criminal liability under state laws restricting and criminalizing abortions.