

Post-Dobbs: Employer and Benefit Plan Considerations

Impact of Dobbs on Employer-Provided Benefits

In its decision in *Dobbs v. Jackson Women’s Health Organization*, issued June 24, 2022, the U.S. Supreme Court overturned *Roe v. Wade*, removing any constitutional right to an abortion and leaving to each state the authority to regulate abortions. There are already state laws in effect (and more that will go into effect soon) that ban or restrict abortions, with some imposing liability on those who aid or abet prohibited abortions.

This landmark decision, along with evolving state legislation on abortions, is prompting employers and plan sponsors to reexamine the terms of their group health plans and current benefit offerings to ensure they align with the employer’s culture, business, benefits strategy, and risk tolerance.

Abortion Care Services and Travel Benefits

For an employer looking to expand abortion-related health services, two areas that warrant analyzing are: (1) coverage of abortion care services; and (2) travel benefits.

- **Scope of Covered Abortion Procedures.** Group health plans typically provide coverage for abortions when due to the health of the mother or performed for a medical reason. However, in the wake of the Supreme Court’s decision, if an employer is looking to expand the scope of abortion coverage under a group health plan, an employer has greater flexibility with a self-insured plan, whereas state laws restrict coverage options under a fully-insured plan.
 - **Fully-insured plan:** An employer with a fully-insured plan purchases a policy with, and pays premiums to, a state-licensed insurance carrier. The carrier then bears the risk of all claims incurred under the policy and is bound by the laws of the state in which the policy is issued. As a result, in any state that bans or restricts abortion services, a fully-insured plan cannot cover such services within that state. However, a fully-insured plan might be able to cover abortion services performed in other states if such plan has in-network providers in other states where abortion can be legally performed, or if it provides coverage for out-of-network services that include abortion care. Therefore, an employer who sponsors a fully-insured plan and wishes to change the scope of its plan’s abortion coverage should meet with its broker and insurance carrier to determine the options that are available, because ultimately, the insurance carrier must abide by the laws of the state where the policy is issued, including any state’s prohibitions or restrictions on abortion coverage regardless of where the services are performed. For example, with planning for 2023’s open enrollment underway at many organizations, an employer sponsoring a fully-insured plan might want to re-visit the potential of converting its plan to a self-funded plan for next year, in order to have more flexibility about the abortion services that its plan covers.
 - **Self-insured plan:** In contrast, an employer with a self-insured plan utilizes an insurance carrier or other third-party administrator for claims processing—but the employer remains responsible for designing the terms and features of its plan, and for all claims payments (subject to cost-sharing by plan participants and stop-loss coverage that may be in place for large claims). Unlike fully-insured plans and the insurance carriers that issue those policies, self-insured plans are not subject to state laws that require offering or excluding a particular benefit, due to a provision under the federal law known as the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), which preempts any state law that relates to an

employee benefit plan. ERISA preemption is extremely nuanced, as discussed further below, but affords more flexibility for an employer with a self-insured plan to decide the scope of abortion benefits that the plan might cover.

- **Travel benefits:** With abortion services being legal in some states but not others, many employers have announced, or are considering, offering travel benefits for their employees who seek treatment in a state where abortion is legally permitted, in a way that is similar to how employers and their group health plans already provide travel benefits for major medical procedures such as transplants. Travel benefits for medical care can be broken down into three categories, each of which is treated differently under current federal tax laws:
 - Meals: Meals cannot be reimbursed to an employee or patient on a tax-free basis under federal tax laws (unless provided by an institution where the patient is receiving inpatient care).
 - Travel: Travel expenses for medical care can be reimbursed tax-free under federal tax law, as long as the travel is “primarily for and essential to” receiving medical care. Such travel expenses can include reimbursement of bus or airplane fare, mileage costs, etc. While federal tax law does not establish a threshold for how far a patient must travel to qualify for tax-free travel benefits, typically group health plans provide that the distance between the patient’s residence and the provider must be at least 50 or 100 miles before this benefit is available.
 - Lodging: Lodging expenses incurred in connection with travel for medical care can be reimbursed tax-free under federal tax law, as long as the lodging is “primarily for and essential to” receiving medical care, and as long as the reimbursement is limited to specific dollar amounts established by the IRS. The IRS generally caps lodging expenses to \$50 per night for the patient and \$50 per night for a travel companion.

When evaluating whether to offer a travel benefit for abortion care, an employer should consider the following design questions:

1. Will the travel benefits be offered under the employer’s group health plan, or through another program?
2. Will there be an annual or lifetime dollar cap on travel benefits?
3. Will travel expenses be provided just for the enrolled participant, or for the participant and one companion (who does not need to be a family member)?
4. Will lodging expenses above the IRS dollar cap be reimbursed and will meals be reimbursed, even though such reimbursements are not tax-free and presumably would have to run through the employer’s payroll system?
5. What procedures will qualify for the travel benefit? At one end of the spectrum, travel benefits could be limited just to medical care for abortion or reproductive health. At the other end of the spectrum, an employer might wish to design its travel benefits so that they cover any medical procedure. Such an open-ended approach has the potential for greater costs due to higher utilization or being considered a health reimbursement account, which in turn raises other compliance considerations under the Affordable Care Act (“ACA”) and for those individuals who are covered by a high deductible health plan (“HDHP”) with a health savings account (“HSA”). In the middle of the spectrum, an employer could provide a travel benefit for enumerated procedures (e.g., transplants, abortion care, bariatric care, and cancer care), or for procedures that are not available in the patient’s home state, and/or include guardrails such as mileage thresholds and dollar limits. Such additional conditions, however, may be complicated to verify (e.g., how to determine a participant’s residency).

Steps to Mitigating Liability

For an employer expanding the scope of abortion coverage and/or travel benefits, the potential risk of legal challenge is difficult to quantify at this time because so many state laws are pending and may change; proposed federal legislation might change the federal tax treatment of travel benefits for abortion care; enforcement is unclear; and judicial review remains untested. In addition, employers should evaluate their potential liability under state laws, such as Texas, which provide a private right action, thereby significantly broadening the pool of potential plaintiffs seeking to tap deep pockets. The coming months will likely bring a series of test cases, which may result in dueling and contradictory holdings, without any nation-wide resolution in the near future.

In this uncertain landscape, employers wishing to provide travel benefits and/or expand the scope of abortion-care services provided by their group health plans should consider the following factors to mitigate the risk of legal challenge:

- **Provide any abortion-related benefit, including travel benefits, through an existing group health plan, rather than through another program or policy:** Employers have a variety of options for offering abortion-related benefits—for instance, as an enumerated benefit under their existing group health plan, through a stand-alone health plan or employee assistance plan (“EAP”), or as a taxable fringe benefit. However, the approach of offering abortion-related benefits through an employer’s existing group health plan provides two advantages.
 - **Group Health Plan Compliance:** An existing group health plan already has the infrastructure in place to comply with the myriad requirements of the ACA, COBRA, and HIPAA. In contrast, offering abortion-related benefits, including travel benefits, through a separate health plan or EAP could subject those programs to their own obligations and requirements under the ACA, COBRA, and HIPAA, which might be untenable.
 - **ERISA Preemption:** An existing self-funded group health plan may be able to defend the scope of its abortion-related benefits on the grounds that ERISA preempts any state law limiting abortion care. Because these state laws have just taken effect, however, ERISA preemption of such laws remains entirely untested. At this early stage, it is not clear whether courts would consider state laws banning or restricting abortions as “relating to” an ERISA employee benefit plan—and therefore preempted—or too indirect to trigger ERISA preemption. Moreover, because there are significant exceptions to ERISA preemption, it does not offer a failsafe guarantee to employers. Most notably, ERISA does not preempt state insurance laws, which means that a fully-insured plan is subject to the laws of the state where its policy was issued. ERISA also does not preempt generally applicable criminal laws, which could become relevant for state laws that criminalize any person who aids, abets, or persuades a person receiving abortion services. Regardless, providing abortion-related benefits through a self-funded group health plan at least preserves the opportunity to argue such a defense.
- **Limit benefits to services that are legal under the laws of the state where the services are provided:** An employer wishing to expand the abortion-care and/or travel benefits offered under its group health plan should consider working with its insurance carrier or third-party administrator to amend plan language to specifically limit these benefits to services that are legal in the state where the services are provided. This approach avoids the possibility of directly violating a state law that bans or restricts abortion services but may be difficult to administer. An employer should discuss with its third-party administrator and claims administrator the feasibility of verifying where the service was rendered and the legality of such services. An employer should also carefully consider the implications of coverage for abortifacient drugs, including those obtained through telehealth that might be mailed across state lines, as the determination of where such drugs are taken would be complicated to verify.
- **Take a neutral, broad-based approach:** To avoid shining a spotlight on expanded abortion-related coverage, and inviting enforcement or litigation challenges, employers may wish to consider taking a broad-based approach and mirroring any abortion-related coverage to already existing benefits. For example, if an employer’s group health plan already offers travel benefits for other treatments (e.g., transplants, cancer, bariatric surgery), consider expanding that travel benefit to now include medical care for reproductive health.

Other Issues to Consider

An employer expanding abortion coverage and/or travel benefits should also consider

- **Mental Health Parity:** Adding a travel benefit for abortion care under a group health plan (but not for travel related to mental health or substance-use disorder benefits) may create risks under the Mental Health Parity and Addiction Equity Act of 2008, which generally prohibits plans from applying financial requirements and treatment limitations to mental health and substance-use disorder treatments that are more stringent than those that apply to medical/surgical treatments.
- **Reimbursement Above IRS Limits:** Any reimbursements above the permitted IRS limits must be taxable to the individual and handled outside the plan, presumably through an employer's payroll system, thereby triggering withholding and reporting obligations. If the individual receiving the taxable reimbursement is not an employee of the sponsoring employer but instead is a dependent who is covered on the employer's group health plan, there are logistical considerations such as how to report such a taxable payment, and privacy considerations under HIPAA, which may also complicate the administration of such reimbursements.
- **High Deductible Health Plan/Health Savings Account Eligibility:** Any expansion of abortion-related coverage under a HDHP must remain subject to the deductible first, otherwise eligibility for an HSA is jeopardized. As noted above, an overly expansive travel benefit may also be considered a health reimbursement account that could affect HSA eligibility.

Action Item Checklist

- ✓ Review the current terms of employer-provided benefits, including coverage under the existing group health plan for abortion-related services and travel/lodging benefits.
- ✓ Determine if any plan changes are appropriate, taking into account the employer's culture, business, benefits strategy, and risk tolerance.
 - Reach out to benefits consultants, brokers and legal counsel to discuss any desired changes and the implications of such changes.
 - Consider obtaining financial data to understand the cost impact of proposed changes.
 - Discuss the changes with vendors to ensure smooth administration and implementation. Vendors may have standard packages for adding travel benefits. Discuss the issue of how much verification is required to administer the benefit (e.g., verify where the service is performed, mileage threshold, residency of the patient).
- ✓ Document clearly how the employer's plan or policy will cover abortion-related services (whether provided or not), and if provided, on what conditions. Keep in mind that any benefit changes should be memorialized in writing through a plan amendment and appropriate board of directors or committee resolutions.
- ✓ Communicate any change to employees through a Summary of Material Modifications to the plan's SPD, FAQs, etc. Recognize that abortion and other reproductive rights issues are deeply personal, and likely divisive, among employees, so leading your communications with empathy may go a long way in building goodwill and understanding as we navigate a changing landscape.

We will continue to monitor federal and state laws, ongoing litigation, proposed legislation and executive/agency actions on reproductive health services as they impact employer-sponsored benefit plans, and we will continue to keep you informed.

Additional Information

For additional information about these benefit plan topics, or any other employee benefits matters, please contact any member of our Employee Benefits and Executive Compensation Practice Group listed below.

1945 Old Gallows Road, Suite 650
Tysons Corner, VA 22182
(703) 748-2690

111 East Main Street, Suite 1605
Richmond, VA 23219
(804) 489-5507

Andrea I. O'Brien
aobrien@islerdare.com

Vi D. Nguyen
vnguyen@islerdare.com

Jeanne E. Floyd
jfloyd@islerdare.com

Grace H. Ristuccia
gristuccia@islerdare.com

Ashley F. Hedge
ahedge@islerdare.com