

# Employee Benefit Plan Considerations Post-*Roe*

## Labor & Employment Law Update

By Kelly Haab-Tallitsch on July 7, 2022

The U.S. Supreme Court's decision last month to overturn *Roe v. Wade* presents new challenges for employee benefit plans. By overturning the case establishing a constitutional right to abortion, the Court's decision in *Dobbs v. Jackson Women's Health* allows individual states to impose restrictions or outright bans on abortion. The decision is quickly leading to a patchwork of state laws that plan sponsors must now consider.

13 states already had laws that took effect automatically or by quick legislative action banning abortion once *Roe* was overturned and it is estimated that a total of 26 states are likely to quickly block the procedure.

Employers that operate in multiple states will need to navigate a patchwork of different rules affecting health plan abortion coverage, depending on where covered employees and dependents live, work and receive health care.

### Employer-Sponsored Health Plans and State Insurance Rules

Fully-insured group health plans, where employers buy coverage through a commercial insurer, are subject to state regulation and must follow state laws regarding abortion coverage. Several states (including Indiana) already prohibit fully-insured health plans from covering abortions and other states banning the procedure will likely follow suit. A fully-insured plan written in states prohibiting insurance coverage for abortion cannot provide such coverage. Conversely, a handful of states (including Illinois) require fully-insured health plans to cover abortion in certain circumstances and such plans must provide the mandated coverage.

Self-funded health plans, where employers pay the cost of health plan claims instead of an insurer, are not subject to state insurance laws due to the federal preemption provisions of the Employee Retirement Income Security Act (ERISA). State laws prohibiting (or requiring) insurance coverage for abortion do not apply to these plans.

### Travel-Related Expense Reimbursement

Well before the final decision in *Dobbs*, several employers announced the addition of abortion-related travel benefits for employees working in states that prohibit abortion. Employers seeking to provide such benefits can consider

enhancing abortion coverage under a self-insured health plan or provide reimbursement benefits outside the plan.

Employers with self-insured health plans can consider changing their plan provisions to cover abortion-related travel costs and/or coverage of non-network abortion providers. Such changes can be made mid-year provided employee premiums do not increase. Alternatively, employers can adopt a policy reimbursing abortion-related travel expenses outside of the health plan.

Generally, reimbursement of travel expenses will be taxable compensation to employees unless the reimbursements qualify as medical expenses. To qualify as non-taxable medical expenses, travel expenses must be primarily for and essential to receiving medical care and are subject to certain limits.

### **State Criminal Liability Issues**

New state laws criminalizing abortion (including “aiding and abetting” an abortion) create additional complexity for self-insured health plans and employers providing abortion-related assistance, including reimbursement of travel expenses. ERISA generally does not preempt applicable state criminal statutes and the extent to which ERISA preempts these laws is not entirely settled. Arguably, claims brought against an employer or a self-funded health plan for “aiding and abetting” an abortion by reimbursing costs associated with an abortion performed in compliance with the laws of the state in which the abortion is performed should be preempted by ERISA. However, a self-funded plan that covers abortions performed in a state that has criminalized the procedure may not be shielded by ERISA from applicable criminal or civil liability. These issues will likely be litigated in the courts.

### **Next Steps**

Employers should: (1) review their health plan documents to determine current coverage, (2) consult with ERISA counsel on the applicability of relevant state laws and potential coverage options, mandates and/or restrictions, and (3) monitor future legal developments on both a state and federal level.

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