



Abortion Coverage in ERISA Plans After Dobbs

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After the overturning of *Roe v. Wade*, some plan sponsors are considering providing reimbursement for travel costs for medical plan participants who are no longer legally permitted to obtain abortions in their home states. Some employers also have expressed interest in ensuring reimbursement for the FDA-approved abortion pill (mifepristone). Plan sponsors considering such actions should consider:

1. Unpredictability and Uncertainty of State Laws. State laws have already changed, and seem likely to continue to change, rapidly. At least thirteen states have been identified as having anti-abortion laws that become enforceable as a result of the overturning of *Roe* (“trigger laws”). (Texas, Idaho, Kentucky, Wyoming, Oklahoma, Tennessee, North Dakota, Missouri, Louisiana, South Dakota, Arkansas, Utah and Mississippi.) Some states are considering new abortion-related legislation, whether restrictive or, in some cases, liberalizing.

The scope of State anti-abortion laws is also unclear. So-called “morning-after” pills (also commonly referred to as Plan B) are generally considered to be contraceptive in nature, and not abortion causing, but a number of major health systems have stopped providing these medications because of the uncertain scope of State laws. Also uncertain is whether states may extend the *Dobbs* rationale to outlaw puberty blockers, hormone therapy and gender affirmation surgeries and fertility services.

2. Plan Sponsor Reaction. A Mercer study from early June said that 14% of large employers had an abortion travel benefit in place, with another 25% saying they were considering it.

Based on press reports, large companies that have said they will cover some or all of a participants travel costs include Amazon, Starbucks, Uber Technologies, Tesla, Meta, Disney, Dick’s Sporting Goods, JPMorgan Chase, Lyft, Citigroup, Yelp, Match Group, Apple, Cigna, T-Mobile US, Patagonia, Live Nation Entertainment, Goldman Sachs, Bank of America, Deutsche Bank, Microsoft, Biogen, CVS Health, Snap, eBay, Dell Technologies, Pinterest, Compass and Rakuten.

Some companies are structuring the travel benefit to cover travel costs for other medical procedures, as well as abortion. This approach serves three goals: first, to avoid alienating participants who do not agree with the benefit offering; second, potential claims of sex discrimination; and third, to mitigate potential exposure under mental health parity claims.

3. ERISA Preemption. Understanding the scope of ERISA preemption protection is key for ERISA plans. As an initial matter, the applicability of ERISA preemption varies greatly between insured plans and self-insured plans. Moreover, state abortion laws may include both Civil and/or Criminal penalties and the scope of ERISA preemption protection is key for ERISA plans. For example, the 2021 Texas law imposes civil penalties, while the Texas “trigger law” includes both civil and criminal penalties. Even where ERISA preemption would otherwise apply to any state civil statutes, it will not apply to any state criminal law determined to be “generally applicable.”
 - a. Insured Plans. ERISA allows a state to regulate the benefits covered by medical insurance policies issued in that state. A state could, for example, outlaw insured abortion coverage in those policies. Until now, States have not regulated what stop loss insurance can cover, but it is possible that abortion restriction could be imposed on those policies under State insurance law. Of course, nothing would prevent a plan sponsor with a fully insured plan from adding abortion coverage on a self-insured basis so as to avoid any insurance restrictions; split-funded plans are common.
 - b. Self-insured Plans. Self-insured plans often avoid state regulation due to ERISA preemption. Some practitioners have suggested that ERISA preemption should save ERISA self-insured medical plans from any state mandates or limitations, but that is not a foregone conclusion. For example, a state criminal law applying to any party (not just a benefit plan) who aids and abets the performance of an abortion might be construed by a court as a “generally applicable” criminal law. In sum, ERISA preemption should not be viewed as a cure-all.
4. Extra-Territorial Application of State Law. For plan sponsors, a key issue will be how states attempt to apply their laws to actions outside their state (e.g., a Missouri resident traveling to Illinois for an abortion) or actions inside their state that relate to abortion outside their state (e.g., a Texas benefits plan administrator facilitating reimbursement for an out-of-state abortion).

There likely will be a raft of inter-jurisdictional conflicts over abortion-related laws in short order. Some states may apply their criminal laws in an attempt to outlaw out-of-state abortions for their citizens and may attempt to criminalize anyone who aids and abets such abortions no matter where the enabler resides. Other states could well pass laws insulating their providers and residents from out-of-state prosecutions.

These types of laws raise a host of difficult constitutional questions regarding a state's authority to regulate conduct outside its border. Justice Kavanaugh's concurrence opinion in *Dobbs* suggested that a State could not constitutionally ban abortion travel, but that is dicta from one justice, and it does not begin to address all concerns and relevant fact patterns. The issues involve the Full Faith and Credit Clause, the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment right to trial jury, the Commerce Clause, the right to travel, and the general federalism principles of the Constitution. These issues could take years to sort out and need to be addressed by the Supreme Court after the issues have been fine-tuned by the lower courts.

5. Tax Considerations. In general, travel costs for individuals getting medical care can be tax free. Code Section 213(d)(1)(B) and Treas. Reg 1.213-1(e)(1)(iv). (Includes car, rental car, bus, taxi, rideshare, train, plane and ferry expenses. Instead of actual car expenses, a medical standard mileage rate is allowed. For lodging, up to \$50 per night can qualify as a medical cost.) If tax-free, medical travel costs could be reimbursed from an FSA or HSA. However, travel costs would still be subject to deductibles under an HDHP to retain eligibility for HSA contributions.

The questions of extraterritorial application of state abortion laws could still affect the taxability of any abortion coverage. Under Code Section 213, "medical care" does not include expenses for illegal operations or treatment. Treas. Reg. 1.213-1(e)(1)(ii).

Of course, an employer could avoid tax issues all together, including any election timing issues, by providing abortion travel coverage on a fully taxable basis.

6. Federal Response. President Biden and Attorney General Garland have stated that the federal government will fight any state attempt to prevent a pregnant person from traveling to another state to seek an abortion. Justice Kavanaugh's concurrence also appears to indicate that this right to interstate travel should be constitutionally protected. Nonetheless, this issue likely will be subject to prolonged court challenges. Some commentators have suggested that the federal government could allow federal land to be used to provide abortions even in states with strict abortion

laws, with federal preemption providing a shield against state law application. This is an untested idea that might work in civil cases, but the possible application of federal preemption is less clear in a criminal context. At any rate, this approach has been downplayed by the Executive Branch despite some pressure from activists and Congressional representatives.

Regardless of short-term response by the Biden administration, employers will need to be prepared for what changes could result from a Presidential administration change.

7. Medication-Based Abortions. A key area of federal involvement could be based on the FDA's authority over the regulation of abortion medication. In particular, mifepristone (typically followed by misoprostol) was approved in 2000 for use in the first ten weeks of pregnancy. In December 2021, the FDA approved changes in the prior dispensing requirements and opened up the dispensing of these drugs via telemedicine. Some states are likely to target telemedicine based dispensing programs, but the federal government could defend broader usage of the medication on preemption grounds and the FDA's broad authority regarding drug availability, and the current administration appears inclined to do so. This will be another battleground issue because nineteen states currently have laws prohibiting the use of telemedicine for abortion. This issue is particularly consequential given reports that medication-based abortions comprise more than 50 percent of all abortions in the U.S.

8. Other State Business Restrictions. Another consideration is whether states will take other actions against employers that provide abortion coverage to employees. In Texas, for example, fourteen members of the State House of Representatives have pledged to introduce bills in the next legislative session that will ban corporations from doing business in Texas if they pay for abortions in states where the procedure is legal. This pledge was issued in reaction to Lyft's announcement that it would pay for employees in Texas and Oklahoma to seek abortions in other states. It is unclear whether a state would ban a major job provider or taxpayer from doing business, such as Texas banning a company like Lyft, but it is an example of the direction that some states might turn to. Of course, a business ban might not involve a total ban. For example, a state might ban companies from contracting with the state and local governments if they provide any abortion coverage.

9. Protection of Plan Actions. Plan sponsors should review corporate indemnification provisions and E&O coverage to determine if any state criminal procedures are covered. Corporate by-law indemnification provisions typically apply to both civil and criminal actions, but E&O policies sometimes exclude criminal proceedings. There also may be exclusions for “willful” violations of law that could be problematic. Fiduciary liability coverage often has exclusions of criminal actions, but those policies are unlikely to come into the mix because the plan fiduciary is not violating any provision of ERISA by providing an abortion benefit that may involve a state law violation.

Conclusion

The overturning of *Roe v. Wade* may well usher in a period of legal chaos affecting employer health plan abortion coverage. The interjurisdictional legal issues are difficult to resolve. Employers providing abortion coverage and abortion travel coverage should understand that ERISA preemption may not provide the shield they need and that they may be exposed to possible state civil and criminal action. Given the fluid situation, staying in close touch with your benefits counsel as you proceed is advisable.

For questions concerning these issues, please contact [Kevin O'Brien](#) or a member of our [Benefits Team](#).
