

June 27, 2022

IMPLICATIONS OF ABORTION DECISION FOR EMPLOYEE BENEFIT PLANS

On Friday, June 24th, the Supreme Court released its decision in *Dobbs v. Jackson Women's Health Organization* finding that the United States Constitution does not guarantee a right to abortion access. This decision effectively overturns its prior decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*. The decision will result in near immediate abortion bans in thirteen states. Those states had previously passed laws providing such bans would go into effect upon a decision by the Supreme Court making such a prohibition legal.

Last week's decisions raise many questions for employee benefit plan sponsors that may take months or even years to fully resolve. However, existing law does help to answer certain key questions:

How is it determined if fully insured plans cover abortion?

The benefits available through fully insured plans are generally prescribed by state law. Under previously existing state laws, abortion is not covered under such policies. In some such states, employers are permitted to purchase riders providing for abortion coverage, but in others there is no option to cover abortion in the fully insured market. Conversely, other states require that all fully insured plans issued in the state cover abortion. A map showing which states have laws limiting or requiring coverage is available [here](#).

How is it determined if self-funded plans cover abortion?

Employer plan sponsors can generally decide if their plans cover abortion. Self-funded plans are generally not subject to state laws prescribing benefits because ERISA preempts such laws. However, a self-funded plan cannot pay for a procedure that is illegal in the location in which it is performed. Therefore, plans that continue providing for abortion coverage will only be able to pay for such procedures when performed legally.

It is also worth noting that in recent years there has been litigation surrounding the extent to which state laws seeking to regulate self-funded health plans are preempted. In a 2020 decision, the Supreme Court ruled that an Arkansas state law regulating pharmacy benefit managers was not preempted by ERISA because it did not govern "a central matter of plan administration or interfere with nationally uniform plan administration." It is likely that certain states will pass legislation attempting to limit the autonomy of self-funded plans to determine the extent to which they cover abortions and/or travel out of state for the purpose of obtaining an abortion.

Can an employer provide a benefit covering the cost of travel to obtain an abortion?

Generally, yes, but this will create certain legal risks. Existing tax law includes travel expenses incurred “primarily for, and essential to, receiving medical expenses” in the definition of medical expenses that can be paid for on a pre-tax basis through a medical plan. Thus, it appears that employers will be able to amend their self-funded plans to pay for such expenses. However, plans are still subject to criminal laws, and such coverage may not be permissible if provided to a participant living in a state where it is illegal to assist a state resident in traveling to obtain an abortion.

Employers wishing to provide a travel benefit outside their health plan risk such a benefit being deemed to provide medical care. Any employer program providing medical care is by definition a group health plan. If such a plan only provided for travel benefits, it would raise its own set of compliance issues (e.g., failure to comply with the ACA, COBRA, HIPAA, etc.).

Other Considerations

As demonstrated above, even for established rules, the implications of the *Dobbs* ruling are broad and complex. Other open issues that will need to be addressed moving forward include how to:

- Design and administer plans operating in multiple states in light of competing state laws;
- Handle prescription drug benefits for medications that can induce medical abortions; and
- Apply illegal act coverage exclusions.

We will continue to monitor this evolving situation and keep you apprised of any significant new developments.

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