

Dobbs v. Jackson Women's Health Organization

Evolving Considerations for Employers

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Dobbs v. Jackson Women's Health Organization

- The U.S. Supreme Court upheld a Mississippi state statute outlawing abortions after 15 weeks and in doing so explicitly overruled *Roe v. Wade* and *Planned Parenthood v. Casey*, finding no Constitutional right to privacy
- Leaves to the states the right to decide the legality of abortions and restrictions
- Some states had laws restricting abortions prior to *Roe* that will come into play (“trigger” laws), others will enact new legislation
- It is expected that half of the states will have some restrictions, creating a patchwork of rules that will be particularly difficult for multi-state employers and plan sponsors

Employer Considerations

- Statements regarding intent/position on the decision; Employers need to balance varying interests and constituencies
- Group Health Plan coverage of abortions
 - Fully-insured/Self-Insured distinctions
 - Prior to *Dobbs*, approximately 75% of group health plans covered abortions in some capacity
- Expanding access through travel benefits
- Addressing prescription drug impact
- State law concerns
- Data privacy and security concerns

Group Health Plan Coverage of Abortions

- Plans are not required to cover abortions except for fully insured plans issued in states where certain coverage is required under state insurance law (CA)
- Not all coverage is the same – plans vary over coverage of elective abortions and/or coverage in the event of the health of the mother, rape or incest
- Coverage for Abortifacient drugs
 - Plans also vary in the extent to which abortifacient drugs are covered
 - Anticipating issues related to mailing drugs to states with restrictions; ingesting in states with restrictions
 - Biden administration has taken the position that interstate commerce protects shipping and FDA approval trumps the ability of states to outlaw/restrict approved prescription drugs
 - Raises battle over role of FDA – to ensure access to approved drugs, or only opine on safety and effectiveness

Travel Benefit Design

- Broad or Narrow?
- Cover travel for just abortion-related services or for all covered services under the health plan?
 - For services that are not available within a certain radius (i.e., 60 or 100 miles) from the participant's home
 - Provide only to those who are covered by the group health plan or to all employees?
 - Provide an annual cap on benefits? (For example, \$2,000, \$4,000, \$10,000 per participant)
- Concerns that a narrow travel benefit (only for abortion services) may violate Mental Health Parity requirements applicable to group health plans
 - Mental health parity prohibits more limitations on mental health and substance use disorder benefits than medical surgical benefits

Travel Benefit Design

- Broad or Narrow?
- A broader travel benefit may also help against any state law challenges targeting abortion benefits
 - Providing a travel benefit for any covered service improves access for all participants for any treatment and is not, on its face targeting abortions
 - Depending on geography of the participant population, a broader benefit may not materially increase costs of the benefit
- A broader travel benefit may also guard against other arguments that the benefit is discriminatory on the basis of sex, pregnancy or disability
 - Perhaps more to come from the EEOC on this

Tax Implications

- Expenses for “medical care” under Internal Revenue Code Section 213(d) are exempt from federal income tax
- Travel whose primary purpose is to obtain “medical care” is itself considered medical care under Section 213(d) up to certain limits:
 - Lodging expenses up to \$50/night per person
 - Standard mileage rate - \$0.22/mile (7/1/22)
 - Other *reasonable* travel expenses (plane, train, bus)
 - No reimbursement for meals
 - Travel expenses for companions also covered
 - Requires substantiation
- Reimbursements above IRS limits require the excess amounts to be imputed into the employee’s income (can be administratively challenging and could raise data privacy risk)

Optional Travel Benefits

- Options for Coverage
 - Group Health Plan
 - Subject to ERISA, COBRA and HIPAA - ERISA Preemption Arguments Available
 - Many plans already provide coverage for some travel expenses – i.e., “Centers of Excellence”
 - Provides the most direct route to reimbursing travel expenses
 - Should travel benefits count towards deductible/out of pocket maximums? (must count in HDHP/HSA designs)
 - Consider Mid-Year Election Change Rights where there’s a “significant” enhancement
 - Health Flexible Spending Account (FSA)
 - Subject to ERISA, COBRA and HIPAA – ERISA Preemption Arguments Available
 - Subject to contribution limits
 - May be entirely employee-funded and limited to current participants until open enrollment
 - Claims substantiation/privacy considerations
 - Interferes with HDHP/HSA enrollment

Optional Travel Benefits

- Health Reimbursement Account (HRA)
 - Subject to ERISA, COBRA and HIPAA – ERISA Preemption Arguments Available
 - Allows reimbursement for eligible medical care expenses (up to IRS limits)
 - Employee must also be enrolled in group health plan (integrated)
 - No limits on contributions
 - Coordination with HDHP/HSA Options
 - Claims substantiation/privacy
- Excepted Benefits HRA (EBHRA)
 - Nonintegrated, subject to ERISA, COBRA and HIPAA – ERISA Preemption Arguments Available
 - Allows reimbursement for eligible medical care expenses (up to IRS limits)
 - Must be available to all similarly situated employees on the same terms (not restricted to medical plan participants)
 - Contributions limited (\$1,800 for 2022, \$1,950 for 2023)
 - Claims substantiation/privacy

Optional Travel Benefits

- Health Savings Account (HSA)
 - No substantiation requirements – Not subject to ERISA
 - Contribution limits – linked to HDHP coverage only
- Employee Assistance Plan (EAP) – Likely subject to ERISA
 - Would allow coverage of travel benefits to entire workforce
 - EAP cannot provide significant benefits in the nature of medical care
 - Cannot be coordinated with another group health plan
 - Must be made available at no cost
 - Questions remain; requires careful structuring to be an “excepted” benefit
- “Lifestyle” Accounts
 - Provides general, taxable reimbursements up to a certain limit
 - No benefit of ERISA preemption
 - Need to avoid being considered a group health plan subject to the ACA
 - Privacy concerns if substantiation of reason for travel is required

State Law Considerations

- State legislation and enforcement is evolving
- In some cases, momentum shifting based on public sentiment
- Laws vary as to what is restricted and how, creating a patchwork
- Some intend to block travel, receipt of abortion pills in the mail or via telemedicine, aiding and abetting, or have criminal implications
- Private right of action against any person who “aids or abets”
- Employers should consider the location of all covered participants (dependents) and not just employee locations
- <https://www.guttmacher.org/> is a good source to track state initiatives and activity

ERISA Preemption Arguments

- ERISA generally preempts state laws that “relate to” benefits, but there are limits
- Fully insured plans are subject to state insurance laws
 - States that restrict abortion will likely amend their state insurance laws to restrict coverage
 - Fully insured plans issued in these states will have fewer options for coverage and travel benefits
- Preemption does not apply to generally applicable criminal laws that do not specifically target employee benefit plans
- Preemption of these types of state laws is a novel question and will take time to develop; Different plans/arrangements have different arguments

Other Possible Actions

- Congressional Action
 - Calls to codify *Roe v. Wade* at the national level (unlikely)
- Executive Action (public health declarations and directives to agencies)
- Federal regulatory action – possible guidance from IRS, DOL, HHS and CMS regarding benefit design and tax implications
- Potential EEOC position on discriminatory designs
- State law challenges (internally and externally) and refusals to enforce
- Local law/enforcement differences within a state
- ERISA preemption litigation

Other Employer Considerations

- Abortion-related discussions in the workplace
 - Protection of employee expressions
- Pregnancy Discrimination Act
 - Requires all women affected by pregnancy, childbirth or medical conditions to be treated the same for all employment-related purposes
 - Health plan must cover abortion where the life of the mother is in danger
 - Must cover complications of all abortions (regardless of reason)
 - Unclear the impact *Dobbs* will have on continued applicability
- Criminal records and background checks of employees
- Data Privacy and Security
 - Could states seek to subpoena health information for enforcement activity? HIPAA does not provide full protection and various state privacy rules may be implicated

Data Privacy and Security

- Compliance requirements
 - HIPAA
 - ADA/GINA
 - CCPA/CPRA
 - State law statutory and common law protections

Data Privacy and Security: HIPAA, ADA/GINA

- Applies only to healthcare providers and health plans – including Health FSAs, HRAs and EAPs
- Does not apply to employers
- “Lifestyle accounts” possibly not subject to HIPAA
- Privacy and security regulations
- Notice of Privacy Practices
- ADA/GINA

Data Privacy and Security: Practical Considerations

- Access management – administration of benefit, availability of TPAs, appeals
- Permissible uses and disclosures
- Data security and retention
- Vendor management, if applicable
- Handling requests for personal health information and security
 - Example, what if state subpoenas health information for enforcement activity?
 - HIPAA is not a shield, review the many exceptions to nondisclosure
 - Avoid making guarantees that information collected and used in connection with the benefit will not be further disclosed
 - TPAs may take different approaches on this

Key Takeaways

- Take care in announcing and implementing any changes – consult with legal counsel on design, administration and changing laws – understand risks; less may be more in terms of risk mitigation
- Carefully review current coverage to determine what is covered (including in-network and out-of-network options); consider protective plan language
- Discuss with third-party administrators, insurers and vendors to understand administrative options and indemnification requirements; review choice of law provisions in vendor agreements
- Stay tuned to developments and evolving landscape
- Remain flexible and retain the ability to pivot in any plan design and communications based on changes in legislation and enforcement

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Thank **you.**