

Impact of Dobbs Decision on Employee Benefits

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On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade* and holding that there is no constitutionally protected right to abortion. While the *Dobbs* decision does not make abortion illegal, it does permit states to make abortion illegal under state law. Whether employers assume new risks in covering abortions (including aiding or abetting someone in receiving an abortion) under their health plans is now a matter of state law. In the wake of this decision, employers now need to consider what they can legally do to support employees (and their covered dependents) who wish to terminate a pregnancy, including those who need to do so due to a medical condition or emergency.

Fully Insured and Self-Insured Plans

The implications of the *Dobbs* decision for group health plans will differ depending on whether a plan is fully insured or self-insured. Since states generally have the power to regulate fully insured health plans, insurance policies would need to comply with the law of the state where the policy is issued; fully insured health plans in states where abortion is banned would not be able to provide abortion benefits. Employers with such plans would therefore want to review their plan documents, insurance policies, and governing state laws, and should explore alternatives with their carriers and brokers as needed to see if there is still a way to provide assistance for abortion services. Employers may also want to consider the possibility of switching to a self-insured plan, as doing so would give them more discretion in terms of plan design (as discussed below). If this is not possible, there could still be other alternatives available such as establishing an HRA that covers any unreimbursed expenses for medical care (which includes abortion procedures which constitute "medical care" under IRS rules). The HRA would need to either be integrated with the employer's medical plan to comply with the Affordable Care Act or structured as an Excepted Benefit HRA (with different implications with respect to eligibility, funding, and other features). Kelley Drye is available to assist employers wishing to learn about an HRA approach.

Self-insured employers should have much more freedom when it comes to providing abortion assistance in states with restrictive abortion laws. Since ERISA preempts state laws that "relate to benefit plans," it will likely preempt most state laws prohibiting medical plans from covering abortion benefits for residents of the state. However, issues will arise where a state law makes it a criminal act for individuals to get abortions in the state or for others, including employers, to assist women seeking an abortion, as ERISA does not preempt general state criminal laws. As such, there is now a much higher level of risk in this area, and employers may wish to consider amending their medical plans to eliminate coverage for abortion procedures performed in states where aiding a person in getting an abortion in the state is categorized as a criminal act (this would include, for example, coverage of an abortion after 15 weeks of gestation in states where abortions are legal only before 15 weeks). Such a plan change would of course need to be communicated to all plan participants,

including their dependents.

Travel and Lodging Benefits

Employers should also consider whether their medical plans can cover travel and lodging expenses that could permit employees and their covered dependents to be reimbursed for the costs of traveling to a state where abortion is legal if abortion is prohibited in their state of residence. Many medical plans cover travel and lodging expenses where out-of-state treatments are necessary, provided the services otherwise meet IRS and plan requirements for coverage of travel expenses to obtain medical care. Generally, we would expect little risk in covering such services for plan participants to travel to another state to obtain an abortion, provided the destination is a place where the services are legally permissible, as it should be protected under the right to interstate commerce and travel. It is important to note, however, that some states have announced intentions to try to regulate and prevent even these types of benefits and whether such laws will be upheld remains to be seen. It should also be considered whether reimbursing travel expenses *only* for abortion services could be a violation of the Mental Health Parity and Addiction Equity Act, which prohibits group health plans that provide mental health and substance use disorder benefits from placing more restrictions on accessing those benefits than medical or surgical benefits.

Prescription Drugs

Employers will also want to think about how to handle plan coverage of medications that induce abortion, as more than half of all abortions performed in the U.S. are medication abortions, with most using Mifepristone, a drug approved by the FDA in 2000. The Department of Justice has taken the position that FDA policy governing abortion medications would preempt any state ban. However, some states have argued that abortion medications fall within states' power to regulate medical practice, and lawsuits in this area are ongoing. Some states require that a physician be physically present during the administration of medication abortions, even though the FDA has allowed abortion pills to be prescribed via telemedicine since the COVID-19 pandemic. In light of the uncertainty around whether these state bans or restrictions are legal, it may be prudent for health plans not to cover medication abortions in states with such bans or restrictions, and instead provide abortion assistance through medical travel benefits under the plan as described above.

Next Steps

Going forward, employers will need to monitor the status of abortion laws in each state in which they have employee populations or dependents covered under their plans. Employers with insured plans will need to coordinate with their insurance companies, and self-insured employers will want to consult and coordinate with their third-party administrators, to ensure that their objectives are being met and that their plans comply with state law. Finally, whatever they decide, they should be sure to communicate any plan changes to covered employees and their dependents.

Kelley Drye is here to assist you with the many questions raised due to the impact of *Dobbs* on employee benefits. If you would like assistance with these analyses, plan changes that need to be made, or employee communications, please reach out to your contacts at Kelley Drye.