

Group Health Plan Considerations in the Wake of the Reversal of Roe v. Wade

By National Employee Benefits Practice

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The speculation is now over as the Supreme Court released its decision on Friday, June 24, 2022 in the [Dobbs v. Jackson Women's Health Organization case](#) ("Dobbs decision") overturning Roe v. Wade and Planned Parenthood v. Casey, precedents that established and maintained a federal constitutional right to abortion. The Dobbs decision did not render abortion illegal nationwide. Rather, the decision removed the federal constitutional protection of abortion access across the country and provided states the ability to enact laws regulating abortion.



Even though the Dobbs decision itself does not directly address employer-sponsored group health plans, state abortion laws will directly affect group health plans. While it is too early to determine the nature and significance of the impact the Dobbs decision will have on abortion-related coverage and services for group health plans across the country, we can briefly summarize a few salient points in connection with this topic. We will continue to closely follow the shifting national landscape of abortion access ([26 states are certain or likely to ban abortion](#)), particularly around ERISA preemption and potential state criminal liability in the context of insurance coverage.

Many employers currently cover abortion-related services under their group health plans. Still others may be interested in offering a travel assistance benefit for employees to receive an abortion out-of-state, joining the ranks of a growing list of U.S. companies currently offering this travel benefit. While this travel benefit may vary in terms of scope and types of care, many group health plans already reimburse travel and lodging expenses for plan participants based on limitations of provider availability in certain geographic areas and to receive care at a center of excellence. Adding abortion access to a current group health plan travel benefit is becoming more commonplace. While there are currently more questions than answers, we have outlined a few considerations and compliance concerns below with respect to offering abortion-related services under an employer-sponsored group health plan, including a travel benefit:

1. **Fully insured plans:** Will a travel benefit, or other abortion-related services, including prescription drugs such as the morning after contraception pill, offered within the group

health plan be permitted for fully insured plans subject to applicable state law? Self-funded plans under ERISA might enjoy more flexibility here since ERISA generally preempts state insurance laws.

2. **Taxation considerations:** What are the tax implications of providing a travel benefit to receive abortion access under IRS rules, both within a group health plan and outside the plan? Generally, employers are allowed to reimburse travel expenses (including transportation and lodging) incurred by employees and covered dependents through a group health plan on a pretax basis as long as the expenses are incurred for medical care as defined by IRS Code Section 213(d). Examples of offering a travel benefit outside of the group health plan include reimbursement of travel and lodging expenses under an employee travel reimbursement plan and/or a lifestyle spending account. These examples will require a thorough and careful analysis to ensure compliance with applicable laws and regulations.
3. **Criminal liability issues:** Will providing travel benefits for participants to receive abortions out of state where abortions are not legal subject an employer and its employees to potential liability under state law that criminalizes assisting an individual from receiving an abortion in a state permitting abortion access? Although ERISA generally preempts state insurance laws, it does not necessarily preempt state criminal laws.
4. **HSA deductible considerations:** What are the financial implications for participants enrolled in an HDHP/HSA as it relates to a travel benefit, which would require the participant meeting the plan deductible first?
5. **Mental Health Parity concerns:** Will offering a limited travel benefit for abortion services run afoul of Mental Health Parity rules issues by providing an enhanced travel benefit under the medical/surgical side of the plan?
6. **Prescription drug coverage:** Will state laws prevent a group health plan from covering certain prescription drugs used to terminate a pregnancy, particularly if mailed to a participant in a state with restrictive laws?
7. **Employment law concerns:** What are the additional employment law issues that could arise in the context of abortion, including employee privacy concerns, Pregnancy Discrimination Act and American with Disabilities Act (ADA) concerns and access to federal and applicable state leave protections to seek abortion coverage and related services?

In a related noteworthy development, the White House recently [announced two specific actions](#) to protect abortion access on a national basis:

1. The Administration is prepared to challenge any state or local laws restricting or preventing women traveling to another state for abortion access.
2. The Administration is directing the Secretary of Health and Human Services (HHS) to protect access to medications for reproductive health care, including contraception and medication abortion. In fact, the Secretaries of HHS, Department of Labor (DOL) and Internal Revenue Service (IRS) collectively released a [letter on June 27, 2022](#) addressed to group health plans and health insurance issuers reminding them of their obligations under the Affordable Care Act to provide contraceptive coverage to individuals and covered dependents at no cost.

Moreover, HHS released [recent guidance](#) detailing when protected health information (PHI) under HIPAA (Health Insurance Portability and Accountability Act of 1996) is required and not required to be disclosed in connection with reproductive health care, including abortion care, by covered entities when “required by

law.” The guidance clarifies that HIPAA rules reinforce efforts to keep individuals’ reproductive health information private and underscores that health care providers may only disclose PHI to law enforcement authorities when it is “required by law” pursuant to the HIPAA rules definition. Although this recent guidance is practically more relevant to medical providers and facilities as HIPAA covered entities, employer-sponsored self-funded group health plans are considered covered entities under HIPAA as well and are advised to take note.

It appears the Dobbs decision is effective immediately. This means employers do not have the luxury of waiting until the beginning of the next plan year to consider any changes to their health plans and should begin now to consider the impact on their plans. Employers are strongly encouraged to consult with their employee benefits and employment counsel regarding the legal implications of abortion coverage within their group health plans and within the general employment relationship. Employers should also consult with their health plan carriers and third-party administrators regarding the logistical and practical plan changes that will likely occur as states enact laws regulating abortion coverage and services.

Risk Strategies will continue to closely monitor the rapidly evolving developments in both state and federal law and litigation activity in this space.

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