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Group Health Plan Coverage for Abortions After *Dobbs*

On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization* and ruled there is no federal constitutional right to a legal abortion. The Court's repeal of *Roe v. Wade* allows each state to regulate abortions, creating a complex patchwork of laws that affect coverage for abortions under employer group health plans. Multiple states have laws banning abortions that have taken effect or soon will take effect following the repeal of *Roe*. Other states have laws that have been temporarily blocked by courts, and some states are expected to introduce laws limiting or banning abortions. The federal government has taken steps to provide access to abortions.

This Client Alert addresses some initial questions employers are grappling with following *Dobbs*.

May a health plan reimburse medical travel-related and lodging expenses for participants to obtain care outside their state of residence?

Generally, yes. Under federal law, amounts paid for transportation constitute "medical care" if the transportation is primarily for and essential to medical care (the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body). Transportation expenses that are "medical care" may be reimbursed by a health plan. Under federal law, amounts paid for "lodging" are considered "medical care" if certain requirements are met, including that the lodging is not lavish or extravagant, is primarily for and essential to medical care, and the amount does not exceed \$50 for each night for each individual.

Some states have enacted laws that criminalize performing abortions and a person or entity that aids or abets the abortion. Those issues are addressed below.

May health reimbursement arrangements ("HRAs") be used to supplement group health plan coverage for abortion-related services?

Possibly. There are various types of HRAs, and the HRA design depends on a variety of factors, such as whether the employer offers other group health plan coverage and whether an employee is enrolled in it. Depending on the circumstances, an HRA may be a way to provide coverage for abortion-related medical expenses that are not fully covered under another group health plan, such as copays and deductibles.

How will a state law prohibiting abortion affect a self-insured group health plan in that state?

Some states are experimenting with various methods to restrict or eliminate access to abortions. ERISA generally preempts all state laws that “relate to” an employee benefit plan. While ERISA preemption is complex, a state law “relates to” an employee benefit plan if it has a connection with or reference to such plan, such as a state law that directly refers to ERISA plans. Similarly, state laws that indirectly but substantially affect an ERISA plan can “relate to” the plan for preemption purposes, particularly if the laws affect a central matter of plan administration and interfere with uniform plan administration across the country. A state law that attempts to prohibit a self-insured group health plan from providing abortion-related health services should be preempted, meaning the plan is not subject to that state law.

How will a state law prohibiting abortion affect fully insured group health plans in that state?

ERISA does not preempt state laws that regulate insurance. State insurance laws that prohibit a group health insurance plan from providing coverage for abortion-related services in that state will not be preempted by ERISA.

What if a woman needs an emergency abortion in a state that prohibits or criminalizes abortion?

Most health plans provide coverage for emergency health services. The U.S. Department of Health and Human Services (“HHS”) recently issued guidance to hospitals and physicians regarding providing abortions pursuant to the federal Emergency Medical Treatment and Labor Act (“EMTALA”). Enacted in 1986, EMTALA requires most hospitals to provide all patients who come to the emergency department (including certain labor and delivery departments) an appropriate medical screening examination, stabilizing treatment for emergency medical conditions, and transfer, if necessary. HHS guidance reiterates that if a pregnant woman shows up at an emergency department (including certain labor and delivery departments), is experiencing an emergency medical condition (defined by federal law), and abortion is the stabilizing treatment necessary to resolve that condition, the hospital and its physicians are, with some exceptions, required to provide that treatment—even if state law prohibits abortion. Last week, the State of Texas filed suit against the federal government challenging this guidance.

Does the Dobbs decision affect federal rules related to contraceptives, reproductive health-related services, or medications?

No. Under the Affordable Care Act, most health plans are required to provide contraceptives at no cost, along with preventive health services, such as pap smears and breast and cervical cancer screenings. HHS recently issued guidance to pharmacies reminding them of their obligations to continue to stock and fill prescriptions for drugs like misoprostol or methotrexate, which can be used to facilitate an abortion, but which also have other uses. Additionally, under HHS guidance, pharmacies that refuse to fill prescriptions for mifepristone, misoprostol, or other drugs can be liable for violating federal discrimination laws that apply even in states that prohibit abortion.

What about state criminal statutes that make performing an abortion a crime?

Some states are making it a crime for doctors to perform an abortion. States typically have laws making it a crime to aid or abet another person in committing a crime, including abortions. ERISA does not preempt “any generally applicable criminal law of a State.” This exception to ERISA preemption is

intended to prevent otherwise criminal activity from being immunized from prosecution simply because the criminal activity “relates to” an employee benefit plan, such as embezzlement and larceny. By referring to criminal laws of general applicability, Congress intended to preempt state criminal statutes aimed specifically at employee benefit plans. This means that if a state enacted a criminal law making it illegal for a group health plan to cover abortions, ERISA should preempt that law so that it would not apply to plans or employers in the state.

Texas and Oklahoma have civil enforcement statutes that, among other things, allow any person to bring a civil action against any person that knowingly engages in conduct that “aids and abets” someone in performing or inducing an abortion that contravenes state law (including paying for or reimbursing the costs of an abortion through insurance or otherwise). Statutory damages of at least \$10,000 can be awarded for each abortion that a person aids or abets. There are various affirmative defenses under those laws, including reasonably believing that, after conducting a reasonable investigation, that the physician performing the abortion would comply with state law. An ambitious plaintiff might use one of those laws to file an action against a plan that was reimbursing abortion-related expenses, but there are a number of defenses a plan could use to defend itself.

Can state law enforcement officials require health plans to turn over the names of women who have received abortions?

Information a health plan holds regarding whether a woman received an abortion is protected health information (“PHI”) under HIPAA. Under HIPAA, a health plan may, but is not required to, disclose PHI for law enforcement purposes if various requirements are met. Recent HHS guidance emphasizes that the “permission to disclose PHI as ‘required by law’ is limited to ‘a mandate contained in law that compels an entity to make a use or disclosure of PHI and that is enforceable in a court of law.’ Further, where a disclosure is required by law, the disclosure is limited to the relevant requirements of such law.”

A health plan that receives a request for PHI should immediately contact its HIPAA Privacy Officer and legal counsel to review and respond to the request. Plans should also ensure their HIPAA policies and procedures are up to date.

What other benefits could an employer consider to help ensure participants have access to abortions or other reproductive health services?

Employers can consider a variety of benefits, such as:

- Providing a paid time off benefit employees can use when they need to travel for a medical appointment.
- Adding navigator or concierge services to help employees locate healthcare providers.
- Ensuring prescription drug formularies cover emergency contraceptives and similar medications to prevent or terminate a pregnancy.
- Ensuring telemedicine providers can prescribe contraception and abortion-related drugs.
- Issuing robust, specific information regarding reproductive health services that are available to participants and how to access those services.
- Adding transportation and lodging benefits to reimburse those costs when travel is required because a participant cannot locate an in-network provider near the participant’s residence. Plans should take care to ensure that transportation and lodging benefits are provided in accordance with mental health parity requirements.

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What if a group health plan wants to restrict abortion coverage?

Under federal law, group health plans are generally not required to cover abortions except where the life of the woman would be endangered if the fetus was carried to term or medical complications have arisen from an abortion. If a group health plan covers the costs of abortion, it must do so in the same manner and to the same degree as it covers other medical conditions. Title VII prohibits employers from taking actions based on a woman's decision to have an abortion, such as firing, withholding advancement, or withholding benefits from her. Thus, an employer could decide to limit abortion coverage under its group health plan.

Are there resources employers can share with employees regarding their reproductive rights?

Yes. On June 28, [HHS launched a new website](#) that provides information regarding individuals' rights to access care and have it covered by insurance or a group health plan. It provides details regarding the right to birth control, abortion services (including resources to locate a provider), preventive health services, emergency care, patient privacy, and how to enforce one's rights.

If you have any questions regarding providing abortion or reproductive health services, please contact a member of the [Kutak Rock Employee Benefits Practice Group](#).

