

Key Considerations for US Employers to Navigate New Abortion Restrictions

Health Law



Highlights

- US employers are considering their options regarding abortion and related healthcare coverage and travel benefits.
- The US Supreme Court's decision raises a host of issues for in-house counsel and their organizations to consider, such as criminal liability, mailing abortion medications, privacy, tax implications, mental health parity, and other issues.
- Abortion regulations are in flux — in-house lawyers need to monitor the situation and be aware of changes.

The US Supreme Court's overturning of the right to abortion in Dobbs v. Jackson Women's Health Organization has caused uncertainty for employers as they attempt to manage the health insurance plans they offer employees.

This article is based on the webcast, "Dobbs v. Jackson Women's Health Organization: What it Means for Employers" (June 6, 2022), which was presented by Joy M. Napier-Joyce, principal,

Employers are evaluating their options in a changing environment

Some employers offer medical insurance that covers abortion services in states that are outlawing or moving to outlaw abortion. An alternative some employers have begun implementing is benefits to cover travel expenses for employees to get to states that permit abortion.

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The legal landscape across the country is changing day by day, leaving employers and their in-house counsel to determine how to continue covering abortion care for their employees. Many of these issues are particularly difficult for multi-state employers.

Meanwhile, employers seeking to provide health coverage and travel reimbursement for abortions must consider that there may be different viewpoints among their employees, customers, and partners, some of which may be against providing assistance to obtain abortions.

See How One Company is Using Policy to Address Recent Changes in US Health Law.

Group health plans

Health plans might need to change in the future as state laws change.

To start, employers should determine if abortion is covered by the company health plan, and if abortion will continue to be covered. Some plans cover elective and therapeutic abortions (the latter needed to protect the health or save the life of the mother), but some only cover therapeutic ones. Group health and self-insured plans offer a lot of options in plan design. And certain states, such as California, require coverage of abortion services — the majority of states do not have that requirement.

Travel benefits

Employers are also assessing whether to provide travel benefits for employees who live in states where abortion is restricted to travel to another state where abortion is legal. Group health plans may already include travel benefits. Some plans annually cap travel benefits. Meanwhile employers are gauging whether they should offer travel benefits outside of group health plans. There is also the question of whether a travel benefit should be limited to employees who participate in the plan or whether it should be available to employees who are not in the plan.

Legal implications

There are several issues for in-house counsel to consider, such as:

- *Preemptive effects of the* Employee Retirement Income Security Act (ERISA), which promotes uniformity in benefits;
- State criminal statutes on aiding and abetting;
- Prescription drug coverage;
- Mental Health Parity Act;
- Tax implications for providing travel benefits;
- Pregnancy Discrimination Act; and
- Privacy concerns in the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

ERISA Preemption

ERISA preempts state laws if the laws are related to benefits. While this would seem to give cover to employers, there are limits to ERISA preemption. Fully insured health plans are subject to state insurance laws, and ERISA does not preempt state insurance codes. States could restrict abortion by amending the state insurance code.

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In addition, ERISA preemption does not apply to general criminal laws, but it is unclear if state laws that criminalize abortion are subject to preemption. The outcome of this issue may hinge on how the state law is written.

Aiding and abetting

Texas and Oklahoma have criminal laws against aiding and abetting anyone seeking an abortion, and they also provide for a private right of action against any person who aids and abets someone seeking abortion services. A question is whether convictions for aiding and abetting an abortion will be found in an employee background check, or if there will be measures to treat these type of convictions differently from other types of convictions as part of background checks.

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The Biden Administration said the Supreme Court decision doesn't prevent traveling to states that permit abortion from states where it is illegal.

Prescription drug coverage

While abortion drugs may be covered by a health plan, it is unclear if a state that bans abortion can restrict those drugs from being sent to a state resident from a pharmacy outside of the state.

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The Biden administration considers that the Food and Drug Administration's approval of abortion drugs preempts any state laws from restricting or banning their being sent through the mail. An additional question is whether state restrictions against the mailing of drugs would violate the US Constitution's Commerce Clause. There is also the issue of how pharmacy benefits managers will deal with those issues.

Mental Health Parity Act

If a group health plan includes a travel benefit only for abortion services, it may run afoul of the Mental Health Parity Act's prohibition of limiting mental health, including substance abuse treatment, compared to other coverage. A question is whether providing a travel benefit only for abortion could be viewed as unequal to mental health coverage.

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Taxes

The US Internal Revenue Code (IRC) section 213(d) exempts expenses for medical care from federal income tax, and lists the limits on lodging, mileage, reasonable travel expenses, and companion travel costs. Any reimbursements by an employer that is above the limits can be imputed taxable income to the employee. If an employer decides to cover expenses beyond the IRC limits, there must be a way for the employer to track those amounts to include them in payroll for tax purposes.

Pregnancy Discrimination Act

The impact of the Dobbs decision on the federal Pregnancy Discrimination Act is unclear. The act bars discrimination based on pregnancy, childbirth, or medical conditions, but says an employer offering health insurance is not required to pay for abortion coverage except when the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion. The Equal Employment Opportunity Commission is expected to provide guidance on that issue in the future.

Privacy

HIPAA protects sensitive patient health information from being disclosed without a patient's consent, but it does not provide full protection of health information. States which ban abortion could attempt to subpoena health information about employees accessing abortion services for enforcement activities based on state privacy rules.

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What will happen next?

State legislatures and the federal government are expected to issue laws and guidance on these issues in the next several months, but for now employers often look to their in-house counsel for guidance on this patchwork of laws on abortion. While there are many unanswered questions, employers and their in-house counsel may want to review their organizations' health plan coverage to determine what is covered, consult with third-party administrators, insurers, and benefits vendors (for example to understand administrative options and indemnification terms), monitor developments, and remain flexible to adapt to the changing context.

Get more ACC resources on the Dobbs decision and abortion policy.

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