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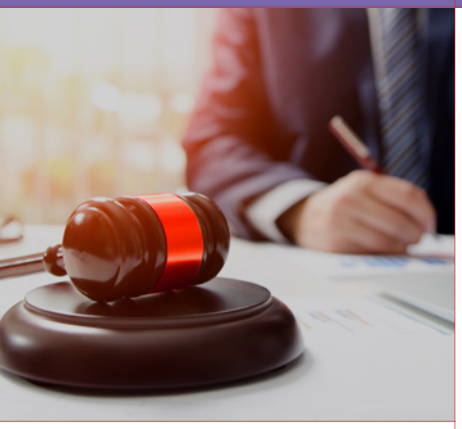
Eye on Washington

Legislative Update



Roe v. Wade Overturned: Employer Considerations

The U.S. Supreme Court has held in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (June 24, 2022) that there is no federal protection of abortion rights, overturning nearly 50 years of precedent from the Court's decision in *Roe v. Wade* and *Planned Parenthood Pennsylvania v. Casey* on the issue. The ruling now enables each state to set its own legal requirements regarding abortions. Without *Roe*, an estimated 22 states already have laws on their books which ban or severely restrict access to abortions. This includes 13 state legislatures which have passed laws that became enforceable immediately or soon after the court overturned *Roe* (these are known as 'trigger laws'). An additional four states are considered likely to ban abortion without federal protections in place.

There are several employer considerations that the courts and government agencies will likely address in the future. This would include, for example, issues involving leave management, requests for accommodations and anti-discrimination laws. Of particular interest for employers are group health plan considerations that plan sponsors and plan administrators should review in light of this ruling.

The Details

ERISA Preemption

The extent to which a group health plan will be directly impacted by this ruling will depend primarily on whether the plan is fully-insured or self-insured.

State laws do not regulate self-insured group health plans (i.e., plans under which the employer pays for its employees' health claims out-of-pocket) because such regulation is left to the federal government under the Employee Retirement Income Security Act (ERISA preemption). In contrast, fully-insured group health plans (i.e., when employers purchase group health insurance through an insurance carrier) remain subject to state insurance law.

For fully-insured plans, coverage of reproductive services, including abortion, will depend on state insurance law. Self-insured plans have greater flexibility regarding design (including coverage). Self-insured plans can generally choose to offer, or not offer, coverage for abortion services or to limit the coverage to specific circumstances.

It is important to note that ERISA preemption is generally not considered to be a shield against state criminal laws. Therefore, state laws that potentially impose criminal liability relating to abortion must still be reviewed with legal counsel.

Travel cost as medical expenses

Many employer-sponsored group health plans already include a travel benefit for the employee (and, in certain instances, another individual such as a spouse, parent, or caregiver) related to the provision of medical treatment or procedures that cannot be obtained near where the employee resides. Travel reimbursements will be taxable compensation to employees except to the extent the expense is a 'qualified medical expense' under the Internal Revenue Code (Code). The Code considers transportation primarily for and essential to medical care to be a 'qualified' expense. Ancillary costs associated with traveling for abortion, such as lodging (not at a hospital or treatment facility), may also be considered a qualified medical expense (these expenses must meet certain conditions under the Code and lodging expenses are capped at $50 per individual).

Employers should be aware that the Code generally excludes amounts expended for illegal operations or treatments (an illegal procedure would not be a qualified medical expense). In these circumstances, the IRS usually looks to the laws where treatment was received or procured. Therefore, this should not impact plans providing assistance to employees traveling to states where abortion is permitted, but it could restrict tax-free reimbursement for services received in any state where abortion is illegal.

If an employer-sponsored group health plan does provide medical travel reimbursement, it should consider the implications of state laws prohibiting the aiding and abetting of the performance or inducement of an abortion. These state laws, including those in Texas and Oklahoma, could expose plan sponsors and insurers to criminal liability as a result of paying for or reimbursing the costs of abortion services through insurance or otherwise. The potential out-of-state application of these laws has yet to be tested.

Providing abortion-related travel benefits to address state bans on abortion, a medical procedure, without providing comparable travel benefits to address state bans on gender dysphoria treatment, a mental health treatment, may create a compliance issue under the Mental Health Parity and Addiction Equity Act (MHPAEA), which generally prohibits group health plans from providing mental health and substance use disorder benefits with less favorable benefit limitations than those benefits under medical/surgical coverage. For this reason, employers may want to take a broader approach and offer travel expenses for treatments that cannot be legally obtained near the employee's home or in their home state but can be legally obtained in another state.

Next Steps

Issues in this area are expected to develop rapidly. States on both sides of the abortion debate will move quickly to pass laws either regulating, limiting, or protecting access to abortion if they do not currently have them in place.

Plan sponsors of fully-insured plans should be evaluating the extent to which state law may impact or otherwise limit their participants' coverage and review their plan documents and insurance policies. Sponsors of self-insured plans should review their documents and have a conversation with their stop-loss carriers and third-party administrators (TPAs).

Employers should continue to monitor the situation closely and engage with legal counsel to develop policies that comply with their various legal obligations.

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