

Post-Dobbs: FAQs for Employers and Other Benefit Plan Sponsors

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Dobbs Impact on Group Health Coverage for Reproductive Care

Can group health plans continue to provide coverage for abortion-related expenses?

In short, yes. *Dobbs* does not prohibit group health plans from covering abortion-related expenses. Instead, *Dobbs* eliminates federal constitutional protections on an individual's choosing to obtain an abortion, meaning that states can outlaw or severely curtail access to abortion. Having said that, the full answer to this question is complicated by whether a group health plan is fully-insured or self-insured, as explained below.

Can group health plans cover abortion-related expenses (in a state where abortion is legal) for someone who resides in a state where abortion is banned?

Self-insured health plans should be able to provide this coverage, assuming that the procedure is performed (or the medication is obtained) in a state where legal. On the other hand, fully-insured plans might have a more difficult time providing that coverage because these plans are regulated by state insurance laws, which are not preempted by ERISA. Presumably, each state banning abortion will seek to prohibit insurance policies underwritten in the state from covering abortion, even if the procedure occurs in a state where legal.

In addition, some states outlawing abortion either have or intend to enact statutes that would assess civil or criminal liability for anyone who "aids or abets" or "assists" a resident of that state with procuring an abortion. The constitutionality of these statutes has not been tested yet (and longstanding constitutional law jurisprudence suggests that individual states should not be able to enforce laws penalizing out-of-state conduct). Nevertheless, it is possible that a state might use these laws to challenge a group health plan or employer that reimburses individuals for the abortion-related costs or related costs for travel to a state where abortion is legal.

Aren't state laws preempted by ERISA if they "relate to" an employee benefit plan?

In general, yes. There is a strong argument that statutes purporting to prohibit plans from paying for abortion-related services "relate to" employee benefit plans and are preempted by ERISA. However, there are some exceptions. For example, state insurance laws are not preempted by ERISA. Neither are state criminal laws of general applicability. Depending on the circumstances, a court might conclude that a state law criminalizing "aiding and abetting" behavior in this context is a law of general applicability that is not preempted by ERISA. This may expose the plan sponsor and plan fiduciaries to potential criminal penalties on the basis that a group health plan violates the law by covering an out-of-state (legal) abortion. On the other hand, taking into account the purposes of ERISA preemption in the first instance, a court could conclude that these types of aiding and abetting laws targeted to abortion are not laws of general applicability.

Unfortunately, it is difficult to predict how a court might rule on this issue. Since *Roe v. Wade* predates ERISA, there are no test cases on whether pre-*Roe* state abortion laws were preempted by ERISA. Also,

the majority of case law interpreting the phrase “criminal law of general applicability” focuses on state criminal laws related to wage payment, and is thus less relevant.

Bottom line? Employers and other plan sponsors should carefully evaluate the risks of covering reproductive care and related travel expenses based on the state law at issue.

Offering Travel Benefits to Access Reproductive Care

Can a group health plan pay for expenses for out-of-state residents to travel to access reproductive care, including abortion?

Yes. A group health plan may cover travel expenses incurred in connection with accessing health care, including reproductive care. Travel expenses (such as transportation and lodging) are medical expenses eligible for reimbursement from a group health plan. Of course, this is subject to the caveats noted above with respect to the risks to group health plans posed by state civil and criminal statutes penalizing assistance with procuring reproductive care.

Are there any limits on the amount of travel expenses that a group health plan may reimburse as a tax-free benefit?

Yes. Travel expenses necessary to access medical care, including abortion and other reproductive care, are reimbursable as tax-free medical expenses up to the following IRS limits:

- *Automobiles*: The standard medical mileage rate will increase from \$0.18 per mile to \$0.22 per mile on July 1, 2022.
- *Planes, Trains, and Buses*: Ticket cost can be reimbursed so long as the price is reasonable and the travel is primarily for and essential to medical care.
- *Lodging expenses*: Lodging expenses can be reimbursed up to \$50 per night per person, provided that the expenses are primarily for and essential to medical care. Including a parent, nurse, companion, etc. would increase the benefit to \$100 per night.
- *Meal expenses*: Meals generally cannot be covered on a nontaxable basis.

Can a group health plan reimburse travel expenses in excess of the applicable IRS limits?

Practically, the answer will depend on whether the plan is fully-insured or self-insured. Fully-insured plans are unlikely to permit reimbursement of travel benefits in excess of IRS limits. Plan sponsors of self-insured plans have flexibility to reimburse excess expenses under a group health plan, although excess expenses would be taxable and subject to withholding. In addition, the plan’s third-party claims administrator would need to agree to process reimbursements in excess of IRS limits.

For self-insured multiemployer health plans that utilize a “voluntary employee beneficiary association” (VEBA) trust to pay health plan expenses, counsel should analyze whether the VEBA’s reimbursement of travel expenses in excess of IRS limits would jeopardize the tax-exempt nature of the trust (*i.e.*, whether the excess amounts cause the VEBA to pay for more than a *de minimis* amount of taxable benefits).

Do plan sponsors have to consider mental health parity concerns when adding travel benefits to access reproductive coverage?

Yes. The Mental Health Parity and Addiction Equity Act (“Parity Act”) requires that group health plans offering mental health or substance use disorder (MH/SUD) benefits provide them “in parity” with the medical and surgical benefits covered under the plan. If a plan sponsor chooses to provide travel benefits *only* for reproductive care and not for MH/SUD services, this should be reviewed with counsel to ensure that it is done consistently with the Parity Act.

Can travel benefits be offered under a high-deductible health plan (HDHP)?

Yes. However, first-dollar coverage of travel expenses for reproductive care would not be possible under an HDHP until the individual satisfies the plan’s annual deductible. On the flip side, an individual covered by an HDHP would be able to withdraw funds from their health savings account (HSA) to reimburse travel expenses to access reproductive coverage, consistent with the IRS limits on eligible travel benefits summarized above.

Alternative Approaches: Offering Travel Benefits Outside of the Group Health Plan

Can employers just “pay as you go” outside a group health plan, and offer ad-hoc taxable reimbursements of travel expenses to access reproductive care?

Although the simplicity of this approach is seductive, there are potential legal issues associated with this approach that require employers to carefully evaluate whether the risks outweigh the rewards.

There are significant privacy concerns (including HIPAA and state law) when an employer holds information about employee reproductive care decisions. Relatedly, holding this type of information about an employee may inadvertently expose an employer to claims (whether or not meritorious) under Title VII if an adverse employment action is taken against an employee who obtained an abortion or contemplated having an abortion.

This “pay as you go” approach also might complicate an employer’s ability to assert ERISA preemption if the employer’s reimbursement is challenged under a state civil or criminal law that prohibits “aiding or abetting” or otherwise assisting individuals in obtaining an abortion. Technically, a “pay as you go” arrangement is an ERISA-covered group health plan because the employer is reimbursing employee medical expenses. However, a court might view the ERISA preemption defense as weaker if the employer did not “paper” the arrangement as a formalized group health plan and comply with generally-applicable ERISA mandates that apply to all group health plans. In addition, the arrangement itself could expose the plan sponsor and fiduciaries to penalties under ERISA as a non-compliant group health plan (e.g., failure to comply with ACA mandates, COBRA, Form 5500 reporting, etc.).

Employers should also consider other related issues posed by using a “pay as you go” approach. For example, if someone is covered by a high-deductible health plan, first-dollar reimbursement of travel expenses for medical benefits would impact the individual’s eligibility to make health savings account (HSA) contributions. In addition, taxable reimbursements to employees under a “pay as you go” approach could be viewed as additional “compensation” for purposes of other benefit plans in which they participate (such as a qualified retirement plan).

Can a separate health reimbursement arrangement (HRA) be created solely for reimbursing travel expenses to access reproductive care?

Potentially. Health reimbursement arrangements (HRAs) are group health plans, meaning they can reimburse medical expenses such as travel expenses to access reproductive care. Because they are group health plans, HRAs are subject to the Patient Protection and Affordable Care Act (ACA) market reforms.

To avoid tripping over the ACA rules that would otherwise apply to group health plans (such as first-dollar coverage of preventive services), the HRA must be structured as an “integrated” HRA or an “excepted benefit” HRA.

To satisfy the requirements for an integrated HRA, the HRA generally must be offered in connection with other group health coverage (that does not consist solely of excepted benefits) and the individual must be enrolled in group health coverage (through the employer or another plan) that meets the ACA’s minimum value standard. Also, HRAs generally are subject to ERISA’s reporting and disclosure rules, as well as COBRA, among other requirements.

By contrast, there are fewer regulatory requirements applicable to an excepted benefit HRA (including elimination of the requirement that the individual is enrolled in other group coverage providing minimum value). However, an excepted benefit HRA currently limits reimbursements to \$1800 per year (indexed for inflation), which may not meet the plan sponsor’s objectives.

Can travel benefits for abortion be offered through an “employee assistance plan”?

In theory, yes. Depending on how it is structured, an “employee assistance plan” (EAP) may be a group health plan governed by ERISA and subject to the ACA rules (and other requirements) described above. Accordingly, an EAP must be structured as an excepted benefit to avoid various compliance requirements, and to ensure that an individual’s eligibility for the EAP benefits does not interfere with their eligibility to make HSA contributions (if applicable).

To constitute an excepted benefit under applicable regulations, an EAP must meet several requirements. Important here is that an EAP may not provide significant benefits in the nature of medical care or treatment. This is a subjective test that will require a careful review of all of the benefits offered under the EAP in the aggregate. Some employers may conclude that adding travel benefits to an existing EAP might “tip” the scale toward the EAP providing significant medical care or treatment benefits, especially if the dollar amounts that would be reimbursed under the EAP are substantial.

Dobbs Impact on Infertility Coverage

Does *Dobbs* impact infertility benefit coverage under a group health plan?

Potentially. Termination of a fertilized egg or embryo occurs relatively frequently at the conclusion of in vitro fertilization (IVF) treatment. This could mean that IVF coverage may no longer be available in a state that outlaws abortion, which, in turn, might require consideration of the same travel benefit analysis described above in the context of reproductive care. This may also cause complications for individuals who are currently undergoing IVF treatment in a state where the procedure is now illegal.

Potential Agency Guidance

Will the federal agencies that regulate benefit plans issue guidance that may make any of this easier?

Although we do not have a crystal ball, this is certainly possible. On the same day the *Dobbs* decision was released, President Biden released a statement condemning the decision and announced steps the Biden Administration would take to protect an individual's right to seek reproductive care in a state where legal. The Centers for Medicare and Medicaid Services (CMS) also released a statement indicating that CMS intended to take all actions within the scope of its authority to ensure individuals retained reproductive autonomy.

Potential agency relief from DOL, IRS, and HHS in the context of group health plans might include the following:

- Classification of travel benefits to access reproductive care as “non-disqualifying” coverage for purposes of permitting first-dollar reimbursement of travel expenses without adversely affecting an individual's HSA contribution eligibility if covered under a high-deductible health plan.
- Offering a special enrollment period permitting individuals to add or switch group health plan coverage mid-year to join a group health plan offering travel benefits to access reproductive care. This would clarify that individuals would be able to change coverage despite the IRS cafeteria plan rules that might otherwise prohibit this type of mid-year change.
- Confirmation of a non-enforcement policy under the Parity Act with respect to group health plans that add or expand travel benefits to access reproductive coverage but do not add travel benefits for accessing mental health/substance use services.

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Proskauer's Task Force on Reproductive Healthcare Benefits is assisting employers and multiemployer health plans as they begin to navigate the legal and practical environment in the post-Dobbs world. Future updates will be posted on our blog, www.erisapracticecenter.com, to which you can subscribe [here](#).