Employer Considerations in Anticipating a Post-*Roe* World

As SCOTUS decision nears, employers ponder impact on plan design of state laws, travel benefits, ERISA preemption

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With national attention focused on whether the U.S. Supreme Court (SCOTUS) will overturn *Roe v. Wade* when it issues its decision this term in *Dobbs v. Jackson Women's Health Organization*, employer plan sponsors are considering various approaches if the SCOTUS decision, expected by the end of June, leads to disparate state laws regarding reproductive services like abortion. This Aon bulletin addresses:

- State of the States;
- Travel Benefits;
- Taxability;
- ERISA Preemption; and
- Other Considerations.

State of the States

Prior court decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* upheld the right to reproductive health services, like abortion, on a nationwide basis. If the court overturns these decisions this term when it issues its opinion in *Dobbs*, states will be permitted to make their own laws with respect to abortion services, including restricting or prohibiting those services in their states to a greater extent than they could under *Roe* and *Casey*.

Currently, 13 states have "trigger" laws that will go into effect immediately if SCOTUS overturns *Roe*. Several other states are considering similar laws. These laws vary, from implementing restrictions such as shorter timeframes to receive abortion services after conception or banning all abortion services at any time, to penalizing persons who receive abortion services or who "aid and abet" such individuals in receiving abortion services (such as Texas and Oklahoma). Some states, such as Connecticut, have recently passed laws designed to protect abortion services in their states and protect their residents from adverse actions by other states.

For employers/plan sponsors with employees/participants in multiple states, a patchwork of state laws regarding abortion services may make it difficult to provide a uniform set of benefits for participants that are equally accessible to participants regardless of their state of residence. Moreover, it is not clear how certain state laws restricting abortion services will apply to employers/plan sponsors who

pay for or facilitate abortion services that are legal in other states. More litigation will be required to settle these types of issues.

Travel Benefits

Many employers/plan sponsors are considering whether to provide benefits to pay for travel for plan participants who live in states that restrict abortion services. Many plans already offer benefits for travel outside of the participant's area for services at Centers of Excellence or for travel for other reasons related to medical care.

However, employers/plan sponsors that are considering travel benefits should review state laws that may impose liability on an employer/plan sponsor that assists residents with travel to another state to receive abortion services. Such laws may purport to restrict plan sponsors from paying travel benefits for these services. However, it is not clear whether ERISA would preempt such laws, as applied to the plan. Additional considerations regarding ERISA preemption are discussed below.

If employers are considering offering these types of travel benefits to all employees, not just for participants in the medical plan, employers will need to determine whether this practice constitutes a separate group health plan. Such a separate group health plan could raise compliance issues under the Affordable Care Act (ACA). Under the ACA, group health plans must comply with the group market reform provisions, which generally include providing preventive care services and imposing no annual or lifetime dollar limits on coverage that is an essential health benefit. A stand-alone plan providing benefits for employees to travel to another state to receive abortion services may violate these ACA requirements. Employers that want to provide these travel benefits to all employees should consider whether other options are available, including taxing employees on the benefit.

Taxability

Internal Revenue Code Section 213(d) generally governs the types of medical benefits that can be provided by employers and group health plans on a tax-free basis. Under Section 213(d) medical care includes amounts paid for the diagnosis, cure, mitigation, treatment, prevention of disease, or the purpose of affecting any structure or function of the body. It also includes travel benefits, including transportation or lodging up to certain limits, primarily related to medical care. However, Section 213(d) excludes amounts for illegal operations or treatment. Historically, the Internal Revenue Service has looked to the laws in effect where the service was received to determine whether the service was legally provided.

The current provisions of Section 213(d) generally allow health plans to provide travel benefits related to abortion services, including transportation and lodging, up to the amounts permitted. The provisions also allow such expenses to be reimbursed from health flexible spending accounts or health reimbursement accounts, as long as the service is not illegal. However, the cost of meals while traveling is generally not an expense for medical care (unless provided by an institution while an individual is receiving inpatient care) and lodging expenses are subject to additional requirements to qualify for inclusion. Furthermore, legislation has been introduced in Congress that would remove tax deductions for corporations that provide travel expenses related to abortion services or gender-affirming care for minor children.

ERISA Preemption

If *Roe* and *Casey* are overturned and states implement more stringent laws imposing restrictions on abortion services, the question is whether ERISA would preempt those state laws as they relate to employee benefit plans that pay for abortion services or travel for such services. While ERISA preempts state laws that "relate to" an ERISA plan, ERISA does not preempt such laws to the extent that they have only an indirect impact on employee benefit plans. The question (likely to be litigated) is whether state laws restricting abortion services apply to employee benefit plans that provide benefits for abortion services or travel related to such services and whether ERISA will preempt such state laws. Another issue likely to be litigated is whether ERISA will preempt a state law, such as the one in Connecticut, that protects entities from criminal or civil penalties in another state for providing or paying for abortion services in that other state. Thus, ERISA preemption is likely to figure in state laws that restrict abortion services as well as those that provide protections for those services.

Additionally, ERISA does not preempt state laws that regulate insurance. Thus, to the extent that a state law prohibits fully insured plans from paying for abortion services or requires fully insured plans to cover such service, those laws would not be preempted by ERISA.

Other Considerations

Employers and plan sponsors should also consider the following.

- Employers/plan sponsors should carefully review any state laws restricting abortion services to determine the impact not only on benefits for abortion services but also the impact on fertility benefits the plan may provide. State legislatures have been particularly active in this area recently, which requires ongoing monitoring of newly enacted legislation or proposals in most states.
- Employers/plan sponsors should consider whether implementing travel benefits related to abortion services will impact mental health parity compliance, if similar travel benefits are not provided for mental health-related benefits.
- Employers/plan sponsors that provide benefits related to abortion services or travel for such services should monitor federal tax law for any changes to whether these benefits can be provided on a tax-free basis. The design of such benefits should be evaluated by tax counsel if the employer intends such benefits to be excluded from the recipient's income.
- Employers should monitor for state-imposed changes to fully insured plans, particularly if such changes would occur in the middle of a plan year.
- Employers/plan sponsors should continue to monitor ongoing litigation around these issues.

Conclusion

It remains unclear whether SCOTUS will overturn *Roe* when it issues its decision this term in the *Dobbs* case. Employers and plan sponsors, however, should start thinking about how they want to operate in a post-*Roe* environment. Such considerations include reviewing state laws where they operate or have employees, deciding if they want to provide additional benefits to address restrictions on abortion

services in certain states, and if so, how to provide those benefits. In any event, there will be no shortage of continued litigation before there is certainty around these specific issues for employers and plan sponsors.

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