U.S. Supreme Court Overrules *Roe v. Wade* and *Planned Parenthood v. Casey*

Upholds Mississippi law, rules states can regulate abortion services; Employers weigh decision's impact on group health plan coverage

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In a landmark ruling, the United States Supreme Court held in *Dobbs v. Jackson Women's Health Organization* that the United States Constitution does not confer a right to abortion and that states may regulate the practice of abortion. In doing so, the Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, two cases that had governed legislative restrictions on abortion services, and upheld a Mississippi law that generally prohibited abortion services after the fifteenth week of pregnancy.

This Aon bulletin addresses:

- The *Dobbs* Decision
- State Laws Regulating Abortion Services
- Adopting and Expanding Travel and Lodging Benefits for Abortion Services
- Tax Implications for Travel and Lodging Expenses
- Next Steps for Employers

The *Dobbs* Decision: 6–3 to Uphold Mississippi's Law, but 5–4 to Strike Down *Roe* and *Casey*

In a 6–3 ruling, the Supreme Court upheld the Mississippi Gestational Age Act, which prohibits abortions after the fifteenth week of pregnancy except in the event of a medical emergency or in the case of a severe fetal abnormality. In a 5–4 ruling, the Court also overruled *Roe* and *Case*y. Justices Clarence Thomas and Brett Kavanaugh filed concurring opinions. Chief Justice John Roberts, however, filed an opinion concurring only in the judgement upholding the Mississippi statute. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan authored an opinion dissenting from the judgement upholding the Mississippi law and overturning *Roe* and *Casey*.

State Laws Regulating Abortion Services

Under *Dobbs*, states now will be able to pass laws regarding abortion services, including restricting or prohibiting those services, to a greater extent than they could under *Roe* and *Casey*. Under *Dobbs*, such laws will be subject to less rigorous scrutiny by courts, allowing much greater restrictions for abortion access.

Thirteen states have “trigger” laws restricting abortion that become effective either upon or shortly after (e.g., 30 days) a Supreme Court decision overturning *Roe* and *Casey*. Five additional states have bans on abortion that are “on the books” and might now be enforced. These include the following states:

- Alabama
- Arizona
- Arkansas
- Idaho
- Kentucky
- Louisiana
- Michigan
- Mississippi
- Missouri
- North Dakota
- Oklahoma
- South Dakota
- Tennessee
- Texas
- Utah
- West Virginia
- Wisconsin
- Wyoming

Several states are considering laws that restrict abortion services. These proposals vary, from implementing restrictions such as shorter timeframes to receive abortion services after conception, banning all abortion services at any time, or penalizing persons who receive or provide abortion services, as well as penalizing those who “aid and abet” individuals in receiving abortion services. On the other hand, some states, such as Connecticut and New York, have recently passed laws designed to expand abortion services in their states and protect their residents from adverse actions by other states.

States have also previously imposed coverage requirements or prohibitions for fully insured health plans. Eleven states already restrict coverage for abortion in fully insured, non-governmental group health plans to limited circumstances (such as life endangerment or rape),[1] while seven states already require coverage of abortion in certain circumstances.[2] Additional laws relating to insurance coverage for abortion services are anticipated.

ERISA Preemption. States that adopt laws imposing restrictions on abortion services, including restrictions on entities that pay for abortion, will likely confront several issues. One issue is whether ERISA preempts those state laws to the extent they relate to employer group health plans that pay for abortion services. While ERISA preempts state laws that "relate to" an ERISA plan, ERISA does not preempt state laws that have only an indirect impact on employee benefit plans. The issue, likely to be litigated, is whether state laws generally restricting abortion services apply to employee benefit plans that provide coverage for abortion services and, if so, whether ERISA preempts such state laws.

Additionally, since ERISA does not preempt state laws that regulate insurance, ERISA is not likely to preempt a state law prohibiting fully insured plans from paying for abortion services or, alternatively, requiring fully insured plans to cover such services. Additionally, ERISA does not preempt any generally applicable criminal law. For states that restrict access to abortion services, the type of law (i.e., whether it imposes civil or criminal liability) may also factor into the ERISA preemption analysis.

Impact on Employers. For employers with employees in several states, a patchwork of state laws regarding abortion services and insurance coverage will make it difficult to provide a uniform set of health plan benefits that are equally accessible to plan participants regardless of their state of residence or employment. Moreover, it is not clear whether state laws restricting abortion services will apply to employer plan sponsors that pay for or facilitate abortion services that are legal in other states. Extraterritorial application of such state laws is likely to be the subject of future litigation.

Adopting and Expanding Travel and Lodging Benefits for Abortion Services

Employers considering adopting and expanding travel and lodging benefits for abortion services should consider the implications for benefits that are available to employees in a self-insured plan versus all employees.

For Participants in a Self-Insured Plan. Many employer group health plans already offer travel and lodging benefits for travel outside of the participant's area for medical services to centers of excellence or for travel and lodging for other reasons related to medical care. As a result of *Dobbs*, many employer plan sponsors are considering expanding these benefits to plan participants who live in states that restrict abortion services as part of coverage under the existing medical plan. These employers should

[1] Circumstances vary by state. Applicable states are Idaho, Indiana, Kansas, Kentucky, Michigan, Missouri, Nebraska, North Dakota, Oklahoma, Texas, and Utah. Numerous additional states limit coverage for abortion under insurance policies for public employees.

[2] Circumstances vary by state. Applicable states are California, Illinois, Maine, Maryland (effective July 1, 2022), New York, Oregon, and Washington.

review any state laws that might impose liability on an employer or plan sponsor that assists residents with travel to another state to receive abortion services. As discussed above, ERISA may arguably preempt such state laws, depending on the type of law and the extent of its scope.

Employers considering adding a travel and lodging benefit to an existing medical plan should also consider the following compliance obligations.

- **Dollar Limits.** If there is a dollar limit on travel and lodging benefits, does this limit violate the Affordable Care Act (ACA) prohibition on annual dollar limits for essential health benefits? Arguably travel limits are not essential health benefits and therefore limits may be permissible, but employers should review such limits with counsel.
- **Mental Health Parity and Addiction Equity Act (MHPAEA).** Employers should consider whether a travel and lodging benefit that is provided only for a medical/surgical procedure violates MHPAEA.
- **High-Deductible Health Plan (HDHP)/Health Savings Accounts (HSAs).** If the plan is an HDHP/HSA plan, no benefits for travel or lodging can be paid before the deductible is met.

For All Employees. Many employers are considering offering travel and lodging benefits to all employees, not just to plan participants, either because their fully insured carriers will not offer such benefits or because employers want to make such benefits available to all employees who may not have local access to abortion services. Employers considering offering this benefit broadly for all employees outside of a medical plan should consider whether doing so would create a separate group health plan under ERISA. If so, such a separate group health plan would raise compliance issues under the ACA. Under the ACA, a group health plan must comply with the ACA's group market reform provisions, which generally include providing preventive care services, among other requirements. A stand-alone travel and lodging benefit for all employees may not be able to meet these requirements.

An alternative strategy may be to offer the travel and lodging benefits to all employees through an employee assistance program that qualifies as an "excepted benefit." Excepted benefits are exempt from many ACA requirements. However, it is not clear whether such a vehicle would meet the first prong of the excepted benefit requirement—not provide significant benefits in the nature of medical care. The question will be whether such travel and lodging benefits are significant benefits in the nature of medical care. Even if the benefits qualify as excepted benefits and therefore are exempt from the ACA requirements, such benefits would still be a group health plan subject to the requirements under ERISA and COBRA and would face associated compliance obligations.

Other approaches include offering travel and lodging benefits as part of a Health Reimbursement Account (HRA) (either integrated with a health care plan or as an "excepted benefit" HRA) or offering a general reimbursement benefit that is taxable and doesn't require employees to substantiate how such funds are used. The HRA rules, however, are complex, and a general reimbursement fund may raise other issues, such as concerns relating to confidentiality and privacy. All these options should be reviewed carefully with counsel.

Tax Implications for Travel and Lodging Expenses

Internal Revenue Code Section 213(d) generally governs the types of medical benefits that employers and group health plans can provide on a tax-free basis. Under Section 213(d), "medical care" includes amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for 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.

Section 213(d) generally allows health plans to provide travel benefits related to abortion services, including transportation and lodging, up to the permissible amounts. This means that group health plans can provide these benefits, and expenses for these benefits can be reimbursed from health care flexible spending accounts, HRAs, and HSAs, subject to the following:

- 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.
- Lodging expenses are subject to additional limitations to qualify for exclusion.
- Section 213(d) excludes amounts for illegal operations or treatments. 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.

Next Steps for Employers

There is no one-size-fits-all approach for employers and plan sponsors with respect to offering benefits related to abortion services. Employers and plan sponsors should consider the following when deciding on an approach in a post-*Dobbs* environment:

- Employers should consider their own culture, business, and benefits strategy when deciding what approach, if any, they want to take now that states may regulate the practice of abortion.
- If an employer decides that it wants to implement benefits for access to abortion services, it should review its current benefit offerings, determine how and to whom it wants to provide such benefits, and what the potential risks may be depending on those decisions.
- Employers that provide benefits related to abortion services should monitor federal and state tax laws 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-specific changes to fully insured plans, particularly if such changes would occur in the middle of a plan year.
- Employers should continue to monitor ongoing litigation and state legislative activity around these issues, particularly as the latter relates to other reproductive health services.

Conclusion

Employers and plan sponsors should consider how they want to operate in a post-*Dobbs* environment. Such considerations include reviewing state laws where they operate or have employees, deciding if they want to provide additional benefits to address access to abortion services in certain states, and if so, how to provide those benefits. State insurance laws apply to the policies issued in the state, and the extraterritorial application of these laws should be considered. In any event, there will be continued litigation before there is certainty around these specific issues for employers and plan sponsors.

Finally, each employer should seek its own independent legal, tax, and advisory counsel on these issues. Aon is not a law firm and the advice in this document is not intended as, and should not be construed as, legal advice. The information in this Alert is subject to change as laws in this area are in a constant state of flux.

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