

EFFECT OF U.S. SUPREME COURT'S OVERTURN OF ROE V. WADE ON EMPLOYER-SPONSORED GROUP HEALTH PLANS

On June 24, 2022, the U.S. Supreme Court overturned its 50-year precedent in *Roe v. Wade*, which held the U.S. Constitution protects the right of women to terminate a pregnancy prior to the date of viability, holding instead that there is no such Constitutional right. As a result of this holding in [*Dobbs v. Jackson Women's Health Organization*](#), the power to regulate the legality of abortions will rest with each individual state. It is expected that abortion will soon be illegal in over half of the 50 states, with varying exceptions and levels of criminality.

The *Dobbs* decision and evolving landscape of abortion regulation in the states creates challenges for employers with group health plans. As organizations begin to maneuver these issues, we have outlined an initial list of action steps.

Confirm Scope of Current Coverage under the Plan.

Both fully insured and self-funded health plans vary as to the scope of reproductive health services that are typically covered. Employers should review their plan terms and confirm with their insurers or administrative services providers exactly what services are covered and how the coverage will change in response to the *Dobbs* holding and applicable state laws.

Determine if your Organization Desires to Reduce or Expand Covered Services.

- Fully insured plans. Contact the insurer for details on what additional benefits may be added to the plan and the limits on those benefits. Several employers are considering adding travel and lodging reimbursement provisions to their group health plans to provide assistance for covered individuals who must travel to a different state to receive reproductive health care services
- Self-funded plans. Contact the administrative services provider for this information. Before announcing a new benefit, confirm that the administrative services provider can administer the benefits your

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organization plans to announce or desires to add to the plan.

Legal Issues to Consider as New Benefits are Considered.

- For many reasons, expanding reproductive health services, including the addition of a travel and lodging reimbursement benefit, should be considered under the umbrella of a welfare benefit plan, which for non-governmental and non-church plan employers has the benefit, subject to limitations, of the preemption of state laws pursuant to the Employee Retirement Income Security Act of 1974, as amended (ERISA). ERISA broadly preempts state civil laws related to employee benefit plans, offering plan sponsors some protection from private lawsuits in states such as Texas with state legislation intended to encourage private litigation to discourage abortion. Preemption of state criminal laws is narrower, and the effect of generally applicable state criminal laws on employee benefit plans related to the plan's reimbursement of out-of-state travel to obtain an abortion is evolving
- If expanded travel and lodging reimbursement provisions are desired, consideration should be given to applying these new provisions to all benefits covered under the plan, as opposed to limiting the application to costs associated with travel to obtain reproductive health services. A narrow provision requires additional analysis as to whether the provision complies with the Mental Health Parity and Addiction Equity Act (MHPAEA), which discourages unequal coverage between medical/surgical benefits (such as reproductive health services) and mental health and substance use disorder benefits. It may be possible to limit travel and lodging reimbursement to reproductive health services due to the differentiating fact that such services are illegal in the state of residence, but mental health services are presumably not
- If expanded travel and lodging reimbursement provisions are desired, consider the tax impact of reimbursements which exceed the limits created under the tax rules for nontaxable "medical care." If the new provisions could exceed these limits, determine with the insurer or administrative services provider how the taxation and reporting of these benefits will occur
- Some states have enacted or are considering enacting aiding and abetting statutes which, in general, seek to impose civil and/or criminal liability on a person who provides assistance to a woman seeking reproductive health services which are illegal in the state. We continue to analyze the effect and possible application of these laws to employer-provided benefits under a group health plan.

The Equal Employment Opportunity Commission's published guidance interprets the Pregnancy Discrimination Act and Title VII of the Civil Rights Act to establish the following abortion-related requirements for employers to

observe:

- Title VII protects women from being fired for having an abortion or contemplating having an abortion
- Title VII also prohibits adverse employment actions against an employee based on her decision not to have an abortion
- Employers cannot pressure a woman to have, or to not have, an abortion
- An employer that offers health insurance is not required to pay for coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term, or medical complications have arisen from an abortion
- If an employer decides to cover the costs of abortion, it must do so in the same manner and to the same degree as it covers other medical conditions.

The legal issues facing employers due to the *Dobbs* decision are complex. As the issues continue to evolve, we will provide updates.