Employers Have Options Related to Abortion Benefits

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The recent U.S. Supreme Court *Dobbs v. Jackson Women's Health* decision still leaves a lot of legal and regulatory abortion access questions unanswered. In overturning the prior landmark Supreme Court decisions in *Roe v. Wade* and *Planned Parenthood v. Casey, Dobbs* complicated matters by removing any national standard. Now, employers with employees in multiple states are left to manage multiple regulations around abortion benefits.

One of the most pressing issues for employers and plan sponsors is whether they can continue offering abortion coverage through their health plans when coverage networks include states where abortion is illegal, and specifically, whether such plans can reimburse costs incurred when plan participants travel to a different state for a lawful abortion.

Options to Provide Abortion-Related Travel and Lodging Reimbursement

There are options for abortion-related travel and lodging reimbursement for employees seeking abortion outside their state due to new state regulations. Employers have several options depending on their health plan and whether it is fully insured or self-funded. Options broadly fit into four categories:

1. **Providing travel and lodging benefits through the existing health plan**

   Currently this is an option for self-funded employers only, and only applies to medical-enrolled participants. This would not be available under a fully insured plan in a state that restricts abortion access.

   All plans can still cover abortion in states where it is lawful, but fully insured plans will not reimburse individuals traveling out of state. Self-funded employers will need to check with their insurance carriers and/or third-party administrators (TPAs) to confirm whether the carrier or TPA can oversee or administer these benefits.

2. **Provide travel and lodging benefits under health reimbursement arrangements (HRAs)**

   There are two main types of HRAs that could be used to provide these benefits.

   General purpose or integrated HRAs must be integrated with a major medical plan to comply with certain ACA requirements. Only employees enrolled in the major medical plan integrated with the general purpose HRA are eligible to participate. One additional drawback is that eligibility for a general purpose HRA precludes eligibility for a health savings account (HSA).

   Excepted benefit HRAs (EBHRAs) are available to all employees that are eligible to enroll in a major medical plan regardless of whether the employee actually enrolls, but reimbursements are capped at $1,800.

   Health FSAs and Other Types of HRAs are also available to reimburse these costs but are less commonly used and have more limitations than the two described above.

3. **Providing reimbursement through excepted benefit employee assistant programs (EAPs)**

   This benefit could be offered to all participants, but only if employers can overcome potential regulatory hurdles that can limit access and the EAP vendor can administer travel and lodging. To be an excepted benefit, the EAP: cannot provide "significant medical care" benefits (which is not currently defined in any regulations), cannot require enrollment in another group health plan, and cannot charge a premium or require any cost sharing by participants.

4. **Taxable reimbursement programs**

   Employers can offer a taxable reimbursement program, but for most, this is not a good fit. Often these programs are administered through the employer, creating the potential for privacy law violations and discrimination liabilities. However, some vendors are offering these options.

Shaping Your Reimbursement Programs

When designing these plans, employers also need to consider the scope and scale of these reimbursement programs. It's generally better to make these benefit plans available for all reproductive healthcare and broad enough to be inclusive of all employees.

It is important to work with your benefits consultant and legal team to craft language that reflects the benefit you are trying to offer.

Employer Concerns Over Legal Liabilities

Many employers and plan sponsors are concerned about being sued for "aiding and abetting" abortion access or for cooperating with abortion providers. At least two states, Texas and Oklahoma, have included criminal aiding and abetting statutes in their state laws. As of the time of this writing, no employers sponsoring benefit plans have been sued under one of these "aiding and abetting" laws, although it remains a possibility. Further, while it hasn't been tested or upheld through case law yet, there is expectation that ERISA would preempt these state laws. In any event, all plan documents should make clear that abortion access and coverage is only applicable in the states where it is lawful.

Until there is a court decision that makes it clear that employers will be held liable, it is unlikely that employers will be subject to liability for continuing to provide abortion services in their health plans.

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