CORPORATE SYNERGIES®
A Foundation Risk Partners Company

compliance ALERT

Supreme Court Overturns Roe v. Wade; Abortion to be Regulated by State Law

June 27, 2022

Action Required:

- Continue to monitor federal– and state-level developments.
- Develop policies that comply with legal obligations that may vary by state.

On June 24, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health*, overturning the prior landmark Supreme Court decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*. The *Dobbs* decision ruled that the U.S. Constitution does not provide a federal right to an abortion, giving the states authority to regulate abortion. This results in a patchwork of differing state laws and regulations on abortion.

For employers and plan sponsors, this decision makes health plan administration more difficult, particularly if coverage spans multiple states. Many employers will likely struggle to remain compliant with federal and state laws in this environment.

How can employers and plan sponsors continue to make abortion and abortion services available to participants and their dependents?

Employers and plan sponsors with employees in states where abortion is illegal have options to help facilitate abortion access for employees and their dependents, including:

- Providing coverage for abortion through the existing health plan
- Providing travel and lodging benefits through the existing health plan
- Travel and lodging benefits under health reimbursement arrangements
- Travel and lodging benefits under employee assistance programs
- Travel and lodging benefits as taxable reimbursements

The details and implications of these options are discussed in the full explanation.

What should employers and plan sponsors do next?

Employers and plan sponsors now face the difficult task of navigating these choppy regulatory waters. Continue to monitor the situation closely and engage with trusted consultants and advisors to develop policies that comply with legal obligations that may vary by state.

We are following developments closely and will be providing information and updates to help our clients understand the options available. ■

↓ Full Explanation Follows ↓

Supreme Court Overturns Roe v. Wade; Abortion to be Regulated by State Law

On June 24, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health*. The decision overturns the prior landmark Supreme Court decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, which held that the U.S. Constitution prohibits states from banning abortion or unduly burdening access to abortion services in the initial phases of pregnancy. Currently, 24 states have laws that can now be enforced that ban abortion or impose conditions beyond those previously permitted under *Roe* and *Casey*.

How Does the *Dobbs* Decision Change the Law for Employers Sponsoring Health and Welfare Plans?

The *Dobbs* decision ruled that the U.S. Constitution does not provide a federal right to an abortion but instead gives the authority to the states to regulate abortion. States can now completely ban abortion or place significant limitations on abortion procedures. Because this results in a patchwork of differing state laws and regulations on abortion across the country, for employers and plan sponsors the immediate impact of this decision is that it will make health plan administration more difficult, particularly if coverage under the plan is available in multiple states.

The *Dobbs* decision was expected. Since an early draft of the opinion was leaked last month that was very similar to the final version, many employers and plan sponsors across the country have started the process of implementing health reimbursement arrangements (HRAs) and other benefit programs to reimburse travel expenses of plan participants needing to procure an abortion in a state where abortion is still legal.

However, the *Dobbs* decision still leaves a lot of legal and regulatory questions unanswered, particularly with regard to the intersection of federal and state laws pertaining to abortion. Among other concerns, one of the most pressing for employers and plan sponsors is whether they can continue offering coverage of abortions 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 jurisdiction to procure a lawful abortion. It also remains unclear as to the extent to which ERISA and other federal laws will preempt (or override) state laws that ban abortion, and the extent to which plan participants will still be able to obtain "medication abortion," which is the prescription of FDA-approved medications (typically prescribed via telemedicine) that induce abortion.

Background: What happened in the *Dobbs* case and why did the Court eliminate the right to an abortion under *Roe* and *Casey*?

In *Dobbs*, the Supreme Court reviewed a Mississippi law that prohibits individuals from knowingly performing or inducing an abortion if the probable gestational age of a fetus is 15 weeks or greater, except in cases of medical emergency or severe fetal abnormality. This law, as written, directly conflicted with the Supreme Court's prior rulings in *Casey* and *Roe*, since those rulings held that state efforts to ban abortion prior to fetal viability (roughly 24 weeks) violated the U.S. Constitution.

The majority opinion in *Dobbs* upheld the Mississippi law and overturned the prior decisions in both *Roe* and *Casey*, concluding that access to abortion is not a fundamental right protected by the Constitution. The decision then gave the authority to the states to regulate abortion and abortion services.

In overturning *Roe* and *Casey*, Court's majority opinion looked at the intent of the Constitution's drafters at the time that the 14th amendment was ratified, and other historical evidence, to determine whether a right to abortion was a fundamental right. The Court concluded that it was not a fundamental right and that the Constitution does not expressly or implicitly protect the right to abortion. However, Justice Kavanaugh, in his concurring opinion, explained his view that a state may not bar a resident from traveling to another state to obtain an abortion "based on the constitutional right to interstate travel."

What does the legal landscape look like right now – which states ban or severely limit abortion?

At least 24 states have laws that criminalize abortion, including 13 states with "trigger laws" that criminalize abortion if *Roe* is overturned. Most states will be able to enforce these laws immediately. However, four of the trigger laws take effect 30 days after a decision overturning *Roe* or upon the fulfillment of an interim condition, such as a state attorney general or other official confirming that *Roe* was overturned.

It is not expected that all of these 24 laws will be actively enforced. For example, the current governor of Michigan has indicated that she will not enforce the state's law against abortion and the current governors of Wisconsin and North Carolina also appear unlikely to enforce their pre-*Roe* abortion bans.

Further, it should be noted that the specific limitations imposed by each state's anti-abortion law vary.

- 16 of these 24 laws prohibit abortion at any point in a pregnancy with only narrow exceptions. Six of the laws prohibit abortion once a fetal heartbeat is detected, which is roughly at the sixth week of gestational development.
- Three laws prohibit abortion when the estimated gestational age of the fetus is 15 weeks or greater, and
- Nearly all of the laws make performing an unlawful abortion within the state a crime.
- Both Texas and Oklahoma have also recently enacted laws that permit individuals to file civil actions against entities that perform abortions or that knowingly "aid and abet" the performance or inducement of abortion (which includes paying for or reimbursing the cost of an abortion through insurance).

The Texas and Oklahoma laws are the only ones that expressly classify employer coverage or reimbursement of abortion services banned in those states through insurance or benefit plans as aiding and abetting unlawful abortion (as the remaining 22 laws do not explicitly ban employers from covering abortion or abortion services through employer-sponsored insurance coverage). The extra-territorial effect (or out-of-state impact) of these two states' laws, however, is unclear, and we will likely have to wait for a court case or federal legislation to clarify whether these laws can subject employers and plan sponsors to liability for allowing participants who reside in one of these states to obtain an abortion outside the state.

For additional information on the state landscape of abortion laws, Kaiser Health News and other media sources have been providing regularly-updated state abortion law listings (those resources are available here and here).

How can employers and plan sponsors continue to make abortion and abortion services available to participants and their dependents?

Employers and plan sponsors with employees in states where abortion is illegal have a number of different options available to them to help facilitate abortion access for employees and their dependents.

Providing coverage for abortion through the existing health plan: While employers with health plans that do not cover abortions may amend their plans to provide for it in states where it is legal, they should first ensure that their insurance carrier and/or third party administrator is able to provide this coverage option. To the extent that an employer's applicable Certificates of Coverage do not make it clear already, plans should be amended to clarify that abortions and abortion-related benefits are limited to coverage to procure an abortion in states where abortion is legal and performed in compliance with the laws of the state in which such medical services are rendered.

Employers can also expand access to medication abortion through their health plans, including through expanded telemedicine services that can prescribe the applicable medications that induce abortion. However, these benefits may not be available in states that restrict or prohibit abortions, and the *Dobbs* decision did not clarify the extent to which federal agencies, like the FDA or others, can mandate that medication abortion be available in all U.S. jurisdictions.

As noted above, in response to the leaked draft opinion, many employers began (and are still) considering amending their plans to include additional travel and lodging benefits. These coverage options are discussed below.

Providing travel and lodging benefits through the existing health plan: One approach is to add travel and lodging benefits to an employer's existing group health plan. Generally, as a group health plan benefit, the travel and lodging benefits will be subject to the requirements of ERISA, including the requirements of the Health Insurance Portability and Accountability Act (HIPAA), Affordable Care Act (ACA), and COBRA. Also, it should be noted that this approach will not be available under a fully-insured plan in a state that restricts abortion access.

In addition, the travel and lodging benefits would be limited to individuals who have enrolled in the employer's medical plan. Employers will need to check with their insurance carriers and/or third-party administrators to confirm whether the carrier or administrator is able to oversee or administer these benefits.

Travel and lodging benefits under health reimbursement arrangements: Another option is to reimburse travel and lodging expenses through a health reimbursement arrangement (HRA). An HRA is subject to ERISA, and an HRA cannot reimburse travel and lodging expenses above the modest reimbursement limits set forth in Section 213 of the Internal Revenue Code.

In addition, as required by the ACA, an HRA must be integrated with other medical coverage or qualify as an excepted benefit HRA. Failure to do this will violate certain ACA rules that prohibit lifetime and annual dollar limits for certain benefits and require coverage of preventive care without cost sharing.

Travel and lodging benefits under employee assistance programs: Another option is to offer travel and lodging benefits under an employee assistance program (EAP) that is an excepted benefit. Because employers typically provide EAP coverage to all eligible employees without charging a premium, this provides the ability to offer the travel and lodging benefits to all employees, not just those who are enrolled in the employer's group health plan.

While such an EAP would be subject to ERISA, excepted benefits are exempt from ACA requirements. To be an excepted benefit, the EAP: (1) cannot provide significant benefits in the nature of medical care or treatment; (2) cannot be coordinated with benefits under another group health plan; (3) cannot charge a premium for participation; and (4) cannot require any cost sharing for offered services.

Assuming that these requirements can be satisfied, the EAP may be an attractive option. However, finding an EAP vendor that can administer travel and lodging benefits is likely to be more challenging than finding an HRA vendor for these benefits.

Travel and lodging benefits as taxable reimbursements: A fourth option is to offer a taxable reimbursement for any travel or lodging expense incurred by an employee. Under this approach, employers would require receipts for travel and lodging, but would not request substantiation of an abortion or other wellness expense. This would not be our recommended option given that (1) it will likely be more costly, both from the perspective of it being a broader benefit and from a tax perspective (it's not a tax-favored benefit); (2) this benefit would not be subject to ERISA, which means the employer would not be able to argue that ERISA preempts a state law challenge to this benefit; and (3) this benefit could still be challenged by a federal agency as providing a "de facto" or "unintentional" HRA, or by a state agency arguing that it's an unlawful "workaround" of their civil or criminal anti-abortion statute.

Should our organization be concerned about civil or criminal liability for "aiding and abetting" abortion if we continue to provide abortion and abortion services?

Many employers and plan sponsors are concerned about potential civil or criminal liability for "aiding and abetting" abortion access or for cooperating with abortion providers (which is considered unlawful in some state anti-abortion laws). As noted above, the *Dobbs* decision did not provide a clear answer to this question, but in our view, until there is a court decision (or federal law, which is less likely) that makes it clear that employers will (or will not) be liable for this, it is unlikely that employers will be subject to "aiding and abetting" liability for continuing to provide abortion services in their health plans.

ERISA generally preempts (or overrides) state laws that "relate to" an ERISA plan, but it does not preempt "generally applicable" state criminal laws. While the application of ERISA preemption to state civil laws that restrict abortion is not as clear, it is likely that ERISA will preempt state criminal laws.

Also, as we noted above, Justice Kavanaugh's concurring opinion indicates that, in his view, a state may not prohibit a resident of that state from traveling to another state to obtain an abortion. This suggests that if the Supreme Court were to, in the future, consider a case challenging a state statute that prohibits or restricts out-of-state travel to obtain abortion services, there might be at least five votes to invalidate that statute. Additionally, it should be noted that it is possible that the U.S. Department of Labor will issue guidance clarifying the preemptive effect of ERISA in this area.

What should employers and plan sponsors do next?

Issues in this area are developing rapidly and employers should closely monitor developments at both the federal and state level. Governors and state legislatures opposed to abortion are moving quickly to pass laws regulating access to abortion and abortion services and it's likely that some states will consider more restrictive bans on abortion as well as laws designed to prohibit employers and plan sponsors from implementing policies that help employees procure an out-of-state abortion.

We understand that employers and plan sponsors face the difficult task of navigating these choppy regulatory waters. Organizations should continue to monitor the situation closely and engage with their trusted consultants and advisors to develop policies that comply with their various legal obligations.

At Corporate Synergies, we are focused on the implications of this decision for our clients and their health and welfare benefit programs. We are following developments closely and will be providing information and updates to help our clients understand the options available. Please contact your Corporate Synergies Account Manager for more information. ■

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

CORPORATE SYNERGIES®
A Foundation Risk Partners Company