POST-*DOBBS* BENEFITS COMPLIANCE CONSIDERATIONS ON ABORTION AND TRAVEL EXPENSE COVERAGE AND REIMBURSEMENT

On June 24, 2022, the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*. The *Dobbs* case involves a Mississippi law that bans most abortions in the state after 15 weeks of pregnancy. The Court upheld that law, overturning both *Roe v. Wade* and *Planned Parenthood v. Casey* in the process. The *Dobbs* decision also returned the right to legislate abortions to the states. Several states have since deemed abortion illegal under state law, and others may seek to do so as a result of the *Dobbs* decision and subsequent state rulings. Employers are left to grapple with how these developments affect their group health plans, and how to provide their employees with access to abortion care without violating the law.

Ever since the Dobbs decision to overturn *Roe v. Wade* was handed down in June 2022, many employers have considered ways to provide employees with additional assistance in accessing medical care.

FULLY INSURED VS. SELF-INSURED

The funding status of a group health plan (i.e., whether it is fully insured or self-insured) can affect how plans deal with the healthcare implications of the *Dobbs* decision.

Fully insured group health plans are directly subject to state insurance laws. Accordingly, if a state insurance law restricts abortion coverage, a policy issued by a carrier licensed in the state could not provide abortion coverage nor likely reimburse the travel costs for a participant to obtain an abortion in a state that permits the procedure.

By contrast, self-insured plans are not subject to state insurance laws due to ERISA preemption. So, an insurance law prohibiting abortion coverage would not likely apply directly to a self-insured plan to restrict such a plan from reimbursing travel costs to another state to obtain a legal abortion.

However, employers should keep in mind that abortion prohibitions or restrictions that affect group health plans often are not drafted as state insurance laws. Rather, many may be found in the states' criminal and health and safety codes, and some states may seek to aggressively enforce such abortion prohibitions. So, employers should engage counsel to navigate the myriad of state laws that may apply. Since the subject is contentious and further state laws and court rulings are anticipated, employers should work with their counsel to monitor abortion-related regulations and enforcement actions in the states in which they operate.

OPTIONS FOR COVERING ABORTION-RELATED TRAVEL EXPENSES

In the period since the *Dobbs* decision to overturn *Roe* was first leaked in early May 2022 and subsequently decided the following month, many employers have considered ways to provide employees with additional assistance in accessing medical care. Even before the *Dobbs* decision, some employers considered employer-sponsored medical travel as a means to assist employees who could not access

certain gender-affirming services or other healthcare in their state (or even in the country). Additionally, the IRS has long held that travel for purposes of receiving medical care can be considered a qualified medical expense, meaning it can be reimbursed or paid on a tax-advantaged basis, sometimes through an HRA, health FSA, or HSA. For further information about the features of these tax-advantaged plans and the range of qualified medical expenses that can be reimbursed on a pre-tax basis, see the PPI publications **Quick Reference Chart: HSAs, Health FSAs, and Traditional HRAs** and **Qualified Medical Expenses**.

Employers that sponsor group health plans will likely adopt varying approaches in response to the *Dobbs* decision based upon their company culture, existing benefits, and the states in which they operate. Some employers already provide or intend to provide coverage for abortion-related travel expenses to employees in states that restrict access to abortion medications and procedures. Before adopting any abortion travel benefit, employers should carefully assess existing company benefits related to abortion care, reproductive care, and other related benefits. Because of the potential civil and criminal liability that could attach to providing such benefits, employers should also consult with counsel regarding the legal risks and possible mitigation measures.

Amend Existing Group Health Plan Coverage

For self-funded plans that wish to provide coverage for abortion-related travel expenses, expanding coverage directly through the group health plan may be the most straightforward option. However, it is important to recognize which expenses constitute qualified medical expenses (i.e., under Section 213(d)) that could potentially be reimbursed by the group health plan, if permitted by the plan document. If primarily for and essential to medical care, qualifying expenses would include reasonable amounts paid for transportation, such as by auto, bus, taxi, train, or plane, for the employee (and a companion) and lodging expenses, not to exceed indexed limits established by the IRS. Meal costs are not qualifying expenses, unless for meals at hospitals and similar facilities. For further details about what items or services constitute qualified medical expenses, see IRS Publication 502, *Medical and Dental Expenses*. For general information about the application of ERISA, COBRA, HIPAA, and the ACA to various benefits that may constitute medical care, see the PPI publication **Point Solution Programs: A Guide for Employers**.

Employers that offer such travel benefits through a group health plan must ensure that the plan continues to comply with the Mental Health Parity and Addiction Equity Act (MHPAEA). MHPAEA requires plans that cover mental health/substance use disorder (MH/SUD) benefits to provide such coverage on par with the plan's medical/surgical (MED/SURG) benefits. With respect to the plan's travel benefits, employers should review whether coverage of travel for MH/SUD is in parity with the offerings for MED/SURG benefits. From a design perspective, employers may want to consider offering travel benefits more broadly for those traveling for both MED/SURG care and MH/SUD care when access to those benefits is not locally available. For additional information about MHPAEA requirements, see the PPI publication **Mental Health Parity and Addiction Equity Act Comparative Analysis: A Guide for Employers**.

Cover Expenses Through an Integrated HRA

An alternative approach would be to cover the expenses through an HRA integrated with the group major medical plan. As a stand-alone group health plan, the HRA would not independently satisfy ACA requirements, such as the prohibition on lifetime and annual dollar limits for essential health benefits and coverage of preventive services without cost-sharing. Integrating an HRA with the group health plan will satisfy ACA and other requirements. Another advantage of this approach is that employers can establish a maximum reimbursement amount of their choosing, without limitation.

Note that HRAs are subject to ERISA, so any such benefits must be addressed in the plan documents and the SBC. Additionally, HRA benefits are subject to COBRA. Accordingly, this approach requires significant coordination with the major medical plan carrier or TPA. In addition, employers should recognize that HRAs are subject to PCOR fees, which must be remitted annually with the second quarter filing of IRS Form 720. Employers should also note that HRAs, as self-insured plans, must also comply with Section 105 nondiscrimination rules. These rules are designed to ensure that contributions and benefits do not discriminate in favor of highly compensated employees.

Further, HRA coverage must be limited to those participating in the major medical plan (or certified to be enrolled in another group medical plan, such as that of a spouse or domestic partner, although this adds administrative complexities). The integrated HRA can be designed to reimburse eligible expenses of the employee as well as a spouse or dependent. Finally, the group major medical plan to which the integrated HRA is linked must continue to comply with MHPAEA as described above. For further information about the compliance obligations associated with HRAs, see the PPI publication **HRAs, ICHRAs, and Other Employer Reimbursement Arrangements**.

Introduce an Excepted Benefit HRA (EBHRA)

In contrast to an integrated HRA, an EBHRA is a type of stand-alone HRA that can be offered to all employees and eligible dependents who are offered the employer's group health coverage, regardless of whether or not they enroll in such coverage. The "excepted benefit" status means the EBHRA is not subject to ACA requirements (including PCOR fees), but ERISA and COBRA still apply. However, a limitation of the EBHRA is that the maximum benefit per employee is capped at limits indexed annually by the IRS ($1,950/year for plan years beginning in 2023; $2,100/year for plan years beginning in 2024). The EBHRA benefit would need to be offered on the same terms to all similarly situated employees.

Provide Benefits Through an Employee Assistance Program (EAP)

Another potential option is to offer medical travel benefits under an EAP that qualifies as an excepted benefit. The EAP coverage can be made available to all employees regardless of whether they are enrolled in the employer's major medical plan.

Although EAPs are subject to ERISA (and COBRA, for medical care provided), an exemption from ACA requirements is available if all six of the following conditions are met:

1. The program must not provide significant benefits in the nature of medical care, taking into account the amount, scope, and duration of covered services.
2. The program must not coordinate with benefits under another group health plan.
3. Participants cannot be required to exhaust benefits under the program before being eligible for benefits under another plan (i.e., the program may not be a gatekeeper to obtain benefits from the underlying medical plan).
4. Participation in the program may not be dependent on participation in another group health plan.
5. No employee premiums or contributions may be charged for the program (i.e., the program must be fully employer-paid).
6. There may be no cost-sharing under the program.

However, it is unclear whether coverage of abortion-related travel expenses could potentially qualify as significant medical care benefits, removing the EAP from the ACA excepted status. The determination would involve a fact-specific analysis, but the more cautious approach is to assume that such a benefit would be considered "significant," and therefore the exception would not apply. Regardless, employers should assess this aspect of the option with counsel before adopting this approach.

Offer a Taxable Benefit

Finally, some employers may consider reimbursing employees on a taxable basis for travel expenses not specific to medical care for abortions, or may choose to provide an unconditional taxable bonus. The option of offering a taxable travel benefit to employees would be more costly than other options noted above (since there would be fewer restrictions on the reason for travel) and may not appeal to employers who prefer greater control over the expense reimbursements.

Note that arrangements sometimes referred to as "lifestyle spending accounts" (LSAs) may provide an avenue for reimbursing certain types of travel expenses. Benefits reimbursed from an LSA would be taxable, and ERISA would not apply if the LSA does not reimburse medical expenses. However, given that travel for medical reasons is considered a medical expense, ERISA would likely apply. Due to the inherent compliance issues, employers should consult with counsel before going this route.

HEALTH SAVINGS ACCOUNTS (HSA) ELIGIBILITY

It is important for employers to consider how their medical travel benefits may impact HSA eligibility. Remember that in order to be eligible for an HSA, individuals cannot have impermissible coverage, which is coverage provided before the statutory minimum high deductible health plan (HDHP) deductible is met (also called "first-dollar" coverage). If the benefit pays for travel expenses before the deductible is met, this could render covered participants (or their spouses or dependents) ineligible to make or receive contributions to an HSA. Accordingly, employers that sponsor HSA-qualified HDHPs should consider making any abortion-related benefits available only after the HDHP statutory deductible is met, such as in the form of a post-deductible HRA. For additional information about HSA requirements, see the PPI publication **Health Savings Accounts: A Guide for Employers**.

MIDYEAR BENEFIT ELECTIONS

Generally, benefit elections are irrevocable for the plan year under Section 125. Meaning, once a participant makes an election, the participant generally may not change that election for the duration of the coverage period (usually the plan year). However,

the IRS provides certain permissible exceptions to this irrevocability requirement. Per the IRS, a midyear election change is permissible only if 1) it is one of the permitted IRS qualifying events; 2) the Section 125 plan allows the change (i.e., it is included in the Section 125 written plan document); and 3) the change requested is consistent with the specific qualifying event.

Adding an abortion-related benefit (such as a travel reimbursement benefit) to the major medical plan on a midyear basis would likely trigger a midyear election change event based on an addition or significant improvement of a benefit option. Employers should review their Section 125 plan document to see if it includes that permissible midyear election change event or consider amending their plan to allow for this event if it is not already available. Most plan documents allow for any change allowed by the IRS, unless the employer has imposed specific restrictions. Employers that adopt midyear plan enhancements will need to distribute to plan participants a summary of material modification (SMM) describing the midyear change to the plan.

QUESTIONS TO DISCUSS WITH COUNSEL

As noted above, any employer response to the *Dobbs* decision will implicate myriad laws and regulations that must be considered. Employers should consult with their legal counsel when considering how answers to the following questions will impact their decision to offer these types of benefits:

- How will the employer determine eligibility for such benefits?
- How will the employer distinguish between travel expenses that are eligible for reimbursement under the employer's medical travel arrangement versus those that are eligible for reimbursement under the employer-sponsored health FSA or HRA (as applicable)?
- If the major medical plan is fully insured, does it offer benefits to employees in states that limit abortion coverage or that require additional riders for state residents?
- If the major medical plan is self-insured, will claims for additional abortion or gender-affirming care (beyond what the plan currently provides) be processed through the medical plan? Would such claims be considered in-network under all circumstances?
- What requirements must be met if the benefits are offered through an HRA? What steps will be required to integrate the HRA with the major medical plan?
- If reimbursing travel expenses is a key component of the chosen design, how will the employer substantiate qualified expenses? What vendor or TPA will assist in the reimbursement process if the employer is unable to self-administer the benefit?
- How will the design of the benefit alter its federal taxability? Even though current federal law allows for tax-free coverage of health expenses, what will it mean if certain states require that abortion or gender-affirming services be taxed on the state level?
- Will the midyear addition of an enhanced benefit trigger a new open enrollment period for benefits-eligible employees and/or require distribution of an SMM?
- Will certain state laws (current or proposed) subject the employer to any liability for providing the means for state residents to receive locally prohibited health services in a different state?
- How will the bevy of differing state laws affect multistate employers that wish to provide such benefits?

SUMMARY

The *Dobbs* decision overturning *Roe v. Wade* and *Planned Parenthood v. Casey* raises many questions that plan sponsors may need to address with legal counsel in designing healthcare travel arrangements and related health and welfare benefits. Employers should be aware that this issue will likely be heavily litigated on the federal and state levels and become the subject of federal and state congressional action for years to come. So, employers should be prepared to re-examine their decisions at various intervals as certain court cases are decided and federal or state laws are enacted.

RESOURCES

19-1392 Dobbs v. Jackson Women's Health Organization

Publication 502, Medical and Dental Expenses

PPI BENEFIT SOLUTIONS