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## Group Health Plans and The Dobbs Abortion Decision Implications for Plan Sponsors

In light of the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, employers that sponsor group health plans are considering what impact this decision will have on their group health plan. In *Dobbs*, the Supreme Court overruled fifty years of precedent and held that the Constitution does not provide for a right to abortion and that states can legislate and limit (or ban) abortion. This alert discusses immediate issues raised by the decision. As noted below, the issues raised by *Dobbs* and resulting state laws on abortion are complicated and not subject to a clear answer. Employers may wish to consult with their legal counsel regarding the issues below.

### May a Group Health Plan Continue to Provide Coverage for Abortions?

To the extent a group health plan currently offers abortion coverage<sup>1</sup>, whether it may continue to do so will be affected by two factors: (1) whether the plan is fully insured or self-funded, and (2) the state in which the plan is located. In general, ERISA's broad preemptive provisions allow group health plans to continue to provide coverage for abortions, whether elective or medically necessary, regardless of state laws limiting abortion. (ERISA is the federal statute that governs group health plans, except those sponsored by churches and federal, state and local governments.) ERISA preempts all state law regulation of group health plans, with the exception of the states' right to regulate insurance. Thus, an employer plan should be able to offer coverage for abortion services even though the employer has employees in states that ban abortion. If a health plan offers abortion services, employees residing in a state that bans abortion obviously will have to travel to obtain abortion services.

Plans that are fully insured face additional issues. Currently, a number of states do not directly regulate abortion services coverage under insurance policies (i.e., either requiring coverage or restricting it). Unless state insurance laws prohibit insurance carriers from providing abortion benefits, an insurance policy in that state could provide abortion coverage even though the state bans abortion. However, again, travel outside the state would be required to access such benefits. (When travel is required to access abortion, network issues may also exist, as the plan may not have any "in-network" providers outside of the state.) As state abortion trigger laws go into effect and additional states restrict abortion rights, more states may also amend their insurance laws to prohibit coverage of abortions. If state law prohibits insurance plans from covering abortion services, then a fully insured plan could not offer abortion coverage unless the plan added a self-insured abortion benefit to the plan.

### Can an Employer Reimburse Travel Expenses to a State Where Abortion is Legal, either through its Group Health Plan or Directly?

If the employer has employees in states where abortion is banned or severely limited, a self-funded plan that covers abortion services could also cover the travel expenses needed to access covered abortion care, to the extent such costs are allowable under the Internal Revenue Code (the Code). In general, under the Code, the following travel expenses that are necessarily incurred to access care are considered a "qualifying medical expense," and reimbursement of such expenses is exempt from the employee's taxable income and otherwise deductible by the employer:

- Transportation costs such as plane, train or bus fares, or taxi costs, or the cost of gas and oil if driving by car (the current mileage reimbursement rate is \$0.18/mile for medical expenses);
- Required lodging of up to \$50 per night; and
- Meals, but only if provided by the medical provider.

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Client Alert Applies To: Self-Funded, Fully-Funded, Large Group, and Small Group

Note that if the employer has a qualified High Deductible Health Plan (HDHP), reimbursement for abortion-related travel services, as with other medical expenses, would be subject to applicable plan deductibles and co-insurance.

An employer with a non-HDHP could also opt to establish a Health Reimbursement Account (HRA) that reimburses abortion-related travel expenses (subject to Code-related reimbursement rules outlined above). Note, however, that under Affordable Care Act (ACA) rules, the HRA would either need to be integrated with the employer's group health plan, meaning that only participants in the group health plan would have access to the HRA, or the HRA would need to limit benefits to a maximum of \$1,800 per year, in order to qualify as an excepted benefit under the ACA. (Note that an employer who maintains a HDHP would need to structure the HRA as a post-deductible HRA, to maintain employee HSA eligibility.) A standalone abortion-related HRA would also be considered a health plan that must comply with the requirements of ERISA, COBRA, and HIPAA.

Finally, an employer could reimburse abortion-related travel expenses on a post-tax basis outside of the group health plan.

## May Employees Use FSA or HSA Funds for Abortion Services and/or Out-of-State Travel?

Abortion medical services that are legal in the jurisdiction in which such services are obtained are qualified medical expenses under the Code, and as such, may be reimbursed by a FSA or HSA on a tax-free basis. FSA or HSA funds may similarly be used to reimburse travel expenses (subject to the limits set forth above) necessarily incurred to obtain abortion services.

## Does an Employer Risk Liability Under State "Aid and Abet" Laws by Providing Abortion-Related Travel Assistance?

It is currently unclear whether an employer that offers abortion travel could face potential liability under state laws that impose civil or criminal sanctions on those who "aid and abet" a citizen in obtaining an out-of-state abortion. Currently, Oklahoma and Texas are the only states with "aid and abet" laws, and both states' laws impose civil (not criminal) penalties for aiding and abetting an illegal or out-of-state abortion. However, state legislators in additional states have suggested more similar legislation is likely. While there are numerous legal and practical obstacles to imposing liability on employers or health plans under aiding and abetting laws (including ERISA preemption principles, jurisdictional issues, the constitutional right to interstate travel and the difficulty of enforcement), uncertainty remains over how these issues would be resolved by the courts. Employers are well-advised to continue to monitor this issue and to consult with their legal counsel as necessary.

<sup>1</sup> Some plans only provide coverage for non-elective abortions, i.e., in situations where the mother's health is at issue, the pregnancy was the result of rape or incest, or fetal viability. Plans can continue to restrict abortion coverage subject to the requirements of the Pregnancy Discrimination Act, which mandates coverage of abortion where the mother's life would be endangered if the fetus were carried to term, and coverage of complications that arise in the course of an abortion.

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