Dobbs: Considerations for Plan Sponsors Post-Roe

On Friday, June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health*. Overturning two prior precedents, *Roe v. Wade* and *Casey v. Planned Parenthood*, the *Dobbs* decision permits states to regulate and/or prohibit access to abortion at any stage of pregnancy. Following the decision, it is expected that at least 26 states will ban or severely curtail access to abortion.

Considering the shifting legal landscape, many employee benefit plans sponsors are seeking guidance on how the decision will affect health plan coverage of abortion and how best to respond to the Court's ruling and the expected patchwork of laws governing abortion. Below we discuss several of the more immediate considerations.

As an initial matter, the impact of the Dobbs decision depends in part on whether the sponsor's health plan is fully insured or self-funded. Fully insured plans are subject to state insurance law and, as such, may not provide abortion coverage in states where abortion is prohibited. Meanwhile, self-funded plans are not subject to state insurance laws, providing more flexibility when designing and implementing abortion coverage.

ERISA Preemption

As a general rule, the Employee Retirement Income Security Act of 1974 (ERISA) preempts all state laws that relate to or have an impermissible connection with employee benefits plans. Therefore, any state law that specifically prohibits or mandates abortion coverage under an employer-sponsored group health plan would be seemingly preempted for plans subject to ERISA.

However, ERISA does *not* preempt generally applicable criminal law. This exception is most often applied for criminal conduct such as fraud, embezzlement and larceny, but not for laws specifically directed at employee benefit plans. Many states' statutes prohibiting abortion make unlawful abortion a crime, and several others (e.g., Texas and Oklahoma) go one step further by criminalizing "aiding and abetting" the performance of an illegal abortion.

As such, it is unclear whether ERISA preemption will provide a complete shield in the event a plan sponsor elects to make abortion coverage available in a state with wide reaching criminal laws related to abortion. Commentators and industry leaders agree that the preemptive effect of ERISA on state abortion laws will be

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litigated in the near future, but clarity on this issue may take years to achieve. Accordingly, if plan sponsors wish to provide some sort of abortion related assistance through employee benefits, those sponsors should ensure that they are comfortable with a level of legal uncertainty.

Health Plan Coverage

Sponsors of self-funded plans should first review their current plan provisions for coverage for abortion-related services. Many plans may already include a limited abortion benefit due to interpretations of the Pregnancy Discrimination Act. A thorough review of their plan should help sponsors determine if changes are necessary due to state legal requirements.

If comfortable with the legal risks, plan sponsors that already cover abortion could continue providing that coverage without change. In addition, plan sponsors could amend their plans to provide abortion coverage under the medical benefit. Plan sponsors might also consider expanding pharmaceutical coverage to include prescription abortion medication such as mifepristone and misoprostol. To this point, abortion medications have taken a backseat to more traditional surgical abortions among state legislatures. However, plan sponsors should be prepared for rapid changes in the regulatory landscape as states may move to enact corresponding restrictions on pharmaceutical abortion, which may affect health plan coverage decisions.

Travel-Related Expenses

Plan sponsors could also consider adding a travel benefit to allow covered individuals access to abortion services if they live in a state where abortion is prohibited. Travel benefits could be provided in a number of ways, including group health plans, health reimbursement arrangements (HRAs), employee assistance programs (EAPs) and taxable reimbursement programs, and each option has pros and cons. An EAP and a taxable reimbursement program limited to medical travel would still be considered ERISA benefits and, as such, would require additional administration. Further, an EAP would need to qualify as an "excepted benefit" in order to satisfy ACA requirements. As such, the direct group health plan coverage and HRA reimbursement seem to be the most viable options.

- *Group Health Plan Coverage*. Plan sponsors may be able to provide travel-related benefits under currently existing group health plans, which would allow the sponsor to implement the benefit with minimal administration changes.

Furthermore, travel-related expenses may not be considered "essential health benefits" under state benchmark plans, which would allow sponsors to cap total travel benefits at a certain dollar amount. However, plan sponsors should also consider the risk under the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) of providing travel benefits for medical/surgical procedures and not mental health and substance use disorder treatment. One way to address the MHPAEA concern could be to provide a generally applicable travel benefit that would apply to any covered service under the plan. The limits under section 213 of the Internal Revenue Code (the Code) for reimbursement of medical related travel (e.g., $50 per night for lodging) would apply, but plan sponsors could provide a more robust taxable benefit.

- *Health Reimbursement Arrangement Coverage*. Plan sponsors could also provide reimbursement for travel and lodging expenses through an integrated HRA. However, as a group health plan, an HRA would have similar issues as the direct group health plan coverage discussed above and an HRA would have start-up and administrative costs in the event the sponsor does not already have one in place. Furthermore, any reimbursement provided through an HRA would be subject to the limits under Code section 213, without the ability to provide the greater taxable benefit.

Some sponsors may wish to use an EAP or taxable reimbursement program in an effort to provide coverage for employees not enrolled in the sponsor's group health plan. However, using these methods may create substantial administrative difficulties and compliance concerns. Therefore, we recommend that plan sponsors who are interested in providing a travel benefit contact qualified legal counsel to determine which method would be appropriate for their current benefit structure.

Service Provider Considerations

After plan sponsors have determined how they want to provide abortion coverage, they should coordinate with their service providers (e.g., third-party administrators, pharmacy benefit managers and telehealth providers) to determine whether they are capable of administering these benefits. Not all vendors will facilitate abortion-related coverage for any number of reasons. For example, state laws could potentially impact the ability of telehealth providers to prescribe medication and/or prescribe medication across state lines. Furthermore, while many administrators are moving quickly to respond to recent developments, it may be some time before abortion-related administrative

services are widely available across the country.

If you have questions about the Dobbs decision and the potential impact these legal changes could have on your benefit plans, please contact your Reinhart attorney.