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Benefits, Leaves, Pay, and Accommodations Post-*Dobbs*: Critical Reminders for Employers

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Agenda

- Quick overview of *Dobbs*
- What does *Dobbs* mean for employer health plans?
- Tax treatment of travel reimbursement
- Mechanics of travel reimbursement benefits
- State law issues – aiding and abetting?
- Anti-discrimination
- Leaves of absence and accommodations
- Pay/wage replacement benefits
- California!
- Questions

Dobbs v. Jackson Women's Health Organization (2022)

- Overturned *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)
- No federal constitutional right to abortion
- States can decide how to regulate abortion – the practical impact will vary by state
 - Some have retained pre-*Roe* abortion laws that may again take effect
 - Some have “trigger laws” set to take effect either immediately, within a set time after the *Dobbs* decision, or upon some action (e.g., certification by the state attorney general)
 - Some are expected to pass new laws restricting abortion
 - Some are expected to strengthen protections for abortion

What does *Dobbs* mean for employer health plans?

- ERISA does not restrict employer-sponsored health plans from covering abortion
- ERISA does not require employer-sponsored health plans to cover abortion
 - Except Pregnancy Discrimination Act (PDA) requires coverage of abortion where the life of the mother would be endangered if the pregnancy were carried to term

What does *Dobbs* mean for employer health plans?

- Insured plan will be subject to the law of the state that governs its insurance contract
- Self-insured plan can be designed to cover abortion or not, subject to PDA exception
- For plans that cover abortion, participants in some states will now have difficulty accessing that benefit
- Many employers considering adding medical travel expense benefits

Medical Travel Expense Benefits

- Scope of the benefit
 - Access to abortion care only?
 - Access to reproductive health care + gender affirming care?
 - Access to any medical care restricted by state law?
 - Access to any medically necessary care covered by the plan?

Medical Travel Expense Benefits – Tax Treatment

- Internal Revenue Code Section 213(d): the following amounts are treated as “medical care” that is excludable from an employee’s income, if they are “primarily for and essential to” obtaining medical care:
 - Transportation expenses (e.g., airfare, mileage, etc.)
 - Up to \$50 per night of lodging expenses
 - The above expenses for a travel companion whose presence is necessary for the patient to obtain medical care

Mechanics of Travel Reimbursement Benefits

- Programs to reimburse medical expenses are generally group health plans under ERISA
- Options would include: medical plan, health reimbursement arrangement (HRA), or employee assistance program (EAP)
- Reimbursements limited to those enrolled in your current plan?
- Practical reasons to have an outside company administer these arrangements
 - Third-party administrator (TPA) or benefits enrollment firm
 - Could this be done in-house, at least as a stop-gap?

State Law Considerations (Outside California)

- There are some federal legal considerations (ERISA, MHPAEA, HIPAA privacy), but ...
- 13 states have “trigger” laws of one form or another on overturn of *Roe*
- Half the states expected to ban or restrict abortions under *Dobbs*
- Typical laws bar abortions after a certain time (15 weeks, 6 weeks)
- No longer a state or regional issue for employers

State Laws – What About Aiding and Abetting?

- Other types of statutes could include aiding and abetting as a violation
- State abortion laws generally focus closely on medical providers
- Texas (2021) and Oklahoma (2022) “heartbeat” laws put new twist on this
 - Aiding and abetting includes reimbursing for an illegal abortion through *insurance*
 - States are moving fast and others may follow suit
- Could covering out-of-state medical expenses under your plan really violate state civil laws?
 - Out-of-state abortions v. reimbursements of employees in-state
 - Justice Kavanaugh’s take on a related issue
- Criminal liability under pre-Roe laws?

How to Manage Aiding and Abetting Risks

- ERISA plans, especially self-insured ones, have a good card in their hands – ERISA broadly preempts state laws that “relate to” benefit plans
- Good arguments that these laws interfere with uniform administration of plans
- Limitations on ERISA preemption include: insurance laws, “generally applicable” criminal laws
- Practical considerations to minimize potential exposure now and vigilance about future laws (especially criminal laws)

Quick Note on Medications

- Abortion medications covered under many plans (about half of recent U.S. abortions are by medication)
- States often regulate medications specifically
 - 19 states require presence of doctor to administer (no telehealth)
 - A few states ban them completely
- As states legislate in this area, they may ban or restrict medications, too
- What will pharmacy benefit managers (PBM) be able to do for your employees as state restrictions continue?

Practical Tips for Reimbursement Benefits

- Take advantage of ERISA (broad preemption of state laws) and use self-serving plan language
- Coordinate with administrators – TPA, PBM, telehealth company – to see what is actually doable
- Staying within IRS guidelines will simplify administration
- Check liability policies to see what might apply to state exposure: E&O, D&O, ERISA fiduciary liability
- Be sure to consider impact on coverage of abortion medications
- Cautious approach in early communications to employees

Federal Pregnancy Discrimination Act

- Protects employees from discrimination on the basis of ...
 - Pregnancy
 - Childbirth
 - Related medical conditions
- Related medical conditions
 - An employee having an abortion
 - An employee contemplating having an abortion
 - An employee NOT having an abortion

Leaves of Absence – FMLA



- Employee entitled to abortion-related care if health care provider certifies employee has a serious health condition
 - Serious health condition – continuing treatment and generally more than 3 consecutive calendar days of incapacity
- Elective abortions covered?
 - Incapacity due to pregnancy or for prenatal care – minimal amount of incapacity or needed leave sufficient

Leaves of Absence -- CFRA

- Disabilities related to pregnancy are NOT covered by CFRA

California Pregnancy Disability Leave (PDL)

- California Fair Employment and Housing Act (FEHA) prohibits discrimination, harassment, and retaliation
- Applies only where a doctor has certified that a pregnant woman suffers from a “disability” based on pregnancy, childbirth, or **conditions related to pregnancy**
- Conditions related to pregnancy include prenatal care, loss or end of pregnancy, and post-partum depression
- FEHA also requires employers to provide PDL to an employee if her doctor certifies that time off is necessary

Pregnancy Disability Leave (PDL)

- Must grant up to **4 months** of “disability” leave
 - 17 1/3 weeks, or 693 hours for F/T employees working 40 hours; 346.6 hours for P/T employees working 20 hours
 - An employee who works 48 hours per week is entitled to 832 hours
- Must maintain employee on benefits
- **Guarantee reinstatement to former position**



Reasonable Accommodations



- ADA and FEHA
 - An employer must engage in the interactive process with an employee with a statutory disability
 - Pregnancy is not a disability
 - Pregnancy-related conditions can be a disability
- Pregnancy-related restrictions
 - Employer must accommodate pregnancy-related restrictions just as it would non-pregnancy-related restrictions

Leaves of Absence – State/Local Leaves

- State may define conditions covered/not covered
- Some states may decide to exclude abortion expressly
- Some states may decide to include abortion or remain silent

Leaves of Absence – Employer Policies

- Employer policies
 - Sick leave
 - Personal leave
- Federal law requires that employers apply the policies evenhandedly
 - PDA – no abortion discrimination
- Even in states that prohibit abortions?
 - Likely would be a legitimate, nondiscriminatory reason
 - BUT employer would have to know the employee is seeking employer-provided leave for that reason

Reasonable Accommodations?

- Pregnant employee who travels for business asks not to have to travel to states that restrict abortions
- Pregnant employee who works in branch in state that restricts abortions asks to work temporarily at a branch office in a state that does not restrict abortions

Pay/Wage Replacement



- State paid leave benefit
- Employer benefit plan – short-term disability benefits
 - Incapacity duration may not be long enough to qualify for benefits
 - Discuss with insurer or TPA if in a state with aiding and abetting law to confirm whether any changes to claim process will be implemented by TPA/insurer
- Employer policy – PTO, vacation pay, sick pay
 - Employer has control over scope of coverage
 - Employer has control over information required to request the benefit
 - Key Point: Not clear whether lack of any notice for the reason paid leave is requested would be a sufficient defense to avoid some state penalties. The Texas law confirms the penalty applies when someone “knowingly” aids or abets in obtaining an abortion, regardless of whether the person knew or should have known the abortion would be performed in violation of this state law.

California!

- AB 1666
 - Already signed by Governor Newsom (6-24-22) as urgency legislation
 - New law shields people seeking abortion care in California from civil actions brought by other states
- Proposed constitutional amendment enshrining right to an abortion in the state's constitution (on November ballot)

Other California Measures Being Considered

- Reproductive Health Proposal
 - Grants to providers to offset cost of providing care to low/moderate income individuals without access to health plan coverage
 - Grant to fund public outreach on sexual and reproductive health issues
- State scholarships/loan payments for health care providers that provide reproductive health services
- New proposal for tax and other incentives for businesses to relocate to California or create new jobs from states that are hostile to reproductive freedom
- SB 24 – UC/CSU student health facilities must offer medical abortion (onsite or telehealth)

Questions?



Thank you!

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