

## Post-Roe Roulette:

How the *Dobbs* Decision Impacts  
Employer-Sponsored Benefit Plans and  
Employment Policies

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# Presented by



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# Agenda

- Benefits
  - Reimbursement of travel expenses
    - Federal benefits concerns
    - State law enforcement
  - Coverage for abortion
    - Special concerns for fully-insured plans
    - Decisions for self-funded plans
    - State law enforcement
- Employment law considerations





# Travel Reimbursements

# Federal Considerations

- Eligibility
- Taxation
- Mental health parity
- HSA considerations
- Practical/administrative issues

**Why are employers limiting this to  
medical plan participants only?**

# Eligibility

- Offering reimbursements to *all* employees could be an issue under the ACA
- Limiting eligibility to medical plan participants is the safer approach
- For a fully-insured plan, this may need to be drafted as a “side car” HRA if it can’t be baked into the insurance policy itself
- Be careful of turning your “emergency relief fund” into a group health plan

***Q.) What EAPs? They're offered outside medical plans! Can't we just call this an EAP?***

**A.)** An EAP can be offered on a standalone basis, but only if it qualifies as an “excepted benefit.” To be considered an “excepted benefit,” the EAP cannot offer “significant” medical benefits.

- No clear guidance on what that means
- Reimbursing a flight doesn't seem significant, but...
- Several thousand dollars in reimbursements could be reasonably viewed as “significant” by a regulator



**Are all reimbursements automatically  
tax-free?**

# Taxation

- The federal tax code allows certain travel reimbursements to be provided on a tax-free basis
- Be mindful of tax code's limits on lodging expenses
- Confirm that your administrator will be able to handle the imputed income issues associated with excess lodging reimbursements
- Exceeding the Code's limit is permissible; it just means that the excess is treated as taxable wages

**Why is my TPA telling me I have to  
reimburse *other* expenses too?**

# Mental Health Parity

- Benefits for mental health/substance use must be provided on the same terms as medical/surgical benefits
- Providing a travel reimbursement for abortion benefits without an equivalent benefit for MH/SU may cause parity concerns
- Consider expanding the reimbursement to all care that is prohibited locally

# How does this work with an HSA?

# HSA Coordination

- HSA contributions are permitted only if the individual is covered under certain “high-deductible” coverage
- To be HSA-compatible, the coverage cannot reimburse most medical expenses before the deductible is met
- Until we receive further guidance from the IRS, assume that an HSA-compatible plan *cannot* reimburse travel expenses before the deductible is satisfied
- *But...*remember that participants can use their accrued HSA balance to cover these costs

**What else do we need to consider  
under federal law?**

# Practical/Administrative Considerations

- Who is going to be processing these reimbursements?
- Be mindful of HIPAA privacy
- Consult with your claims administrators now



# State-Law Considerations

- ERISA preemption
- Aiding & abetting liability
- Criminal liability

# ERISA Preemption

- Don't bet on it but it's better to have an ERISA plan than a plan that has no defense to state claims
- While strong arguments exist, ERISA preemption is a defense, not a guarantee.
- Criminal laws of “general applicability” are not preempted by ERISA, and case law is thin in this area.

# State Regulation

- If ERISA preemption fails, state statutes are now a live concern
- Numerous states have laws that potentially implicate travel reimbursement programs
- Enforcement varies from civil remedies (e.g., Oklahoma) to criminal punishment (e.g. Texas)
- Texas and Arizona have issued an AG opinions stating that their historic criminal statutes regarding aiding and abetting abortion remain good law....but Texas' law is temporarily blocked

# Hypothetical Example

- “§ 13A-13-7 Inducing or attempting to induce abortion, miscarriage or premature delivery of woman
- Any person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than \$100.00 nor more than \$1,000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months”

# Risk Consideration

- Evaluate your employee population and physical locations
- Review all local state laws
- Consult local criminal counsel
- Potentially adjust the scope of your program based on your risk tolerance



# **Adding/Removing Abortion Coverage**

# Fully-insured Plans

- Your insurance policy is governed by state insurance law
- 6 states *require* abortion coverage\*
- 20 states *restrict* abortion coverage in some fashion\*
- Your ability to subtract abortion coverage through the policy will be dictated by state law
- If state law prohibits addition of abortion coverage to your policy, consider integrating a self-funded HRA with your coverage

\* Source: <https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion>

# Self-Funded Plans

- No *requirement* to cover abortion under a self-funded plan.
- Employers can choose whether or not to cover abortion under their plans.
- If ERISA preemption fails, consider your liability under state law for directly funding an abortion.
- When considering state law, don't forget about your employees' dependent children.





# Employment Law Implications

# Impact to the Workplace

- Polarizing topic = strong reactions/opinions
- Watch for:
  - Discrimination
  - Impact of differing viewpoints on morale and productivity
  - Additional requests for leave
  - Impact on training needs and policy revisions

# Discrimination

- Title VII, as amended by the Pregnancy Discrimination Act prohibits adverse employment actions based on “pregnancy, childbirth or related medical conditions”
  - EEOC’s Position: Employers may not discriminate against employees on the basis of an employee’s decision to have an abortion

# Differing Viewpoints

- Consider the need for additional/refresher training on company policies concerning harassment and retaliation
  - What is appropriate conduct in the workplace?
    - Dress codes
    - Social media posts

# Differing Viewpoints



# Differing Viewpoints



"I have been working for ABC Corporation, and after the Supreme Court's ruling in *Dobbs*, ABC Corporation announced it will pay for employees who need to travel to another state to get an abortion. They should use that money to pay us more! They could give us a 401k match, but nope... here we are... Killing babies!" #livingwage #prolife.



Word of Caution: Section 7 of the NLRA

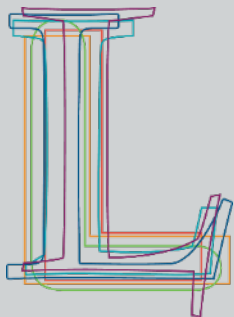
# Requests for Leave

- Mental health impact = potential FMLA and ADA issues.
  - Federal + state-by-state analysis
- Need for abortion = potential FMLA and paid sick leave implications (for the states that have it)
- Assess procedures for evaluating leave/accommodation requests and ensure management /HR is properly trained on how to process requests

# Policy Evaluations

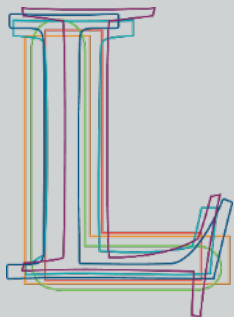
- Social media
- Dress code
- Code of conduct





# Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



# Thank You!

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