

Employer-Provided Abortion & Travel Benefits: An Overview of Legal Considerations

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In the wake of the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, many companies have announced plans to assist employees in accessing abortion services, including providing travel assistance to employees located in states where abortion is now illegal. There are important legal considerations for employers to weigh when considering whether and how to provide such benefits.

Impact of State Laws

Employers should consider whether the potential benefits could be considered illegal in the particular state(s) in which they operate and whether the employer's assistance could be viewed as aiding and abetting the provision of abortion services. These laws will likely guide the type of coverage and assistance employers provide.

For Iowa employers, Iowa law *currently* does not restrict private insurance coverage for abortion services, nor does it criminalize the aiding and abetting of abortion services. However, since the Iowa Supreme Court also recently held abortion is *not* protected under the Iowa Constitution, nothing prevents the Iowa legislature from passing abortion restrictions in the future.

Employers in states criminalizing the aiding and abetting of abortion services will want to work with legal counsel to assess the risk associated with various benefit designs and ways to structure the benefit to reduce risk. While the Employee Income Retirement & Security Act ("ERISA") generally preempts state laws that regulate private employer-sponsored benefits, state criminal laws that are "generally applicable" are not preempted.

In addition, "travel benefits" offered outside of the employer's group health plan may not be considered ERISA-covered benefits to which the preemption doctrine would apply. Whether a state law criminalizing the aiding and abetting of abortion services is preempted by ERISA will likely depend on how the law is drafted. If it targets and specifically applies to employer-sponsored health benefits it is more likely to be preempted.

Employers should monitor the state laws as they develop in the states that they operate, including legal challenges to their application to employers and employee benefit plans. For the time being, including the benefit within the employer's major medical coverage and expanding travel-related benefits to services other than abortion coverage (such as services that can only be obtained from a provider out of state) are ways employers can reduce the risk in states with restrictive laws.

Eligibility and Design

Employers seeking to add, expand, or maintain abortion coverage and access benefits should also consider whether to include such coverage with the current medical insurance coverage. Whether and how fully insured employers can

add the coverage to their major medical insurance will likely depend on the specific state law and their carrier policies. For example, some states already restrict insurance coverage of abortion in private insurance plans. Self-funded plans will have more flexibility (subject to the considerations above). Employers adding benefits to their underlying major medical coverage should work with their carrier and/or third party administrator to help design and implement the benefit. Some of the benefits may need to be self-administered by the employer, such as reimbursement of out-of-pocket travel expenses.

Employers wishing to extend abortion and/or access benefits to all employees, regardless of whether they are eligible for and covered by the employer's major medical coverage, will likely have more risk associated with the underlying benefit. In addition to the state laws referenced above but also because of the variety of complicated laws that apply to employer-provided benefits.

Because of the numerous requirements, the Affordable Care Act ("ACA") imposes on group health plans, employers will need to design the benefit to either (a) meet an exemption to the ACA requirements; or (b) be limited to paying only for non-health benefits, such as travel expenses, so as not to be considered a group health plan.

For example, it may be possible to design an integrated health reimbursement arrangement or employee assistance program to fund certain access benefits, such as travel assistance. Because the law on this issue is still evolving, employers should be mindful that travel benefits payable solely to obtain an abortion or other health care services could be viewed as a "group health plan" and subject to various federal laws applicable to group health plans, including the ACA.

In addition, there will be potential tax implications depending on how the employer structures the benefit. Employers should work with their legal counsel and tax advisors to ensure any benefit provided outside the employer's major medical coverage is appropriately structured to comply with federal benefits and tax laws and assess the state law impact discussed above. As the Biden Administration weighs its options for protecting access to abortion services it is possible additional regulatory reforms could be proposed to provide employers with greater flexibility.

Coverage Issues

Employers wanting to ensure employees have access to abortion services should also assess what benefits their major medical insurance currently covers and whether there are opportunities to improve access to abortion-related services by expanding their prescription drug formularies, telehealth services, or in-network providers.

In addition, employers who offer tax-free accounts, such as health FSAs and health reimbursement arrangements, may wish to review their plan's definition of qualifying medical care expenses to ensure it is as expansive as federal tax law allows, such as covering travel expenses for medical care.

Bottom Line

Employers should understand that the law on these issues will likely continue to evolve for years to come and may change from time to time as administrations change. Employers should consult their legal and tax advisors for the most recent developments.

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