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Reviewing Employer Health Plan Coverages in the Post-Roe Era

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Insights for Employers

With the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, employers should review their employee benefit plans and assess their options and obligations in offering group health plan coverage to their employees. The post-*Dobbs* landscape is likely to create challenges for multistate employers that provide health coverage to employees in states that have different laws regarding abortion.

As always with employer group health plans, the first question the employer should ask is, "What does the plan say?" Employers should carefully review the terms of their plan documents, summary plan descriptions, benefit booklets, or certificates of coverage to understand exactly what their plan covers with respect to women's health and reproductive care, pregnancy, and abortion services. For insured plans, some of those coverages may be mandated by state insurance laws that apply to policies issued within a particular state. In addition to coverage rules for specific treatments, employers should review any services that would be covered in relation to those treatments—such as reimbursement for travel, lodging, or companions.

After assessing current coverages, an employer should consider whether a change in coverage is warranted. For example, an employer may want to amend their plan to remove health plan coverage for abortion services that have become illegal for plan participants in a particular state or in the employer's home state. Alternatively, an employer may want to amend their plan to provide for additional coverage to plan participants residing in states where abortion services have become illegal, including coverage for travel and lodging expenses. The employer should carefully review and consider whether such coverage expansions will qualify as "medical care" under Section 213(d) of the Internal Revenue Code. Expenses that do not qualify as medical care would have to be provided as a taxable benefit to the employee. In this regard, Section 1.213-1(e)(1)(ii) of the Treasury Regulations provides that "[a]mounts expended for illegal operations or treatments are not deductible."

The ability of employers to determine which coverages are available under their group health plans is generally protected from state interference through ERISA's broad preemption doctrine. These preemption rules place limits on the ability of states and local governments to dictate which healthcare services private employers must or must not cover through their group health plans subject to ERISA. Under these rules, if an employer offers a group health plan

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that is self-insured (*i.e.*, funded by the employer without insurance), state efforts to regulate the plan's coverages will generally be preempted. If, however, the employer purchases a group health insurance policy to provide benefits under a plan, a state may regulate the plan indirectly through its regulation of the plan's insurer and health insurance policy. Thus, group health plans that are insured will continue to be subject to state regulation through the states' authority to regulate insurance.

Further, ERISA preemption does not apply to the "generally applicable" criminal laws of a State. Historically, this criminal law exception to ERISA preemption has rarely arisen in the employer health plan context. However, the extent to which state law will seek to criminalize conduct related to abortion (including "aiding and abetting" in the provision of an abortion) remains uncertain.

The *Dobbs* decision will likely impact employers and their employees in several ways, and the treatment of employee health plans is just one area for employers to consider. Employers should carefully consider the effect of these potential issues and consult with qualified legal counsel to assess their risks and options.