

Publications

Employee Benefits Considerations Following *Dobbs*

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CLIENT ALERT | 7.7.2022

The U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* overturned the constitutional right to an abortion. As a result of the *Dobbs* decision, each state will determine if, and to what extent, abortion services will be permitted in that state.

Many employers are now considering whether and to what extent they may provide benefits to employees and their dependents who are seeking an abortion and other reproductive health services. For the foreseeable future, employers will need to be prepared to react to many variables, including changes in state laws, court decisions, and new regulations that may be issued at the federal and state levels. Employers also need to understand that there may be risks associated with implementing changes following the *Dobbs* decision; however, at this time, some of those risks are difficult to quantify.

The following is a brief overview of some of the issues employers should consider when deciding whether to implement any changes to their employee benefits post-*Dobbs*:

- *The extent to which coverage for abortion services is required or permitted under applicable law.* In general, federal law does not require employers to provide coverage for abortion services. Fully-insured group health plans are subject to state insurance laws. As a result, whether coverage for abortion services is required or permitted under a fully-insured plan will depend on the insurance law in the state where the insurance policy is issued. In contrast, a state law that "relates to" a self-insured group health plan generally will be preempted by ERISA. This means a self-insured plan may have more flexibility with respect to plan design. However, there are limits to ERISA preemption. For example, courts have ruled that ERISA does not preempt some generally applicable state laws and there is an express exclusion from ERISA preemption of generally applicable criminal laws. It is not yet clear how courts will rule (or whether they will agree) on whether ERISA preempts a state law that penalizes aiding and abetting an abortion.

- *Whether travel expenses for abortion and other reproductive health benefits should be covered under a group health plan.* Providing benefits inside a group health plan gives possible ERISA preemption protection against state laws, but the benefits are then limited to those employees enrolled in the plan. Providing benefits outside of a group health plan (e.g., a taxable cash reimbursement for travel expenses related to abortion services) potentially allows an employer to provide benefits to all employees and not just the employees who are enrolled in the employer's group health plan. However, these stand-alone benefits can raise compliance issues, including under the Affordable Care Act and HIPAA privacy rules.
- *Potential tax consequences of covering abortion-related travel expenses under the group health plan.* An employee will have taxable income for any expenses reimbursed under a group health plan that exceed the limits for qualified medical expenses (as defined under IRS rules). Those IRS limits are lower than most travel and lodging expenses actually incurred, which means employers will need to treat reimbursements in excess of those limits as taxable income to their employees. This also means that employers may need to create a process to tax any reimbursement that exceeds those limits.
- *Compliance with mental health parity rules.* Employers that provide increased travel benefits for abortion services under their group health plans will need to consider compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). For example, employers will need to consider whether offering travel benefits for abortion services means the group health plan needs to offer comparable travel benefits with respect to mental health and substance use disorders.
- *Administrative feasibility.* Employers will need to determine whether their group health plan's medical carriers, third party administrators, and pharmacy benefit managers will be able and/or willing to administer any proposed changes.

As these considerations illustrate, employers will need to carefully assess any proposed changes to their employee benefits in reaction to *Dobbs*. Contact your Vorys lawyer if you have questions about the *Dobbs* decision and its impact on employee benefits.