

COMPLIANCE FAQs IN A POST-ROE (DOBBS) LANDSCAPE

Was *Roe v. Wade* overturned?

On Friday, June 24, 2022, the Supreme Court of the United States (SCOTUS) ruled that the US Constitution does not confer any right to an abortion. The case was brought to the high court to review whether the Mississippi law banning abortion after 15 weeks was constitutional in light of the precedent set under *Roe v. Wade*. *Although Dobbs v. Jackson Women's Health Organization (Dobbs) does not directly overrule Roe v. Wade, it ultimately leads to the exact same result as if Roe had been directly overturned because of the removal of the constitutional right to have an abortion.*

Who has the authority to regulate abortion after the *Dobbs* ruling?

Without a federal constitutional right to an abortion, each state will now have the authority to regulate abortion and reproductive services as they see fit.

What are anti-abortion “trigger” laws?

There are 13 states that already had laws banning abortions that were “triggered” once SCOTUS issued their decision to remove the constitutional protection to an abortion. Some of the trigger laws became effective either immediately or soon after the *Dobbs* decision (e.g., within 30 days).

Can health plans still cover abortions in states where there are anti-abortion laws?

Employers should tread very carefully. Some of the states that have laws restricting or prohibiting abortions (and related services) will include either a criminal penalty or a civil (monetary) penalty in their statute. Currently a very small number of states have accomplice liability statutes (sometimes referred to as “aiding and abetting”) that impose criminal liability on anyone (including employers) who assists or procures an abortion.

Regardless of criminal or civil liability, all insurance carriers who want to continue to conduct business within the state will need to comply with the state rules. Therefore, fully insured health plans issued outside of a state where there is a coverage restriction **must** comply with the laws of the state of issuance.

Self-insured health plans are not subject to state insurance laws and generally need to follow the federal laws impacting health plans (e.g., ERISA, ACA, COBRA, etc.). Therefore, a self-insured plan has more flexibility regarding whether to provide or extend coverage. However, employers will need to consider liability and business impact as discussed below.

Criminal Liability

In states where there is potential criminal (felonious) liability, employers might not be able to assist in covering the procedure or the related expenses without facing the risk of potential criminal prosecution by the state attorney general or local district attorneys. Third-party administrators would face similar risks and may not be able or willing to administer the coverage or the payments.

Civil Liability

In states where there is potential civil liability, there could be three potential hurdles: (1) the statute may impose a flat penalty e.g., \$1,000 or \$10,000 per occurrence; (2) the statute might permit individual citizens (from anywhere) to sue the employer for facilitating or procuring payment for abortions and related services; and (3) the statute or state government might bar the employer from conducting business within the state altogether.

Can health plans pay for travel to an area that permits abortions?

For fully insured plans, the answer depends on where the policy was issued. As we explained above, insured health plans must comply with the laws of the state where the policy was issued and likely cannot cover the procedure itself nor travel to another area if the state statute prohibits it. Self-insured plans have more flexibility on the plan design to add a medical travel expense because they do not have to follow state insurance laws (assuming there are no other state laws that prohibit it).

If state law restrictions are not an issue, it may be possible for employers to pay for travel and lodging through the group health plan. For example, many plans have a travel and lodging benefit for organ transplants that are covered by the plan. Note that those benefit amounts are often subject to either an annual or a lifetime maximum and may need to be adjusted.

Are there other ways employers can pay for the travel and lodging costs?

Yes, there are a few potential options for travel reimbursement through:

1. The group health plan as discussed above
2. An employee assistance program (EAP)
3. Family planning benefit
4. Employee emergency fund
5. Payroll or other direct reimbursement (not recommended)

Employee Assistance Programs

EAPs are limited exception benefits that are not subject to the full suite of federal laws under ERISA and the ACA because benefits under an EAP are not significant medical care. Although it might be legally possible to pay for the travel and lodging reimbursement, EAPs are not designed to facilitate payments or reimbursements to participants.

Family Planning Benefit

Some employers are considering expanding their existing family planning benefit, which is used to address fertility and certain reproductive services. Employers will need to ensure that the family planning benefit does not cross over the line where it would be considered providing significant medical care, which would trigger ERISA implications and potentially create a “health plan” that might interfere with HSA eligibility.

Employee Emergency Fund

A few employers are adding travel and lodging costs to their existing employee emergency fund, which generally provides financial assistance when an employee has experienced a natural disaster (such as fire, flood, hurricanes, etc.). This potential option is unlikely to trigger ERISA implications but would probably be a taxable amount to the recipient. Employers should carefully review how to validate and request information without triggering HIPAA concerns.

Direct Reimbursements

Some employers are wondering if it would be possible to provide a direct reimbursement through payroll or some other direct method. This is not a recommended approach because it might trigger HIPAA Privacy Rule issues, e.g., employees and participants would need to disclose their pregnancy status to the employer.

Would the travel and lodging reimbursement be taxable?

There is (old) IRS guidance that certain travel/lodging expenses might be reimbursed as “medical care” and be free from taxation (capped at \$50/day) if the travel/lodging is necessary for the person to obtain medical care. Many employers are considering amounts much higher than this limit; thus, amounts above this cap would be taxable. We look forward to additional guidance from the IRS on this issue.

Other important issues for employers to consider:

Here is a summary of some of the key issues for employers to consider if/when implementing a travel benefit to cover procedures in another state.

1. **HIPAA Privacy:** Employers must be mindful about any PHI that is used or disclosed when an employee/participant is seeking reimbursement. Best practice would be to use a TPA to administer reimbursements and coverage for services rather than administering the benefit directly.
2. **Triggering ERISA and Interference with HSAs:** Employers should consult with their brokers and counsel to ensure that EAPs and family planning benefits do not lose their exempt status from the suite of federal laws governing employee benefits (e.g., ERISA, ACA, COBRA, etc.). If these programs become robust enough, they risk leaning too heavily towards providing significant medical care, which would turn the programs into “group health plan” status. If a group health plan is inadvertently created, then it would impact a participant’s ability make or receive HSA contributions.
3. **HDHP-HSA deductibles:** Participants enrolled in an HDHP would need to satisfy the plan’s deductible before the health plan can pay first-dollar coverage for services or any other benefits paid out of the health plan.
4. **Mental Health Parity:** If reimbursement is provided through the group health plan, employers should review whether there might be mental health parity issues with covering travel for a medical benefit when travel for mental health is not covered.
5. **Liability Coverage:** Employers should consult with their brokers to review: (1) whether their liability coverage policies would cover costs associated with defending criminal and/or civil suits brought from outside jurisdictions, and if so; (2) which individuals would be covered.
6. **Business Impact:** Employers may need to review where they conduct business and generate revenue on a state-by-state basis to gain insight over the potential business impact of any decisions made related to this issue. An employer’s ability (or desire) to transact business or to open/close an office in a certain state or locality may depend on current (or upcoming intended) legislation related to abortion procedures and related services.

Woodruff Sawyer is staying on top of the impact of this post-Roe (Dobbs) landscape and will continue to provide updates as the landscape evolves. For further questions, please contact your Woodruff Sawyer representative.