COMPLIANCE ALERT

EMPLOYEE BENEFITS | JULY 5, 2022

Supreme Court Turns Abortion Regulation to The States: Considerations for Group Health Plans and Employers

On June 24, 2022, the United States Supreme Court ("the Court"), released its much anticipated decision in *Dobbs, State Health officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization, et al.*, which examined the Mississippi abortion law that, with limited exceptions for the health of the mother or severe abnormality of the fetus, prohibits performing abortions on a fetus of greater than 15 weeks gestation. This gave the Court the opportunity to re-examine its historical decisions in *Roe v. Wade and Planned Parenthood v. Casey*.

Background

In 1973, the Court issued its decision in the well-known case of *Roe v. Wade* and held that the right to have an abortion is a form of a right to "privacy" that springs from the First, Fourth, Fifth, Ninth, and 14th Amendments. In doing so, the Court essentially opened the door for virtually unlimited access to abortions in the first trimester of pregnancy and limited the power of a state to regulate abortion pre-viability (i.e., before the third trimester). Under the strict confines of *Roe*, states were subject to a strict scrutiny standard when attempting to regulate access to abortions, which is the highest standard in civil cases, and requires the government to show a compelling governmental interest in enacting the law and the least restrictive means have been employed to accomplish that goal.

Regardless of this significant hurdle, many states continued in their attempt to regulate abortions. It wasn't until the Court issued its opinion in *Planned Parenthood v. Casey* in 1992 that the legal standard that applied to the states under *Roe* was modified, and the state's right to regulate abortion more defined. Specifically, the Court in *Casey* determined that *Roe* provided an unworkable balance between the right to choose and the state's interest in protecting the fetus. Therefore, relying on the doctrine of *stare decisis* the Court found the right to choose an abortion is a protected "liberty" under the 14th Amendment's Due Process Clause, and employed the undue burden standard.

Essentially, this allowed states to impose protections to ensure pregnant people are afforded an informed choice before having an abortion, so long as the purpose or effect of such state laws do not place substantial obstacles in the path of a pregnant person seeking an abortion prior to the fetus' viability. This eliminated *Roe*'s "trimester" view of abortion but left a lot of confusion and division about what is "viability" and what would be an "undue burden."

Under the *Casey* framework, many states continued to try to assert their powers, passing laws based on varying themes, some with success and others without success, including parental consent, parental notification, ultrasound, and fetal heartbeat bills, as well as regulating and/or prohibiting late term abortions. Some states also, using the theory that viability is much earlier than that stated in *Roe*, attempted to fully regulate abortions much earlier in the pregnancy. Mississippi was one such state.

DOBBS OPINION

In 2018, Mississippi's legislature passed, and the Governor signed into law, the Gestational Age Act that, with limited exceptions, prohibited performing abortions on a fetus of greater than 15 weeks. The law was immediately challenged the day it went into effect and was enjoined by a federal district court in Mississippi. The Fifth Circuit Court of Appeals affirmed the lower court's decision, and the State of Mississippi appealed the decision to the US Supreme Court.

In a 6-3 decision split among party lines, with Justices Kavanaugh and Roberts writing separate concurring opinions, the Supreme Court essentially rejected that stare decisis binds them when prior opinions were not firmly rooted in the text of the Constitution. Among other things, the majority rejected the idea that the right to abortion is protected under the Equal Protection Clause of the 14th Amendment because only one sex can have an abortion and, therefore, there is no equal protection required of another sex and no heightened scrutiny is required. Further, the right to obtain an abortion is not a right rooted in the nation's history and tradition and, in fact, the nation's history and tradition made it a crime until very recently (after *Roe* was decided). Finding no support elsewhere in the Constitution or law, the Court overruled the *Roe* and *Casey* decisions, and returned regulation of abortion to the states.

As a result of *Dobbs*, it is estimated that the right to an abortion will be restricted in at least half of the states. For some states, the ban is automatically triggered because of *Roe* being overturned, while in others the state is expected to act to either restrict or ban abortion. Some states, such as Florida, have an express right to privacy in their state constitutions, so there may be limits on how deep the state may restrict an individual's access to abortion within the state's borders.

What does this mean for Employer-Sponsored Health Plans?

Many employers have inquired about whether they can pay for employees who live in states where abortion is banned or severely limited to travel to states where such limitations don't exist. While this may be an option, there are several considerations to be made, including (1) whether the plan is self-funded or fully-insured, (2) whether the state law banning or limiting abortion is an insurance law, practitioner law/regulation, and/or a criminal law that also regulates the recipient of an abortion, (3) the way the law is written in the state where the participant resides, and (4) how the employer intends to structure the benefit – i.e., whether they will make it a benefit under the medical plan, a separate tax-exempt reimbursement under an HRA, offer the benefits through the employer's employee assistance program ("EAP"), if available, or if they will offer taxable travel reimbursement benefits.

While some states have already expressed their intent to ban individuals from traveling outside the state to receive abortions, the constitutionality of such actions could be challenged, as several provisions in the Constitution have been construed to protect an individual's right to interstate travel. Justice Kavanaugh alludes to this in his concurring opinion; however, because this issue was not directly before the Court and, therefore, not resolved by the majority opinion, it's possible we will see some legal challenges should states impose these restrictions.

OFFERING THE BENEFITS UNDER A MEDICAL PLAN

Generally, ERISA permits group health plans to cover travel expenses related to medical care. Section 733(a)(2) of ERISA defines medical care to mean, among other things, the amount paid for transportation primarily for and essential to medical care obtained for the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body.

If an employer sponsors a self-insured medical plan, then ERISA would preempt any state insurance law that prohibits abortions. In such case, the employer could add a travel benefit to the group health plan. Our understanding is that many third-party administrators (TPAs) are developing options that would allow employers to add a travel benefit to the plan. It's likely that an employer adopting any such options would be required to indemnify the TPA from any liability if the employer or employee faces any legal repercussions for traveling out of state to obtain an abortion. For example, some have

suggested that this could raise criminal law implications for the plan (i.e., "aiding and abetting" the receipt of an abortion, which is a crime in the state from which the employee has travelled). While Section 514(b)(4) of ERISA is clear that "generally applicable criminal laws of a state" are not preempted, based on prior precedent it seems unlikely that a law prohibiting employers from covering the costs of travel and expenses related to an abortion under their employee benefit plan would be construed as a "generally applicable" criminal law.

If the plan is fully-insured, there is no blanket answer on whether adding a travel benefit will be viable, as it will depend on how the law in each state is drafted. For example, if the ban on abortions is an insurance regulation, as is the case in roughly thirteen (13) states, it may be difficult as the plan may be unable to reimburse mandatory excluded coverage. An employer with a fully insured plan may have to consider an HRA or another benefit such as an EAP; however, if the state's law is drafted to prohibit performing or receiving abortions within its borders, then the plan may still be able to cover those expenses incurred out of state. While it seems unlikely, if the abortion prohibition is a criminal law, then employers may wish to consult criminal counsel in the state prior to making their decision to avoid any adverse results for the company or employees.

If the plan is used in a state that does not prohibit abortions or coverage for abortions but a participant lives in a state that has a prohibition on abortions, then the state law would have to be evaluated, but it may be possible for the plan to cover abortions and travel for such abortions performed outside the state where the participant resides.

Some carriers who insure plans in states where abortion is legal are requesting the state insurance agencies to approve riders for employers to add travel benefits for participants who reside in states where abortion may be illegal or unavailable. This does not absolve the employer of needing to meet and understand the criminal implications, if any, for allowing participants to travel outside their state to obtain abortions, and it is likely the carriers will ask employers to indemnify them. In either case, any self-funded or fully insured plan offering medical travel benefits will need to ensure compliance with the Mental Health Parity and Addiction Equity Act ("MHPAEA"), such that any travel benefits provided for medical/surgical benefits are comparable to those for mental health/substance use disorder benefits.

REIMBURSING TRAVEL EXPENSES UNDER AN HRA

For fully insured plans (or even self-funded plans if they prefer), an employer could add a travel benefit as part of an HRA. Note, the HRA would need to be integrated with the employer's medical plan (i.e., be available only to those employees enrolled in the employer's medical plan). If not, then the HRA would not be an excepted benefit and must meet HIPAA portability requirements and the ACA's market reform and reporting requirements, among other compliance obligations.

We recommend working with counsel to develop their HRA to ensure the various compliance requirements are satisfied and ensure they have a TPA who can administer the plan. While our understanding is that many HRA vendors are planning to assist employers with developing and administering HRAs for this purpose, the HRA would require a written plan document to meet both ERISA and IRS documentation requirements, and an SPD to meet ERISA requirements. Thus, it may take some time to develop customized or customizable documents for this purpose.

EMPLOYEE ASSISTANCE PROGRAM BENEFITS

To avoid some of the complexities of offering the benefit under a medical plan or HRA, or to make the benefit more widely available to employees who are not enrolled in the employer's medical plan, employers may also be able offer travel (including lodging, but not food) benefits through an employee assistance program. Assuming all requirements to be an excepted benefit for EAPs are met – employees are not required to pay premiums or otherwise contribute towards the cost of the EAP (including any cost sharing), the program does not provide significant benefits in the nature of medical care, the EAP does not coordinate with other benefits or require participants to maximize benefits under the EAP before using benefits under another plan, and employees are not required to be enrolled in other group health plan coverage to be eligible

for the EAP benefit – and EAP for this purpose would remain an excepted benefit, though reimbursements would have to meet the medical necessity requirements under the IRS' Publication 502 (discussed in more detail in the next section) for the expenses to be tax exempt.

TAXABILITY OF TRAVEL EXPENSES FOR MEDICAL CARE

Whether employer paid travel expenses in cases where they are being reimbursed under a medical plan, HRA, or EAP would be taxable to the employee depends on if the travel expenses are medically necessary or essential to the medical care received. Under IRS Publication 502, the certain transportation expense for trips primarily for, and essential to, the receipt of medical services from a medical practitioner are reimbursable as medical care. Travel may include bus, taxi, train, or plane fares (including those expenses incurred by a parent who must go with a child who needs medical care). Travel by car can be reimbursed at the medical mileage rate, which was increased to 22 cents ($.022) per mile effective July 1, 2022, and individuals may seek reimbursement for parking fees and tolls as well.

When the principal purpose for being at a hospital or similar institution is to receive medical care, then the costs of lodging at a hospital, including food maybe reimbursed. Otherwise, any lodging primarily for or essential to medical care that is provided by a doctor in a licensed hospital (or an equivalent facility) may be reimbursed at no more than $50 per night per person. The lodging cannot be lavish and there cannot be any significant element of personal pleasure, recreation, or vacation in the travel away from home. Meals aren't included.

TAXABLE BENEFIT TO EMPLOYEES

Employers may also seek to provide a taxable, travel stipend for employees that is not conditioned on the employee incurring a medical expense, such as is required for medically necessary travel under the HRA, EAP, or medical plan. Such a benefit would not be subject to ERISA; however, it would also not be afforded preemption of state laws that relate to ERISA plans.

In these situations, the employer would not be able to specify the travel stipend is for receiving abortions or other medical care, as that would make the arrangement a medical care reimbursement and subject the stipend to the requirements listed previously. Employees would be able to use the travel stipend for any purpose, such as their own personal vacation, and the employer would not be able to require employees to substantiate that the reason for travel was to obtain an abortion in a state that allows abortions. This may be the least cumbersome of the potential approaches, and potentially alleviates some of the criminal law concerns since the employer will not know or have reason to know on what the stipend was spent. Further, it would allow the employer to cover more expense types, such as food and beverage purchased during travel, though it will result in taxable income to employees and would require the benefit be offered to all employees versus limiting the benefit to those employees enrolled in the employer's medical plan.

Conclusion

While there are several options for employers, each option requires careful evaluation of any applicable state law, which varies among the states that limit or prohibit abortions. Employers should work with experienced counsel when determining the best approach for their employees so as to understand all potential civil, criminal, or insurance law implications, and avoid any potential legal, unintended consequences to the company or its employees.

This alert was prepared for Woodruff Sawyer by Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on ERISA-governed and non-ERISA-governed retirement and welfare plans, executive compensation, and employment law. Contact Stacy Barrow or Nicole Quinn-Gato at sbarrow@marbarlaw.com or nquinngato@marbarlaw.com.

agency and Marathas Barrow Weatherhead Lent LLP are not obligated to provide updates on the information presented herein. Those reading this alert are encouraged to seek direct counsel on legal questions.