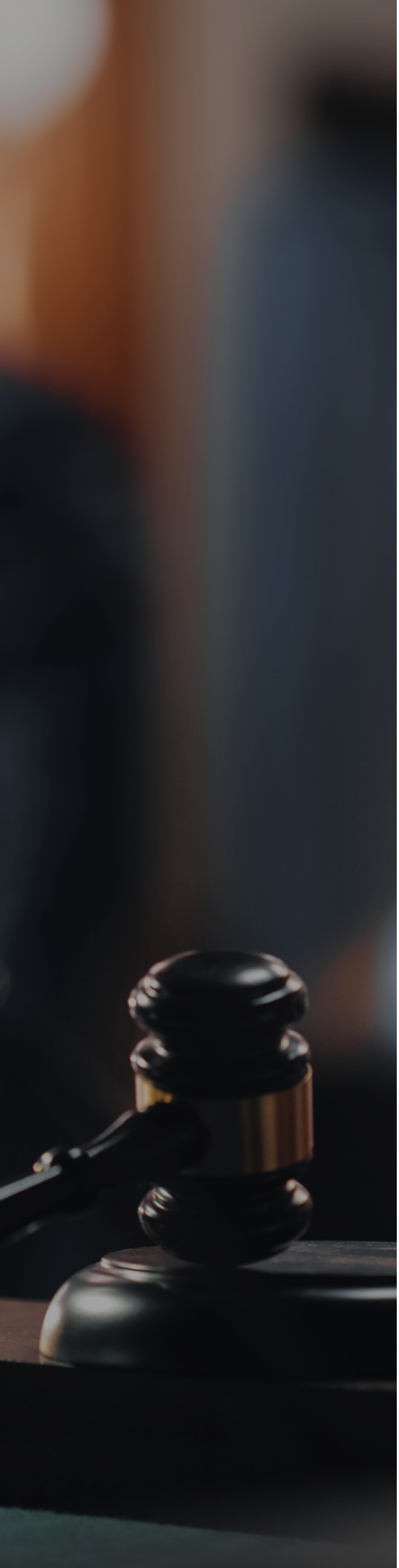

Dobbs v. Jackson: Fallout for Benefit Plans and Other Employer Considerations

The U.S. Supreme Court's June 24th decision in ***Dobbs v. Jackson Women's Health Organization*** overturned Roe v. Wade and Planned Parenthood v. Casey, which previously held that the Constitution prohibited states from banning abortion or unduly burdening access to abortion services during initial phases of pregnancy. After the recent Dobbs ruling, states now have complete freedom to either allow or prohibit access to abortive care within their borders. At least 24 states have laws that can now be enforced barring abortion or imposing strenuous conditions. Certain states (such as Oklahoma and Texas) now enable individuals to bring civil lawsuits against anyone who assists in the performance or inducement of abortion, including paying for or reimbursing the costs of the procedure through insurance or otherwise. We expect that this decision will also open the door for further state regulation regarding reproductive rights.

In light of the Supreme Court's decision, we recognize that some employers will want to continue to provide abortion-related benefits to their employees. This Client Alert outlines various plan design options and other factors to consider. However, many of the issues surrounding these types of benefits remain open questions at this time. Legal challenges to these laws are already underway, and more are expected in the future.

Action Steps

As explained below, employers sponsoring group health plans should closely analyze any abortion benefit offered under their group health plans to ensure full compliance with applicable restrictions. Depending on the type of plan offered, employers may have some amount of discretion in enhancing or restricting coverage.

Employers wishing to support employees seeking abortions through employee benefits may have to creatively examine alternative benefit structures if they find themselves in a state that prohibits abortion. A review of non-benefit policies and practices may also be necessary to ensure a peaceful and productive working culture in this new "post-Roe" era.

Group Health Plan Coverage

How this change affects group health plan coverage offered by employers will be different depending on whether the plan is fully-insured or self-funded, as well as where the plan is issued, and where the employees work and reside. We recommend that employers carefully review their group health plans to understand what level of coverage for abortion is currently available. Also, to the extent an employer has employees in a state with particularly strong prohibitions on abortion, consultation with legal counsel is highly recommended.

Fully-Insured Plans

Insurance carriers will have to tailor fully-insured plans to provide coverage in accordance with applicable state law, based on the state where the policy is issued – not where the plan's participants reside or work. Because some states will prohibit covering abortions (and other states will require such coverage), employers operating across several states may choose to obtain coverage from an insurer in the state which more closely reflects their desire to provide or restrict abortion coverage. Of course, providing coverage for an abortion doesn't necessarily mean that a participant may easily obtain abortive services if they live in a more restrictive state.

Self-Funded Plans

Because ERISA preempts state law, employers subject to ERISA offering self-funded health plans may largely ignore state insurance laws and choose whether or not to cover abortive services. With that being said, there are a few caveats to consider before amending your plan:

- Non-ERISA employers (such as local government plan sponsors) will likely have to follow state laws and guidelines, much like fully-insured plan sponsors
- Self-funded plans carrying insured stop-loss coverage may experience carve-outs in those fully-insured re-insurance policies, as carriers will have to follow state law
- While ERISA plans do not have to follow state insurance laws, employers should carefully consider other state laws where their employees reside to understand if there is any other kind of potential risk. For instance, if a state imposes civil or criminal penalties on individuals or providers assisting with obtaining abortions, it is not yet clear whether such penalties could impact plans or plan sponsors covering abortive services.

Alternative Benefit Strategies

Employers with employees in states where abortion is illegal may consider different strategies to facilitate abortion access for employees and their dependents. Some employers are considering ways to cover the travel and lodging expenses relating to out-of-state abortions in lieu of actually covering abortive services, even though it is still unclear whether individuals can sue companies that cover travel expenses for legal out-of-state abortions. What follows are descriptions of a few alternative strategies.

Travel and Lodging Benefits through the Group Health Plan

In a fully-insured plan, such benefits will be limited by the carrier's policy and, in turn, affected by that state's insurance laws. In a self-funded plan, such travel benefits could be added. However, remember that all benefits under a group health plan will be subject to ACA rules and Mental Health Parity rules, among other ERISA and IRS-related requirements, which could prove to be too restrictive in their own ways. Careful analysis of the effects on plan administration and non-abortion benefits should be considered before choosing to cover travel and lodging under the group health plan.

Health Reimbursement Arrangements (HRAs)

Let's say a fully-insured employer is prohibited from covering abortive services under state insurance laws. Could that employer sponsor a stand-alone HRA to cover abortive services or the costs of travel to an abortion state? After all, an HRA is really just a self-funded health plan. Theoretically, yes, that might work. A few words of caution:

- Remember that the HRA's eligibility requirements must be tied to the group health plan or else it may not comply with ACA requirements. (Tangent: HRAs enjoy the status of being an excepted benefit if they are integrated with the group health plan; if they are not, they'll be subject to the ACA's annual limit requirements. And because an HRA is really just one big annual limit, compliance might not be possible).
- Understand that an HRA providing such coverage in conjunction with a High Deductible Health Plan could disqualify participants from being eligible to contribute to an HSA.
- Finally, under Section 213 of the Internal Revenue Code, the actual amounts an HRA may reimburse for travel and lodging expenses are limited to a relatively modest amount.

Employee Assistance Plans (EAPs)

It is possible to cover travel and lodging benefits under an EAP that is an excepted benefit, which would exempt those benefits from ACA requirements. But to be an "excepted benefit," the EAP:

- cannot provide significant benefits in the nature of medical care or treatment,
- cannot be coordinated with benefits under another group health plan,
- may not charge a premium, and
- may not require any cost-sharing contributions from participants.

It is the subjective nature of the first requirement that may prove challenging to overcome. Whether or not costly expenses related to abortion travel is considered "significant" may be too much of an unknown factor for an employer to risk taking on, as no plan sponsor wants to inadvertently turn their add-on EAP referral service in to a full-blown ACA-compliant health plan. Employers considering this strategy will want to first consult with their EAP provider to determine potential viability.

Taxable Compensation as a Means to Cover Abortion-related Costs

The best way to stay clear of stringent IRS rules and burdensome ACA, ERISA and HIPAA laws is to simply give an employee more taxable cash. An employer could create a "wellness stipend" to provide taxable compensation to be used for abortion-related costs or to reimburse travel expenses in addition to other health-related expenses. Since the benefit would be taxable, specific substantiation would not be required. This might also serve the dual purpose of protecting the employer from the potential ramifications of a state civil or criminal penalty (if the employer truly didn't know why an employee was receiving the benefit or how that employee was spending the money) while simultaneously ensuring an employee's privacy. However, implementation could be tricky and inconsistent application of providing a stipend could appear discriminatory.

Non-Benefit Employer Considerations

In addition to health plan benefits, all employers will be wise to consider the impact of such a controversial decision on workplace culture and employee protections. We strongly recommend that you work with your legal employment counsel and HR advisors to develop a checklist of policies and practices to review in accordance with federal, state and local laws. While not exhaustive, the following are a few of the federal employment-related laws employers should begin to consider.

Americans with Disabilities Act (ADA)

Pregnancy alone is not considered a disability under the ADA. However, a pregnancy-related impairment may be covered under the ADA from an accommodation standpoint. An employee seeking an abortion due to a disability may be entitled to take leave as an ADA-accommodation, unless such leave would result in an undue hardship to the employer.

Family Medical Leave Act (FMLA)

Employers (with 50 or more employees) covered under FMLA may have to provide protected leave for employees obtaining abortion-related care if their healthcare provider determines that they have a qualifying serious health condition. When administering such leave requests, employers should remember to follow FMLA guidelines for obtaining certification and maintaining confidentiality of the employee's medical information.

National Labor Relations Act (NLRA)

While employers can educate employees and coax their workforce toward creating a supportive and inclusive work environment, no employee can prohibit employees from talking with each other about the terms and conditions of their employment. So, if an employer chooses to cover or not cover abortion-related services under their health plan, for instance, the NLRA provides employees with right to express their opinion to other employees about such a policy. This protection extends to social media as well.

Pregnancy Discrimination Act (PDA)

The Pregnancy Discrimination Act protects women from being fired for having an abortion or contemplating having an abortion. It also prohibits adverse employment actions against an employee based on their decision not to have an abortion. The Act further covers reasonable accommodations for pregnant workers, but only if such accommodations are offered to other employees with similar situations. Does this mean that the PDA would require an accommodation related to a pregnant employee obtaining an abortion? While not totally clear, given the unprecedented nature of this situation, unpaid leave should be permitted for a pregnant employee to the same extent that other employees who are similar in their ability/inability to work are allowed to do so.