Considerations for Employer Group Health Plans in the Aftermath of Dobbs

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Authors:

Kaitlin E. Hizny

On June 24, 2022, the U.S. Supreme Court decided in *Dobbs v. Jackson Women's Health Organization* that there is no constitutional right to an abortion, thereby giving each state the right to define its own laws relating to abortion services. In light of this decision, many states have implemented laws that restrict abortion services through various civil and criminal penalties. These rulings have generated many issues for employers to contemplate in the context of their group health plans. Some of these issues are obvious, such as how, if at all, will group health plans provide coverage for abortion services. Other issues are more obscure, such as whether reimbursements for abortion-related travel and lodging expenses are excludable for federal income tax purposes. Employers that choose to provide such reimbursements through their group health plans may encounter several legal obstacles. This article provides an overview of such considerations for employer group health plans.

Providing Coverage for Abortion Services in a Post-Dobbs World

As an initial matter, an employer's options will be impacted by whether the plan is fully insured or self-funded. For fully insured plans, the employer pays insurance premiums to an insurance company, which then pays the medical claims. Under self-insured plans, the employer pays claims from its general assets and engages a claims administrator to process and pay medical claims.

In the case of a fully insured plan, the insurance policy will need to comply with the state law where the policy is issued. State laws that ban abortions, as well as state insurance laws that limit abortion coverage, will prevent fully insured group health plans from offering such coverage, even if those plans are subject to the Employee Retirement Income Security Act of 1974 (ERISA). This result occurs because under ERISA, state insurance laws are "saved" (*i.e.*,

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exempted) from ERISA's general preemption of state laws.

Self-funded group health plans are typically afforded more flexibility in plan design and benefit choices, in large part due to ERISA's preemption of state laws. Consequently, sponsors of self-funded health plans that decide to cover abortion services can likely assert that ERISA preempts any state-imposed restrictions on access to abortion. If the state imposes criminal penalties on those seeking abortion services, however, these sponsors will run into problems, because ERISA preemption does not extend to a state's generally applicable criminal laws. The role of ERISA's preemption clause in the state abortion law analysis is unclear at this time and will likely be the subject of litigation in the future.

Reimbursements for Abortion-Related Travel and Lodging Expenses

Many employers are looking to add the reimbursement of travel and lodging expenses for health plan participants and their dependents that will need to travel to a different state to obtain abortion services. As discussed above, for fully insured plans, the insurance policy needs to comply with the state law of where the policy is issued. Consequently, an insurance company may not agree to add abortion-related travel and lodging expense reimbursements to its policy. Employers will need to consult with their insurance company to determine their options. For self-insured plans, employers will need to work with their claims administrator to determine whether they will agree to provide such reimbursements as a plan benefit.

In the event that the claims administrator does not wish to take on this task, some employers have expressed the desire to do it themselves by either processing abortion-related travel and expense reimbursements or creating a separate reimbursement policy outside of the health plan. There are significant legal implications with these approaches. Employers that process reimbursements involving access to employee and dependent information could invoke privacy considerations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or other state privacy laws. Additionally, reimbursing travel and lodging expenses outside of the health plan would remove the employer's protection under ERISA's preemption clause from state laws barring

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this type of practice.

Moreover, other items to consider are the taxation of travel and lodging reimbursements by the Internal Revenue Service (IRS). Section 213(d) of the Internal Revenue Code provides for the tax-free reimbursement of transportation costs to receive "medical care." Transportation expenses are limited to "reasonable" transportation costs, including taxi fares, trains, and buses, among others. For use of a personal vehicle, transportation expenses may be reimbursed at the standard mileage rate or the actual operating expense. Current IRS rules limit tax-free lodging expenses to no more than $50 each night for each person (*e.g.*, if the employee has an individual accompanying them to the procedure). Amounts reimbursed above these limits would be taxable benefits to the employee.

If you have any questions about the implications of the *Dobbs* decision on your group health plan, please contact the author of this article or any attorney with Frost Brown Todd's Employee Benefits & ERISA practice group. You can also visit our Tax Law Defined Blog for more analysis on the latest trends and developments in state, local and federal tax administration.

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