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Impact of *Dobbs v. Jackson Women's Health Organization* for Employer-Provided Health Benefits

The United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overruling *Roe v. Wade* will have far-reaching implications for employees seeking abortions and the health care professionals who provide them. Employers who offer a broad range of reproductive health benefits through their employee benefit plans are likewise facing many questions about continued coverage for and access to these services in the wake of *Dobbs*. This Alert discusses some of the key issues employers and others will have to consider in the aftermath of the decision.

The pre-*Dobbs* Landscape

Even pre-*Dobbs*, there was wide variation from state to state with respect to the regulation of abortion, including the time period during which an abortion was available following fertilization. Yet the ability of employers to offer coverage for abortion services across state lines and the ability of employees to access such services has not been questioned or challenged. While rapid adoption of outright bans on in-state abortion services coupled with the stated objectives of certain state legislators to impose civil or criminal penalties on those who "aid and abet" any resident of the state who seeks an abortion out of state understandably heightens concerns, the fact of variation in access to abortion services among states is not itself new, and so there is some historical practice to guide us.

Coverage for Abortion Services

Coverage for employees arises in one of two contexts: fully-insured and self-insured coverage. Employers who offer fully-insured coverage pay a premium to a state-licensed insurer who then bears the risk of all claims incurred under the policy. Employers who choose to self-fund their health benefits, however, assume the risk of and pay claims incurred by their employees. These self-funded plans are administered under contracts with third-party administrators.

A. *Employers offering fully-insured coverage.* When a state prohibits the delivery of abortion services within its borders, any insurance company licensed by the state to issue insurance policies to employers and individuals in that state will be unable, as a practical matter, to provide covered abortion services within that state. Similar to the current situation regarding state variation in abortion laws, many fully-insured plans operating in states where abortion would no longer be legal may have in-network providers in other states and/or provide coverage for out-of-network services. These fully-insured carriers could, subject to the points discussed below, continue to pay claims for abortion services provided in states where abortion remains legal. Today, less than half of the states directly regulate coverage for abortion services under insurance policies (either requiring coverage or restricting it in private insurance plans), but that number could well increase. To the extent state law precludes an insurance company within the state from issuing coverage for abortion services, the insurance company would have to comply with such restrictions, as insurance is generally regulated by state law.

B. *Employers offering self-insured coverage.* Employers who offer *self-funded* health care benefits for abortion services should be able to continue to offer this coverage to their benefits-eligible employees regardless of whether any states in which they have employees purport to ban insurance coverage for abortion services. Self-funded plans' ability to do so stems from the fact that such health plans are governed by ERISA, which contains a provision preempting any state law that relates to an employee benefit plan. While the question of what kinds of laws "relate to" an ERISA plan has spurred considerable debate, it is generally agreed that state insurance laws that mandate offering or excluding benefits "relate to" an employee benefit plan and would, therefore, be preempted. We discuss below other types of state statutes that could impact coverage more indirectly and whether they too might be preempted under ERISA.

Access to Abortion Services

While self-funded employers can continue to offer coverage for abortion services under their group health plans, local access to these services for employees working or residing in states where abortion is prohibited will necessarily be restricted. Employers whose group health plans have in-network providers in multiple states, however, can continue to provide coverage and access to abortion services from such providers in states where abortion is legal.

If an employer's self-funded group health plan has out-of-network coverage, employees would similarly be free to seek abortion services from an out-of-network provider, though such services would be covered at the out-of-network benefit level, likely resulting in higher out-of-pocket costs to the employee. (Some group health plans cover out-of-network care for which there is no in-network provider in a service area at the in-network benefit level.)

Fully-insured employers operating in states that prohibit insurance coverage for and access to abortion services will need to consider alternative means if they wish to continue providing assistance for these services. Given the complexity of doing so outside the group health plan context, it will be important for employers to discuss such coverage with their benefits consultants and lawyers.

Travel

A good deal has been written about whether an employer can cover the cost of travel should an employee working or residing in a state where abortion is prohibited seek care in another state where abortion is legal.

As the law currently stands, Section 213(d) of the Internal Revenue Code[1] expressly states that medical care includes amounts paid for transportation primarily for and essential to medical care related to the "diagnosis, cure, mitigation, treatment, or prevention of disease or for the prevention of disease or for the purpose of affecting any structure or function of the body." The IRS, in Revenue Ruling 73-201,[2] confirmed that because an abortion is deemed to be for the purpose of affecting a structure or function of the body, its cost is an amount paid for medical care as defined in the Code, and was therefore deductible as a medical expense. While Rev. Rul. 73-201 did condition the conclusion to permit the expense to be deducted on the abortion not being illegal under state law, that would appear to mean the law of the state where the abortion is provided. The practice of medicine is generally regulated by the law of the state where the medical care is provided, and abortion services are clearly medical care. Thus, if the care is received in a state where abortion is legal, we believe expenses for travel for such services would be eligible for reimbursement as medical care under an employer's group health plan.

As medical care, travel expenses incurred for the primary purpose of going to a state to receive an abortion can be offered on a tax-free basis under an employer's group health plan, just like any other expense for medical care under the plan. The IRS does impose limits on the amount of the reimbursement for travel expenses, so to the extent that the plan will reimburse amounts beyond an allowable IRS limit, consideration needs to be given to how to treat those excess reimbursements as taxable income to the employee, subject to all applicable withholdings. We would not expect that treating limited benefits as taxable under a group health plan would jeopardize the treatment of all other medical benefits under the plan as excludable from income.

We discuss offering a fully taxable travel reimbursement benefit outside of a group health plan later in this Alert. If an employer is considering offering to pay for these travel expenses on a pre-tax basis outside of its group health plan, the employer should take into account that, notwithstanding that this benefit is being provided pursuant to a separate employer policy, it could be characterized as a standalone group health plan that must comply with the requirements of the Affordable Care Act, ERISA, HIPAA, and COBRA. Furthermore, to the extent that employers would be implementing this benefit solely for employees seeking out-of-state abortions, as opposed to having or establishing a policy that pays for travel for a broad array of medical services, it could make it easier for states where abortion is illegal to argue that by establishing a narrow travel expense reimbursement policy, the employer is facilitating access to abortion services in violation of state law. As discussed below, while we think it unlikely that a state would prevail if it brought such a claim against an employer, this nonetheless could require an employer to respond to any actions brought pursuant to such a law.

Possible Litigation Risks Ahead

In overturning *Roe v. Wade*, the Dobbs decision is certain to mark the beginning of a new frontier in abortion litigation. Slightly more than half of the states are certain or likely to ban abortion, and many have already done so in the immediate aftermath of *Dobbs*.[3] More than a dozen states had "trigger" laws on the books under which abortion prohibitions took effect automatically or with very little further state action following the *Dobbs* decision.[4] The extent to which legislatures and prosecutors in such states may seek to extend the application of those laws beyond their states' borders remains an open question—but it is clear that some are likely to try.

In Missouri, for example, a proposed amendment to several abortion-related bills would have made it unlawful to seek or perform an abortion on a resident or citizen of Missouri, regardless of where the abortion was or would be performed. Taking a cue from Texas's S.B. 8, the proposal would have deputized private citizens to sue providers and anyone else who helps a pregnant person get an abortion, regardless of where those individuals are located.[5] While the Missouri proposal did not make it to a vote in the state House of Representatives this year,[6] anti-abortion advocates in other states have taken notice. Similar measures are likely to be introduced elsewhere in the near future.[7]

States need not necessarily pass such laws explicitly reaching out-of-state conduct for prosecutors to attempt to hold individuals liable for seeking, obtaining, providing, or assisting with abortions across state lines. For instance, prosecutors may argue that forming the intent to travel to a state where abortion is legal in order to obtain the procedure is a sufficient jurisdictional hook for prosecution in a state where it is not;[8] or they may invoke statutes that criminalize conspiracy, attempt, or aiding and abetting in pursuit of the same result. Importantly, while ERISA contains a broad preemption clause, it does not preempt generally applicable state criminal laws.[9]

Remote abortion access presents additional questions. Today, over half of all abortions in the United States are "medication abortions," induced by ingesting a combination of two drugs (mifepristone and misoprostol).[10] In December 2021, the U.S. Food and Drug Administration permanently eliminated a requirement that patients seeking medication abortions pick up their mifepristone prescription in person.[11] Theoretically, the move cleared the way for patients to obtain abortions without ever visiting a physical clinic, by undergoing a virtual or "telemedicine" visit with a provider and ordering the pills through the mail.[12] But access to remote abortion services likewise varies by state; many states have enacted laws restricting telemedicine abortion.[13] A Nevada-based generic manufacturer of mifepristone has challenged Mississippi's law requiring patients to see a provider in person to obtain the drug, arguing that the FDA's rule preempts state law.[14] Following the *Dobbs* leaked draft opinion, counsel for the manufacturer argued that the Supreme Court's decision in that case should have "absolutely no effect" on its challenge.[15]

Potential Collateral Constitutional Implications

Endeavoring to hold individuals liable for out-of-state abortions would raise profound and complicated constitutional questions. Indeed, it would reflect an effort on the part of individual states to impose their own policy choices on their sister sovereigns to an extent that is without modern equivalent. Longstanding Supreme Court precedent suggests that extending the reach of one state's laws to encompass a medical procedure taking place outside of its borders, in a jurisdiction where that procedure is lawful, would be impermissible.

The clearest statement on the subject can be found in the 1975 case of *Bigelow v. Virginia*.[16] Bigelow, a Virginia newspaper editor, published an advertisement for an abortion service in New York (where the abortion procedure in question was legal) and was subsequently prosecuted under a Virginia statute prohibiting the circulation of any publication "encourag[ing] or prompt[ing] the procuring of an abortion."[17] Bigelow challenged his conviction on First Amendment grounds. Ruling in his favor, the Supreme Court explained: "The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded [at oral argument], prosecute them for going there."[18] The Court went on to explain that "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[19]

Proponents of abortion regulations with extraterritorial effect would likely argue that those pronouncements in *Bigelow* were unnecessary for the Court to reach its conclusion and therefore lack precedential value. But they are animated by principles of federalism and state sovereignty that are at the heart of our constitutional order and have been applied in numerous instances, across various contexts. For example, these principles are the reason that the Supreme Court held in 1996 that an Alabama judge could not consider lawful conduct outside of the state in awarding punitive damages against BMW for violating a state law governing the disclosure obligations of automobile manufacturers.[20] And these same principles are the reason that the Court ruled more than a century earlier that one state could not exempt from taxation property in another state: "No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular."[21]

Allowing a state to punish extraterritorial abortions would require the Supreme Court to grapple with the impact that such a fundamental shift in the constitutional landscape would have outside of the narrow context of abortion. State laws on any given subject may differ in a multitude of ways, reflecting "the diverse policy judgments of lawmakers in 50 states."[22] To uphold a law seeking to impose liability for abortions performed in a state where the procedure is lawful, the Court would be obliged to revisit doctrines separate and apart from its abortion jurisprudence, such as the dormant Commerce Clause and the constitutional "right to travel,"[23] that govern the relationships between and among states and their citizens in innumerable other aspects of American life. Notably, Justice Kavanaugh, who joined the five-member majority opinion, sought to preempt such extraterritorial over-reach by stating his view that "the constitutional right to interstate travel" would preclude "a State bar[ring] a resident of that State from traveling to another State to obtain an abortion[.]"[24]

The Possible Federal Response

Federal preemption could serve as a means of limiting the chaos that could otherwise result from *Dobbs* upending fifty years of settled law. Following the leak and publication of a draft of the decision, multiple bills that would have codified a right to abortion were proposed and rejected in Congress.[25] Congress could revisit at least some such bills in the future, perhaps focused on such things as telemedicine as it relates to medication abortion. Even if Congress does not, the Executive Branch may issue orders or regulations relating to such topics. Ropes & Gray will be closely monitoring any such developments.

Action Steps for Employers

In light of the decision in *Dobbs* and the speed at which many states have moved to ban abortion within their borders, employers committed to ensuring their employees have access to abortion services should be prepared to take the following steps:

1. Engage with benefits consultants, third-party administrators, pharmacy benefit managers and insurers to understand what reproductive health benefit options they are able to administer and ensure that those benefits are being administered in accordance with the employer's plan design, its goals and objectives, and applicable law.

    a. Consider the way in which your medical benefits are funded. As noted above, self-funded health plans can provide coverage for abortion services without regard to any limitations imposed by state law. If feasible, employers who offer fully-insured health plans, which are subject to state law limitations on abortion services, should consider the feasibility of transitioning to self-insured coverage. Admittedly, this will not be an economically viable option for many employers, especially those who employ relatively few employees, but for employers where the economics could work, self-funded health plans would give these employers more flexibility in plan design.

    b. Review provider network access. If your group health plan has a limited provider network, i.e., an HMO or EPO, consider whether expanding in-network coverage or adding an out-of-network benefit will give employees access to covered abortion services in states where such services remain available.

c. Establish a Health Reimbursement Arrangement for abortion services. While care and attention needs to be given to how a health reimbursement arrangement ("HRA") is designed and administered to ensure it complies with the Affordable Care Act, ERISA, HIPAA, COBRA and related regulatory guidance, employers, whether offering fully-insured or self-insured major medical coverage, can consider establishing an HRA that covers any unreimbursed expenses for medical care, as defined in Code section 213(d). As noted above, these include expenses related to abortion services. As an initial matter, the HRA would either need to be integrated with the employer's major medical plan to comply with the ACA or it would have to be structured as an Excepted Benefit HRA ("EBHRA"). The former gives the employer more flexibility with respect to levels of funding, but it must comply with the ACA market reform requirements and would only be available to employees who are enrolled in the employer's major medical plan, assuming such plan is not a high-deductible health plan ("HDHP") under which employees are contributing to a Health Savings Account. An EBHRA, on the other hand, can be offered to anyone who is eligible for an employer's major medical plan and not just those who are enrolled, but it has a funding cap and other restrictions do apply. For 2022, an EBHRA cannot reimburse more than $1800 in qualified medical expenses. Importantly, any unused amounts remaining in the EBHRA for the current year may, at the employer's discretion, be rolled over to a subsequent year without reducing the amount an employer can make available under the EBHRA in that subsequent year.

d. Consider establishing a travel and lodging benefit under your medical plan. As noted above, the IRS has confirmed that legally obtained abortion services are medical care and thus would be payable as medical expenses under an employer's group health plan. IRS Publication 502, which addresses medical and dental expenses, states that a taxpayer can "include in medical expenses amounts paid for transportation primarily for, and essential to, medical care…[including] bus...train, or plane fares [and] transportation expenses of a parent who must go with a child who needs medical care." Lodging expenses eligible for reimbursement are more limited. While a taxpayer can include in medical expenses amount paid for transportation to another city "if the trip is primarily for, and essential to, receiving medical services," IRS Publication 502 states that the taxpayer can only include "up to $50 for each night for each person. [The taxpayer] can include lodging for a person traveling with the person receiving medical care." Expenses for meals purchased while traveling are not eligible for reimbursement.

   Self-funded employers can work with their TPAs to determine if and how the plan will administer this benefit, including whether to cover travel for a broader range of covered medical services not available locally. Employers offering fully-insured coverage will have to determine if such a benefit is available under those plans. If not, whether due to cost or administrative limitations imposed by the insurer or due to legal limitations imposed by the state, fully-insured employers who do not provide coverage under an HDHP can consider establishing an HRA or EBHRA that will reimburse eligible travel and lodging expenses incurred for a trip that is primarily for, and essential to, receiving medical services. Self-insured employers who find administering travel and lodging benefits through their non-HDHP major medical plans to be less desirable can also establish an HRA or EBHRA for these purposes. Please note that employers can determine the amount available under an HRA for reimbursement of expenses incurred for both abortion services and related travel and lodging. If the employer is using an EBHRA for reimbursement of these combined expenses, however, the $1800 cap applies to the combined expenses. In other words, employers cannot make $1800 available to reimburse abortion expenses under one EBHRA and make an additional $1800 available under another EBHRA to reimburse travel and lodging expenses.

e. Other options. Some employers have contemplated administering travel reimbursements outside of their health plan and treating such reimbursements as taxable income to the employee. While the seeming simplicity of such an approach may make it appear attractive, it is not without its risks. Such risks include having to balance the need to respect the right of an employee to keep her health care decisions private against requiring proper documentation of the expenses incurred and considering the scope of medical services for which travel

reimbursements will be paid to avoid potential liability under state law for having a policy that is designed to cover travel expenses incurred only for abortions. Furthermore, such a policy would not be governed by ERISA, so an employer would not be able to avail itself of the argument that ERISA preemption would apply to any state law attempts to restrict this benefit. Employers seriously considering this approach should consult with counsel to evaluate these risks.

f. Understand the risks. A good deal has been written about whether states could attempt to restrict an employer's ability to facilitate an employee's access to abortion services by paying travel expenses to obtain an abortion in a state where it is legal to do so. As noted above, we know from Justice Kavanaugh's concurrence in *Dobbs* that would be a bridge too far for him. Justice Kavanaugh did not speak for the Court on this issue, though, so, while this could give a state pause with respect to enforcing these laws against employers and women who seek a legal abortion, it is far from certain that they would refrain from doing so. Furthermore, while an employer could challenge such enforcement on the basis that the statute is preempted by ERISA because it "relates to" an employee benefit plan, it is possible that such a challenge could fail should a court find that the statute is one of general applicability. It would appear from a flurry of employer announcements immediately following the *Dobbs* decision that many employers are willing to tolerate those risks in order to continue to support their employees' access to reproductive health care.

2. Review any group health plan documentation and other employee communications to ensure they align with whatever changes in benefits will result from the *Dobbs* decision.

   a. Employers should not lose sight of the fact that ERISA requires that plan documentation reflect the benefits available to plan participants. In light of the potential benefit changes that could result from *Dobbs*, employers should ensure that they provide proper notice of any changes to reproductive health benefits under their group health plans.

3. Prepare employee communications to clearly explain how reproductive health benefits will change, if at all, and if continued to be offered, how employees can continue to access them.

   a. For many employees, questions about their access to reproductive health benefits will be front of mind. Apart from any communications about plan documentation changes and any public statements that might be made by company leadership about these benefits, employers should be prepared to tell employees what they can expect to hear in the coming weeks about the details of coverage for and access to abortion services benefits and where to go for more information about these benefits.

Ropes & Gray will continue to monitor any ongoing developments regarding actions taken in response to *Dobbs*, and you should feel free to reach out to your Ropes & Gray advisor, who can discuss any questions you have or put you in touch with colleagues to speak with you about the decision and how it affects you and your employees.

1. 26 U.S.C. § 213(d).
2. Rev. Rul. 73-201 (1973).
3. *See* Elizabeth Nash and Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why*, Guttmacher Institute, https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why (last accessed June 16, 2022).
4. *Id.*
5. *See* Lydia Wheeler and Patricia Hurtado, *Abortion-Travel Bans Are 'Next Frontier' With Roe Set To Topple*, Bloomberg Law (May 4, 2022), https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/X8LMD8T8000000?bna_news_filter=health-law-and-business.
6. *Id*.
7. *See* Alice Miranda Ollstein and Megan Messerly, *Missouri wants to stop out-of-state abortions. Other states could follow*, Politico (Mar. 19, 2022) (indicating that advocates in Texas are "working with the same lawmakers who drafted the state's six-week ban to craft a Missouri-like bill that could be introduced when lawmakers return to Austin next year").
8. *See* supra n.3 (quoting Prof. David Cohen).
9. 29 U.S.C. § 1144.
10. *See* Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin, and Marielle Kirstein, *Medication Abortion Now Accounts for More Than Half of All US Abortions*, Guttmacher Institute, https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions (last accessed June 21, 2022).
11. *See* Matthew Perrone, *U.S. regulators say abortion pill no longer has to be picked up in person*, PBS (Dec. 16, 2021), https://www.pbs.org/newshour/health/u-s-regulators-say-abortion-pill-no-longer-has-to-be-picked-up-in-person.
12. Some employees seeking abortions may also order the medication to be shipped directly from a foreign supplier.
13. *See* Brendan Pierson, *Judge weighs abortion-drug maker's challenge to Mississippi law*, Reuters (Jun. 8, 2022), https://www.reuters.com/legal/government/judge-weighs-abortion-drug-makers-challenge-mississippi-law-2022-06-08/.
14. *Id*.
15. *Id.*
16. 421 U.S. 809 (1975).
17. *Id.* at 811.
18. *Id.* at 822–24 (citations omitted).
19. *Id.* at 824.
20. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).
21. *Bonaparte v. Appeal Tax Ct. of Baltimore*, 104 U.S. 592, 594 (1881).
22. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 570.
23. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489 (1999).
24. *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808, at *65 (U.S. June 24, 2022) (Kavanaugh, J., concurring).
25. Democrats attempted and failed to advance the Women's Health Protection Act of 2022—a bill that would have not only codified the federal right to abortion but also prohibited numerous restrictions on the procedure including, for example, requiring medically unnecessary in-person visits to a provider. Republican Senators Collins and Murkowski proposed the narrower Reproductive Choice Act, which was limited to codifying *Roe* and *Casey*.