



Post *Roe v. Wade* Employer Considerations

Friday, June 24, 2022, the Supreme Court of the United States (SCOTUS) issued a **decision** in *Dobbs v. Jackson Women’s Health Organization* that overturns the high court’s previous decisions on *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992).

There is no longer a federal constitutional right to access abortion services, meaning it’s up to each State to determine whether and to what extent access to abortion services is legal.



We recognize there are employee relations considerations. We encourage employers to discuss how to address employee communications with HR/employment law counsel. It may also be beneficial to determine how an employee assistance program (EAP) or other benefit offering may assist employees with reactions regarding this Supreme Court decision.

We expect lawsuits and legal challenges to develop rapidly as well as new laws in each state either protecting abortion rights or restricting rights which could also include criminalizing abortion along with those who aid and abet. Additionally, TX and OK have whistleblower laws that empower individuals to sue people who perform or aid and abet abortions.

At this time, employers wishing to increase access to abortions and related services will not have a straightforward path for those organizations with employees in multiple states. This means that employers may introduce risk of fiduciary liability, amongst other legal issues, if it runs afoul of state laws that could be applicable.

We've highlighted a few health plan considerations below to help organizations stay compliant as they contemplate potential plan design changes.

CONSIDERATIONS

Does your health plan currently cover abortion services and drugs?

- + If not, does your organization want to add such coverage?
- + If your current SBC and plan reflect an exclusion and you want to expand coverage, be sure to update your SBC and plan to remove the exclusionary language.

Is your group medical plan fully insured or self-insured?

- + If fully insured, what state laws are applicable (i.e. in which state was the plan written)?
- + The Kaiser Family Foundation provides a helpful chart [here](#)

Does your organization want to increase access for participants who live in a state where abortion is restricted or illegal?

- + How comfortable is your organization with taking on risk/liability if it increases access in states where abortion is criminalized?
- + How soon does your organization want to take action to increase access to abortion services?
- + Will any benefit to increase access be provided to all employees or only those enrolled in the group health plan?

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WHAT SOME LARGE NATIONAL EMPLOYERS HAVE BEEN ANNOUNCING

Special note: To the extent an employer has employees in a state with particularly strong prohibitions on abortion, consultation with legal counsel is highly recommended.

We expect that state law will continue to evolve, with some states choosing to regulate not only plans, employers, and individuals residing within their own states, but also attempting to exert extra-territorial (out-of-state) enforcement authority.

Contact your benefits broker to discuss in detail.

The most popular way to increase access is to cover travel expenses for participants who do not live in a state where abortion will remain protected. As noted above, this may carry potential risk with multi-state participants.

The benefit can be tax-free up to IRS caps and amounts over the cap will need to be imputed as income. Airfare and bus/taxi are generally reimbursable (within reason). Currently, limits are a mileage reimbursement rate set by the IRS (18 cents per mile today) as well as \$50 per night lodging (and an additional \$50 per night for a traveling companion if their assistance is needed for the patient to obtain care). Any reimbursements above the mileage rate and lodging allowances are imputed as taxable income, including all meals and other personal expenses which might include facilitating time off, child care, and other needs.

We've already seen travel reimbursement programs designed broadly so as not to be seen as specific to abortion. For example, legal counsel might introduce the benefit as covering travel and lodging for a covered healthcare service in the nearest state that isn't legally available where the employee lives.



Self-Insured Medical Plans

A travel benefit can be offered as a component under the group health plan. In fact, some plans already have travel reimbursement benefits for travel to Centers of Excellence.

Self-funded group health plans are not subject to state insurance laws, which typically regulate insurance carriers. However, there is less clarity on how state laws imposing civil or criminal penalties on individuals or providers who assist with obtaining abortions may impact employers (or their group health plans) if coverage for abortions is made available.



Fully Insured Medical Plans

The employer has less flexibility with their fully insured group health plan as the plan must follow the laws specific to the state where the coverage was written. For instance, CA, IL, ME, MD, NY, OR, and WA require state-regulated medical plans to cover abortion and abortion related services.

Fully insured plans wanting to increase access for participants that don't live in a state that protects abortion services can design a travel reimbursement benefit outside of the group medical plan if the carrier does not offer an option. However, providing travel benefits outside of the group health plan to employees not enrolled in the group medical plan raises additional tax, Affordable Care Act, Mental Health Parity and Addiction Equity Act, and ERISA compliance issues. A medical travel benefit should be limited to those enrolled in the employer's medical plan. Please contact your benefits broker to discuss options for a travel reimbursement benefit.

In any event, employers should be clear in their communication regarding a new travel benefit which may include language regarding the taxability of the program it develops to increase access.

RISKS

- + The most risk lies in increasing access for plan participants who live in states where abortion and related services are illegal, criminalized, or have whistleblower laws and/or empower private individuals to sue people who perform or aid in abortions. To date, these states include Oklahoma and Texas.
- + A lesser-known complexity centers on medication abortion which uses two different medically prescribed pills to bring about abortion. This procedure accounts for a significant amount of all abortions, and we expect there to be many legal challenges to come specific to the "abortion pill".
- + Any program created to increase access that also results in being defined as a group health plan (i.e. integrated with medical or an HRA) will need to be offered differently to qualifying HDHP participants as the reimbursement would affect HSA-eligibility if not made available only after the minimum HDHP deductible is met.

Adding to this patchwork of laws is the complexity of each specific state law. Each state has their own policy nuances including differing exemption policies, whistleblower laws, criminal laws, etc.

This material is for general information only and should not be considered as a substitute for legal, medical, tax and/or actuarial advice. Contact the appropriate professional counsel for such matters. These materials are not exhaustive and are subject to possible changes in applicable laws, rules, and regulations and their interpretations.