The Aftermath of *Dobbs v. Jackson Women’s Health Organization* for Health Plan Sponsors

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The national news has been dominated lately by the Supreme Court’s ruling in *Dobbs v. Jackson Women’s Health Organization*. This decision held that the Constitution of the United States does not confer any right to an abortion and overrules both *Roe v. Wade* and *Planned Parenthood v. Casey*. Along with the political implications of this decision, there are potentially significant implications for employers who sponsor group health plans.

Here are the main points employers may consider working through after *Dobbs*:

1. **Does your group health plan currently cover abortion services?**

   Practice Pointers. Start by reviewing your plan documents, summary plan documents, and insurance policies. Note that abortion services may be covered, but not explicitly stated in the Plan document. If they are covered and not explicitly stated in the Plan document, anticipate that you will begin getting increased participant questions regarding this point.

2. **Does your company want to stop/limit covering, continue covering, or start/expand covering abortion services?**

   Practice Pointers. Any decision will require consideration of the legal considerations as well as tolerance of risk. See below for our discussion of the implications of state laws and the impact of *Dobbs* that factor into this question.

3. **Does your company want to increase or expand travel benefits for employees to receive abortion benefits out of state if abortion services are illegal in their state of residence? If your company wants to offer expanded travel benefits, will it do so through the group health plan or through a separate arrangement?**

   Practice Pointers. While adding these sorts of benefits may be simple from administrative and communication perspective, this addition can raise legal issues. A consideration for employers is to expand travel benefits under a group health plan more broadly than just for abortion services for reasons we will discuss below.

4. **Have you discussed items #1-3 with your insurers, third-party administrators, pharmacy benefit managers (PBMs), and/or other vendors to ensure that they are able to administer your desired plan design?**
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Practice Pointers. No matter the decision, employers will need to make sure that they have the systems in place to administer their plans under the desired design.

As plan sponsors work through the action item questions above, it may be helpful to consider these factors:

ERISA Preemption. One of the most significant aspects of the Dobbs decision is that it leaves the question of abortion, its legality, and corresponding restrictions to the individual states. ERISA generally preempts "any and all state laws" to the extent they "relate to" employee benefits. This has been the subject of a myriad of complicated litigation, but very simply:

- Typically, fully insured group health plans are also subject to state law, meaning if a state passes a law saying a group health plan cannot cover abortion services, a fully insured group health plan would be subject to that law.
- Self-insured group health plans are generally not subject to state laws (a key exception to this rule includes governmental plans).
- ERISA generally does not preempt state criminal laws. There is some risk that state criminal conspiracy and/or aiding and abetting laws may be cited against companies even with self-insured group health plans that cover abortion services (and, depending on further legal developments, potentially also any related medical travel reimbursements).

Essential Health Benefits. Abortion is not considered an "essential health benefit" under the Affordable Care Act. There is no federal requirement that a group health plan cover abortion services.

Existing State Abortion Laws. Prior to Dobbs, several states had passed laws either requiring abortion service coverage as an essential health benefit or placing restrictions on abortion services provided by private health insurance plans.

- Due to ERISA preemption, these laws generally only applied to fully insured group health plans.
- We anticipate more states to enact laws regulating the insurance and PBM industries post-Dobbs.
  - Many plans currently cover abortion medications that can be shipped to a patient’s home, thus PBMs becoming a target for state legislation.

Group Health Plan Requirements. Group health plans are subject to a litany of compliance requirements (e.g., the Affordable Care Act, ERISA, HIPAA, and COBRA). If an employer offers a "pool" of money to reimburse employees who need to travel to receive abortion services, it is possible that the employer could inadvertently create a group health plan that would not have the compliance structures in place of its existing group health plan. For that reason, employers should consider providing any travel reimbursement through the employer’s existing group health plan arrangement.
COBRA Requirements and EAP Structure. One of the disadvantages of running any travel benefits through the group health plan is that it is only able to benefit those employees enrolled in the group health plan. To avoid this consequence, some employers have chosen to create travel benefits under an Employee Assistance Program (EAP), which allows employers to provide the benefits tax-favored but can avoid some of the federal law compliance requirements. However, COBRA still applies to EAPs and would apply to every employee who terminates employment.

Limited Scope Travel Benefit and State Law. If an employer is sponsoring a fully insured group health plan it is likely that state laws attempting to restrict the provision of abortion services under the plan will apply to the plan. However, pending further legal developments, it appears less likely that state laws would be able to attach to a broad medical travel benefit that is neutral in form and operation.

Medical Travel Benefit Reimbursement Arrangement. Employers could consider offering a medical travel benefit reimbursement arrangement on a facially neutral basis to all eligible medical plan participants for all plan services that are unavailable within a fixed geographic limit (e.g., 100 miles).

Mental Health Parity and Addiction Equity Act (MHPAEA). The other advantage of a broad travel benefit as opposed to an abortion service-only travel benefit is that it helps obviate some of the potential MHPAEA compliance concerns. An abortion-only travel benefit is an added benefit only on the medical/surgical side that isn’t balanced on the mental health/substance use disorder side.

Tax Implications. Only certain travel and lodging expenses are considered "medical care" by the IRS.

- IRS mileage rate is 62.5 cents per mile (effective July 1, 2022).
- Lodging expenses are capped at $50 per night for the patient and $50 per night for the travel companion.
- Meals and other "personal expenses" are not medical care; if reimbursed, need to be treated as imputed income.

There are more factors, action items, and considerations for employers in the aftermath of Dobbs. The items discussed in this First Alert are only the tip of this politically charged iceberg. We recommend reaching out to trusted legal counsel, advisors, and consultants to begin working through these items. At Calfee, we will continue to monitor for all the latest legal updates and will provide First Alert updates as needed.
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