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Potential employer health plan impact if Supreme Court overturns *Roe v. Wade*

A recently leaked U.S. Supreme Court draft opinion in *Dobbs v. Jackson Women's Health Organization* suggests that the U.S. Supreme Court decision in *Roe v. Wade* will soon be overturned. This would profoundly impact the provision of employer-provided abortion benefits in many states.

Background

The U.S. Supreme Court (Court) will soon issue its opinion on the legality of a Mississippi state law that bans persons from knowingly performing or inducing an abortion after 15 weeks (except in cases of a medical emergency or severe fetal abnormality). A recently leaked majority draft opinion in *Dobbs v. Jackson Women's Health Organization* would overturn the Court's landmark 1973 abortion rights decision in *Roe v. Wade*. Many employers have questions and seek guidance as to how an overturning of *Roe* will impact their group health plan offerings and the various options they might have in response to such a decision.

If the leaked *Dobbs* draft is made final, it will allow each state to decide whether and how to restrict or ban abortion. While the Court's final *Dobbs* opinion may differ from the leaked draft, the overturning of *Roe* would immediately make anti-abortion laws effective in over 20 states. It is anticipated that additional states would work quickly to enact laws responsive to such a decision. For the most part, these laws vary significantly from state to state as to the type of law involved (e.g., public welfare law versus insurance law) and the scope of the ban or restriction (e.g., complete abortion ban versus timeframe on when the procedure is permissible). Ancillary state and federal laws could also be implicated, including insurance, telehealth, pharmaceutical and tax laws. In addition, existing state abortion laws are subject to modification pending the Court's final ruling in *Dobbs*.

While the overturning of *Roe* would result in significant legal and policy considerations for employers who want to provide health coverage for abortion procedures or related benefits, an employer's

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options and associated risk will depend on a host of factors, all hinging upon the type and scope of the state law(s) at issue. The complexity of this analysis, particularly for employers with employees in multiple states, cannot be overstated. This *FYI* focuses on key areas of employer and plan sponsor inquiry that we have observed thus far relating to the potential impact of *Dobbs*.

Employer-provided abortion-related benefits

Some employers and plan sponsors are evaluating whether to offer an abortion-related benefit in response to the draft *Dobbs* opinion. For example: if a participant must travel more than a certain distance (e.g., 100 miles) to receive a legal procedure, an abortion travel benefit would cover a certain amount of travel costs. Some employers are looking into a more broad-based medical travel benefit that is not specific to abortion procedures. Another abortion-related benefit discussed is the potential for a coordinated benefit utilizing telehealth and pharmacy benefits. If *Roe* is overturned, we expect other ideas and approaches for abortion-related employer-provided benefits will soon emerge. A host of compliance concerns will likely need to be considered in designing and administering any such benefit.

Highlighted compliance considerations

Employers seeking to offer an abortion-related benefit will need to evaluate matters of taxation. For example, while Internal Revenue Code (Code) Section 213(d) currently treats the travel and lodging portion of a medical travel benefit as tax-free (up to certain limits), the cost of meals for medical travel is generally excluded. In addition, Section 213(d)'s exclusion from taxation for certain travel benefits does not apply to medical procedures that are "illegal." This exclusion will necessitate a further evaluation of the state law(s) at issue in determining whether the procedure is deemed "illegal" for purposes of Section 213(d).

Employers and plan sponsors must also consider how any abortion-related benefit is best structured, as well as the potential application of various group health plan mandates (ERISA, ACA, mental health parity, etc.). Coordination with the administrators and carriers involved in certain types of abortion-related benefit offerings will also be necessary to ensure compliance with contractual and administrative requirements. In addition, employers and plan sponsors must consider whether an abortion-related benefit comes with any potential exposure to civil or criminal liability (e.g., "aiding and abetting" anti-abortion measures, such as those recently enacted in Oklahoma and Texas). Last but not least, employers should be aware that noncompliance with a state's anti-abortion law could come with business consequences. For example, members of the Texas House of Representatives recently stated that they would propose legislation prohibiting corporations who provide abortion-related benefits from doing business in that state.

ERISA preemption

With certain exceptions, ERISA Section 514(a) preempts state laws that “relate to” an ERISA plan. Following a complex and nuanced body of case law examining the “relates to” ERISA preemption rule, whether a state law “relates to” an ERISA plan is essentially a question for the courts. Generally speaking, ERISA will not preempt a state law that only indirectly impacts an ERISA plan. Thus far, we have not observed any state abortion laws that reference ERISA plans specifically.

ERISA Section 514(b) provides an exception to ERISA preemption for “state laws regulating insurance.” With respect to state abortion laws that constitute “laws regulating insurance,” (e.g., state insurance mandates) the application of ERISA preemption will depend primarily on whether the plan at issue is fully insured or self-funded. Single employer ERISA plans that are self-funded are not subject to state laws regulating insurance. However, fully insured plans are subject to most state insurance mandates, as are self-insured multiple employer welfare arrangements. ERISA preemption also does not apply to “any generally applicable criminal law of a State.” While the question of whether a state criminal law prohibiting abortion or abortion-related activities constitutes a law of general applicability for this purpose is ultimately a decision for the courts, it is reasonable to expect that a state criminal law aimed at abortion generally would easily fall within this exception to ERISA preemption.

Extraterritoriality

State law has an extraterritorial effect when it applies to activities occurring in another state. In the abortion rights context, some states will seek to prevent their residents from traveling out of state for legal abortions. For example, a recent proposal in Missouri would make it illegal for anyone out-of-state to provide, aid, or advertise abortion to a Missouri resident. States legalizing abortion will seek to protect the rights of out-of-state residents to receive legal abortions in their states. Employers and plan sponsors offering abortion-related benefits will need to evaluate state laws with extraterritorial provisions regardless of where the employer is headquartered or where the procedure is performed.

In closing

The recently leaked draft of the *Dobbs* opinion suggests that states will soon be permitted to enact and enforce anti-abortion laws that *Roe* currently prohibits. Even when *Dobbs* is made final, much uncertainty will remain for employers and plan sponsors due to variances in the nature and types of state anti-abortion laws, differing effective dates, ERISA preemption, matters of extraterritoriality and other factors. State enforcement initiatives, judicial discretion and even the discretion and policies of abortion providers will also play a significant role in the future of abortion rights and benefits. Much in the way of both state and federal legislative activity is anticipated should *Dobbs* overturn *Roe*. Ultimately, employers and plan sponsors evaluating abortion-related benefits should actively monitor these developments and seek advice from their advisors.

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