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Travel benefits for abortion coverage

With the Supreme Court decision overturning *Roe v. Wade*, employers who want to provide abortion coverage in states that will prohibit or limit abortions are considering options to assist employees and their dependents. The option to provide travel benefits is one approach that many employers are investigating. While offering a travel benefit for limited services is fairly common, the issues that need to be considered when offering this benefit in the abortion context are complex and quickly evolving.

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Background

As reported in our [June 24, 2022 FYI Alert](#), the recent decision handed down by the U.S. Supreme Court (the Court) in *Dobbs v. Jackson Women's Health Organization* overturned the landmark 1973 abortion rights decision in *Roe v. Wade*. At issue in *Dobbs* was 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). Finding that the U.S. Constitution does not provide an abortion right, the *Dobbs* decision empowers each state to decide whether and how to restrict or ban abortion. As a result, laws that prohibit or limit abortions will likely be effective in roughly half the states, with additional states expected to pass laws responsive to the *Dobbs* opinion in the near future. This leaves employers to grapple with group health plan coverage questions, including how to address potential coverage gaps, amid a shifting legislative landscape.

Providing an abortion travel benefit has emerged as a key solution for group health plans and employers seeking to continue to provide abortion coverage for employees in impacted states. While such a solution may assist in offering access for otherwise restricted abortion procedures, it is by no means a cure-all and comes with a host of compliance concerns and considerations. This *FYI* examines the primary compliance considerations in designing and implementing an abortion travel benefit.

Abortion travel benefit

The concept of an abortion travel benefit is fairly straightforward: 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 the employee or dependent's travel costs (all or up to a specified amount). However, this type of benefit comes with significant ERISA, income tax, and other compliance concerns and considerations apart from the *Dobbs* decision. Employers considering abortion travel benefits will need to carefully evaluate the relevant federal employee benefit laws against the backdrop of specific state anti-abortion laws. The following summarizes the most significant of these concerns.

Travel benefit design and structure

The question of whether an abortion travel benefit will be offered as part of or separate from an employer's medical plan is paramount. Both approaches have their pros and cons — including an abortion travel benefit as part of the medical plan would necessarily limit benefit access to only participants enrolled in coverage. It would also necessitate the need for greater formality, including the requirement for a plan amendment. Importantly, however, an employer's inclusion of an abortion travel benefit within its medical plan would likely bolster its protection from state anti-abortion laws on the basis of ERISA preemption, at least with respect to self-funded plans. (See our [May 27, 2022 FYI](#) for a basic discussion of ERISA preemption.)

Buck comment. The ability to administer a travel benefit may be limited by the capabilities of a plan's insurer, TPA, or other service providers. Therefore, it is crucial that employers carefully coordinate with their medical vendors.

Employers offering an abortion travel benefit apart from their medical plan must be cognizant of creating a "mini" group health plan. Such a stand-alone plan would face serious compliance obstacles as it would be subject to the requirements of ERISA, ACA and corollary laws. One of the more approachable solutions that has emerged is the potential for utilization of an excepted benefit employee assistance program (EAP) to provide this benefit. Under the DOL's current subregulatory guidance, an EAP will be deemed "excepted" and not a "group health plan" for purposes of ERISA if it does not provide "significant medical care." If the EAP abortion benefit is limited to travel reimbursement only, then it might not constitute "significant medical care." In addition to the rule that an excepted benefit EAP cannot provide significant medical benefits, it also must not: (i) be coordinated with benefits under another group health plan; (ii) charge a premium for participation; or (iii) require any cost sharing for offered services. Importantly, an excepted benefit EAP abortion travel benefit solution not only avoids the onerous requirements of ERISA and ACA, it also would not impact an individual's HSA eligibility.

Buck comment. One acknowledged risk of the excepted benefit EAP approach is the potential for a new administration in Washington to alter the current view on what constitutes "significant medical care" for purposes of the excepted benefit EAP.

In addition to the above, some employers may find the excepted benefit EAP approach advantageous to the extent that it allows abortion travel benefits to be extended to employees beyond those who are enrolled in their medical plan. The tax advantages available for such a benefit (discussed below), would still be available in this context. Nonetheless, it is necessary to evaluate the question of administration of an excepted benefit EAP abortion travel benefit. Many existing EAPs have limited administrative capabilities and an abortion travel benefit gives rise to substantial tax and administrative requirements.

Some employers may opt for in-house administration of an abortion travel benefit. However, that approach raises its own set of concerns. For example, while HIPAA privacy requirements are generally understood by and considered in group health plan administration, employers having access to what would surely be considered highly personal information could raise more generalized employer-employee privacy concerns.

Buck comment. A health reimbursement account (HRA) may also be a viable solution for employers seeking to offer an abortion travel benefit. An integrated HRA approach would however limit availability of an abortion travel benefit to employees enrolled in the medical plan. While an excepted benefit HRA could make an abortion travel benefit more broadly available (to employees offered medical plan coverage), the excepted benefit HRA reimbursement limit of \$1,800 per year in 2022 (\$1,950 in 2023 and indexed in future years) may be less than the actual abortion travel cost in many instances.

When it comes to establishing the parameters of an abortion travel benefit, it may be advisable to make it more broadly available for medical travel generally. Attaching a medical benefit to state law restrictions in general (as opposed to abortion bans specifically), would seemingly prove useful in an ERISA preemption argument, as well as other areas. For example, a plan's abortion-specific travel benefit could create parity concerns unless the equivalent benefit is also extended for the plan's mental health and substance use disorder benefits. While it may be some time before this concern is tested before the courts or challenged by regulators, a more broad-based benefit would likely be better positioned to withstand scrutiny where mental health parity is concerned.

An additional option that some employers are considering is a taxable reimbursement benefit for "wellness" related travel generally. A broad-based wellness travel benefit would encompass an employee's travel and lodging expenses incurred in abortion-related travel. If the employer does not require substantiation of an abortion or other underlying wellness treatment, its lack of knowledge as to the purpose for the travel would better position it to defend against any aiding and abetting allegations (see discussion below). While such a benefit would likely come with more significant costs in covering wellness travel generally, its potential to protect employers from civil and/or criminal liability makes it an attractive option for some. This approach could mitigate privacy and similar employment-related concerns as well.

Taxation

Travel for medical purposes can be provided tax free as a medical expense under IRC Section 213(d) when it constitutes “transportation primarily for and essential to medical care.” This includes reimbursement of mileage and bus, train and plane fare. However, certain conditions and limitations apply. Any meal reimbursements covered by a medical travel benefit would generally not be covered by Section 213(d) and could not be provided on a tax-free basis. Section 213(d) limits tax-advantaged medical travel hotel reimbursement to \$50 per night (\$100 per couple). Additionally, the Code limits companion travel benefits to “necessary” companion travel. In the abortion travel context, a companion’s travel cost will likely meet this standard, but employers will need to consider how they will substantiate that the requirements have been met. While an employer is able to design a medical travel benefit to cover whatever expenses it wishes, any expenses not covered by Section 213(d) or in excess of Section 213(d) limits would be considered taxable wages subject to income tax and withholding.

Liability concerns

Employers and plan sponsors may be surprised to learn that the decision of whether to offer an abortion travel benefit in the post-*Roe* world could come with potential civil or criminal liability in some jurisdictions. This is true because some states — Oklahoma and Texas, for example — attach liability to those who “aid and abet” others in violating their state’s anti-abortion laws. Other states have aiding and abetting laws which may apply to prohibited acts more generally. Depending upon the nature and scope of a particular state’s anti-abortion law, civil and/or criminal liability may attach to those who assist others in obtaining abortion procedures, even where the treatment is received in a different state. This liability could extend to employers who pay for an employee’s travel to obtain a legal abortion in a different state.

Buck comment. Justice Kavanaugh, in his concurring opinion, stated “...some of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.” On this point it is important to note that the full Court’s view of the issue could be different if challenged.

In these situations, the question will ultimately become “who is liable?” The answer will depend on a number of factors, including the corporate laws of the state of the employer’s incorporation. In many cases, liability would typically rest with the corporation’s board of directors. While the extent of enforcement of aiding and abetting laws in this context will ultimately be state-specific and is unknown at this time, employers and other plan sponsors should be prepared for the possibility of liability should they offer abortion travel benefits to individuals residing in states where the procedure is illegal. As a related concern, it is important to keep in mind that fiduciary liability and E&O policies generally contain exclusions for liability arising from acts taken knowingly in violation of applicable laws.

In closing

Employers exploring a travel benefit for expanded abortion coverage will need to address the compliance issues involved and also be prepared for rapid changes in state law. A critical factor in the decision process to provide abortion travel benefits will be the support and capabilities offered by insurers, TPAs, EAPs and other vendors who will be charged with administering the benefit.

Upcoming webinar:

The implications for health benefits and HR communications in a post-Roe workplace

We'll discuss the ramifications for group health plan sponsors and strategies for communicating plan changes to employees on this highly charged issue.

Date: Wednesday, July 27, 2022

Time: 1:00 - 2:00 p.m. ET

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