

Employee Benefits Update: Group Health Plan Considerations After the *Dobbs* Decision

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Today's Topics

- Overview of the Supreme Court's *Dobbs* decision
- How states may regulate abortion
- Impact of *Dobbs* on group health plans (and related benefits)

Overview of the Supreme Court's *Dobbs* Decision

Supreme Court's Abortion Jurisprudence

- In *Roe v. Wade* (1973), the Supreme Court found that the right to obtain an abortion was protected by the U.S. Constitution (trimester framework)
- In *Planned Parenthood v. Casey* (1992), the Supreme Court upheld *Roe's* constitutional right to an abortion, but abandoned the trimester framework and replaced it with a viability analysis

The *Dobbs* Decision

- In *Dobbs*, the Supreme Court found that the U.S. Constitution does not confer a right to an abortion and expressly overruled both *Roe* and *Casey*
- The *Dobbs* decision did not outlaw abortions. Rather, the regulation of abortions is left to the states
- There has been various federal legislation proposed that both codifies *Roe/Casey* protections and limits an individual's right to an abortion
 - Currently, it doesn't appear that any of this legislation has enough support in the Senate to pass. And any legislation limiting an individual's right to an abortion would likely be vetoed

How States May Regulate Abortion

State Regulation of Abortion

- States, currently, have discretion to regulate abortion
 - States may prohibit abortion with no exceptions (including in order to protect the life or health of the mother)
 - States may allow abortion up to childbirth
 - And anywhere in between
- For states that prohibit or restrict abortion, this will likely happen by:
 - Prohibiting the provision of abortion, either through civil or criminal liability; and/or
 - Imposing civil or criminal liability on assisting with, or aiding and abetting an individual in procuring an abortion (which likely includes paying for an abortion)

Michigan's 1931 Law

- Currently enjoined by the Court of Claims and a Wayne County Circuit Court
- Ballot initiative

THE MICHIGAN PENAL CODE (EXCERPT)
Act 328 of 1931
CHAPTER III
ABORTION

750.14 Miscarriage; administering with intent to procure; felony, penalty.

Sec. 14. Administering drugs, etc., with intent to procure miscarriage—Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

History: 1931, Act 328, Eff. Sept. 18, 1931;—CL 1948, 750.14.

Constitutionality: Section held unconstitutional as relating to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in the exercise of his medical judgment. *Doyle v Briker*, 389 Mich 524; 208 NW2d 172 (1973).

Former law: See section 34 of Ch. 153 of R.S. 1846, being CL 1857, § 5744; CL 1871, § 7543; How., § 9108; CL 1897, § 11503; CL 1915, § 15225; CL 1929, § 16741; sec. 35 of Ch. 153 of R.S. 1846; Act 61 of 1867; CL 1871, § 7544; How., § 9109; CL 1897, § 11504; CL 1915, § 15226; and CL 1929, § 16742.

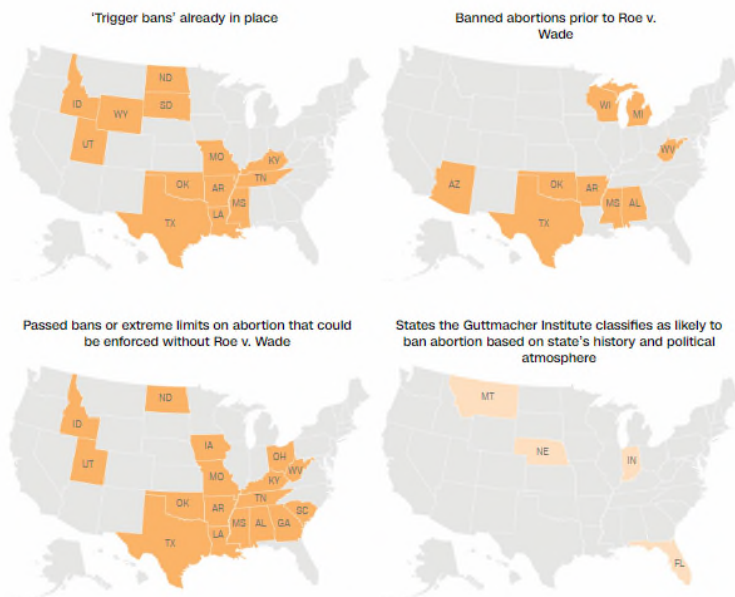
750.15 Abortion, drugs or medicine; advertising or sale to procure; misdemeanor.

Sec. 15. Selling drugs, etc., to produce abortion—Any person who shall in any manner, except as hereinafter provided, advertise, publish, sell or publicly expose for sale any pills, powder, drugs or combination of drugs, designed expressly for the use of females for the purpose of procuring an abortion, shall be guilty of a misdemeanor.

Any drug or medicine known to be designed and expressly prepared for producing an abortion, shall only be sold upon the written prescription of an established practicing physician of the city, village, or township in which the sale is made; and the druggist or dealer selling the same shall, in a book provided for that purpose, register the name of the purchaser, the date of the sale, the kind and quantity of the medicine sold, and the name and residence of the physician prescribing the same.

History: 1931, Act 328, Eff. Sept. 18, 1931;—CL 1948, 750.15.

Former law: See section 1 of Act 138 of 1873, being How., § 9312; CL 1897, § 11729; CL 1915, § 15523; CL 1929, § 16085; section 3 of Act 138 of 1873, being How., § 9314; CL 1897, § 11731; CL 1915, § 15525; CL 1929, § 16087; section 2 of Act 138 of 1873, being How., § 9313; CL 1897, § 11730; CL 1915, § 15524; and CL 1929, § 16086.



Note: North Carolina also has a ban that was in place before Roe, but according to the Guttmacher Institute, "it is unclear if the state's law would be implemented quickly." Data as of May 2, 2022
Source: Guttmacher Institute, Graphic: Priya Krishnakumar and John Keefe, CNN

Impact of *Dobbs* on Group Health Plans (And Related Benefits)

Two Areas to Cover Today

1. Issues with covering abortion (and abortion-related services) under a group health plan
2. Issues to consider when adding a travel reimbursement benefit to assist employees who must travel to obtain an abortion

Covering Abortions under a Group Health Plan

- First step is to determine does your group health plan currently cover abortions
 - Medically necessary abortions. Most group health plans must cover medically necessary abortions under the Pregnancy Discrimination Act
 - Non-medically necessary abortion, but limited to those in the event of rape and incest.
 - Voluntary or elective abortions
- Second step is to, as an organization, determine how the organization's group health plan will cover abortions post-*Dobbs*

Issues to Consider with Covering Abortions

- For group health plans that cover abortions (or will cover abortions), the plan sponsor must consider:
 - The states in which it has employees who are eligible for the group health plan
 - Whether the group health plan is subject to ERISA (all group health plans except those sponsored by governmental and church employers)
 - Whether the group health plan is fully insured or self-funded
- These last two points are important to determine the application of ERISA preemption of state law

Primer on ERISA Preemption

- Generally, ERISA preempts any state law that relates to any employee benefit plan subject to ERISA
 - Under the “savings” clause, a state law that regulates insurance, banking, or securities is not preempted
 - But under the “deemer” clause, a state cannot “deem” a self-funded group health plan as insurance
- ERISA preemption also does not apply to state criminal laws of “general applicability”
- As a result, most state laws that prohibit paying for an abortion will likely prohibit fully insured plans (through insurance regulation) from paying for abortions, but will not apply to self-funded plans due to ERISA preemption

How State Laws May Impact Group Health Plans

- States that only prohibit the provision of abortion will likely have little (if any) impact on group health plans
 - An employee who resides in such a state and is enrolled in a group health plan that covers abortions will not be able to obtain an abortion, unless the employee travels to another state that allows abortions
- For states that prohibit assisting, or aiding and abetting an individual from procuring an abortion:
 - Civil liability - This will likely prohibit fully insured group health plans (through state insurance regulation), but not self-funded group health plans subject to ERISA, from covering abortions
 - Criminal liability – This will likely prohibit all group health plans from covering an abortion (exception for criminal laws of general applicability)

Travel Reimbursement Benefit

- Many employers with employees in states that do (or plan to) prohibit or restrict abortions have publically pledged to provide a travel reimbursement benefit for employees who incur expenses to travel to another state to procure an abortion
- Employers must evaluate the permissibility of these arrangements using the same framework as whether it is permissible for a group health plan to cover abortions
- These arrangements can be offered in various methods:
 - Under the employer's group health plan
 - As a separate (or carve-out) arrangement from the employer's group health plan

Travel Reimbursement Benefit

- Considerations when offered under an employer's group health plan:
 - MHPAEA – If the reimbursement benefit is only offered for abortions (a medical/surgical benefit), this may violate the MHPAEA (which generally requires that a group health plan cover mental health/substance use disorder benefits in parity with medical/surgical benefits)
 - Tax issues – limitations on tax-free reimbursements:
 - Auto - \$0.22 per mile
 - Planes, trains, buses, etc. – the price must be reasonable
 - Lodging - \$50 per day (\$100 per day if necessary to travel with a companion)
 - Meals – generally not allowable outside of hospital-provided meals
 - Is the insurer (fully insured) or TPA (self-funded) able to administer?

Travel Reimbursement Benefit

- Considerations when offered on a separate basis:
 - If the benefit will only reimburse travel that is necessary in order to receive “medical care,” this is likely a “group health plan” under ERISA and the Code. As a result, the employer must consider:
 - ERISA
 - ACA
 - COBRA
 - Taxability
 - HIPAA
 - MHPAEA
 - HSA eligibility
 - ERISA preemption

Travel Reimbursement Benefit

- If the benefit will be a broad-based travel reimbursement benefit (i.e., not just travel that is necessary to obtain “medical care”), this is likely not a group health plan
- This will remove many of the concerns that exist when the arrangement is a group health plan (i.e., ERISA, ACA, COBRA, HIPAA, MHPAEA, HSA eligibility). However, there are still other issues that must be considered:
 - How to define expenses that are eligible for reimbursement outside of the context of “medical care”
 - Taxability – reimbursement is treated as taxable wages, which are subject to income and payroll tax and applicable withholdings
 - This could increase an employer’s wage costs (e.g., profit-sharing or matching contributions under a 401(k) plan, workers’ compensation, etc.)
 - No ERISA preemption

Questions



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