

## Harter Secrest &amp; Emery LLP

ATTORNEYS AND COUNSELORS

## EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

**OVERVIEW OF LEGAL ISSUES IN COVERING ABORTION-RELATED TRAVEL EXPENSES**

If the leaked draft opinion in *Dobbs v. Jackson Women's Health Organization* (or some close variation of it) becomes the official majority opinion, the Supreme Court will overturn the landmark decision of *Roe v. Wade*, which held that the United States Constitution includes a right to have an abortion. The Court's holding in the draft *Dobbs* opinion denies that a constitutional right to an abortion exists, and instead would leave the issue of abortion regulation to the legislative process. Federal legislation guaranteeing the right to an abortion is unlikely to be enacted by the current Congress. A number of states have already enacted legislation that will eliminate or severely restrict access to abortion and a number of large employers have already announced that they plan to offer travel benefits designed to help employees access abortion services. The legal issues associated with offering a travel benefit are vast and complex. This LEGALcurrents provides a broad overview of some of the basic legal issues that an employer should consider in deciding whether to offer such a travel benefit. Obviously, abortion is an issue on which individuals hold a wide range of opinions, and employers will also need to consider the impact that any action or inaction may have on their employees and, potentially, their public image.

**Determining Whether to Offer a Travel Benefit**

At the outset, employers will first want to consider whether offering a travel benefit is necessary to ensure sufficient access to abortion. To state the obvious, if an employer's workforce is located exclusively within states where access to abortion has been sufficient and is not likely to be subject to additional restriction by state legislative action following the anticipated decision in *Dobbs*, there wouldn't be a need to offer a travel benefit. However, employers with a national workforce or with a workforce in states that currently limit (or are expected to limit) abortion access, may want to consider offering a travel benefit if they decide to take steps to facilitate access to abortion services.

**Group Health Plan Considerations**

An employer that wants to offer a travel benefit will have to decide whether to offer the benefit as part of its group health plan or to offer the benefit to all employees, regardless of whether they are enrolled or eligible to enroll in the group health plan. We generally do not recommend the latter approach, as discussed later.

As background, abortion constitutes "medical care" under the Internal Revenue Code, which means that a group health plan can cover abortion on a tax-free basis. Moreover, Internal Revenue Code rules also treat as medical care lodging costs (up to \$50/person per night) and reasonable travel costs (excluding meals) associated with obtaining medical care. Thus, an employer could cover travel costs associated with abortion

---

Practice Group Leader  
Paul W. Holloway

Health and Welfare  
Thomas J. Hurley  
John W. Brill

Counsel  
Leslie E. DesMarteau  
Lisa G. Pelta  
Joseph E. Simpson

Associates  
Amanda M. Karpovich  
Crosby A. Sommers  
Hailey S. Trippany

Benefits Litigation  
Jessica N. Clemente  
Erika N. D. Stanat

Retirement  
Mark R. Wilson

Executive Compensation  
Christopher M. Potash

through its group health plan, though the employer would have to impute as income the value of the benefit that does not constitute medical care (e.g., lodging above \$50 per night and meals, if covered by the plan).<sup>1</sup>

Most group health plans do not broadly cover travel expenses and those that do typically limit the coverage to travel to “centers of excellence” that provide specified, high-cost procedures (e.g., transplants). So, if an employer wanted to cover abortion travel costs, it would likely need to amend its plan. One consideration at the outset would be whether to cover travel costs just for abortion or whether to expand it to all benefits or some narrower category of benefits. In making these decisions, the employer will want to consider not only the cost, but also some legal risks in limiting the travel benefit to abortion. For example, limiting travel costs to obtain an abortion could create a disparate treatment or impact claim risk, as only biological females can benefit. Limiting travel to obtain an abortion (a medical/surgical benefit) could also implicate the federal mental health parity law, which generally requires that plans’ nonquantitative treatment limitations on mental health benefits be no more onerous than those that apply to medical/surgical benefits. Employers that amend their plans to add travel benefits will need to consider the parameters for the benefit. For example, is travel limited to the closest state in which an individual may obtain a legal abortion? In addition, employers with health savings account (“HSA”)-compatible high deductible health plans should ensure that the travel benefit is provided only after the individual has satisfied his or her deductible; otherwise the plan would lose its status as an HSA-compatible high deductible health plan.

Employers with self-insured plans (meaning, claims are funded from the employer’s general assets or a trust) generally have broad flexibility to amend their plans to enhance the scope of benefits, though employers with stop-loss insurance should review their stop-loss policy and notify the stop-loss carrier of any benefit design changes. It is more difficult for employers with fully-insured plans (meaning, an insurance carrier is financially responsible for paying the claims and the employer’s obligation is limited to paying the premium to the carrier), since the insurance carrier is effectively responsible for the plan design and may need approval from a state insurance department to modify benefits. Employers with fully-insured plans could consider offering a health reimbursement arrangement (“HRA”) to cover travel costs. An HRA is a self-insured arrangement in which the employer can credit a notional account with a dollar amount of the employer’s choosing; the HRA could, in turn, reimburse travel expenses. In general, the HRA would have to be limited to employees enrolled in the employer’s underlying group health plan or those enrolled in another group health plan (such as a spouse’s employer’s plan).<sup>2</sup>

### **Offering the Benefit Outside of the Group Health Plan**

As an alternative to offering a travel benefit under its group health plan, an employer could try to make the benefit available outside of its group health plan. There are a number of concerns with this approach.

---

<sup>1</sup> We note that Senator Rubio of Florida has introduced a bill that, if enacted, would prevent employers from deducting the cost of providing travel benefits for abortions or certain transgender services by children. This bill has little chance of becoming law while President Biden is in office.

<sup>2</sup> Note that establishing an HRA creates other legal obligations, such as paying the annual PCORI fee and enhanced HIPAA privacy/security obligations.

First, if the employer pays for or reimburses travel expenses associated with an abortion, the employer could be viewed as unwittingly creating a separate group health plan. This is because, as discussed above, abortion travel costs can constitute medical care, and an employer that establishes a program that reimburses or pays for medical care will have effectively created a group health plan. Unfortunately, a group health plan that only covered travel costs would not satisfy the Affordable Care Act's coverage rules, and so would not be permitted on a standalone basis. To avoid this issue, an employer could try to pay a pre-determined fixed dollar amount/stipend to any individual who traveled to obtain an abortion, rather than paying a reimbursement based on actual expenses, but even doing that would not guarantee that the arrangement would not be considered a group health plan by the Department of Labor or the Department of the Treasury.

Another advantage to providing the travel reimbursement through an established group health plan is that the program would be subject to HIPAA's privacy rules and thus operate under the employer's established HIPAA policies and procedures. HIPAA generally prohibits a group health plan from disclosing protected health information to an employer unless the information is needed for health care operations of the plan, and even then, the disclosure is subject to a "minimum necessary" standard. Employers are strictly prohibited from using or disclosing protected health information for employment purposes. HIPAA would not apply to an arrangement outside of a group health plan, and so employees may feel less comfortable seeking abortion travel benefits directly from their employer without HIPAA's protections.

Finally, as discussed in more detail in the next section, if an ERISA-covered employer (generally, private sector employers) offers the travel benefit outside of its group health plan, it would not be able to use ERISA's preemption provision as a shield to try to avoid application of state law.

### **Federal and State Law Considerations**

If *Roe* is overturned, the federal government could regulate abortion. While Democrats currently control Congress, they do not have a filibuster-proof majority in the Senate, and so they would likely have to eliminate the filibuster to enact abortion legislation. Based on recent commentary from some Democratic senators, eliminating the filibuster appears unlikely. Republicans have also hinted that they may try to enact abortion legislation if they control Congress and the presidency, but the earliest that could happen is 2025.

In the meantime, states would essentially have free reign (except as may be limited in state constitutions) to restrict or even outlaw abortion. In fact, several states have "trigger laws" that would automatically regulate abortion upon *Roe* being overturned. One recent law that has garnered national attention is a Texas law that would allow private citizens to file lawsuits and collect up to \$10,000 in damages against individuals that perform or aid and abet (including by paying for) an abortion that would violate Texas law.

Employers offering a travel benefit for abortion will want to be cognizant of these state laws and the impact they may have on their travel benefit. As discussed earlier, one advantage of including the travel benefit as part of a group health plan is that it would give ERISA-covered employers the ability to argue that state civil laws (such as the Texas law) prohibiting the reimbursement of travel expenses are preempted by ERISA. ERISA preempts state laws that relate to ERISA-covered employee benefit plans. In recent years, the

Supreme Court has interpreted the ERISA preemption provision somewhat narrowly, holding that ERISA only preempts state laws that intrude upon a central matter of plan administration and interfere with nationally uniform administration. Even so, we believe that a group health plan would have a strong ERISA preemption argument if a state civil law attempted to prohibit or limit the practice of covering travel for abortion services, since if an employer were prohibited from offering the benefit in certain states, those states' laws would obviously have a drastic impact on the nationally uniform administration of the plans.

It is important to note that ERISA provides that certain state laws are not preempted by ERISA. This so-called "savings clause" allows state laws that regulate insurance to escape ERISA preemption. Thus, if a state prohibited (either explicitly or implicitly) an insurance carrier from selling an insurance product that covered abortion and/or an abortion travel benefit, the carrier would be prohibited from doing so.

However, ERISA also includes what is referred to as the "deemer clause," which provides that an ERISA plan or trust established under an ERISA plan cannot be deemed to be an insurance company for purposes of state laws regulating insurance companies. Thus, states cannot directly regulate self-insured ERISA-covered group health plans (including HRAs, discussed earlier).

Also saved from ERISA preemption are generally applicable criminal laws. So, if a state enacted a criminal law that made covering abortion/abortion travel illegal, the law would not be preempted by ERISA and thus could result in criminal liability on an employer paying for travel benefits.

## Conclusion

As noted earlier, this LEGALcurrents is intended to provide a basic overview of the issues employers should consider in offering a travel benefit in light of the anticipated decision in *Dobbs*. Offering and designing the benefit entails legal and administrative complications, and an employer's specific design choices will largely hinge on the location of its workforce and the type of benefit plan (insured versus self-insured) it currently offers. If you are interested in offering a travel benefit, we are happy to discuss these issues in further detail. Please contact any member of the Employee Benefits & Executive Compensation group at 585.232.6500, 716.853.1316, or visit [www.hselaw.com](http://www.hselaw.com).

Attorney Advertising. Prior results do not guarantee a similar outcome. This publication is provided as a service to clients and friends of Harter Secrest & Emery LLP. It is intended for general information purposes only and should not be considered as legal advice. The contents are neither an exhaustive discussion nor do they purport to cover all developments in the area. The reader should consult with legal counsel to determine how applicable laws relate to specific situations. © 2022 Harter Secrest & Emery LLP

