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Labor & Employment Alert

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Employer challenges post-*Dobbs* — travel benefits to access reproductive healthcare

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With *Roe* and *Casey* overturned, we discuss options, related risks, and other considerations for employers weighing new policies/existing benefits regarding healthcare travel.



What's the Impact?

- / Several seemingly straightforward options for implementing travel reimbursement benefits exist, but none are perfect solutions
- / Employers must weigh their goals against their risk tolerance and other potential limitations

On June 24, 2022, the Supreme Court of the United States issued its expected ruling in *Dobbs v. Jackson Women's Health Organization*, which overrules long-standing precedent (including *Roe v. Wade*) and allows individual states to regulate access to abortion services. Given that at least 26 states immediately did or are poised to ban abortion access, individuals residing in these states may need to travel to another state to obtain reproductive healthcare.

In an effort to maintain equal access to care regardless of location, many companies are attempting to reduce the monetary barriers imposed by such travel through changes to their employee benefits packages. However, the structure of such a travel reimbursement presents a

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complex Gordian knot of applicable, and sometimes conflicting, employment, healthcare, benefits, and tax laws. These are some of the options, related risks, and other considerations for employers as they endeavor to implement new policies and/or expand existing benefits.

Option 1: Expand group health plan benefits

The most straightforward path for implementing travel reimbursement benefits is likely for the employer to expand its existing group health benefits to include reimbursement for travel required to access certain medical services. This is because such a reimbursement program is likely itself a group health plan subject to the Employee Retirement Income Security Act (ERISA) and certain requirements under the Affordable Care Act (ACA). In addition, this approach can minimize privacy concerns because the health plan provides the benefits directly, eliminating the need for employees to approach their employers to request reimbursement or for employers to unwittingly become subject to Health Insurance Portability and Accountability Act (HIPAA) privacy and security rules. Because travel benefits provided through a group health plan are likely to enjoy ERISA preemption, this option also may protect the employer from potential enforcement of and liability under state civil statutes that allow individuals to recover penalties through lawsuits against companies or individuals that aid or abet the procurement of abortions.¹

This option would also permit employers to provide travel reimbursements in a more tax-efficient manner. Transportation expenses primarily for and essential to the provision of medical care cannot be included in the gross income of the individual receiving that care. However, meals and lodging could be taxable to the individuals.

Although this is the simplest approach, employers may find it to be far from perfect. To start, it is an option really available only to self-insured employers. Fully insured employers are at the mercy of what their carriers will cover. Even if fully insured employers were to add a standalone health reimbursement arrangement (HRA) to pay for out-of-state services (an option also available to self-insured employers), group insurance approaches are far from comprehensive. For instance, providing for these benefits through the group health plan naturally requires that the benefits be limited only to those employees and dependents enrolled in the plan. In other words, this approach would exclude from eligibility any employees who, for any reason, did not elect coverage and/or who are not benefits-eligible (i.e., part-time employees, interns). An intermediate approach is to offer an excepted benefit HRA to all benefits-eligible employees, whether they are enrolled in the plan or not. The downside of this approach is the limited amount an employer may make available under the HRA for a year (\$1,800 in 2022, which may be increased for cost-of-living adjustments in future years).

Another potential limitation whether the benefit is added to an existing health benefit plan or as a standalone HRA (including an excepted benefit HRA), to the extent the program is a group

¹ Please note that ERISA does not preempt state criminal laws, and it is possible that state attorneys general will seek to prosecute employers who “aid and abet” employees in obtaining abortion services out of state by funding their travel.

health plan, it would likely be disqualifying coverage for purposes of health savings accounts (HSAs). Thus, employees enrolled in a high-deductible health plan with an HSA would not be able to get travel reimbursements until the statutory minimum deductible has been reached.

Option 2: Structure the program as part of an Employee Assistance Program (EAP)

Another option for employers may be to structure the travel reimbursement program to be part of an EAP that satisfies the ACA's "excepted benefit" requirements. In short, those requirements are that (i) the program does not provide significant benefits in the nature of medical care, (ii) the program is not coordinated with benefits under another group health plan, (iii) no employee contributions are required, and (iv) there is no cost-sharing under the program.

If the travel benefit is part of an excepted benefit EAP, it can be offered to all employees and their dependents (i.e., not just those who are enrolled in the group health plan) without running afoul of the ACA's group health mandates. Employers should reach out to their current EAP providers to determine whether the EAP could support this benefit.

Option 3: Develop a standalone travel reimbursement policy

Employers seeking to offer benefits most expansively may consider creating a standalone reimbursement policy through which the employee would seek reimbursement directly from the employer. This approach affords companies greater flexibility in setting eligibility, scope, and coverage parameters. To this end, it also offers employers the ability to cover reasonable expenses of an accompanying companion, if they so desire.

However, this approach is not without risk, including that potential penalties for noncompliance with the ACA requirements for group health plans discussed above (e.g., the requirement to cover recommended preventive services without cost and not imposing any annual dollar limits on available benefits). At this time, there is no current guidance from either the Internal Revenue Service or the Department of Labor (the enforcement authorities for such requirements) on this type of policy. While, practically speaking, it is not likely that the current administration would issue any applicable adverse regulatory guidance, a different administration after 2024 could announce a different enforcement policy with respect to these employer reimbursement arrangements (at which time, the policy might have to be reconsidered). In addition, some states with strong anti-abortion positions may take the position that funding travel for abortion services may constitute "aiding and abetting" abortion services in violation of certain civil or criminal statutes.

Things to consider regardless of selected approach

Should the program be limited to abortion services only?

Travel reimbursement programs that are limited to abortion are more likely to catch the eye of regulators in states that take anti-abortion positions. Therefore, employers should consider whether to offer a broad-scope travel reimbursement program for all medical expenses. In fact,

many group health plans already provide travel benefits for certain complicated procedures (such as transplants), so existing programs may easily be expanded. Also, following the *Dobbs* decision, it is anticipated that many states will target other health services (such as those related to gender dysphoria). An expansive program would cover these costs without requiring additional amendment.

What limits should be placed on the program?

Reimbursable travel benefits typically include airfare, lodging, car rental, and meals. To help manage costs, employers can place maximum reimbursements on each of those categories, or apply an aggregate reimbursement maximum. Usually, limits are applied annually rather than as a lifetime maximum benefit.

How will the information be communicated?

Keeping in mind that the situations in which employees will need to access these benefits will be highly personal and often very stressful, employers will want to be proactive with communication about the specific details of any benefits offered.

Will additional paid time off be made available for this purpose?

Employers desiring to offer additional paid time off for reproductive healthcare should consider including details in any travel reimbursement policy or communication. Please note, however, that any paid time off policy available only to women for this purpose (i.e., and not made available to accompany a dependent for the same reason) may violate certain sex and/or gender discrimination laws.

Takeaways

In short, companies seeking to modify their policies, group health plans, and/or benefits packages to address gaps in equal accessibility to healthcare post-*Dobbs* should speak with their employment and/or benefits attorneys to evaluate their risks and options.

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