

Publication

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Client Alert: Supreme Court Decision on Abortion Rights: 10 Key Questions for Employers and Group Health Plans

Recently, the United States Supreme Court issued its long-awaited opinion in *Dobbs v. Jackson Women's Health*, which addressed a Mississippi law that generally prohibits abortions after 15 weeks of gestation. In its ruling, the Court ended the right for pregnant women under the United States Constitution to have reasonable abortion access regardless of the state in which they live. As a result, the legal framework for abortion rights across the United States will now return to the states, meaning there will be varying access to abortion services across the country.

The Supreme Court's ruling will impact employers and the health plans offered to their employees. Below, we provide our high-level commentary to **10 Key Questions** facing companies as they evaluate their options to facilitate abortion access for their employees in the wake of the *Dobbs* decision.

#1: What did the Supreme Court decide in *Dobbs*?

The Supreme Court's majority opinion in *Dobbs* upholds the Mississippi abortion law. The decision also overturns the Court's previous abortion decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*. Those prior rulings held that the United States Constitution prohibits states from banning or unduly restricting access to abortion

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services for women in the early stages of their pregnancies.

#2: How will the *Dobbs* decision impact abortion rights in the United States going forward?

The issue now returns to the individual states. As of now, almost half of the states have laws that allow for immediate enforcement of abortion bans and restrictions that would not have been permitted under the *Roe* and *Casey* rulings. These laws include Texas SB 8, which among other things, makes it illegal to “aid and abet” an abortion after a fetal heartbeat can be detected. The *Dobbs* decision may also encourage states to enact new laws that further restrict abortions and other reproductive services.

#3: What does the *Dobbs* decision mean for companies and the group health plans they provide for their employees?

Depending on the states in which employees live, abortion access under a company’s group health plan may now become illegal or severely restricted. Employers will, therefore, have to decide whether (and how) to provide continued access under their plans. These decisions will raise numerous legal and administrative issues for companies to address with their third-party administrators, payroll providers, and other service providers.

#4: Our company self-insures its group health plan. Are there ways the company could provide additional benefits to help employees who might seek abortions in other states where it remains legal?

Yes, subject to other tax and legal requirements, companies with self-insured plans should be able to offer additional benefits under their plans to help employees obtain abortions in states where it remains legal,

although some states are threatening to take civil and/or criminal actions against companies that do so ([see Q&A #8](#) below). For example, under IRS rules, transportation costs necessary to obtain medical care under an employer's group health plan are generally considered qualified medical expenses. As a result, employers can consider amending their health plans to reimburse employees up to certain limits for the costs of transportation and lodging for themselves (or their eligible dependents) who will now be required to travel out of state for abortion services. As summarized below, however, there are certain IRS limitations and restrictions that should be kept in mind if the intent is to provide employees with these additional benefits on a tax-free basis under federal law.

#5: If our company decides to offer additional benefits, are there any tax considerations to keep in mind?

Yes, as noted above, reimbursements for certain travel and lodging expenses can be considered "medical care" and therefore excluded from the employee's gross income under federal tax law. There are, however, specific limitations under IRS rules that companies should keep in mind, including caps for automobile mileage and lodging reimbursements under IRS rules. For example, the IRS limits lodging expenses to \$50 per night for the patient (\$100 per night if traveling with an eligible companion) and for 2022, the standard tax-free mileage reimbursement for medical travel is limited to \$0.22 per mile driven. Amounts reimbursed under the plan over these limits will be taxable to the employee, but should not result in other negative tax consequences under the plan.

Reimbursements for meals or other personal expenses are not considered "medical care" under IRS rules and generally cannot be provided to the employee on a tax-free basis.



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#6: If our company also decides to offer additional benefits outside its plan, should we establish a formal written policy?

There is no clear answer at this point. A formal written policy, however, could minimize confusion as to which additional benefits will be provided by the company and also help ensure consistency in treatment amongst the employees. An employer should also consider whether the additional benefits will be limited only to abortion procedures or whether they will include a broader range of reproductive benefits, mental health benefits, or other covered health services (see Q&A #9 below).

#7: What if our company's health plan is fully insured?

Companies with fully insured plans should consult with their carriers to determine the impact of the *Dobbs* decision for abortion access under their plans. Because these plans are subject to state insurance laws, it may not be possible to reimburse employees for the travel costs and other expenses under the plan for obtaining an abortion if the employee's state of residence bans the procedure. An employer with a fully insured plan that nevertheless wants to provide additional "outside the plan" benefits should discuss its options with its legal advisors.

#8: Are there risks to the company and its employees if we decide to offer benefits for abortion access?

Yes, some states may seek criminal sanctions and/or permit civil enforcement against companies and their employees by private citizens if companies facilitate access to abortions for employees in states where it is now illegal or restricted. In particular, as of now there are at least two states (Texas and Oklahoma) with laws that permit individuals to file civil actions against individuals and entities that "aid or abet" abortions for pregnant women, including paying or reimbursing costs

related to abortion services through insurance or otherwise.

Although its preemption standard is very broad, ERISA generally does not preempt state criminal laws and may not preempt all state civil laws. As a result, it is possible that some states and/or private individuals could bring an action against an employer that facilitates abortion access in states where it is illegal (and for which an ERISA preemption defense may not be available to the employer). Court challenges are already underway in some states (and more are expected in the future) that hopefully will address the scope of ERISA's preemption for state abortion laws.

#9: Are there other legal issues to address if our company wants to limit the additional benefits to only abortion services?

Yes. An employer that wants to limit the additional benefits to only abortion services should consider other legal requirements under ERISA that are applicable to its group health plan. For example, there may be issues to address with the health discrimination rules under the Health Insurance Portability and Accountability Act, the minimum value and essential benefit rules under the Affordable Care Act, and the parity rules for mental health and substance abuse benefits under federal law. In addition, a company may also need to coordinate the additional benefits with its health savings accounts, health reimbursement accounts, flexible spending accounts, wellness programs, and other welfare plans offered to employees to ensure compliance with IRS rules and other legal requirements. Finally, there may be issues under state and federal employment laws that need to be addressed.

#10: What should our company consider for next steps?



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The *Dobbs* decision creates complexities and risks for companies and their health plans. At this point, there are still many unknowns regarding how current state abortion laws will be enforced and whether new laws will be enacted in the future. As a result, employers that want to offer additional benefits to facilitate abortion access for its employees should discuss their options and risks with their legal advisors.

If you have any questions regarding how providing abortion access relates to employers and group health plans in light of the *Dobbs* decision, please contact Andrew Douglass, Patty Cain, Linda Hoseman or your Neal Gerber Eisenberg attorney.

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