

Insights

ROE OVERTURNED! MEETING EMPLOYEE HEALTHCARE NEEDS POST-ROE

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The constitutional right to abortion has been eliminated. The Supreme Court has overturned *Roe v. Wade*, undoing a federal standard that had legalized abortions since 1973. As a result, abortion will likely become illegal in half the country and many employers will be looking to revise their employee benefits in an effort to meet their employees' health care needs. However, as discussed more fully below, the adoption of a new benefit can result in inadvertent compliance issues that need to be fully considered.

For a summary of the evolving legal landscape and emerging trends in employer abortion coverage, please [click here](#).

State Law and Preemption

The current scope of state laws banning or restricting abortions range from a complete ban, bans after a certain time after conception, and bans on abortifacient drugs. These state abortion laws may, in some instances, be preempted by the Employee Retirement Income Security Plan of 1974, (ERISA), the federal statutory scheme that governs employee benefit plans. A state law is preempted under ERISA to the extent it "relates to" an employee benefit plan. However, preemption does not apply if the state law has only an indirect impact on an employee benefit plan or if the law regulates the state's insurance industry and thus is "saved" from preemption under ERISA.

The general consensus is that a strong ERISA preemption argument exists against state civil laws seeking to prohibit a self-insured health plan's coverage of abortion, abortifacient drugs or travel for abortion services. However, employers with fully-insured health plans may have a more limited ability to provide abortion coverage because insurers are required to issue policies consistent with its state laws. Moreover, ERISA preemption generally does not extend to criminal laws. Thus, an employer who reimburses an employee for travel costs to obtain abortifacient drugs out of state may have exposure for aiding and abetting if the employee waits until returning home to consume the drug.

Travel Benefits for Employees Enrolled in Medical Plan

For employers that want to cover abortion-related travel expenses, offering such benefit through an existing medical plan may be the most straight-forward approach. However, this approach can limit significantly the availability of the benefit depending on the percentage of employees who are enrolled in the employer-sponsored medical plan. In addition, if an employer offers a high deductible health plan option, the provision of first dollar coverage for travel expenses could adversely affect participants' eligibility for health savings account contributions, even if they do not avail themselves to the travel benefit.

Travel Benefits to Employees Without Regard to Medical Plan Enrollment

For employers that want to cover the travel expenses of a broader range of employees, a stand-alone benefit may be an option. This could take the form of a reimbursement arrangement, a relief fund providing employees with financial assistance for abortion-related travel expenses or providing additional pay to employees who travel out of state to obtain an abortion. However, if the stand-alone arrangement is considered to be providing medical care, it may be deemed a group health plan that must either comply with or be exempt from the market reforms mandated under the Affordable Care Act ("ACA"). Design options that may circumvent this obstacle include the following:

- A Health Reimbursement Arrangement (HRA) that reimburses travel expenses related to out-of-state abortion care but limits coverage only to employees or dependents who have other ACA-compliant health coverage.
- An Employee Assistance Program (EAP) providing travel benefits that is structured to qualify as an "excepted benefit" not subject to ACA.

Further, as a group health plan, the arrangement would remain subject to a number of laws, including but not limited to the Health Insurance Portability and Accountability Act (HIPAA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA).

In contrast, if the stand-alone arrangement is not an employer-sponsored group health plan subject to ERISA, the employer loses the ability to assert preemption protection and the benefit is unlikely to qualify for income exclusion.

Other Tax Concerns

Employees may exclude from gross income a health plan's reimbursements of travel costs incurred to obtain qualifying medical care. Amounts expended for illegal operations or treatments may not be excluded from income. In applying this rule, the IRS will look at the locality where the care was received to determine whether it was legally obtained. Further, if a treatment violates the federal law, then it is an illegal treatment within the meaning of the regulations, even if lawful where procured. Thus, if a federal ban on abortion or abortifacient drugs was enacted, all coverage for these services and related travel expenses could cease to be eligible for income exclusion.

Mental Health Parity Concerns

The provision of abortion-related travel benefits to address state bans on abortion, without providing comparable travel benefits to address state bans on gender dysphoria treatment, may create a compliance issue under the Mental Health Parity and Addiction Equity Act, which requires that a health plan's non-quantitative treatment limitations on mental health benefits be applied no more stringently than to medical and surgical benefits. For this reason, employers may want to take a broader approach and offer travel expenses for treatments that cannot be legally obtained in the employee's home state but that can be legally obtained in another state.

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