

The impact of Dobbs on employer provided healthcare

This is not a post about politics. You can figure that out by yourself. This is a post about the options employers have in the wake of the Supreme Court's June 24 *Dobbs v. Jackson Women's Health Organization* decision, which reversed *Roe v. Wade*.

Group health plans are the natural place to start when thinking about reimbursing expenses related to female employees' family planning decisions. A welter of laws cover group health plans and in all probability, you won't be able to navigate this landscape by yourself. But we can start you down the path.

What is medical care?

Group health plans reimburse employees for their medical care. Medical care is defined in IRC § 213(d)(1) as:

(A) The diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body

(B) For transportation primarily for and essential to medical care referred to in subparagraph (A).

ERISA's definition of medical care is identical.

Reproductive services meet this definition, including telehealth services and pharmacy benefits.

Which law applies?

Self-insured health plans are subject to ERISA, which generally overrides state law. *Exception:* ERISA doesn't override generally applicable state criminal laws, but generally applicable criminal laws don't apply to ERISA-covered health plans. *Upshot:* Until the Supreme Court says otherwise, individuals at companies located in certain states can't be prosecuted for assisting an employee with her reproductive care benefits.

Fully insured plans aren't subject to ERISA and are subject to state insurance laws. So the one thing we can say today is that self-insured plans have more latitude than fully insured plans.

Can employers underwrite employees' medical travel?



In general, **yes**, if your health plan covers medically necessary travel. If it doesn't, you can amend the plan to cover medically necessary travel. If a third-party administrator handles your medical travel program, give them time to adjust.

A word of advice: Plan amendments should cover all medically necessary travel. Plan amendments will also necessitate amending your summary plan description and may require you to amend your summary of material modifications by the end of the plan year. But the benefits can take effect now.

Employees should be able to substantiate their travel without crushing details—*travel for family planning purposes* or *travel for reproductive care* should suffice for now.

Aside from transportation costs, tax-free reimbursements for employees' medical travel are limited to \$50 per person a day for lodging; meals aren't included. Reimbursements for lodging exceeding \$50/day are taxable, but you may gross up the reimbursement. Picking up an employee's meal expenses would also be taxable.

There are two plan design issues:

- You may run afoul of the Mental Health Parity and Addiction Equity Act of 2008 if you reimburse for medically necessary travel but not for travel related to employees' mental health.
- A stand-alone medical travel reimbursement plan will be considered a group health plan under ERISA and the Affordable Care Act. *Upshot:* These plans must meet the ACA's requirements of not imposing annual or lifetime limits on benefits and must cover preventive services with no cost-sharing.

What if an employee receives out-of-network care?

The No Surprises Act may help, keeping in mind that under most circumstances, these services aren't emergency services. For non-emergency services, out-of-network providers can balance bill if they provide written notice to employees 72 hours prior to their appointments and receive their consent to balance bill. If providing three days' notice isn't practicable, notice can be provided on the day of the appointment.

Employees may be able to use one of the following funding options to offset the balance bill.

Are there other options?

Again, self-insured plans have the most discretion. Assuming your self-insured plan covers reproductive services

(most do) and employees receive these services in a state where it's legal:

- Employees can use their health FSAs to cover the cost. You can contribute to employees' FSAs, too, but beware of discrimination testing. Employees can roll over a certain amount of unused funds at the end of the year (\$570 for taxable years beginning in 2022). Your plan must be amended to allow for the roll-over option.
- Employees can use health savings accounts to cover the cost and you can contribute to those, too. However, HSAs must be paired with high-deductible health plans. The high deductibles continue to apply.
- Employees can access benefits provided through an employee assistance plan. While EAPs traditionally address issues affecting mental and emotional well-being, they may also be used to address medical services and travel. *Plan design issues:* Benefits are excepted benefits under HIPAA if they're not significant benefits in the nature of medical care, the benefits are free to employees (i.e., no cost-sharing or co-pays) and benefits aren't coordinated with other group coverage.
- You can create a relief fund to assist employees. However, payments from such a fund would be fully taxable to employees.
- You can create a [medical emergency leave sharing plan](#), under which employees donate accrued leave to colleagues experiencing medical emergencies. The amounts paid to recipients are fully taxable; amounts donated aren't taxable to the donors. Employees must substantiate their medical emergency.
- You can increase the amount of time in all employees' PTO banks.

What about employees' privacy?

HIPAA protects the privacy of employees' medical records. Employees must substantiate their use of FSA funds, which will activate HIPAA privacy provisions. You should also be aware of any state privacy laws.

Afterwords

Dobbs is an explosive decision, regardless of which side of the political line you fall. As such, you need to ensure the conversations employees have among themselves are polite and don't get out of line. As far as we can see, you have two options:

- You remind employees that all conversations must be respectful.
- You may prohibit discussions of this and other political issues in the workplace. Unless you're a public employer, the workplace isn't a democracy, so you can prohibit some speech and not others.