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# Issue Spotting for Health Plans after Dobbs – More Questions Than Answers

In a year already marked by overwhelming legislative and regulatory change, group health plans now must address yet another issue – abortion coverage in the wake of the U.S. Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Org.* The Court overruled *Roe v. Wade*, eliminating the constitutional right to abortion and leaving states free to regulate the procedure – and health plan sponsors wondering what to do next.

The *Dobbs* decision – and the actions of state legislatures in reaction to it – will have significant repercussions for benefit plan sponsors. From the more obvious issues, such as whether and how group health plans may provide coverage for abortion services, to the more opaque, such as whether employers may provide excludable reimbursements for abortion-related travel expenses and whether participants may be reimbursed for such expenses through Health Reimbursement Arrangements (HRAs), there are more questions at this point than answers. In this preliminary post-*Dobbs* blog, we will attempt to help plan sponsors spot some of the more important issues.

Two factors that will significantly affect a plan sponsor's options are whether the plan is subject to ERISA and whether it is self-funded or fully insured.

**Plan Design and ERISA Preemption**

Group health plan sponsors, including employers and trustees of multiemployer plans, should immediately review their plan designs to determine what action, if any, will be necessary or advisable post-*Dobbs*.

State laws that ban abortions and state insurance laws that restrict the coverage of abortions will effectively prohibit fully-insured group health plans from providing such coverage, even if those plans are subject to ERISA. This is because state insurance laws typically are "saved" – or exempted – from ERISA's preemption of state laws.

Self-funded health plans governed by ERISA historically have enjoyed more flexibility in plan design and the choice of benefits, in large part because of ERISA's preemption of state laws. In the wake of the *Dobbs* decision, sponsors of self-funded ERISA plans that cover abortion services are likely to assert that ERISA preempts (or supersedes) any state-imposed restrictions on abortion. Arguably, any state law restriction on abortion relates directly to matters of plan administration, and therefore would be preempted.

However, even though the scope of ERISA's preemption of inconsistent state laws is broad, it is not without limits. ERISA does *not* preempt generally applicable criminal laws. Challenges to the ERISA preemption argument are likely to rely on that exception, as well as state police powers specifically reserved by the Tenth Amendment to the U.S. Constitution. Additionally, courts may be forced to adjudicate the extraterritorial application of state laws if a state seeks to prohibit a plan from providing abortion coverage for services rendered in another state where abortion remains legal. Whether and how ERISA's preemption clause will apply to state abortion laws remains unclear at this time, and is likely to be heavily litigated.

Self-funded health plans that are sponsored by governmental entities are not governed by ERISA, and thus cannot rely on the ERISA preemption argument. Such plans may or may not be governed by state laws, including laws regulating abortions.

**Open Issues for Plan Sponsors After** *Dobbs*

Plan sponsors first should review whether their plans currently cover, exclude, or limit abortion and determine whether the plan's terms should be clarified. Generally, if a plan is silent with respect to the coverage of a service or condition, coverage of that service or condition is implied, as long as it is medically necessary. Sponsors of plans that do not explicitly address coverage for abortion-related services might consider amending their plans to clearly exclude or provide such coverage.

If the plan's abortion coverage is unclear, sponsors should amend the plan to clarify it. For instance, if the plan limits abortion coverage to situations in which the mother's life is at risk, sponsors should consider defining those conditions clearly. The plan also could be revised to clarify what constitutes a medical emergency necessitating an abortion, the impact that mental health issues have on abortion coverage, and how medical necessity is determined for such coverage.

Sponsors wishing to continue or expand abortion coverage may do so in a number of ways, but they should be mindful of the many considerations involved.

*Access to Abortion*

For plans providing coverage in states where abortion remains legal and unrestricted, the most immediate issue likely will be access. Providers in such states expect to be inundated with both local patients and patients traveling from states in which abortion is restricted or banned. Sponsors can work with their network and claims administrators to determine whether network expansion or inclusion of non-network provider services may improve access.

*Concierge Services*

Concierge services, particularly for plans administered in states in which abortion is banned, may simply offer information to inquiring participants about where they can legally access an abortion, any plan benefits available for such procedures, and the availability of providers to perform the abortion.

*Travel Benefits*

A growing number of employers are offering travel and lodging benefits for employees who seek abortion services when those services are banned in the state of employment. Section 213(d) of the Internal Revenue Code permits plans to reimburse travel and lodging expenses (within certain parameters) as "medical care." In implementing travel benefits, plan sponsors should consider reasonable dollar and mileage limits and ensure that they do not conflict with the Code's rules for such reimbursements.

*HRAs*

Sponsors who wish to add an HRA to their benefit offerings should be cognizant of the Code's rules governing the kinds of medical expenses that may be reimbursed. For insured plans, the addition of an HRA may provide some level of coverage for abortion-related services when the insurance policy itself does not. In order to maintain compliance with the Affordable Care Act (ACA), an HRA generally must be integrated with another group health plan that provides minimum value coverage (such as the employee's or his/her spouse's employer-sponsored medical plan).

*HIPAA*

Certainly, a participant's request for, or receipt of, abortion-related services from a plan, including travel expenses and other reimbursements, constitutes protected health information. Plans must remain mindful that HIPAA's strict privacy and confidentiality requirements will apply to such information.

*Civil or Criminal Liability*

State laws that purport to impose civil or criminal liability on parties who "aid and abet" abortion providers may raise questions of liability for sponsors and fiduciaries of group health plans that cover abortion-related services. It is unclear whether such laws are preempted by ERISA (for plans that are subject to ERISA), or whether the act of paying benefits or resolving claims and appeals under the terms of a plan constitute "aiding and abetting," within the meaning of such statutes. We expect claims payers and third-party administrators to seek indemnification from plan sponsors whose plans offer some level of abortion coverage.

*Contraceptive Coverage Under the Affordable Care Act*

Sponsors also cannot ignore the effect of *Dobbs* on the coverage of contraception and medication abortions. The ACA's preventive services mandate requires the coverage of cost-free contraceptives. That mandate remains intact after *Dobbs*, as was recently reaffirmed by a June 27 joint letter from the Departments of Labor, Treasury, and Health and Human Services. Covered methods of contraception include hormonal treatment (such as birth control pills), sterilization (tubal ligation for women), and emergency contraception (such as Plan B). The contraceptive coverage mandate does not, however, include abortifacient medications. State efforts to restrict access to FDA-approved medications such as these implicate

other issues, though, including provider licensure and state telehealth rules, as well as the U.S. Attorney General's recent assertion that federal law would preempt state bans on such medications.

Although it will take years – if not decades – to identify and resolve the myriad questions that will surface in the wake of *Dobbs*, sponsors of group health plans must be prepared to act immediately to address the most obvious and pressing of those issues. At this point, however, there are simply more questions than answers. We invite you to join Spencer Fane partners Greg Ash and Julia Vander Weele on August 4 for an in-depth, 90-minute webinar in which Greg and Julia will provide more guidance on this topic.

**Key Takeaways for Plan Sponsors**

- *Know your plan*. Review your current plan design and consider amendments to clarify abortion coverage.
- *Understand the state law environment.* Review the laws of the state in which the plan is domiciled and in which treatments are likely to be administered.
- *Notify your employees.* Notify participants of the plan's coverage or exclusion of abortion and how to get more information.
- *Monitor developments*. Moving forward, the battle over abortion rights and services is likely to include group health plans.

This blog was drafted by Greg Ash and Laura Fischer, attorneys in the Spencer Fane Overland Park, Kansas and Denver, Colorado offices, respectively. For more information, visit www.spencerfane.com.