PUBLICATION

Group Health Plans and Abortion: Implications of Supreme Court Decision

Authors: Andrea Bailey Powers
June 28, 2022

In the wake of the Supreme Court's ruling in *Dobbs v. Jackson Women's Health*, employers are questioning what impact, if any, this decision will have on their group health plans. In the *Dobbs* decision, the Supreme Court reversed 50 years of precedent by ruling that the Constitution does not provide for a right to abortion and therefore that states have the Constitutional right to legislate abortion. How, then, does this ruling impact employer-sponsored group health plans? In this alert we address four items of immediate concern and expect to supplement this analysis as this drastic change in the law develops.

1. Must a Group Health Plan Provide Coverage for Abortions?

There are no federal laws or regulations that require an employer-sponsored group health plan to provide coverage for elective abortions. The Patient Protection and Affordable Care Act of 2010, as amended (ACA), set forth standards that require coverage of "essential health benefits" for fully insured non-grandfathered plans. In addition, the ACA eliminated annual and lifetime dollar limits on such essential health benefits for all group health plans, including self-insured plans. At present, elective abortions would not be deemed essential health benefits. The determination of which medical expenses are and aren't "essential health benefits" is made by the U.S. Department of Health and Human Services, an administrative agency under the Executive Branch, and such guidance could change the definition to include elective abortion. In such event, the only employer-sponsored group health plans that would be subject to the change are those that are both non-grandfathered and fully insured.

2. May Group Health Plans Still Provide Coverage for Abortions, Even in States Where Banned?

Upon first impression, it appears that the broad preemptive provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), should allow for group health plans to continue to provide coverage for abortions, whether elective or necessary, regardless of any state law prohibiting the procedure. ERISA is the federal statute that attempts to set uniform standards for the laws governing employer-sponsored benefit plans and applies to all employer-sponsored benefit plans, except those sponsored by non-electing churches and federal, state, and local governments. ERISA contains broad language that preempts "any and all state laws" that "relate to" an employee benefit plan, with the exception of the states' right to regulate insurance. Thus, if an employer group health plan provides coverage for abortion, then the plan **should not** be affected even though some states in which the employer has employees may ban abortion procedures.

3. Can Group Health Plans Provide Coverage for the Travel Expenses to a State Where Abortion is Legal?

To the extent that travel expenses are allowable under the Internal Revenue Code, then a group health plan (or health reimbursement account) should be able to provide this coverage. Many group health plans provide reimbursement for eligible travel expenses for participants who must obtain medical care outside their geographic home. However, the tax treatment of those benefits turns on whether the amounts are treated as exempt from tax under Section 213 of the Internal Revenue Code of 1986, as amended (Code).

Code Section 213(d) excludes from taxable income amounts reimbursed for expenses for medical care of an individual, the individual's spouse, or a dependent under a policy of insurance or group health plan. This

exclusion defines "medical care" as amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

Under current applicable law, a group health plan that reimburses or directly pays the "travel expenses" for "medical care" should be exempt from the taxpayer's taxable income and otherwise deductible by the employer (if self-insured). A fully insured health plan is subject to the terms and conditions of the insurance policy, so employers with this type of health plan could provide a self-insured rider or adopt a health reimbursement arrangement (HRA) to that policy to pay for travel expenses for women to obtain abortions if abortions are not available in their town of residence.

In general, to qualify as a medical expense:

i. The travel expenses must be essential to the medical care – presumably essential if no legal abortion is available in the taxpayer's geographic area, which is usually 35-50 miles for most IRS purposes; and

ii. Travel expenses must be limited to:

a. Transportation costs. The Code defines transportation expenses to include the cost of traveling by bus, air, taxi and/or train, as well as the cost of gas and oil if driving by car. Additionally, if a guardian, caretaker or medical provider is required to travel with the individual to obtain the medical care, those costs associated with the person accompanying the individual seeking medical care are also considered eligible expenses. Costs of car insurance, car maintenance and/or car repair expenses are not eligible medical expenses. The current mileage reimbursement rate is $0.18/mile (for 2022) for medical expenses. However, the taxpayer can use actual expenses (gas receipts);

b. Lodging of up to $50/night; and

c. Meals only if provided by the medical provider.

4. Are Employers at Risk of Liability for Violation of a State's Aid and Abet Law that Creates Liability for Those That Assist a Woman in Obtaining an Abortion?

At this time, the answer to that question is unknown. This is an issue ripe for debate and litigation. While ERISA's preemption provisions are broad and theoretically should protect the plan and the employer from a state's attempt to impose liability on those who assist a woman in obtaining an abortion, there is no certainty on how such a dispute would be resolved in the courts. Further, there are concerns regarding a state's ability to obtain through subpoena information regarding those obtaining abortions out of state. While group health plans are "covered entities" for purposes of the Privacy Rule under the Health Insurance Portability and Accountability Act of 1996, as amended (HIPAA), employers are not covered entities. Thus, employers would be wise to make certain that they receive no individually identifiable health information about their employees so that they will not have knowledge of which participants are receiving abortion-related benefits under the group health plan.

Obviously, this is an issue that presents a great deal of political debate. Our alert is intended to advise employers on their legal options with respect to their group health plans. These issues will continue to develop for the foreseeable future, and Baker Donelson will provide updates and commentary as appropriate. If you have any questions, please contact Andrea Powers or your Baker Donelson attorney.