Initial Benefits Compliance Considerations for Employers: US Supreme Court Overturns *Roe v. Wade*

On June 24, 2022, the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*. The *Dobbs* case involves a Mississippi law that would effectively ban most abortions in the state after 15 weeks of pregnancy. The Court upheld that law, overturning both *Roe v. Wade* and *Planned Parenthood v. Casey* in the process. The decision also returned the right to legislate abortions to the states. Several states have already deemed abortion illegal under state law and several more are likely do so as a result of this decision.

It is important to acknowledge the diverse and far-reaching effects of the decision, including employee well-being. However, for this piece, our focus is on the initial considerations for employers in the context of benefits compliance.

While *Dobbs* gives states authority to promulgate laws concerning access to abortion, it remains to be seen how these laws will affect employer plan sponsors seeking to provide continued access to abortion services through their health and welfare benefits. Fully insured plans are subject to state laws via insurance carriers. ERISA generally prevents states from regulating self-insured plans but it is yet to be determined whether state abortion laws will reach self-insured plans.

Ever since the *Dobbs* decision to overturn *Roe* was leaked in early May, many employers have considered ways to provide employees with additional assistance in accessing medical care. Even before the leak, some employers considered employer-sponsored medical travel as a means to assist employees who could not access certain gender-affirming services or other healthcare in their state (or even in the country). Additionally, the IRS has long held that travel for purposes of receiving medical care can be considered a qualified medical expense.

The *Dobbs* decision will likely lead to myriad laws and regulations that must be considered. Employers should consult with their legal counsel when considering how answers to the following questions will impact their decision to offer these types of benefits:

- How will the employer determine eligibility for such benefits?
- How will the employer distinguish between travel expenses that are eligible for reimbursement under the employer's medical travel arrangement versus those that are eligible for reimbursement under the employer-sponsored FSA or HRA?

- If the major medical plan is fully insured, does it offer benefits to employees in states that limit abortion coverage or that require additional riders for state residents?
- If the major medical plan is self-insured, will claims for additional abortion or gender-affirming care (beyond what the plan currently provides) be processed through the medical plan? Would such claims be considered in-network under all circumstances?
- What requirements must be met if the benefits are offered through an HRA? What steps will be required to integrate the HRA with the major medical plan?
- If reimbursing travel expenses is a key component of the chosen design, how will the employer substantiate qualified expenses? What vendor or third-party administrator will assist in the reimbursement process if the employer is unable to self-administer the benefit?
- How will the design of the benefit alter its federal taxability? Even though current federal law allows for tax-free coverage of health expenses, what will it mean if certain states require that abortion or gender-affirming services be taxed on the state level?
- Will certain state laws (current or proposed) subject the employer to any liability for providing the means for state residents to receive locally prohibited health services in a different state?
- How will the bevy of differing state laws affect multistate employers that wish to provide such benefits?

These are just some of the questions that plan sponsors may need to address with legal counsel in designing healthcare travel arrangements and related health and welfare benefits. We also expect that this issue will be heavily litigated on the federal and state levels and become the subject of federal and state congressional action for years to come. So, clients should be prepared to re-examine their decisions at various intervals as certain court cases are decided and federal or state laws are enacted.

NFP Benefits Compliance will continue to follow this development and provide appropriate compliance commentary when necessary.

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