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Benefits & Executive Comp  
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By Sara Hansard  
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**Companies Urged to Review Abortion Coverage With Roe in Balance**

By Sara Hansard 2022-06-08T05:30:58000-04:00

1. Employers asking about liability over abortion coverage
2. States can't regulate self-insured health plans

Many employers are examining their abortion coverage policies as the US Supreme Court readies a decision that may overturn *Roe v. Wade*.

Regardless of their position on whether to cover abortion, companies are being advised by their legal counsel to review their policies and, at the least, make sure they are clear about what they cover. Legal advisers also say companies need to be prepared to communicate their positions to employees and answer questions about them.

Companies that the Groom Law Group represents are asking "do we have some exposure, do we have some liability, what do we need to do?" if the 1973 decision that legalized abortion nationwide is overturned, Christine Keller, the managing partner, said in an interview.

In addition to health insurers, Groom works with hundreds of health plans sponsored by large employers that are self-insured, meaning they directly pay their employees' claims and are regulated under the federal Employee Retirement Income Security Act (ERISA), not by states. States do, however, have power to regulate fully insured health plans that operate in their jurisdiction.

If *Roe* is overturned, 26 states are likely to restrict abortion, according to a 2021 analysis by the Guttmacher Institute, a research and policy organization that focuses on reproductive health and rights. Many health plans have been silent on whether they pay for abortion services, while some are explicit about abortion coverage but don't include terms based on state legality of the procedure, Keller said.

Groom's recommendation is that "plans put in, with some precision, what they're paying for," as well as precise information about what they are not, Keller said.

In states that restrict abortion, plans that cover the service could be protected from liability by adding language specifying that they will provide the coverage where abortions are legal, she said. If the company chooses to do so, language could be added saying that in states where abortions aren't lawful, travel expenses would be covered, she said.

"States do have the ability and the authority to regulate providers, health-care providers, in their state, and the scope of the provider practice," Keller said. Services in a particular state may no longer be available to participants in the plan, but self-insured plans can't change that, she said.

### **Paying for Travel**

However, if a state attempted to prevent a self-insured plan from paying for travel to another state for abortion services, ERISA would likely pre-empt that state law, Keller said. Such a state law would go beyond regulating health-care providers, she said.

"But if it's not written in the plan, then it becomes much more difficult to say that there's a conflict between the state law that says you can't pay for it, and this plan, which actually doesn't have any provision about paying for it," she said.

If abortion-related travel coverage is viewed as "a significant benefit in the nature of medical care," participants in high-deductible health plans would have to meet their annual deductibles of at least \$1,400 for individuals and \$2,800 for families before the plan could pay for abortion-related travel, Keller said.

Companies should make that clear to enrollees, she said. Violating the high-deductible terms would result in enrollees being ineligible to contribute to tax-advantaged health savings accounts used to pay for medical expenses, she said.

Plan terms can be changed during a plan year, Keller said. Additional benefits must be disclosed to participants within 210 days after a plan year ends, while reductions in covered health services must be disclosed within 60 days of adopting the change, she said.

### **Most Employers Cover Abortion**

Most employers cover abortion, but they don't always cover elective abortions, Shelley Alpern, director of corporate engagement for Rhia Ventures, said in an interview. Rhia Ventures is a nonprofit that invests in reproductive health care, and it files shareholder resolutions related to abortion policies. It tracks public announcements by companies about their abortion policies.

Kaiser Family Foundation's 2019 Employer Health Benefits Survey found that only 3% of companies that offer health benefits exclude coverage of abortion in at least some circumstances.

“Companies really started to pay attention to the abortion-related travel after Texas implemented SB 8 in September, and then there’s been this other wave since the SCOTUS leak of more companies coming out and saying that they would pay for abortion-related travel,” Alpern said. The Texas law allows lawsuits against anyone who performs or “abets” an abortion.

Some companies are wasting no time in updating their abortion coverage.

“Our reproductive rights benefits are currently administered outside of our healthcare benefits because we are moving faster than our healthcare administrator to give our team the support they need,” Kim Nguyen, vice president of people operations for financial services Alloy, said in an email. Alloy is a software company that helps financial services firms prevent fraud. The company wouldn’t divulge its health-care administrator.

Alloy posted a statement on its blog in January announcing new policies to support abortion coverage, including covering legal and travel expenses, and up to \$1,500 in out-of-pocket medical expenses for out-of-network abortion care.

### **Out-of-Network Coverage**

If a company pays for employees to travel to other states for abortions where there are no in-network providers, the company may want to consider whether to expand their networks, said Katy Johnson, senior counsel for health policy at the American Benefits Council.

ABC members include more than 220 large companies that sponsor or administer health and retirement benefits.

Employers are also considering issues related to medical travel benefits for employees not enrolled in employer-sponsored health plans, Johnson said. Employers need to think this through carefully as that could mean the company was creating a new health plan and the company would need to ensure the program was compliant with applicable regulations, she said.

Employers also have started asking whether their current plan covers pharmacy benefits related to abortion, and whether they want to expand the benefit, Johnson said.

### **Staying Out of the Limelight**

Employers are also thinking about how to communicate their policies to employees and how they make bigger picture decisions about benefits they want to offer, Johnson said.

“Many employers will get pressure from their employees to take a political stance independent of what the needed benefits are,” Roberta Casper Watson, leader of the Wagner Law Group’s health and welfare group, said.

Many companies likely want to stay out of the limelight on the issue, Watson said in an interview.

“There are going to be some interesting test cases, and some employers just won’t want to be in the middle of being a test case,” Watson said. “I’ve never had a client yet that was looking forward to being a test case for anything.”

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