

Employers Providing Abortion Benefits Should Address Compliance Questions

Review abortion-related coverage relative to applicable state laws

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More U.S. companies have said they will cover the cost for employees to travel out of state for abortions, when necessary, after the U.S. Supreme Court's June 24 ruling in *Dobbs v. Jackson Women's Health Organization* (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Supreme-Court-Dobbs.aspx) reversed the *Roe v. Wade* decision and allowed states to restrict or end access to abortions.

Employers that are considering offering abortion-related benefits, such as out-of-state travel to a jurisdiction where abortion laws are more accommodating, should keep in mind compliance and liability considerations, benefits advisors point out.

Employers that operate in multiple states will also need to navigate a patchwork of different rules affecting abortion coverage, depending on where covered employees and dependents live, work and receive health care.

Fully Insured vs. Self-Insured Plans

Self-insured employers may have more leeway to provide abortion assistance in states with restrictive laws, depending on how courts interpret the interplay between the federal Employee Retirement Income Security Act (ERISA) and state statutes, benefits advisors have noted.

The Affordable Care Act (ACA) requires fully insured health plans in the small group market, if not grandfathered, to cover essential health benefits as determined by their states. In most states, small-group insurance applies to businesses with 50 or fewer full-time or equivalent employees.

"Self-insured employers have the ability to design what's covered and not covered in their plan," said Ben Conley, a partner in the Chicago office of law firm Seyfarth. Fully insured small-market employers "are restricted and bound by what the carrier will cover, and in states where the insurance laws prohibit coverage for abortion services, carriers may not be legally allowed" to cover abortion-related benefits.

In these states, he said, employers might consider adding a stand-alone health reimbursement arrangement (HRA) "that sidles alongside the health plan" to pay for out-of-state abortion services.

Conversely, Conley noted, "many states have added abortion as an essential health benefit, and we could see other states" start to do so. "You could also see states add travel services related to abortion as an essential health benefit," he noted.

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(www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/navigating-roe-v-wade-workplace.aspx)

Employers with self-insured plans could change their coverage allowances during the plan year to allow for travel costs and coverage of non-network abortion providers, as long as employee premiums don't change, said Roberta Casper Watson, a partner in the Tampa, Fla., office of The Wagner Group law firm, in an interview with Bloomberg Law (<https://news.bloomberglaw.com/daily-labor-report/employer-covered-abortion-travel-draws-unprecedented-interest>).

According to an alert (<https://www.ropesgray.com/en/newsroom/alerts/2022/06/Impact-of-Dobbs-v-Jackson-Womens-Health-Organization-For-Employer-Provided-Health-Benefits>) by attorneys at national law firm Ropes and Gray, "employers that offer fully insured health plans can "consider the feasibility of transitioning to self-insured coverage." They added, "admittedly, this will not be an economically viable option for many employers, especially those who employ relatively few employees, but for employers where the economics could work, self-funded health plans would give these employers more flexibility in plan design."

Travel and Tax Issues

Generally, the travel reimbursement will be taxable compensation to employees "except to the extent the reimbursements qualify as medical expenses (<https://www.employeebenefitslawblog.com/im-leaving-on-a-jet-plane-is-abortion-care-travel-a-covered-benefit/>)," wrote Benjamin Gibbons, an attorney in the Boise, Idaho, office of Holland and Hart.

Depending on what travel expenses are covered and how much is being reimbursed, "some expenses may constitute medical care and some may not," Gibbons explained. "If the travel reimbursement is considered to be a medical expense, employers will generally need to integrate the benefit with the company's group health plan to ensure compliance with the Affordable Care Act."

Involve Carriers, TPAs and EAPs

All group health plans providing any form of abortion-related coverage should be reviewed relative to applicable state laws, wrote Richard Stover, a principal at HR advisory firm Buck in New York City, and Randie Thompson, Denver-based director of compliance at Buck. "Varying application of abortion laws and access to medical treatment across the states will require in-depth analysis, particularly for large, multistate employers (<https://buck.com/dobbs-v-jackson-the-supreme-courts-decision-to-overturn-roe-v-wade-will-immediately-impact-employer-health-plans/>)," they noted.

Employers should discuss with their medical carrier, third-party administrator (TPA), and employee assistance program (EAP) what travel benefits they are able and willing to administer, Stover and Thompson advised.

Julie Campbell, a principal with Mercer in New York City, and Katharine Marshall, a Mercer principal in Chapel Hill, N.C., noted that some employers are exploring options that don't rely upon carrier or TPA capabilities (<https://www.mercer.us/our-thinking/healthcare/scotus-overturns-roe-understanding-the-impact-on-your-benefit-plans.html>) and may offer more flexibility in design and administration.

For example, they wrote, an EAP, a hardship fund or a lifestyle spending account "might offer reimbursement of travel and lodging expenses for employees regardless of medical plan coverage or enrollment."

Topics that Campbell and Marshall advised discussing with legal counsel include:

- **Coverage and reimbursement limitations under ERISA and the tax code.** ERISA permits a group health plan to cover transportation primarily for, and essential to, medical care, and the code considers such transportation to be a reimbursable medical expense, subject to certain requirements and limits. Complications and tax issues can arise when a travel and lodging benefit is offered outside of the medical plan and/or if the coverage is more generous than IRS limits.
- **Mental health parity and nonquantitative treatment limits.** If the travel benefit is integrated with a group health plan that also provides mental health or substance use disorder (MH/SUD) benefits, compliance issues could arise if the travel benefit is not

similarly extended to locally inaccessible MH/SUD care.

- **Privacy protections.** Health Insurance Portability and Accountability Act (HIPAA) privacy and security rules apply to benefits offered through the group health plan and may require a business associate agreement if a new vendor is added to administer the benefit. A travel and lodging benefit outside of the group health plan may be subject to other privacy laws depending on the information required to substantiate expenses.

In addition, employers "might want to explore telemedicine, women's health services, or health care navigation options to determine their capabilities to take patients, prescribe medications, or offer navigation and care coordination services," Campbell and Marshall said, and "also consider communicating and promoting time-off and leave policies for employees who need to travel to access services."

Benefits Outside the Group Health Plan

While some employers are enhancing abortion coverage under their group health plans, others are providing benefits outside the health plan—for instance, by creating a relief fund to pay expenses for employees and dependents who need to travel to another state, or by offering a one-time bonus for the travel and procedure costs in a state permitting abortive care.

If an employer provides a travel benefit outside of its group health plan, "the employer could unwittingly create another group health plan (<https://www.jacksonlewis.com/publication/group-health-plan-considerations-face-potentially-changing-abortion-laws>) that would raise numerous compliance issues," including ERISA reporting, HIPAA privacy requirements and COBRA continuation rights, said an alert by attorneys at national law firm Jackson Lewis.

"We generally do not recommend that employers offer travel benefits for medical care outside of their group health plans," the firm advised.

Similarly, attorneys at Ropes and Gray wrote that "some employers have contemplated administering travel reimbursements outside of their health plan and treating such reimbursements as taxable income to the employee."

They cautioned, however, that "while the seeming simplicity of such an approach may make it appear attractive, it is not without its risks [such as] the need to respect the right of an employee to keep her health care decisions private against requiring proper documentation of the expenses incurred."

Liability Risks

Amending a group health plan to provide travel benefits for participants to receive abortions outside of a state where abortions are not legal "could subject an employer and its employees to potential risk under state law," so employers should proceed with caution if doing so, advised the Jackson Lewis attorneys.

Meredith Kirshenbaum, a principal in the Chicago office of law firm Goldberg Kohn, said that in states such as Texas, where a new state law bans most abortions after about six weeks and allows private citizens to sue anyone who "aids or abets" a prohibited abortion, "we are likely to see litigation of this issue" of employers reimbursing abortion travel and providing related benefits."

Kirshenbaum expects to see states "push the limits in drafting private right of action provisions to address abortions performed across state lines."

However, in his concurring opinion in *Dobbs*, Justice Brett Kavanaugh wrote: "[M]ay a state bar a resident of that state from traveling to another state to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."

That view was shared by U.S. Attorney General Merrick Garland. "We recognize that traveling to obtain reproductive care may not be feasible in many circumstances," Garland said in a June 24 statement (<https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>). "But under bedrock constitutional principles, women who reside in states that have banned access to comprehensive reproductive care must remain free to seek that care in states where it is legal."

3 Action Steps for Employers

Attorneys at Ropers & Gray advise employers that decide to expand access to abortion services to consider the following steps (<https://www.ropergray.com/insights/v-jackson-womens-health-organization-for-employer-provided-health-benefits>):

- **Evaluate provider network access.** If a group health plan has a limited provider network, consider whether expanding in-network coverage to covered abortion services in states where such services remain available.
- **Establish a travel and lodging benefit under the medical plan.** The IRS has said that legally obtained abortion services are medical care under an employer's group health plan, including expenses paid for related transportation. Lodging expenses eligible for reimbursement can include expenses for medical care but only up to \$50 for each night for each person. Expenses for meals purchased while traveling are not eligible for reimbursement.
- **Consider a health reimbursement arrangement for abortion services.** Employers, whether offering fully insured or self-insured major medical plans, can offer a health reimbursement arrangement (HRA) to cover unreimbursed expenses for health care, including expenses related to abortion services.

An HRA integrated with the group health plan must comply with Affordable Care Act requirements and is limited to health plan enrollees. An HRA can be offered to anyone eligible for an employer's major medical plan and not just those who are enrolled, but it has a funding cap and must comply with ACA requirements. For more information, see <https://www.agentbrokerfaq.cms.gov/s/article/What-is-an-excepted-benefit-Health-Reimbursement-Arrangement#:~:text=An%20excepted%20benefit%20Health%20Reimbursement%20Arrangement%20%28HRA%29%20allows%20em>

Related SHRM Articles:

[Companies Are Announcing Abortion-Travel Benefits Following *Dobbs* Decision](https://www.shrm.org/NewsandAnalysis/ArticlesandReports/Pages/companies-announce-abortion-travel-benefits-following-dobbs-decision.aspx) (www.shrm.org/NewsandAnalysis/ArticlesandReports/Pages/companies-announce-abortion-travel-benefits-following-dobbs-decision.aspx), *SHRM Online*, June 2022

[Employers Likely to Revisit Abortion Coverage, Other Benefits, with *Roe* Overturned](https://www.shrm.org/NewsandAnalysis/ArticlesandReports/Pages/employers-likely-to-revisit-abortion-coverage-other-benefits-if-roe-overturned.aspx) (www.shrm.org/NewsandAnalysis/ArticlesandReports/Pages/employers-likely-to-revisit-abortion-coverage-other-benefits-if-roe-overturned.aspx), *SHRM Online*, updated June 2022

[Be Aware of Legal Risks with Post-*Roe* Abortion Benefits](https://www.shrm.org/NewsandAnalysis/ArticlesandReports/Pages/be-aware-of-legal-risks-with-post-roe-abortion-benefits.aspx) (www.shrm.org/NewsandAnalysis/ArticlesandReports/Pages/be-aware-of-legal-risks-with-post-roe-abortion-benefits.aspx), *SHRM Online*, May 2022

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