

*Dobbs v. Jackson Women's Health*  
*Organizations:*  
Considerations for Employer  
Health Plans

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RESOURCE OUTLINE

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# Introduction

On June 24, 2022, the United States Supreme Court issued its long-awaited decision in *Dobbs v. Jackson Women's Health Organization* and ruled in a 6-3 decision that an abortion is not a constitutional right. The ruling overturns a fifty-year-old legal precedent that barred states from banning the procedure prior to viability, a standard established by the Court in its 1973 ruling in *Roe v. Wade*.

In reversing *Roe*, the Court transferred the power to regulate abortion back to the individual states, of which at least nineteen already have enacted abortion restrictions or outright prohibitions that are now in effect, or will become effective in the coming weeks, with others likely to follow suit.<sup>1</sup> This state-based approach raises questions regarding coverage of the procedure and ancillary benefits, such as travel, for beneficiaries who reside in states where abortion is now banned.

One of the most prevalent employer questions is whether options exist to cover travel and lodging expenses associated with obtaining a legal abortion in another state, and whether the reimbursement would be treated as income for the recipient of the benefit.

As explained in more detail below, providing abortion-related travel benefits through a group health plan or an integrated Health Reimbursement Arrangement (HRA) should be tax-exempt under the prevailing regulatory guidance but the benefit would be limited to plan participants and their beneficiaries. The benefit also could be provided directly, but that would then subject those payments to employee income tax obligations. It also may be possible to provide the benefit through an Employee Assistance Program (EAP), but there are potential regulatory hurdles to utilizing that mechanism.

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<sup>1</sup> New York Times, *Tracking the States Where Abortion Is Now Banned*, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

# Coverage Limitations & Concerns

In deploying these mechanisms, employers should be aware of the following potential limitations and concerns:

- Group Health Plan-Related Travel Benefits: Reimbursing out-of-state travel for an abortion procedure as part of a group health plan or through an integrated HRA would be excluded from the recipient's gross income, as other medical benefits they receive. The benefit would, however, be limited only to individuals enrolled in the employer's group health plan and subject to the willingness and capability of the Third Party Administrator (TPA) to administer it. Additionally, if the plan is a High Deductible Health Plan (HDHP) with a Health Savings Account (HSA), the recipient would still be subject to the deductible thresholds just as they would be for any other HDHP benefit.
- Mental Health Parity: For group health plans or integrated HRAs that are offering medical benefits alongside mental health and/or substance use disorder (SUD) benefits, employers should ensure that any travel benefit is structured to comply with any applicable mental health parity requirements.
- State Laws: The extent to which State civil and criminal abortion ban laws that include within their ambit prohibitions on "aiding or abetting" an abortion procedure may be applied to employers and benefit plans that pay for the procedure and/or the associated travel expenses for accessing the procedure in a State in which it is permissible is very unclear and undoubtedly will be resolved only through protracted litigation.

At least two states – Texas and Oklahoma – already have enacted legislation subjecting anyone who pays for or reimburses abortion costs "through insurance or otherwise" as a civil violation subject to monetary penalties.<sup>2</sup> Other states are considering similar "aid or abet" laws for those supporting the procedure.

- ERISA Preemption: There is a threshold question with respect to these "aid and abet" laws as to whether it is constitutional to restrict an individual's right to travel to an abortion permissible state. Justice Kavanaugh wrote in his *Dobbs* concurrence that it is his belief that any such restrictions would not be constitutionally permissible, but his word is not the final word at this juncture.

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2 TX S.B. No. 8; OK HB 4327.

If the “aid and abet” laws can survive that challenge, ERISA may preempt any state civil laws seeking to prohibit such assistance at least for self-insured plans, but ERISA preemption typically does not preempt criminal laws of general applicability.<sup>3</sup>

# Providing Coverage of Medically-Related Out-of-State Travel and Lodging Expenses

## TAX CONSEQUENCES

Section 105 of the Internal Revenue Code dictates that “medical care” paid for or reimbursed by an employer through an “accident or health insurance plan” is considered a nontaxable benefit.<sup>4</sup> The IRS has held that legally performed abortions are a form of “medical care.”<sup>5</sup> IRS regulations further clarify that “medical care” includes, in addition to direct treatment, “transportation primarily for and essential to medical care.”<sup>6</sup> Some courts have further interpreted “transportation” to include meals and lodging while *traveling* to the facility so long as those expenses were required to bring the patient to the point of care.

Here is a *comprehensive analysis* of the tax consequences of reimbursing travel, lodging, and meals.

## EMPLOYER COVERAGE OPTIONS

Here is more detail on the different mechanisms employers may deploy to provide the abortion travel benefit, subject to the restrictions and potential limitations noted at the outset:

### I. Coverage Under Existing Group Health Plan

Some employers already offer travel benefits as part of their existing group health plan for covered procedures and services not available within a designated geographic area. Others are considering amending their plans to include coverage of travel expenses for out-of-state abortions.

3 29 U.S.C. 1144(b).

4 IRC §105(b).

5 Rev. Rul. 73-201, 1973-1 C.B. 140.

6 IRC §213(d)(1)(B); Treas. Reg. §1.213-1(e)(1)(i).

As noted above, including a travel benefit as part of a group health plan would qualify the benefit for tax favorable treatment. This approach, however, would limit the benefit to only those enrolled in the employer plan. Further, as with any plan that relies on a TPA, the practicality of covering travel to obtain an abortion will also depend on the capability and willingness of the TPA to administer it.

Additionally, if the plan is structured as an HSA, with an associated high-deductible plan, the beneficiary would first have to satisfy the applicable out-of-pocket deductible before any coverage for these benefits would apply. This poses challenges for employers who want to specifically cover travel expenses for an abortion procedure, but the employee has not met their deductible for the year.

## II. Coverage Under Health Reimbursement Arrangements

Another option would be to cover travel expenses under an HRA. In order to be excluded from the recipient's income, the HRA would need to be integrated with another group health plan, which would also limit the benefit to only those employees participating in the health plan. The same TPA considerations as the group health plan approach would also apply.

## III. Coverage Under Employee Assistance Programs

Employers potentially could also provide travel and lodging coverage outside the medical plan through an EAP. While there is no universal definition for EAPs, the Department of Labor (DOL) has described these programs as offering a wide range of benefits.<sup>7</sup> EAPs would also avoid the limitations of a group health plan or an HRA in that it could be offered to all employees, not just those enrolled in the group plan. Of the available options, however, EAPs are the least regulated and the tax treatment of an EAP medical travel benefit is unclear.

The key question is whether an EAP can offer the medical travel benefit at all without itself becoming a group health plan that is subject to the full panoply of Affordable Care Act (ACA) requirements. The DOL has issued guidance indicating that, in order for an EAP to qualify as an "excepted benefit" – and to therefore avoid the ACA requirements governing group health plans – that EAP cannot:

- 1) Provide "significant" medical benefits;
- 2) Be coordinated with benefits under another group health plan;
- 3) Condition participation on employee premiums or contributions; or
- 4) Require any cost sharing<sup>8</sup>

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<sup>7</sup> 79 Fed. Reg. 59130, 132 (October 1, 2014).

<sup>8</sup> *Id.* at 133.

Although, as noted above, we have clear guidance from the IRS that abortion-related travel expenses do qualify for tax-exempt treatment under Section 105, there is no guidance of which we are aware of what constitutes a “significant” medical benefit under the DOL EAP guidance. DOL has described low cost, short-term counseling as a type of benefit that would not be considered significant, but other longer-term disease management support would rise above that threshold. It remains unclear, however, where a one-time travel benefit for a specific medical procedure would fall on the “significance” spectrum. There also may be questions related to whether this benefit may be offered through an EAP in States that have established their own EAP regulatory requirements.

#### IV. Coverage under a Taxable Reimbursement Program

An employer also could offer travel, lodging, and meal reimbursement as part of a standalone taxable benefit for any employee. This benefit could be provided to any employee, regardless of enrollment in the employer’s group health plan. Providing this benefit directly would require the expenditure to be included in the employee’s gross income calculation.

## The Bottom Line

Each employer’s approach to providing travel and lodging support for abortion procedures will vary, and will depend heavily on their existing plan structures, their priorities for the benefit(s) (i.e. offering to all employees vs. certainty of the benefit’s tax treatment), the capability and willingness of TPAs to administer these benefits, and decisions regarding the level of legal exposure they are comfortable with. Employers should start by discussing these considerations with their legal and/or compliance teams when assessing how to navigate this new and quickly evolving landscape.

### KEY CONTACT

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