

What Is the Impact of the Roe v. Wade Reversal?

June 27, 2022

Quick Facts

- On June 24, 2022, the Supreme Court of the United States (SCOTUS) released a final decision in *Dobbs v. Jackson Women's Health Organization (Dobbs)*, a case out of Mississippi, striking down decades of precedent case law on abortion and rendering the legality of abortion back to the states for the first time in nearly 50 years.
- Many employer-sponsored health plans cover abortion and related services, although generally speaking, there is no requirement to cover such services.
- Under the tax code, "amounts paid for transportation primarily for, and essential to, medical care" may be provided on a tax-free basis and this may allow employers to include travel of a plan participant to obtain access to an abortion in a state where abortion is legal.
- Fully insured plans must comply with state laws and will not cover abortions in states where abortion is prohibited. It is unlikely that self-funded plans will be able to use Employee Retirement Income Security Act (ERISA) preemption as an argument to cover abortions in states where abortion is prohibited.

Background

On June 24, 2022, The Supreme Court of the United States (SCOTUS) released a final decision in *Dobbs v. Jackson Women's Health Organization (Dobbs)*, a case out of Mississippi, striking down decades of precedent case law on abortion and rendering the legality of abortion back to the states for the first time in nearly 50 years. The court voted 6-3 to uphold Mississippi's ban on abortion after 15 weeks of pregnancy and voted 5-4 to explicitly overturn *Roe v. Wade (Roe)* and the Constitutional right to abortion. Chief Justice Roberts voted to strike down the Mississippi law but to uphold abortion as a Constitutional Right under *Roe*. Upon release of the decision, abortion is automatically illegal in 13 states and several states are expected to follow suit and implement laws banning abortion.

Constitutional Law Background

Dobbs overturns decades of precedent case law on abortion and reproductive rights. Below is a brief history of abortion cases from the Supreme Court.

Griswold v. Connecticut

Griswold v. Connecticut (Griswold) is a 1965 SCOTUS decision where the issue was whether or not a Connecticut (CT) statute that made the use of contraceptives a criminal offense violated a married couple's right to privacy under the Bill of Rights. SCOTUS, in a 7-2 decision, determined that the statute was unconstitutional, holding that a married couple has a certain right to privacy under the Constitution, and within that "zone of privacy" was the right to use birth control. The Supreme Court found that the right to privacy in this case existed in the Third, Fourth and Fifth amendments to the Constitution.

Roe v. Wade

One of the most well-known Supreme Court cases of all time is *Roe v. Wade (Roe)*, the landmark case that legalized abortion rights in 1973. In *Roe*, SCOTUS ruled that a state law that criminalized abortion except in cases where the mother's life was at risk, without regard to the state of pregnancy or other interests violated a woman's right to privacy under the Fourteenth Amendment to the Constitution. SCOTUS held that a woman's decision whether or not to terminate a pregnancy is found in her right to privacy, but that right to abortion is not absolute and may be limited by the state's interests in safeguarding a woman's health, maintaining proper medical standards and protecting potential human life. The SCOTUS decision stated that following the first trimester of pregnancy, the state may regulate abortions for the protection of a mother's health and after the fetus' point of viability, states may ban abortions except in cases where it is necessary to preserve the life or health of the mother.

Planned Parenthood v. Casey

In 1992, SCOTUS reaffirmed *Roe* in a 5-4 decision in the case *Planned Parenthood v. Casey (Casey)* holding that a requirement that a married woman notify her husband before undergoing an abortion presented a substantial obstacle to her choice and was therefore unconstitutional. In *Casey*, the court rejected the trimester framework adopted twenty years prior and adopted a new "undue burden" test to determine whether a state's regulation of abortion placed a substantial obstacle in a woman's decision to choose an abortion before a fetus reached viability. Under *Casey*, states may limit abortion but only if the limitations imposed do not present a substantial burden on a woman's right to choose.

Dobbs v. Jackson Women's Health Organization

In *Dobbs*, the issue before the Supreme Court was whether the Mississippi law that prohibits abortions, with limited exceptions, after 15 weeks' gestational age, presents an unconstitutional ban on pre-viability abortions. SCOTUS issued a [final decision](#) on June 24, 2022.

The final SCOTUS decision, written by Justice Samuel Alito states: "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division." He later concludes: "The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."

Joining in the Dissent were Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan who stated: "With sorrow – for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection – we dissent."

Plan Design and Benefits

Abortion Coverage

Many employer-sponsored health plans cover abortion and related services although generally speaking there is no requirement for plans to do so since these services are not essential health benefits (EHBs) required by the Affordable Care Act (ACA). Because these benefits are not EHBs under ACA employers can place dollar limits on the amount of coverage provided.

Travel Benefits

Group health plans may provide tax-free benefits for services that are "medical care" as defined by the Internal Revenue Service (IRS) Code Section 213. Under the tax code, "amounts paid for

transportation primarily for, and essential to, medical care” may be provided on a tax-free basis. Per these rules, travel of a plan participant to obtain access to an abortion would be medical care so long as the travel is primarily for obtaining an abortion and such services are obtained by a licensed provider in a state where abortions are legal.

Travel Benefits as Medical Expenses

Under IRS Code Section 213 transportation medical expenses may include amounts paid for the following items:

- Bus, taxi, train, or plane fares or ambulance service;
- Transportation expenses of a parent who must go with a child who needs medical care;
- Transportation expenses of a nurse or other person who can give injections, medications, or other treatment required by a patient who is traveling to get medical care and is unable to travel alone; and
- Transportation expenses for regular visits to see a mentally ill dependent if these visits are recommended as a part of treatment.

Also includable, when a car is used for medical reasons are out-of-pocket expenses, such as the cost of gas, oil, parking fees and tolls; however, depreciation, insurance, general repair, or maintenance expenses are not includable expenses.

Medical expense amounts for lodging when a trip to another city primarily for, and essential to, receiving medical services is includable up to \$50 per night. Also includable is lodging for a companion traveling with the person receiving the medical care. For example, the individual receiving medical care traveling with a companion would receive \$100 per night in tax-free lodging expenses. Expenses that are paid over the allowed limit are taxable, and meals are not included. Further, medical expenses for a trip or vacation taken merely for a change in environment, improvement of morale, or general improvement of health, even if the trip is made on the advice of a doctor are not includable.

Travel Benefits to Obtain Abortion Services

Travel to obtain abortion services may be provided as part of the health plan, through a Health Reimbursement Arrangement (HRA), through a Flexible Spending Account (FSA), or through a Health Savings Account (HSA) for individuals enrolled in a High Deductible Health Plan (HDHP). Providing travel and lodging expenses for abortions outside of these types of arrangements could result in the creation of a group health plan because the employer is providing “medical care.” Group health plans are subject to a number of regulations including ACA, ERISA, the Consolidated Omnibus Budget Reconciliation Act (COBRA) and the Health Insurance Portability and Accountability Act (HIPAA). Employers may also choose to provide travel benefits for employees on a post-tax basis.

Plan sponsors are encouraged to seek guidance from legal counsel when designing any travel benefits for abortion-related services.

Considerations for Cafeteria Plans

The Section 125 cafeteria plan rules for midyear changes permit plan participants to make changes to plans outside of open enrollment only in certain specific circumstances defined by the IRS. Midyear changes that are not permitted by the IRS may jeopardize the tax-advantaged status of the plan.

Plan participants may ask if changes to the plan due to abortion services are a qualifying event that would allow a midyear change under Section 125. There are two possible scenarios that may allow

for a change under Section 125. Whether or not these events are permissible is a determination that each plan sponsor should make based on the facts and circumstances of the scenario and the verbiage of their plan document. Plan sponsors are encouraged to seek guidance from their counsel if they have questions on the permissibility of changes under Section 125.

Section 125 allows changes midyear when there is “significant curtailment” of coverage. Assume a plan has a local fully insured Health Maintenance Organization (HMO) plan, but also a national self-funded plan. It is possible that a plan participant in an HMO living in a state that bans abortion may have a claim to switch to a self-funded plan midyear due to a claim that they have experienced a significant curtailment of coverage.

In another scenario, a plan may add coverage for travel and lodging benefits to allow individuals to travel to other states where abortion is legal to have abortion services performed. A plan sponsor could argue that adding these benefits is a significant improvement in coverage, and therefore a midyear change is allowed under Section 125. Plan participants who were not previously enrolled may want to enter the plan due to services being added.

Plan Document Changes

Plan sponsors may need to issue an amendment to cover travel for an abortion. It is likely such changes are material and therefore require a Summary of Material Modification (SMM) to the Summary Plan Description (SPD).

State Law Issues

Fully insured health plans are regulated by state laws; therefore, in any state that bans abortion, fully insured plans will need to comply with the applicable state law and may not cover abortion in states where it is prohibited.

ERISA Preemption

The ERISA Preemption Rule

The “supremacy clause” of the U.S. Constitution allows federal laws to preempt state laws. ERISA is one such law. ERISA has an express preemption provision, which says that a state law that “relates to” an ERISA plan is preempted by federal law. There is an exception for state laws that regulate insurance, banking, or securities as provided for under the “saving clause” that allows insurers to be regulated by state law. States may regulate the insurers that provide services to an insurance plan, but not an employee benefit plan itself.

The intent of ERISA preemption for employee benefit plans is to keep plan uniformity across the country. Courts use a test to determine whether a state law “relates to” an ERISA plan. As provided in Section 514, ERISA “shall supersede any and all State laws insofar as they may now and hereafter relate to any employee benefit plan”. A state law “relates to” ERISA if it has a connection with or reference to the plan. A state law need not directly impact an ERISA plan to be preempted, but the more impact the law has on the central matter of plan design and administration the more likely it is to interfere with national plan uniformity and therefore the more likely it is to be preempted. Laws that have an incidental impact on the plan are less likely to be preempted.

Preemption of Abortion Laws

Self-funded health plans may add provisions to their plans to cover travel and lodging for plan participants to obtain an abortion in a state where abortion is legal. Although there is a lack of case law on the issue, it is highly unlikely that a self-funded plan will be able to use ERISA preemption as a

defense to cover abortion services themselves in states where abortion is prohibited. A group health plan may have an argument that ERISA would preempt the law to preserve national uniformity of the plan as SCOTUS held in previous ERISA cases, but without more precedent there is no guarantee how a Court would rule. In addition, ERISA has not historically preempted criminal laws, and although there is not much guidance on ERISA preemption in this area, the conservative approach is to assume that ERISA will not preempt a criminal law even to protect national uniformity of a plan.

Criminal and Civil Law Issues – Texas SB 8

Providing travel and lodging coverage to obtain an abortion outside of a state where such services are illegal is further complicated by certain state laws that prohibit aiding and abetting an abortion. The primary question that employer plan sponsors and third-party administrators (TPAs) ask is “can we be sued?” It could be argued that a violation occurs when the plan pays for travel and lodging to obtain an abortion in another state. The primary example of such a law is a statute out of Texas commonly known as Senate Bill (SB) 8, which imposes a civil liability on anyone who knowingly aids or abets another individual who gets an abortion. This includes paying for an abortion outright or through insurance.

HIPAA Considerations

Generally speaking, claims substantiation occurs with the health plan carrier or TPA. Plan sponsors that are handling medical claims outside of the TPA may have HIPAA privacy issues if claims are handled by individuals who are not HIPAA trained. Travel and lodging that qualifies as medical care under the IRS code is Protected Health Information (PHI) and therefore protected by HIPAA. Plan sponsors should ensure that individuals handling these types of reimbursement are HIPAA trained. This includes individuals in payroll departments who may be reimbursing individuals for travel and lodging costs that are considered medical expenses. It may be prudent for employers to advise plan participants that employees within the organization will have access to this personal and private information.

EPIC Employee Benefits Compliance Services

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