

What do employer health plan sponsors need to know after the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*?



The Supreme Court's decision overruling *Roe v. Wade* (announced in June 2022) has created a new landscape for abortion-related state laws. Sponsors of ERISA-covered, self-funded plans are usually not concerned with state laws because ERISA preempts, or overrides, state laws on the matter. However, state laws restricting abortion are typically criminal laws which are not preempted by federal law, and it's not entirely clear if civil abortion laws are preempted by federal law. Employer benefits plan sponsors should discuss abortion-related issues with their legal counsel to ensure their plans are in compliance with both federal and applicable state law.

This advisory provides an overview of key issues employers should consider when reviewing current coverage options for abortion-related services.

Group health plans typically include a provision stating only *legal* services are covered. However, determining what is legally permitted/not permitted (or required) now involves a thorough analysis of each applicable state law, including for sponsors of ERISA-covered, self-funded plans. Certain federal laws may also come into play.



Does federal law require group health plans to cover abortion services?

Generally, no. However, the 1978 Pregnancy Discrimination Act (PDA) contains some requirements for employer-sponsored group health plans.

The PDA specifically states:

- Employers do not have to pay for health coverage of abortion services “except where the life of the mother would be endangered if the fetus were carried to term.”
- Plans must cover complications arising from abortion (even if abortion is not covered by the plan), such as excessive hemorrhaging.
- Adverse employment actions related to abortion are prohibited, for example:
 - An employer may not fire a woman for having an abortion or contemplating an abortion.
 - A manager may not pressure an employee to have/not have an abortion in order to retain her job, get better assignments or stay on a path for advancement.

The PDA does not preclude employers from covering abortions. Any covered benefits for abortion must be covered on the same basis as expenses for other medical conditions.

The PDA amended Title VII of the Civil Rights Act, so it applies to employers with 15 or more employees and is enforced by the Equal Employment Opportunity Commission (EEOC). The EEOC has not yet issued guidance regarding the application of the PDA post-*Dobbs*.

Does ERISA preempt state laws restricting abortion?

Because many state abortion laws are criminal laws, ERISA preemption is not easily determined and must be considered on a case-by-case basis.

Generally, ERISA preemption applies as follows:

- ERISA broadly preempts state laws that “relate to” an ERISA-covered plan.
- However, there are a couple of significant exceptions:
 - *ERISA does not preempt state insurance laws as applied to fully insured plans.* However, such laws are preempted by federal law with respect to self-funded plans. For example, fully insured group health plans are subject to state law insurance coverage mandates, whereas self-funded plans are not.
 - *ERISA does not preempt “generally applicable” state criminal laws.* Most state criminal laws restricting abortion are broadly applicable, and thus less likely to be preempted.
- Courts have generally found that state civil laws are not preempted if a state is exercising general police powers.

State criminal laws are often broad in scope and typically include “aiding and abetting” laws or “accomplice laws,” which include anyone who assists in the crime under the state law.



State criminal laws may also apply on an “extraterritorial” basis, or outside the boundaries of the state. For example, some states apply their criminal laws to someone who took action(s) outside the state if part of the crime occurred within the state.

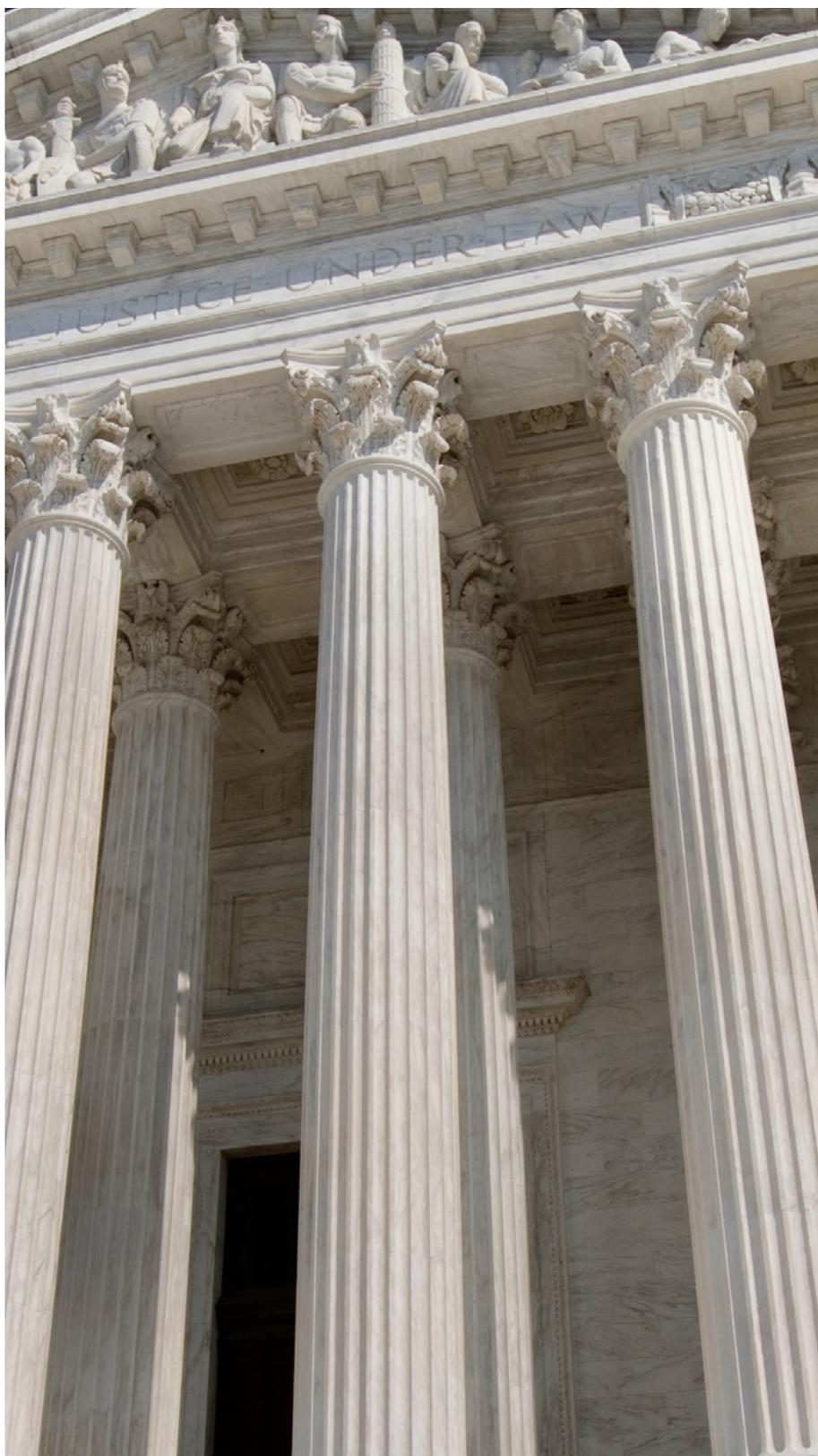
Such laws could be relevant in the case of medication abortions if the entire abortion is not completed in the state in which it is legal. Some actions of a group health plan relating to abortion services (including travel benefits) could fall under certain state laws, including paying for an abortion that is legal in the state in which it occurred, but illegal in the patient’s state of residence.

It is important to note that preemption is typically used as a defense to state action; the possibility of preemption does not preclude state authorities, such as state attorneys general or local prosecutors, from taking enforcement action. Generally, whether a particular state law is preempted by federal law would ultimately be determined by a court.

In addition to ERISA, other federal laws may be relevant. For example, the Biden Administration’s position is that the Emergency Medical Treatment and Labor Act, which requires providers to offer stabilizing treatment, including abortion services in emergency situations, preempts state laws. This issue is now being litigated in two states.

- The constitutional right to travel may also be implicated, as noted by Justice Kavanaugh in his concurring opinion in *Dobbs*.
- Additional federal laws may come into play through actions taken as a result of President Biden’s executive order on protecting access to reproductive rights.

Navigating these issues is very complicated and involves looking closely at one or more state laws, as well as federal law. Thus, any questions regarding abortion services should be discussed with legal counsel.





Assuming the provision of abortion services is legal, what ERISA and Internal Revenue Code issues are involved?

Once legal counsel has determined that coverage of abortion services is legal, the plan sponsor then needs to consider additional compliance issues that arise under ERISA, the Internal Revenue Code or other applicable laws.

Medical travel benefits under ERISA

The easiest way to provide medical travel benefits is through an employer's group health plan. Some employers already have travel benefits, such as travel to centers of excellence for certain surgeries.

- For example, employers could provide travel benefits if a medical service cannot be obtained within 100 miles of the participant's residence.
- Plan participants would need to substantiate any travel expenses, and processes would be needed to appropriately handle protected health information under Health Insurance Portability and Accountability Act privacy rules.

Due to provisions under the Affordable Care Act (ACA), generally medical services (including abortion services and medical travel benefits) cannot be provided to individuals who are not participating in the employer's primary medical plan. However, employers might be able to provide these services on a standalone basis through the following options:

- An employee assistance program.
- An excepted benefit health reimbursement account.

Additional compliance issues arise in such cases that would need to be carefully considered in order for the arrangement to comply with ACA requirements.

Internal Revenue Code limits

Within certain limits, travel reimbursement is excluded from an employee's income and payroll taxes when it is "primarily for" and "essential to" medical care. Travel expenses for medically necessary travel companions are also excludable. *The medical care itself has to be legal for the exclusion to apply.*

Code limits on tax-free reimbursable medical travel benefits

Type of Expense	Limit
Lodging	\$50 per person per night.
Meals	The meal must be obtained within the hospital or other similar facility where the procedure is performed.
Automobile travel	Either: <ul style="list-style-type: none">Actual expenses (not including depreciation, insurance, general repair or maintenance expenses). OR <ul style="list-style-type: none">The IRS standard medical mileage rate. This rate is adjusted periodically by the IRS. The medical mileage rate for July through December 2022 is 22 cents per mile.
Other forms of travel (e.g., air, train)	Actual expenses.

Health plans are not required to cover medical travel and may impose limits on covered travel in addition to the Internal Revenue Code limits.

Medical travel that meets the Code limits is a reimbursable expense from a health savings account.



Conclusion

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* creates new questions — many of which remain unanswered — for health plan sponsors considering coverage of abortion services. Employers should discuss these matters with their legal counsel to ensure compliance with all state and federal laws, paying particular attention to criminal laws.

This material is intended to provide general information about an evolving topic and does not constitute legal, tax or accounting advice regarding any specific situation. Aflac cannot anticipate all the facts that a particular employer or individual will have to consider in their benefits decision-making process.

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