Supreme Court Decision in *Dobbs*: Implications for Plan Sponsors

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Agenda

- Overview of legal environment under *Dobbs*
- Clinical perspective
- Plan design issues for medical travel benefits
- Broader issues

Dobbs v. Jackson Women's Health Organization

- The Supreme Court, in a 6-3 decision issued on June 24 2022, overruled *Roe v Wade* and held that the U.S. Constitution does not confer a constitutional right to abortion.

- States are now able to regulate abortion.

- Plan sponsors, ***including sponsors of self-funded plans subject to ERISA***, now need to consider state law in reviewing current coverage or considering new benefit designs relating to abortion services.

Summary of ERISA Preemption

- ERISA broadly preempts state laws that "relate to" an ERISA covered plan.
  - The general purpose of this provision is to promote uniform regulation of ERISA-covered plans.
  - Courts are less likely to find state law preempted in areas of traditional state regulation, particularly if the law is broadly applied.
- Self-funded group health plans do not need to comply with state insurance laws.
  - However, state insurance laws do apply to fully-insured plans.
- ***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.
- Whether a particular state law relating to abortion is preempted is a complicated analysis, will depend on the specifics of the state law, and will ultimately be decided through litigation.
- Preemption is generally raised as a defense; the possibility that a law may be preempted by ERISA does not preclude state authorities from taking enforcement actions.

Overview of State Law Issues

- State laws vary significantly with respect to abortion services and consequences of noncompliance can be significant. A variety of health plan actions, including paying for certain abortions and providing information regarding providers, could be implicated under certain state laws. Legal counsel should be consulted with respect to these issues.
- General issues relating to state law include the following:
  - Is the law criminal or civil (some states have both)?
  - Who is subject to the law?
    - Many states have “aiding and abetting” or “accomplice” laws that apply broadly to anyone assisting in or facilitating an illegal activity.
  - Does the state law apply extraterritorially (that is, outside the boundary of the state)?
    - For example, many states apply criminal laws to persons who acted outside the state if some part of the crime occurred within the state.
  - Are there any exceptions to the law?
    - For example, if the law provides exceptions based on the health of the mother, who makes that decision? Does “health” include mental health?
  - Who is authorized to enforce the law?
  - What are the consequences for noncompliance?

Federal Laws Other than ERISA

- Pregnancy Discrimination Act
  - Provides that employers do not have to pay for health coverage for abortion services "except where the life of the mother would be endangered if the fetus were carried to term."
  - Complications arising from abortion must be covered, such as excessive hemorrhaging, even if abortions are not covered.
  - Does not prevent plans from covering abortions. Any covered benefits for abortion must be covered on the same basis as other medical conditions.
  - Generally applies to employers and is enforced by the Equal Employment Opportunity Commission (EEOC). The EEOC has not yet made any statements regarding the application of the PDA post-*Dobbs*.

Executive Orders

- July 8, 2022, Executive Order on Protecting Access to Reproductive Healthcare Services
  - Executive Order declares intent to protect healthcare service delivery, promote access to critical reproductive healthcare services, including abortion
  - Includes education, privacy protections, emergency care guidelines, and creation of a Reproductive Rights Task Force
  - Task Force creation announced by the Justice Department on July 12, 2022
- August 3, 2022, Executive Order on Protecting Access to Reproductive and other Healthcare Services
  - Directs HHS to advance reproductive healthcare services, including through Medicaid for patients travelling across state lines
  - Directs HHS to promote compliance with non-discrimination laws

Emergency Medical Treatment and Labor Act (EMTALA)

- HHS Secretary Becerra July 11, 2022 letter to health care providers describes providers obligations to provide emergency services and states that EMTALA preempts state law. https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf
- EMTALA requires that all patients receive an appropriate medical screening examination, stabilizing treatment, and transfer, if necessary, irrespective of any state laws
  - Emergency medical conditions include, but are not limited to, ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.
  - If a physician believes that a pregnant patient presenting at an emergency department, including certain labor and delivery departments, is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment.
- When a state law prohibits abortion and does not include an exception for the life and health of the pregnant person — or draws the exception more narrowly than EMTALA's emergency medical condition definition — that state law is preempted.
- The issue of whether EMTALA preempts state law is being litigated in two states.

Employee Privacy Protections

- The HHS Office for Civil Rights (OCR) issued guidance June 29, 2022, reminding covered plans and providers that an individual's Protected Health Information cannot be disclosed without an individual's authorization, except in certain circumstances.
  - Disclosure must be specifically required by a law in order to allow disclosure "by law"
  - Disclosure for law enforcement purposes generally requires a subpoena, warrant, or other mandate enforceable in a court of law
  - https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html
- Employers also have privacy obligations under the Americans with Disabilities Act, Family and Medical Leave Act, and Genetic Information Nondiscrimination Act

Key Takeaways

- All plans, including self-funded plans covered by ERISA need to consider state law when evaluating current coverage and making plan design decisions with respect to abortion services
- Determining whether certain abortion services can be provided (or must be provided) involves difficult issues under both state and federal law that should be discussed with legal counsel
- The extent to which ERISA or other federal law preempts state laws has not yet been fully litigated, although a number of cases are in progress
  - Criminal laws and laws of general application are less likely to be preempted
- The law in this area continues to develop; new developments need to be monitored.

Clinical perspective

Abortion-Related Medical Benefits

- Medical definition of abortion (induced vs. spontaneous)
- Plan benefits for medical abortion
  - Medication assisted
  - Surgical - Dilation and curettage (D&C)
- Emergency care and EMTALA
  - Dilation and curettage (D&C)
- Implications for physician training and access to care
- Telehealth benefits
- Mental health impacts

Medication Abortions

- Medication abortion is FDA approved for use up to 10 weeks of pregnancy and in 2020 accounted for 54% of US abortions (often called Plan C)
- FDA approved medication abortion regimen involves the following two drugs:
  - **Oral mifepristone (Mifeprex) and oral misoprostol (Cytotec).** This is the most common type of medical abortion. These medications are usually taken within seven weeks of the first day of your last period. *Misoprostoal has a primary indication to treat ulcers and is off label for medical management in a variety of obstetrical care scenarios including acute hemorrhage.*
  - **Oral mifepristone and vaginal, buccal or sublingual misoprostol.** This type of medical abortion uses the same medications as the previous method, but with a slowly dissolving misoprostol tablet placed in your vagina (vaginal route), in your mouth between your teeth and cheek (buccal route), or under your tongue (sublingual route).
  - **Methotrexate and vaginal misoprostol.** Methotrexate's p*rimary use in cancers and other autoimmune disorders.* Methotrexate (Otrexup, Rasuvo, others) is rarely used for elective, unwanted pregnancies, although it's still used for pregnancies outside of the uterus (ectopic pregnancies).
  - **Vaginal misoprostol alone.** Vaginal misoprostol (Cytotec) alone can be effective when used before nine weeks of gestation of the embryo.

Source: Kaiser Family Foundation

Medication Abortions

- In December 2021, permanently lifted the “in-person” requirement, allowing mifepristone to be dispensed by pharmacies and mailed directly to patients
- *GenBioPro, Inc. v. Dobbs* (S.D. Miss. 2020) could address conflict between FDA rules and state law requiring in-person prescriptions
- Medication abortion vs. Emergency contraception
  - Plan B is a type of contraceptive known as the morning-after pill that can be used after unprotected sex to prevent pregnancy. Plan B contains the hormone levonorgestrel — a progestin — which can prevent ovulation, block fertilization or keep a fertilized egg from implanting in the uterus.
  - Plan B is considered emergency contraception and not an abortifacient

Contraceptive Coverage

- Affordable Care Act requires non-grandfathered group health plans and issuers to cover, without cost sharing, at least one form of contraceptive in each method for women currently identified by the U.S. Food and Drug Administration
  - https://www.fda.gov/consumers/free-publications-women/birth-control-chart
  - Plans must have medical exceptions process
  - Free coverage may be limited to in-network
  - Coverage includes Plan B (emergency contraceptives)
- Secretaries Walsh, Becerra, and Yellen have announced an enforcement initiative
  - https://www.cms.gov/files/document/letter-plans-and-issuers-access-contraceptive-coverage.pdf

Design Issues for Medical Travel Benefits

- The Internal Revenue Code places limits on the amount of medical travel benefits. ***In addition, the medical services involved must be legal.***
  - Companion travel also generally reimbursable if the patient is unable to travel alone.
  - Reimbursements in excess of the IRS limits are subject to income and payroll taxes.
- Lodging: $50 per person per night
- Automobile transportation: Either
  - Actual expenses, but excluding depreciation, insurance, general repair, and maintenance, or
  - Standard medical mileage rate (22 cents per mile from July 1 through Dec 31, 2022).
- Air, train, bus: Actual expenses
- Meals: Reimbursable only if obtained within the hospital or similar facility where the procedure is performed.

Considerations

How does the plan cover items and services today?

- Abortion
- Medication abortion
- Contraceptive coverage (all FDA methods including Plan B required for non-grandfathered plans)
- Travel benefits
- Coverage for dependent children
- Health Reimbursement Arrangement (HRA) coverage

Broader Issues

Additional Benefits

- Paid leave
- Dependent care and caregiver benefits
- Education benefits
- Adoption benefits

Family Building Benefits

- Fertility coverage benefit options through both carriers and carve-outs
- Implications of *Dobbs* on fertility coverage
  - Personhood measures would unduly restrict infertile patients' right to make decisions about their own medical treatments, including determining the fate of any embryos created as part of the IVF process.

Source: American Society for Reproductive Medicine

Healthy Mothers and Children

- Each year in the United States, about 700 people die during pregnancy or in the year after; another 50,000 people have unexpected outcomes of labor and delivery with serious short- or long-term health consequences
- Black women are three times more likely to die from a pregnancy-related cause than white women
- Social determinants of health prevent many people from racial and ethnic minority groups from having fair opportunities for economic, physical, and emotional health

Source: Centers for Disease Control and Prevention

Ways to Improve Maternal Healthcare

- Help patients manage chronic conditions or conditions that may arise during pregnancy like hypertension, diabetes, or depression
- Consider incentives for participating in healthy pregnancy programs
- Provide care coordination services during and after pregnancy
- Consider coverage for Doulas, lactation assistance
- Monitor delivery of quality prenatal and postpartum care
- Recognize social determinants of health that may affect your population

Questions?