

## The Dobbs Decision:

### How Dobbs v. Jackson Women's Health Organization Affects Group Health Plans

With its decision on June 24, 2022, the U.S. Supreme Court ruled that the Constitution does not confer a right to an abortion. For the first time in 50 years, the authority to define abortion rights or restrictions has been returned to the states. Employers that sponsor group health plans will be subject to state-level regulation of access to abortion services.

**1. There is no one-size-fits-all solution.** Every client is different. Different strategies will be available, depending on whether the group plan is insured or self-insured, what states they operate and have employees, and whether they offer additional benefits such as health flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), or Health Savings Accounts (HSAs).

**2. Know plans and what states group employees are located.** Brokers should start classifying the plans that their clients have, the states they have group health insurance policies, and employee locations.

Examples:

- If a client has a fully insured group health plan under a policy issued in a state that has a trigger law, such as Kentucky, then abortions will likely be unavailable under the insured plan. The broker or advisor will have to seek out the carrier and the client to communicate potential changes to the policy and coverage around abortion services.
- If the client has a self-insured group health plan, it is not directly impacted by state laws prohibiting abortion due to ERISA preemption. However, state criminal laws of general application are not preempted by ERISA. Employers with self-insured group health plans with employees in states that make abortion a crime may need to address potential liability and ERISA preemption issues with legal counsel.

**3. Medical travel benefits.** For clients with insured plans in states that prohibit abortion, and for all clients with employees living in those states that may need to travel for abortion services, there are a variety of ways to provide medical travel benefits. As a broker/advisor, you may not be able to advise on all the issues (some of which cross over into legal advice), but here are some key points to know:

- **Dollar limits.** Because medical travel reimbursements are fairly limited under the tax code and low dollar limits apply under health FSAs (\$2,850) and Excepted Benefit HRAs (\$1,800), an integrated HRA or a post-tax arrangement can be in any amount the employer chooses.
- **ERISA.** A medical travel reimbursement arrangement will be subject to ERISA disclosure and reporting requirements, depending on the number of participants eligible under the arrangement.
- **Coordination.** Medical travel reimbursement arrangements will need to be coordinated with other arrangements such as health FSAs, and eligibility under a medical travel arrangement will impact HSA eligibility. A careful review of the client's full benefit package is recommended before implementing a medical travel reimbursement arrangement.
- **Liability.** There are some states that have laws that prohibit "aiding and abetting" abortion, including through provision of insurance and reimbursements. Those laws could be directed at employers offering these benefits. Legislators in at least one state have threatened criminal prosecution of at least one employer that offers travel benefits for those seeking abortion services. The ultimate enforceability of these provisions against employers will need to be determined through litigation, which may take years to unfold. In the meantime, clients contemplating medical travel benefits for abortion services will need to consult legal counsel on potential liability and ERISA preemption issues that are raised.

**4. Stop-loss coverage.** Brokers and advisors should be aware of the client's stop-loss coverage and the need to communicate with the stop-loss carrier regarding any change in self-insured plan design related to abortion services.

**5. No quick answers.** Litigation in this area is expected, so fast answers will not always be available. The best strategy is to stay informed and proceed with caution.

**Brokers and advisors should refer their clients to legal counsel as needed.**