

**SCOTUS Decision in
Dobbs:
Important
Considerations for
Employer Health Plans in
a Post-*Roe v Wade* World**

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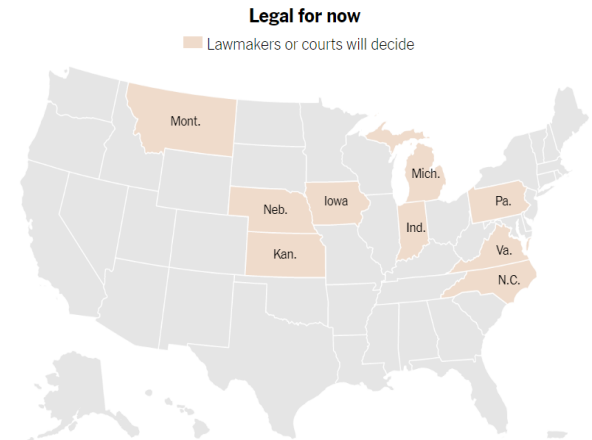
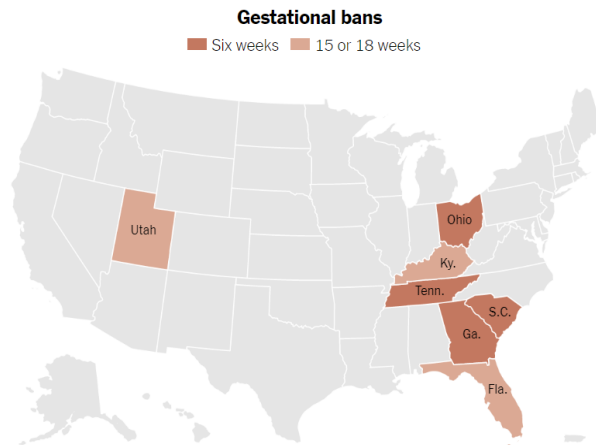
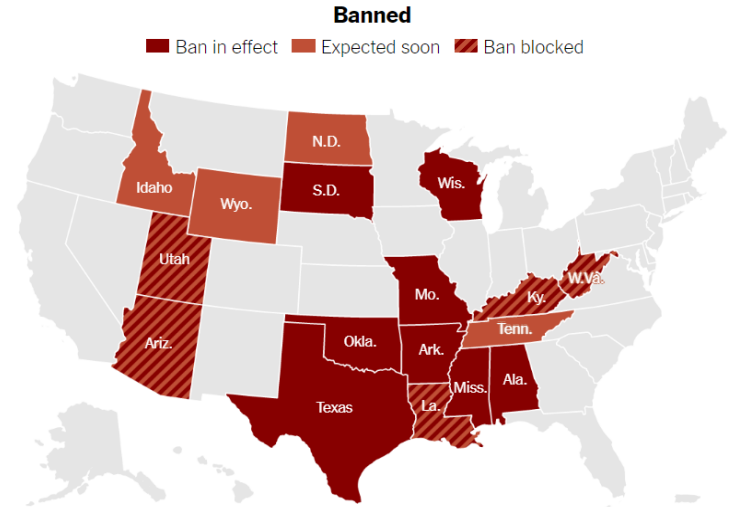
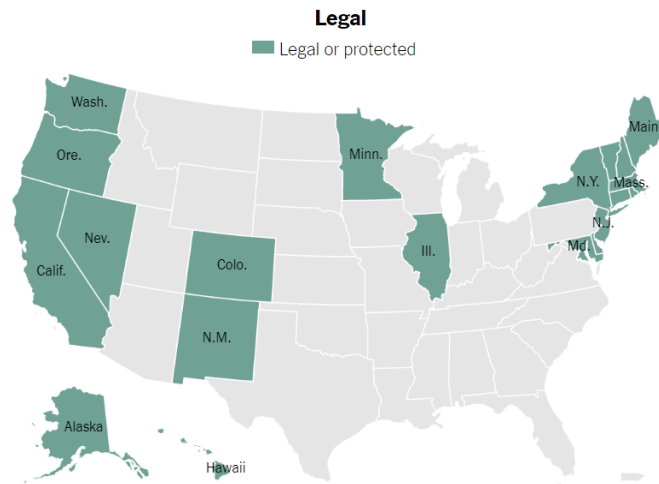
Agenda

- Legal Landscape after decision in *Dobbs*
- Impact to existing benefits
- May our plan cover abortion?
- May our plan exclude abortion?
- Travel Benefit Options
- State “Aiding and Abetting” Laws

Dobbs and Abortion Coverage

- Decision effectively reverts regulation back to states. Many states will or have already banned abortion services to some degree.
- Other states will allow continued access, or require FI health plans to cover abortion services.
- States will see litigation on all sides of the debate
- What does this mean for employers and the health plan?
 - Depends on whether the plan is self-insured or fully-insured
 - Depends also on where plan is located, and where employees reside
 - Travel Expenses or reimbursement outside the major medical plan will need to be considered carefully

State Patchwork of Laws



Reactions to *Dobbs* Decision

- Executive Order on Protecting Access to Reproductive Healthcare Services (HIPAA protection, medical abortion, Section 1557 of ACA)
- Joint guidance warning health plan sponsors and carriers to ensure their plans comply with the ACA's contraceptive coverage mandate with no cost-sharing. Must cover all contraceptive products approved, cleared or granted by the FDA.
- HHS issued proposed rules revising Section 1557 prior rules, including clarification that “discrimination on the basis of sex” includes pregnancy-related conditions, including “termination of pregnancy”
- Litigation expected:
 - ERISA preemption from state criminal liability
 - State Law exerting extraterritorial authority

Impact to Existing Benefits

Depends on whether plan is Fully-Insured or Self-Funded:

Fully Insured & Non-ERISA Plans:

- › Plan must follow state insurance law where policy is issued
- › Group plan coverage depends on state's mandates or restrictions.

Self-Funded ERISA Plans:

- › Governed by ERISA, which preempts state insurance law
- › However, ERISA preemption may not apply against state criminal law.

May our Plan Cover Abortion?

- Fully Insured: policy must comply with state insurance laws
- Self Funded ERISA plan has more flexibility to cover legal abortion services (caution w/ “aid and abet” laws)
- Non-ERISA plans (e.g., governments, church, Indian tribal plans) must comply with state insurance law; no ERISA preemption

May our Plan Exclude Abortion?

- Fully Insured: policy must comply with state insurance laws
 - State laws that require coverage for private insurance plans regulated by that state: CA, IL, ME, NY, OR, WA
- Self Funded ERISA plan has more flexibility to exclude abortion services
- Non-ERISA plans (e.g., governments, church, Indian tribal plans) must comply with state insurance law; no ERISA preemption

What's happening in Wisconsin?

- WI statute from 1849 criminalizing abortion in effect
- Lawsuit filed by AG Josh Kaul that statute is unenforceable
- Will be months or years before law is clarified (likely to end up in WI Supreme Court)
- Would appear fully-insured health plans issued in WI could not generally cover abortion
- But may permit plans to cover procedures in states where it is legal

Coverage and Travel Reimbursements

- Self-insured: exempt from state law banning coverage of abortion services under the health plan, except if facilitating abortion services is a criminal offence
- Fully-insured: subject to the state law in which the plan is written
- Travel expenses or reimbursement (HRA, FSA, HSA, EBHRA, taxable cash, etc.) likely permissible in states where abortion is legal, unless in a state with “aiding and abetting” laws which criminalize facilitation of abortion services.

Non-taxable Travel Reimbursement

The IRC allows non-taxable reimbursement for travel expenses that qualify as “medical care” under Section 213(d).

Medical care includes amounts for transportation **primarily for** and **essential to** medical care. The medical care itself also must be **legal** for tax-favored treatment to apply.

Non-taxable medical travel benefits will be subject to IRS dollar limits:

- Lodging is capped at \$50 per night per person.
- If traveling by automobile, the medical standard mileage rate is less than the mileage rate for business travel purposes at 22 cents per mile for the remainder of 2022.
- Meals generally are not included unless obtained within the hospital (or similar facility) where the procedure is performed.

Medical travel reimbursement amounts in excess of Section 213(d) limits are subject to taxation.

Travel Reimbursement

May employer reimburse for travel to state where services are legal?

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Travel Reimbursement Options

Benefit	Advantages	Disadvantages
Group health plan	<ul style="list-style-type: none"> - Built-in administration through TPA/carrier, as well as HIPAA, ACA, COBRA and ERISA compliance. - ERISA preemption for SI plans possible to counteract state law. 	<ul style="list-style-type: none"> - TPA ability to administer multi-state abortion laws. - Concern with “aiding and abetting” laws - May require amended SPD and SMM.
Health Flexible Spending Account (FSA)	<ul style="list-style-type: none"> - Can cover those not enrolled under major medical plan. <ul style="list-style-type: none"> - Medical expenses reimbursable under 213(d) - FSA has built in parameters 	<ul style="list-style-type: none"> - TPA may be unable to administer across states. <ul style="list-style-type: none"> - Concern with aid and abet laws - Disqualifying HSA coverage
Health Reimbursement Arrangement (HRA)	<ul style="list-style-type: none"> - Can reimburse beyond what major medical plan covers - Medical and travel expenses reimbursable under 213(d) <ul style="list-style-type: none"> - Employer has flexibility in plan design 	<ul style="list-style-type: none"> - TPA may be unable to administer across states - HRAs are SI group health plans, with add'l compliance requirements - HRAs must be funded solely by employer contributions
Health Savings Account (HSA)	<ul style="list-style-type: none"> - Individual trust account, employer not responsible for substantiating HSA payments (distributions) <ul style="list-style-type: none"> - Can pay for any expenses under 213(d) - Employer may contribute to HSA, but not required to contribute 	<ul style="list-style-type: none"> - Disqualifying coverage may render individual ineligible for an HSA - Employee would be responsible for the HDHP deductible and out of pocket.
EAP	<ul style="list-style-type: none"> - Excepted benefit not subject to ACA mandates - Available to employees not enrolled in major medical plan 	Could only remain “excepted” if EAP only reimburses travel costs
Taxable Reimbursement	<ul style="list-style-type: none"> - May provide greatest flexibility - Not limited to 213(d) expenses - Avoids compliance issues with a “group health plan” or tax-free arrangement 	<ul style="list-style-type: none"> - Not as beneficial to employees, taxable cash subject to payroll and income taxes - Requires employer administration/policy

Aid and Abet Considerations

Do the “aiding and abetting” laws in certain states affect our plan or ability to reimburse where legal?

- “Aid and abet”
 - Defined under state law to include **paying for reimbursing the costs of an abortion through insurance or otherwise**
 - Extends liability beyond providers
 - Likely brings in employers paying for or reimbursing for costs

Employers must take caution and work with legal counsel:

- › Employees in states where abortion is criminalized beyond doctor or provider (eg- TX and OK so far)

Texas and Oklahoma

STATUS	TEXAS	OKLAHOMA
In effect now	<p>Abortion banned at six weeks; Only exception is life of the mother.</p> <p>Enforced through civil suits filed by individuals - allows anyone - a relative, neighbor or stranger - to sue in civil court for injunctive relief, statutory damages and attorney fees. These laws are called “civil bounty laws” because the person who brings a successful suit receives money damages.</p>	<p>Modeled after Texas law.</p> <p>Abortion banned starting at fertilization; Exceptions for life of the mother, and rape or incest, if reported to law enforcement.</p> <p>Enforced through civil bounty lawsuits filed by individuals for injunctive relief, money damages and attorney fees.</p>
Effective August 25	<p>Abortion banned starting at fertilization; Only exception is life of the mother.</p> <p>Makes it a felony for a provider to perform, or attempt to perform, an abortion; \$100,000 civil fine.</p>	<p>Abortion banned starting at fertilization; Only exception is life of the mother.</p> <p>Makes it a felony for a provider to perform, or attempt to perform, an abortion; \$100,000 civil fine, 10 years in prison or both.</p>
Might be introduced in next state legislative session	<p>Will prohibit employer in Texas from paying for or reimbursing abortion-related expenses, regardless of where the abortion occurs, and regardless of the law in that jurisdiction.</p> <p>Makes it a felony for anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law.</p>	<p>Currently unknown</p>

Compliance Concerns

Preferred tax status
of benefits

Accommodation
and
Leave Issues

Mental health
parity

HIPAA/Enhanced
Scrutiny of Health
Records

Criminal liability
under aid and abet
laws

TPA capabilities

Amendment of
plan terms (SPD,
SMM, etc.)

Separate
arrangement
creates new ERISA
plan

Thank you for attending!

