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Abortion-Related Travel Benefits Post-*Dobbs*

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June 29, 2022

Immediately following the Supreme Court decision in *Dobbs v. Jackson* returning the power to regulate abortion to the states, a number of large employers announced that they would offer out-of-state travel benefits for employees living in states where abortion-related medical care is unavailable. Employers considering offering abortion-related travel benefits have several key considerations to keep in mind. The law currently allows health plans to provide reimbursement for travel primarily for and essential to medical care. Although this area of the law is evolving, employers with self-funded medical plans may amend their existing medical plans to provide abortion-related travel benefits while those with fully insured medical plans may face more obstacles in providing such benefits.

In *Dobbs v. Jackson*, an abortion clinic challenged a Mississippi law that would ban abortion after 15 weeks of pregnancy, with limited exceptions. In establishing the constitutional right to abortion in *Roe v. Wade*, the Supreme Court restricted states in their ability to limit or ban abortions before viability of the fetus, or 24 weeks from the time of conception. In upholding the Mississippi law, the Supreme Court overturned *Roe* and held that the protection or regulation of abortion is a decision for each state.

Alabama, Arkansas, Kentucky, Missouri, Oklahoma and South Dakota have already banned or made abortion illegal pursuant to trigger laws which went into effect as of the Supreme Court decision on June 24, 2022. Also, a number of additional states are expected to soon have similar legislation in effect, either by virtue of expected legislative action or trigger laws with slightly delayed effective dates. In response, a number of employers have announced that they will reimburse all or a portion of abortion-related travel expenses for employees in states where abortions are banned or otherwise not available.

Under Section 213(d) of the Internal Revenue Code, the definition of "medical care" includes transportation that is both "primarily for and essential to" the medical care sought by an individual. These types of travel benefits have historically been utilized in connection with certain specialized medical treatments, such as organ transplants. However, Section 213(d) is not limited to particular types of procedures, and thus forms the framework for providing abortion-related travel benefits through existing medical plans.

Although Code Section 213(d) applies to both self-insured and insured medical plans, the substantive coverage provisions of insured medical plans will generally be governed by the state insurance code of the state in which the insurance policy is issued. Coverage for abortion services or any related travel benefits may not be permitted under the insurance code of the state in which the policy is issued, or an insurer may not offer a travel benefit for such services even if permitted to do so. Self-insured plans, by contrast, provide employers more flexibility in plan design, including control, consistent with existing federal requirements, over the types and levels of benefits covered under the plan. As noted above, existing plans may already cover travel-related benefits for certain types of medical procedures.

Employers with high-deductible health plans tied to health savings accounts (HSAs) will need to consider the impact of adding abortion-related travel benefits to such plans. Travel-related benefits of any type would not appear to be eligible for first dollar coverage, and thus may be of minimal benefit to participants enrolled in high-deductible health plans.

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Employers with fully insured medical plans that do not cover abortion-related travel benefits may be able to offer a medical travel reimbursement program through an integrated health reimbursement arrangement (HRA). An integrated HRA is an employer-funded group health plan from which employees enrolled in the employer's traditional group medical insurance plan are reimbursed for qualifying expenses not paid by the traditional plan.

Another potential option for employers with fully insured medical plans may be to offer a stipend entirely outside of any established group health plan. Such reimbursement programs may result in taxable compensation for employees who receive such reimbursements. Also, employers would need to be sensitive to privacy and confidentiality considerations of such a policy, which should generally be minimized if offered in accordance with the existing protections of HIPAA through a medical plan and under which claims are processed by an insurer or third-party administrator rather than by the employer itself.

Additionally, some state laws may attempt to criminalize or otherwise sanction so-called aiding and abetting actions related to the procurement of abortion services in another state. This is an untested area of the law, and it is unclear whether any actions brought under such statutes would be legally viable. In this regard, Justice Kavanaugh stated as follows in his concurring opinion in *Dobbs*: "For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel." (Kavanaugh Concurring Opinion, page 10.) This is an area that will require continual monitoring by employers who offer abortion-related travel benefits.

If you have any questions regarding the topics discussed in this bulletin, please contact **Thomas G. Hancuch** at thancuch@vedderprice.com, **Philip L. Mowery** at pmowery@vedderprice.com, **Amal Rafiq** at arafiq@vedderprice.com or the Vedder Price lawyer(s) you normally work with.

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