Debevoise & Plimpton

Insurance Industry Corporate Governance Newsletter

To Our Clients and Friends,

In our last monthly edition of the Insurance Industry Corporate Governance Newsletter, we focused on corporate separations and how they are being used to alter the landscape in the life insurance and annuity industry.

This month, we look at the Supreme Court's decision to overturn *Roe v. Wade* in *Dobbs v. Jackson Women's Health* and the implications it may have for insurance companies, their policyholders and employees, and, in the case of insurers writing health or disability insurance, benefits they provide to third-party employers. This decision has already had wide-ranging consequences for women who live in states where healthcare access has now been restricted. The legal landscape is changing rapidly, but below we address issues for insurance company boards and leadership to consider and certain potential practical approaches in light of the decision.

Filling in the Access-to-Care Gap

Dobbs v. Jackson Women's Health held that the Constitution does not confer a right to abortion, therefore allowing states to restrict abortion as they see fit. In response to the decision in *Dobbs*, many states have adopted enforceable laws that restrict access to abortion. These restrictions have prompted companies of all sizes to address how they might fill the access-to-care gap and what benefits may be needed to address the healthcare needs of employees where abortion care is now restricted. There are a number of approaches available to companies wanting to provide travel or medical coverage for out-of-state abortion, including:

- **Adding or Expanding Medical Travel Benefits within an Existing Health Plan**: Under this approach, companies could work with existing insurance benefit providers to add or expand the availability of travel coverage for abortion (and other healthcare procedures that are unavailable locally) for employees enrolled in the plan. However, state law may regulate or preclude such benefits, depending on the state and the funded or unfunded status of the particular health plan.
- **Telemedicine Benefits**: Companies could also provide telemedicine benefits for employees, but the practical benefits are limited given that not all abortion patient situations can be addressed remotely. Some states require in-person visits for abortion care and may prohibit shipment of abortifacient drugs, and there are currently few telemedicine providers that administer abortion care.
- **Health Reimbursement Arrangements (HRAs) and Excepted Benefit Employee Assistance Programs (EAPs)**: HRAs and EAPs offer tax-favorable options for companies to reimburse travel for out-of-state abortions. These programs must be limited to travel reimbursement to avoid group health plan rules, and are subject to funding and reimbursement limitations.
- **Standalone Travel Benefit Plans**: Companies could also provide a taxable reimbursement for any travel or lodging expense related to health or wellness generally. Under this approach, companies could require receipts for travel and lodging, but would not request substantiation of an abortion or other wellness expense. This approach offers flexibility, but also carries the potential for abuse by employees who may use the benefit for unintended purposes.

Each of these approaches has its own advantages and disadvantages for companies, and we encourage you to reach out to us if you have any questions about which approach may be best for your company.

Criminal and Civil Liability

Employers could face criminal liability for paying for or otherwise assisting a woman to obtain an abortion out-of-state or to travel for an abortion out-of-state. Many states have abortion bans with criminal penalties that are either in effect or will be very soon. There are currently no state abortion laws that impose criminal liability on women who cross state lines to seek abortion care or companies or individuals who help a woman cross state lines to seek abortion care. Instead, most statutes criminalize conduct on the part of an abortion provider. There is a possibility, however, that aggressive state prosecutors could use other general criminal statutes—for example, statutes prohibiting homicide, manslaughter or endangering the life of a fetus—to implicate employers and individuals helping those who access abortions across state lines. Specifically, in states with very restrictive abortion laws, companies may be implicated for aiding and abetting or conspiracy to commit a crime. Additionally, aggressive prosecutors may also try to pursue a theory of criminal liability directly against companies for falsifying business records. If a company deletes, alters, or makes a false entry in business records with the intent to defraud, a company could face criminal liability.

Relatedly, companies may also face civil liability for covering travel or medical expenses for out-of-state abortions. A few states already have laws that not only permit individuals to file civil actions against entities that perform abortions, but also against those who knowingly engage in conduct that aids or abets an abortion, including paying for or reimbursing the cost of an abortion through insurance or otherwise. These laws explicitly classify employer coverage or reimbursement through insurance or benefit plans of abortion care banned in those states as aiding and abetting an unlawful abortion.
If civil suits are pursued based on such laws, there will be relatively strong defenses to liability. There are serious jurisdictional challenges related to holding someone criminally liable for aiding and abetting an abortion that occurs in a state where it is legal. Additionally, the Constitution protects individual liberty and the right to interstate travel, so there is an argument that a state cannot bar a resident from traveling to another state to obtain an abortion.

ERISA Preemption and Potential State Law Liability

For some benefit plan sponsors, ERISA preemption may serve as a defense to liability under certain state laws that would otherwise prohibit coverage for employee travel or medical expenses for out-of-state abortions. While *Dobbs* allows states to restrict abortion care, ERISA still governs health plans and employee benefit plans and generally supersedes state laws that "relate to" such plans. Plan sponsors could therefore argue that state laws prohibiting abortion-related benefits are preempted by ERISA because they "relate to" an employee benefit plan. However, ERISA's preemption doctrine has significant limitations. "Generally applicable" criminal laws of the states are exempt from ERISA preemption. The availability of ERISA preemption for state criminal laws may therefore depend on the breadth of such laws and how they are drafted. Further, in the benefit plan context, preemption arguments would be available only to self-insured plans (and may not apply to self-insured plans subject to a stop-loss policy), as insured plans are not covered by ERISA's preemption rules. Employers with health plans to which ERISA preemption does not apply may nonetheless be able to take advantage of ERISA preemption by adopting standalone self-insured policies covering employee travel or medical expenses related to abortion. However, it is not clear that ERISA preemption will apply to all such plans, and they must be carefully designed if they are intended to avoid being classified as "group health plans" and subject to the related regulations. Moreover, an ERISA preemption defense is uncertain in this context given its novelty and the variations among current state laws and new state laws that may soon take effect.

Employment Law Considerations

Lastly, there are important employment law considerations for companies considering providing coverage to employees for out-of-state abortions.

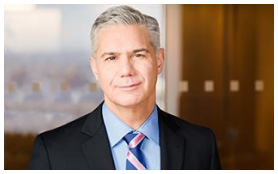
- **Privacy of Records**: Companies that decide to provide coverage through any of the approaches described above may receive sensitive medical information from employees. The Americans with Disabilities Act (ADA) requires companies to treat this information as a confidential medical record. Companies should keep these records separate from other personnel records, limit access to them, and consider adopting practices to limit the level of detail included in these records. While maintaining privacy of employees is incredibly important, as discussed above, an aggressive prosecutor could charge companies with the crime of falsifying business records if it is clear that the company was altering records with the intent to defraud. It is important for employers to find the balance between maintaining employee privacy without falsifying business records.
- **Discrimination**: Providing coverage of travel or medical expenses for out-of-state abortions raises the potential for discrimination claims. Companies that decide to provide this coverage may see reverse discrimination claims from employees who need or wish to travel out-of-state for other medical treatment not covered by these plans. Companies could instead create more general benefits that provide coverage for employee travel for any medical procedure.
- **Reasonable Accommodation**: Companies should also be mindful that under the ADA, they are required to make an adjustment to a job or work environment that enables employees to successfully perform their jobs, for employees with qualifying disabilities. Pregnancy-related disabilities may obligate companies to provide reasonable accommodation in the form of paid or unpaid leave for employees to travel to another state for abortion care.
- **Employee Relations and Concerted Activity Protections**: Companies may see employees engaging in political speech about the *Dobbs* opinion in the workplace. While employers generally have the right to regulate speech and conduct in the workplace, the National Labor Relations Act (NLRA) protects employees who engage in concerted activity for the purpose of addressing issues of concern in the workplace. Employees who engage in concerted activity to advocate for certain employee benefits or policy changes in light of *Dobbs* are likely engaged in protected activity under the NLRA.

Special Potential Concerns for Insurance Companies

Because insurance is primarily regulated at the state level, insurance commissioners and their agencies exercise considerable discretionary power. Whether particular commissioners are appointed or elected, they are understandably subject to political pressures, either from their respective governors or based on their own electorate. Insurance regulators in states restricting or prohibiting abortion might view it as part of their roles in carrying out the will of their respective legislators or the electorate to ensure that insurance companies do not, in their minds, aid and abet or conspire to break the law of their states. For example, we saw great activity by insurance regulators in response to pressure to relieve economic hardships caused by COVID-19 and in connection with the legalization of marijuana in certain states. As with other controversial medical procedures, they might take issue with additional expenses being incurred and reimbursed by insurers (such as to fund interstate travel for medical procedures that would violate their state laws), thereby resulting in expenses being borne by other policyholders in their states in the form of increased premiums (or, albeit less likely, claiming a potential solvency risk). Accordingly, insurance regulators in states restricting abortion or pro-choice states might, on their own accord or at the request by another official, use the regulatory tools at their disposal to pressure insurance companies toward the result that aligns with their respective states' laws on abortion.

Conclusion

The legal landscape of abortion restrictions, and how companies and individuals are able to respond, is changing rapidly. It is unclear how states will apply newly adopted abortion restrictions. If you have any questions on how you should be handling these issues, you should feel free to reach out to us directly.



Eric R. Dinallo
Partner
+1 212 909 6565
edinallo@debevoise.com

Nicolas F. Potter
Partner
+1 212 909 6459
nfpotter@debevoise.com

Douglas M. Hirn
Counsel
+1 212 909 6490
dmhirn@debevoise.com

Malu Malhotra
Associate
+1 212 909 6452
mamalhot@debevoise.com

Cara Ortiz
Associate
+1 212 909 6723
cortiz@debevoise.com