

Employer Travel Benefits Options For Abortion Care Post-Roe

By **Danita Merlau and Ben Conley** (May 20, 2022)

In light of a leaked draft opinion from the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization* purporting to overturn *Roe v. Wade*, as well as the proliferation of legislation in numerous states seeking to place restrictions on abortion access, many employers are considering how to help employees.

In particular, they are considering whether and to what extent they can assist employees in states that have passed abortion restriction laws, or that maintain trigger laws that would go into effect if the Supreme Court were to overturn *Roe*.

This article highlights emerging trends in the travel reimbursement space and examines the legal considerations relating to each option.

Overview of State Abortion Laws

Aside from the heartbeat laws currently in force in Texas and Oklahoma, 13 states have so-called trigger laws that could immediately restrict or prohibit abortion services in the event of a Supreme Court ruling overturning *Roe*. A trigger law is one that would criminalize or otherwise penalize abortion-related services, triggered upon *Roe* being overruled by the court.

A number of other states have attempted to pass abortion restrictions in recent years, evidencing an apparent willingness to do so in a post-*Roe* environment.

These restrictions take a variety of forms, from imposing shorter time frames for receiving abortion services following conception, to outright bans on abortions.

Some state laws would propose banning both abortion procedures as well as the shipment of abortifacient drugs to residents within the state.

Finally, some of the trigger laws would criminalize any person who aids, abets or persuades a person receiving abortion services.

Emerging Trends

While more reports of companies offering travel-related abortion benefits are emerging daily, we summarize below a few of the programs that seem to be emerging in the marketplace.

Broad-Based Travel Benefit Within Medical Plan

Many employer plans already provide some form of travel benefit, usually associated with a transplant benefit or travel to a preferred medical center — sometimes known as centers of excellence — or to address network gaps.

Given the existing framework and administrative process — usually outsourced to the plan's



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third-party administrator — a number of employers appear to be expanding this benefit to cover abortion services.

While some employers are narrowly expanding the scope, others are extending the travel benefit to cover all circumstances where an employee would be unable to receive covered medical services due to restrictions or limitations under state law, or due to network or provider access issues.

The benefits of this approach are twofold: (1) As states move to restrict or limit services for gender-affirming care, the travel benefit could mitigate the impact on transgender employees or dependents; and (2) a generic travel benefit is more benign and could be less likely to trigger civil penalties, criminal penalties or other forms of retribution.

Travel Benefit Outside of Medical Plan

While less common due to the complications noted below, some employers also appear to be implementing a travel benefit outside of their medical plan.

We have seen employers structure this under an employee assistance program, or EAP, framework to preserve the tax-preferred nature of the benefit while attempting to avoid creating a group health plan subject to federal mandates.

Employers who are establishing this as a stand-alone EAP will need to address the ever-present challenge of how to handle COBRA health insurance, which would apply to every employee who terminates employment — as opposed to just those who terminate while enrolled in medical benefits — thereby triggering a much broader distribution obligation.

Support Foundation

Many employers already maintain some form of employee relief fund. Historically, these funds have existed to assist employees going through financial or medical hardship.

While the structure of these types of programs are beyond the scope of this article, the benefit to this approach is that it creates an entity that is separate and legally distinct from the employer to mitigate some of the concerns raised below.

Review of Affected Benefits

The potential changes in abortion laws have also caused some employers to revisit the underlying medical services in their health plan. Not all health plans cover elective abortions, so some employers are now adding that benefit.

Moreover, employers are revisiting the design and parameters of their prescription drug benefit in light of some of the proposed laws restricting mailing of such drugs to residents of certain states.[1]

Also of note, many employers are revisiting their infertility benefit offering. While still uncertain, the language of some state trigger laws would impose liability for the termination of any fertilized egg or embryo[2] — a relatively common outcome following a successful in vitro fertilization procedure.

Relocation Benefit

While less common, some companies are considering offering a relocation benefit, reimbursing employees for the cost of moving to another state.

While this type of benefit could be offered on a tax-free basis in past years if certain requirements were met, the Tax Cuts and Jobs Act suspended the preferred tax treatment for employer-provided relocation reimbursement through 2025.

Employer Risks

It is unclear whether and to what extent states will attempt to enforce their abortion restrictions extraterritorially, or pass new restrictions specifically directed at traveling across state lines to receive an abortion, but it has, at a minimum, been contemplated.[3]

There is limited jurisprudence addressing whether such a travel-related restriction would be upheld, but the cases considering this issue have generally prohibited extraterritorial enforcement of abortion restrictions.

Moreover, there is a strong argument that any such law, as applied to benefit plans, would be preempted by the Employee Retirement Income Security Act.

The strength of an ERISA preemption argument is uncertain, especially given that most of these laws do not attempt to directly regulate benefit plans. Even so, enforcement of this type of law against an ERISA plan would defeat one of the primary purposes of ERISA: to afford employers a uniform, nationwide regulatory scheme.

To the extent a state were to broaden or broadly interpret criminal laws to extend potential penalties to any person or entity that aids, abets or persuades a person in receiving abortion services, it is important to understand that ERISA preemption does not extend to criminal laws.

It is important to understand that these trigger laws are, in most instances, decades old. It is unclear whether they would immediately go into effect post-Roe or if further action would be required.

Given that most of these laws have not ever been enforced — or, at a minimum, have not been enforced in the modern era — it's unclear whether and to what extent state officials would attempt to prosecute an employer for offering a travel benefit that is used to receive abortion services.

Design of Employer-Provided Abortion Travel Benefits

While issues continue to arise as employers explore how to structure an employee travel benefit, we believe there are a few key categories of concern.

Scope of Eligibility

One immediate question that employers should consider is whether this benefit will only be offered to participants in the employer's health plan, or if it will be made available to the employer's entire workforce.

Generally speaking, employer-sponsored group health plans are subject to a host of federal mandates, including the requirements that the benefit (1) cover a predefined list of preventive care services, and (2) impose no annual or lifetime dollar limits.

To the extent an employer-sponsored abortion services travel benefit were to be considered a group health plan, it likely could not be offered on a stand-alone basis without running afoul of these federal guidelines.

At the outset, we should note it is unclear whether reimbursement for travel relating to abortion services would even constitute an ERISA benefit, let alone a group health plan.

On the one hand, the tax code would permit the benefit to be provided under health plan on a tax-free basis, or reimbursed through a health reimbursement account or health flexible spending account, as described in greater detail below. On the other hand, a benefit is only a group health plan to the extent it provides medical care, and viewed narrowly, travel expenses are typically not medical care.

Assuming, for the sake of argument, that the U.S. Department of Labor would view a travel reimbursement benefit as a group health plan, we believe there are several options for employers seeking to offer a more broad-based benefit:

Integrated Health Reimbursement Arrangement

DOL guidance would permit employers to offer a stand-alone health reimbursement arrangement, or HRA, but only if that HRA is deemed to be integrated with another health plan.

Generally, that guidance would allow an employer to offer a stand-alone HRA to its employees as long as those employees (1) were offered the employer's coverage; (2) declined that coverage; (3) were enrolled in other group coverage, e.g., coverage through a spouse's plan; and (4) were permitted to opt out of the HRA at least annually.

Stand-Alone Telehealth

Telehealth is viewed by the DOL as a group health plan, meaning it is subject to the same restrictions under federal law noted above and typically could not be offered on a stand-alone basis.

That said, during the COVID-19 pandemic the DOL relaxed these restrictions and temporarily exempted telehealth from most of the Affordable Care Act's mandates, including the preventive service requirement.

The exemption continues through the end of the plan year beginning before the end of the public health emergency. The PHE was renewed in April and is currently set to expire in mid-July, unless further extended. The DOL has advised, however, that it will offer plans a 60-day advanced notice before allowing the PHE to expire, so it is looking increasingly likely that it will be extended further, at least through mid-October.

While the PHE remains in effect, employers might consider offering a broad-based telehealth benefit, which would allow employees in most places to access medical consultation and potentially to receive a prescription for abortifacient drugs.

We do note, however, some states currently ban telehealth for medication abortions by requiring an in-person element, or they prohibit the shipment of abortifacient drugs to residents within the state.

Employee Assistance Program

DOL guidance exempts certain excepted benefits from most federal mandates. For a benefit to qualify as an employee assistance program, or EAP, excepted benefit: (1) the EAP cannot provide "significant benefits in the nature of medical care"; (2) the EAP cannot be coordinated with benefits under a group health plan; and (3) benefits under the EAP cannot be financed by another group health plan.

Unlike the stand-alone telehealth option outlined above, the excepted benefit guidance is not tied to the COVID-19 pandemic.

Additionally, an EAP can be provided to a broader employee population than those employees who participate in the employer's medical plan.

Arguably, if a program is structured to provide only travel benefits, it could qualify as an EAP, meaning it would be exempt from various group health plan mandates.

Taxable Benefit

Employers may also choose to reimburse travel on a post-tax basis either under the plan or outside of the plan. Providing such reimbursements on a post-tax basis provides greater flexibility as to the expenses that may be reimbursed, and makes the benefit appear less related to medical care.

HIPAA Privacy Considerations

Whether for tax reasons, described below, or otherwise, we assume most employers will attempt to put some form of guardrails around any travel benefit and will seek substantiation of their employees' expenses. To offer the benefit on a tax-free basis, it seems as though such substantiation would actually be required.

To the extent an employer is offering the benefit outside of its ERISA plan, that creates an unusual situation where an employer is soliciting individually identifiable medical information from employees. But because it is not in connection with a health plan, it could be viewed as outside the scope of Health Insurance Portability and Accountability Act privacy protections, although other privacy laws could still apply.

For the purposes of preserving an ERISA preemption argument, and to bring the data collection into the HIPAA privacy fold, many employers may instead pursue one of the approaches outlined above that integrate the benefit into the employer's medical plan or into its health plan more broadly.

Tax Considerations

Many employer plans already include a travel benefit for the employee and, in some instances, a guest, related to the provision of certain medical procedures or services that cannot be obtained near where the employee resides, or to direct the employee to certain network providers or centers of excellence.

Travel benefits may, depending on the employer plan, cover the cost of reasonable travel expenses, including limited reimbursement for lodging and meals, if certain criteria are met.

Such coverage may potentially be provided on a tax-free basis, according to Title 26 of the

U.S. Code, Section 213, so long as travel is "primarily for and essential to" receiving medical care. In limited circumstances, and subject to restrictions on the amount of reimbursement, tax-free coverage might be able to be provided for lodging and meals, and for parents traveling with a child.

Similarly, such qualifying expenses could be reimbursed under a health flexible spending account, an HRA or a health savings account.

Notwithstanding the foregoing, employers should be aware that Internal Revenue Code Section 213(d) generally excludes amounts expended for illegal operations or treatments.

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[1] Kentucky passed a law in April (overriding the governor's veto) that prohibits the mailing of abortifacient drugs. Similar proposals have been introduced in 15 other states.

[2] Notably, trigger laws in Tennessee, Kentucky and Arkansas define embryos as unborn children at the moment of fertilization.

[3] Earlier this year Missouri considered, but ultimately did not pass a law that would have created a private right of action against anyone who helps a resident to travel across state lines to receive an abortion. Interest groups in Texas are working with state legislators to craft a similar measure.