Considerations Guide: Reproductive and Family Planning Benefits

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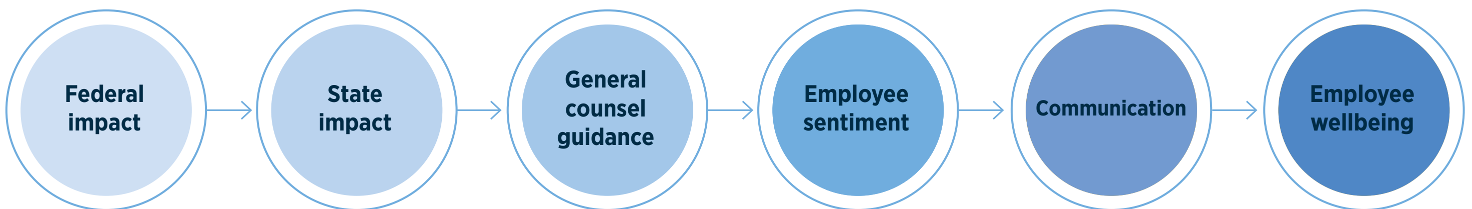
There is no "one-size-fits-all" approach for U.S. employers when it comes to covering reproductive and family planning benefits for their employees. The situation remains very fluid.

However, in one recent poll of HR professionals, 38% say their organization is reviewing its plan documents to confirm coverage or is awaiting general counsel guidance before making any changes to their coverage of reproductive and family planning benefits in light of the recent U.S. Supreme Court decision *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade.*

To help your organization respond to the changing landscape and ensure your strategy keeps your workforce healthy and safe, protects your business, and is sensitive to the varying employee needs and expectations regarding family planning and reproductive coverage, Gallagher has prepared its Considerations Guide: Reproductive and Family Planning Benefits.

From providing financial benefits to fund expensive fertility treatments to offering an emotionally, psychologically safe workplaces for people grappling with life-changing decisions, to covering healthcare and related expenses for abortion, there are many aspects to consider when it comes to seeing your benefits holistically and being an inclusive and equitable employer for today's diverse workforce. Through it all, organizations must do their best to ensure their work policies and environment is supportive, safe, and in compliance with applicable laws.

Gallagher has compiled the questions and considerations below to help individual organizations determine the policy decisions that are the right fit for them.



Background

The Supreme Court of the United States issued their decision on June 24, 2022 in *Dobbs v. Jackson Women's Health Organization* overturning *Roe v. Wade* and *Planned Parenthood v. Casey*, which established and reaffirmed the constitutional right to an abortion. At issue in *Dobbs* was whether Mississippi's Gestational Age Act, which bans most abortions after 15 weeks of pregnancy, was unconstitutional.

By overturning *Roe*, state governments now have the ability to enact more restrictive abortion restrictions, including complete bans.

Partially in anticipation of the Supreme Court decision, so far this year a handful of states have enacted bans on abortion, while a few dozen have passed laws either restricting or protecting abortion rights. Additional state legislative activity is expected in the months ahead.

Employer Considerations

After a draft of the *Dobbs* ruling was leaked, employers began preparing for the actual Supreme Court decision. However, the anticipated increase in state activity creates a very fluid situation, which employers must keep in mind. Below are some of the major questions that have been considering since the initial leak and after the release of the actual decision.

☐ Understand the federal laws impacting your current healthcare plan

Which federal laws are group health plans subject to as it relates to abortion coverage?	Employer group health plans are already subject to certain federal laws that require certain plan coverage for abortions. The Pregnancy Discrimination Act (PDA) does not require employer-sponsored group health plans to pay for abortion services, except where the life of the mother would be endangered if the fetus were carried to term. A plan must also cover medical complications that arise from that abortion. Additionally, available Equal Employment Opportunity Commission (EEOC) guidance requires that if an employer covers the costs of abortion services, the plan must do so in the same manner and to the same degree as it covers medical conditions, though it is not particularly clear what the EEOC meant by this statement. The PDA and the EEOC guidance is unaffected by the decision in Dobbs. Therefore, employers subject to Title VII of the Civil Rights Act of 1964, as amended by the PDA, remain subject to those rules. Employers with at least 15 employees are subject to Title VII and the PDA, though there are exemptions for religious employers that apply to specific employees of that employer.

Is your group healthcare plan fully insured or self-insured?

Self-Insured Health Plans:

What employers can do in response to the final Supreme Court ruling will depend on the type of health plan that they sponsor. For example, how an employer can respond to a fetal heartbeat bill that makes abortions illegal as soon as the embryonic or fetal heartbeat can be detected, by a state in which it has employees, may depend on whether the employer's health plan is fully insured or self-insured. For example, at least one state law prohibits abortions if there is a fetal heartbeat, including (among other things) "paying for or reimbursing the costs of an abortion through insurance or otherwise." While there are arguments that plans covering abortions could be in conflict with this law, there are potential counter arguments that would support the ability of a plan to cover abortions, notwithstanding such a law.

Specifically, under the Employee Retirement Income Security Act (ERISA), state laws that relate to an employee benefit plan are generally preempted by federal law, which generally means that self-insured ERISA plans are not subject to state insurance law or other state laws that seek to regulate plan coverage. As such, even if a state law restricts abortions there might be an argument that federal courts could find that such a state law is preempted by ERISA with respect to employee benefit plans. Nevertheless, the development of case law on this specific question may take time. Further, there is a possibility that states will argue that criminal and civil state laws of general applicability (i.e., those not directly targeting employee benefit plans) are not preempted by ERISA, putting employers and plans that cover such services at risk.

Fully Insured Health Plans:

Employers sponsoring fully insured plans will have less decision-making freedom. Insurers may make their own decisions as to what is permitted or required by state law for the products they sell, and insurers will communicate with their group policyholders accordingly. Therefore, even if an employer sponsors an ERISA fully insured health plan, if the issuing state prohibits insurance payments of abortion services, the plan cannot cover the service through the plan.

See also the State Impact section below.

What options are available for using telehealth to provide prescriptions for mifepristone and misoprostol (RU486) used to cause an abortion during the early part of pregnancy?	After the Supreme Court opinion, some attention has been given to the ability of providers, through a telehealth benefit, to prescribe mifepristone and misoprostol without the need for an in-person evaluation. The Federal Drug Administration (FDA) issued a decision in December 2021 that lifted restrictions on mifepristone, which allows providers to prescribe the medication online and deliver it via mail to individuals. After the *Dobbs* decision, Attorney General Merrick Garland issued a statement that states could not ban the use of mifepristone based on safety and efficacy. Nearly half of the states have banned or restricted access to abortion pills, while others are considering enacting bans or restrictions. This issue is not settled and is expected to be an issue determined through the courts over time.
Does my medical plan have to cover emergency contraception (e.g., Ella, Plan B)?	Possibly, yes. Non-grandfathered group health plans are subject to the ACA requirement to cover certain preventive items and services without cost sharing. Specifically, regarding women's preventive services, plans must cover evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force (USPSTF), and additional preventive care and screenings supported by the Health Resources and Services Administration (HRSA). Plans are currently subject to the 2019 HRSA Guidelines, with the 2021 HRSA Guidelines becoming effective for plan years beginning on or after December 30, 2022. Both sets of HRSA Guidelines require plans to provide access to each category of FDA-approved contraceptive methods, including emergency contraceptives. In recent guidance, the Departments (HHS, IRS, DOL) reminded plans that the ACA preempts state insurance laws that conflict with the ACA preventive services requirements (for example, by issuing policies that exclude coverage for emergency contraception). If a State prevents fully insured group health plans from complying with the preventive service requirements, HHS may step in to enforce the requirements in that State. Grandfathered plans are exempt from the ACA preventive services requirement. Current regulations allow exemptions and accommodations for qualifying religious employers and employers with sincerely held religious beliefs or moral convictions. The Departments have notified the public of their intent to modify those regulations.

Understand state laws' impact on your organization

In which states do you have employees?	Review of each state's stance on abortion services **here**.
Which state laws are group health plans subject to as it relates to abortion coverage?	The impact of a state law on a particular employer-sponsored group health plan will differ based on the plan's funding status (fully insured or self-insured), as well as, whether the plan is subject to ERISA. Fully insured plans are subject to the state laws in which the policy was issued thereby providing employers with less freedom in design. However, for self-insured plans subject to ERISA, state laws that relate to an employee benefit plan are generally preempted by ERISA, which generally means that self-insured ERISA plans are not subject to state insurance law or other state laws that seek to regulate plan coverage. As such, if a state law restricts abortions, there is an argument that federal courts could find that such a state law is preempted by ERISA with respect to employee benefit plans. Nevertheless, the development of case law on this specific question may take time. It is also quite possible that states will argue that criminal laws of general applicability and civil laws that exercise police powers are not preempted by ERISA.

In a state where abortion has been restricted or banned, what liabilities does our organization have?	As of July 15, a slim majority of states have laws that restrict or ban abortion, with the remaining protecting access or lacking state laws altogether. Those laws vary in scope, from restricting access to medication-assisted abortions, prohibiting providers from performing abortions, levying civil or criminal penalties to anyone who “aids or abets” in the termination of a pregnancy, complete bans of abortions, and conferring “personhood” rights at the time of conception or very soon after (e.g., six weeks after conception). To further complicate the patchwork of state laws, employers are faced with questions about how state laws that prohibit entities from aiding an individual in obtaining an abortion will be applied to abortions performed out-of-state. For example, if an employer is present in Texas that has criminalized aiding or abetting an individual in obtaining abortion services, that employer may be at legal risk for providing travel reimbursements to an employee seeking to obtain a legal abortion in New Mexico. The individual leaving the state may also be at risk. If the employer is present in a state that allows abortion services (for example, California), but the employee is present in a state that restricts or bans abortions (e.g., Oklahoma), then it is possible that Oklahoma will attempt to pursue legal action against the employer who provides travel assistance to obtain the out-of-state abortion. The employee leaving the state may also be at legal risk. As such, it is clear that this is both a complicated and fluid issue that, despite the *Dobbs* decision, will likely not be settled in the near future.

☐ Consult your legal counsel

Who do we consult to help determine the best path forward?	As employers consider how they can respond, it is important to emphasize that they should engage legal counsel to help guide them through the analysis, especially in light of the fact that state laws vary greatly.

☐ Deploy proactive communications

Are there specific compliance requirements when it comes to communicating employee benefit plan changes?	Employers must also consider how to best communicate any design changes to their employees. Employers subject to ERISA, who amend their plans, will need to communicate the benefits change via a Summary of Material Modification (SMM).

☐ Continue to prioritize employees' physical and emotional wellbeing. Ensure inclusivity and psychological safety for all your people.

Our organization is considering reimbursing employees for travel to obtain medical care. What considerations should we keep in mind?	After the leak of the draft opinion, some employers have been considering adding coverage for travel expenses to obtain medical care. Section 213(d) of the Internal Revenue Code (IRC) allows for the reimbursement of expenses for transportation primarily for and essential to medical care. Employers with self-insured plans may amend their plans (including in the middle of a plan year) to cover or reimburse travel costs associated with an abortion. Those travel expenses may also include limited reimbursement for lodging. It should be noted that IRC Section 213(d) includes a provision that prohibits the tax-free reimbursement for illegal operations or treatments; however, as long as the coverage or reimbursements were for employees traveling to states where abortion is legal, the reimbursement could remain tax-free. The plan may also place restrictions on those reimbursements, for instance, making it only available up to a capped annual amount or only when employees are unable to receive the treatment in-state. However, state laws that prohibit the aiding or abetting of an abortion may consider this benefit a violation of such a restriction, and those states may view general criminal and civil enforcement measures as not preempted by ERISA, as mentioned above. If an employer chooses this route, it must be mindful of the IRC and its requirements and limitations, including: • Up to $0.22 per mile for automobile travel • Ticket price up to reasonable amount for planes, trains, and buses • Lodging expenses up to $50 per night for the individual receiving the care, and up to $100 per night if parent, nurse, or caregiver is needed • Expenses for meals are generally not reimbursable Employers may also choose to provide a taxable benefit—by reimbursing travel expenses outside the plan, which provides for greater flexibility on what and how much may be reimbursed. Be sure to review this with legal counsel.

What other considerations should our organization bear in mind as it considers reimbursing travel for medical care?	In addition to considering the reimbursement for abortion-related care, an employer should check on its policy to reimburse employees for other medical procedures and family planning-related benefits such as organ transplants, or travel to other states and countries for adoption. Group health plans that provide mental health and substance use disorder benefits are subject to the Mental Health Parity and Addiction Equity Act (MHPAEA), which requires parity between medical and surgical benefits, and mental health and substance use disorder benefits within the same classification. Employers considering adding an abortion-specific travel reimbursement plan (either through the group health plan or a health reimbursement arrangement (HRA)) should discuss the addition with their carrier to ensure compliance with MHPAEA. Potentially, making the travel reimbursements available for other care that is only available out-of-state (e.g., gender affirmation care and specialized mental health or substance use disorder benefits) may help in compliance with MHPAEA. Employers are considering a variety of benefits to accomplish their goal, including adding a travel reimbursement policy to their group health plan, adding a HRA in conjunction with their group health plan, engaging EAP vendors to assist in travel reimbursement, and telemedicine vendors to assist employees in finding medication that induces an abortion. Each of these avenues have their own compliance consideration, including ERISA, HIPAA privacy, COBRA, and ACA requirements that will dictate how the plan or program may be designed. Further discussion with your GBS consultant and plan vendors will be important to ensure compliance with these laws.
How should we prepare our managers to support physical and emotional wellbeing around a topic that can be divisive?	Managers should be prepared for a range of emotional needs and letting people know that whatever they are feeling is okay. Re-communicating any company resources to help reduce stress and anxiety can be helpful. Employers should help managers prepare for how to have respectful conversations in the workplace and be ready to de-escalate tension. Additionally, re-sharing the social media policy can be helpful as the line between employees speaking for themselves and others perceiving them as speaking for the company can often be blurred.

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