On June 24, 2022, in *Dobbs v. Jackson Women’s Health Organization*, the United States Supreme Court overturned both *Roe v. Wade* and *Planned Parenthood v. Casey* and held the access to abortion is not a right protected by the United States Constitution. This article analyzes several employment law issues employers may face following the *Dobbs* decision.

### Federal Law

The *Pregnancy Discrimination Act (PDA)* prohibits employment discrimination “on the basis of pregnancy, childbirth, or related medical conditions.” In construing the PDA’s reference to “childbirth”, federal courts around the country have held the PDA
prevents employers from taking adverse employment actions (including firing, demotion, or preventing the opportunity for advancement) because of an employee’s decision to have an abortion as well as an employee’s contemplation of an abortion. The PDA also prohibits adverse employment actions based upon an employee’s decision not to have an abortion. So, for example, an employer would violate the PDA if it pressured an employee to have, or not to have, an abortion in order to keep her job or be considered for a promotion.

**State Law**

Several states have implemented “trigger laws,” which impose restrictions or categorical bans on abortion following *Dobbs*. In addition, states such as Texas have enacted laws that allow individuals to file civil actions against entities that “knowingly engage in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the cost of an abortion through insurance or otherwise.” Relying on that law, Texas legislators have already threatened at least two high profile employers for implementing policies which reimburse travel costs for abortion care unavailable in an employee’s home state. Although the Texas statute is currently being challenged in court, its text provides for statutory damages “in an amount of not less than $10,000” for “each abortion . . . induced.”

Although the issue has not been litigated yet, courts will likely have to decide how the PDA’s protections interact with a state’s anti-abortion laws.

**Employer Handbook Policies and Procedures**

The *Dobbs* decision may also impact workplace morale and productivity. Accordingly, employers should consider reviewing their handbooks as well as policies and procedures, with human resources and managers to ensure requisite familiarity with the employer’s social media policy, dress code, code of conduct, and how the employer handles confidential health information. Employers should be prepared for increased public expression from the workforce—including social media posts, discussions with other employees and third parties, and wearing clothing or other accessories reflecting strong opinions. Human resources should also be prepared for an increase in leave requests and employee resignations.

**Travel Benefits for Employees Seeking Reproductive Care**

In the wake of *Dobbs*, many businesses in states where access to abortion will be prohibited or highly restricted are considering—or have already implemented—benefit or employee expense plan amendments that would cover travel and lodging for out-of-state abortions. Ultimately, the legal and regulatory future for such plans remains unclear; especially in states where abortion laws are the most restrictive and contain “aiding and abetting” liability.

At a high level, employers seeking to enact such benefit or expense plans may find some comfort in a statement contained in Justice Kavanaugh’s concurrence in *Dobbs*. Specifically, Justice Kavanaugh wrote:
Some of the other abortion related legal questions raised by today’s decision are not especially difficult as a constitutional matter. 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.

Thus, it appears that outright travel bans or similar prohibitive restrictions would face significant legal challenges, and could be declared void.

At this early stage in the post-Roe era, there appear to be several ‘paths’ emerging for employers seeking to provide travel benefits. Each comes with its own set of potential issues and considerations that employers, in conjunction with their counsel and benefit providers, should evaluate carefully. Below is a brief discussion of some of the travel-reimbursement plans employers have begun to implement or consider in the wake of Dobbs:

1. **Travel and lodging benefits under existing group health plans.**
   - Assuming the plans are self-funded and subject to ERISA, they must also comply with other applicable rules such as HIPAA and the ACA.
   - Such benefits may not be available under non-ERISA plans in states restricting abortion access.
   - Generally would be limited to individuals enrolled in the employer’s plan.

2. **Travel and lodging benefits under Health Reimbursement Arrangements (HRA’s).**
   - An HRA is a type of health savings account offering tax-free reimbursement up to a fixed amount each year.
   - HRA’s are generally subject to ERISA and cannot reimburse above the very minimal IRS limits (Section 213), such as mileage (.18 cents) and lodging ($50/per day).
   - Should be integrated with other coverage or qualify as an “Excepted Benefit HRA” or else it may violate certain ACA rules that prohibit lifetime annual dollar limits for certain benefits.

3. **Employee Assistance Programs (EAP’s).**
   - EAP’s are voluntary benefit programs some employers use to allow employees access to certain types of care without accruing co-pays, deductibles, or out of pocket costs. Historically, EAP’s have been predominately used for mental health benefits such as therapy or substance abuse counseling.
   - In certain circumstances, EAP’s are exempt from the ACA. To be an “excepted benefit,” the EAP:
     - Cannot provide significant benefits in the nature of medical care or
treatment;
- Cannot be coordinated with benefits under another group health plan;
- Cannot charge a premium for participation; and
- Cannot require cost sharing for offered services.

The first of the above requirements (significant benefits of a medical nature) is highly subjective and may create risk for employers because it is difficult to determine whether a benefit is “significant.” Accordingly, it may be difficult to locate a third-party vendor or provider that would administer travel and lodging benefits through an EAP.

4. **Travel and lodging benefits to employees as taxable reimbursements.**

- Taxable reimbursements—up to a certain amount annually—for travel to obtain abortion or other medical care not available in the employee’s place of residence.

- Some employers are requiring only receipts for lodging, but are not requesting substantiation of the employee’s abortion procedure. Some argue this might insulate an employer from liability in states with statutes prohibiting “aiding or abetting” an abortion, on the grounds that the employer does not know what the employee is using the benefit for. Ultimately, whether that is true remains largely untested and unclear.

- Likely more costly for the employer, because the benefit is broader in scope. In addition, employers may run the risk that a payroll reimbursement of this kind could qualify as setting up a “new medical plan,” thereby raising compliance and other related issues.

Additionally, employer travel-and-lodging benefits of this type present innumerable other questions and issues. Such questions should include:

1. **Is the employer’s benefit plan subject to ERISA?**

- ERISA is the federal law applicable to qualifying employee benefits plans, including employer-sponsored group health plans. Plans subject to ERISA must also comply with HIPAA, the ACA, and other applicable rules and regulations. So-called self-funded employer plans are subject to ERISA.

- With some exceptions, ERISA preempts or blocks the implementation of state laws that “relate to” the ERISA plan.

- However, ERISA does not:
  - Preempt a state law that regulates insurance companies operating in the state; or
  - Preempt state criminal laws of general applicability.
If a plan is self-insured and subject to ERISA it may not be required to comply with state laws related to abortion services based on ERISA preemption.

However, the impact of new and untested civil and/or criminal penalties remains unclear.

2. **What procedures does the plan cover?**

   - In this environment—especially in states with the most restrictive abortion laws—employers should have a firm understanding of what specific type of abortion procedures the plan covers.

3. **Specific or “general” travel stipends?**

   - As noted above, some companies are choosing to provide travel/lodging stipends and benefits to access abortion care in jurisdictions where the procedure is lawful.

   - Some employers are making this travel stipend more general—*i.e.*, not requiring the stipend be used for abortion, or otherwise naming abortion in the benefit program. As an example, a policy that provides a stipend for an employee to “travel to receive medical care that is unavailable within 100 miles of the employee’s place of residence.”

   - Note that out-of-plan reimbursements to employees are likely taxable as wages. Some employees may choose to gross up such stipends to compensate.

4. **What about privacy concerns?**

   - Employers should think carefully about how to provide any benefits or stipends while protecting employee privacy, not violating HIPAA, and—where applicable—not running afoul of so-called ‘aiding and abetting’ legislation.

   - To that end, as noted above, some companies are requiring only that employees provide travel receipts—not documentation of the underlying procedure—to qualify for the benefit, reimbursement, or stipend.

   - Of course, without any verification, there is always the potential for abuse—or otherwise using the program for something well beyond its core intent, such as travel, elective plastic surgery, etc. However, some employers may evaluate the risk of abuse as worth the potential lessening of privacy and other concerns.

**Protected Activity**

Employers must also be aware that certain speech in the workplace—including speech about abortion—may be legally protected. Although the First Amendment generally does not extend to private companies, the National Labor Relations Act
(NLRA) prohibits retaliation against employees who discuss the terms and conditions of employment, commonly referred to as “protected concerted activity.” Thus, employees (1) discussing or advocating for an employer to provide benefits to women seeking reproductive and abortion-related healthcare services, (2) advocating for the employer to take a certain public stance on the issue, or (3) protesting the employer’s public position on the issue, may constitute protected activity under the NLRA.

Contacts and Next Steps

Employment law issues will continue to arise and evolve in the coming months following the Dobbs decision. The EEOC, DOL, and HHS may provide further guidance on how Dobbs impacts employment laws such as the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and PDA. Employers should consult with legal counsel concerning these developments.

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