

# Group Health Plan Considerations in the Face of (Potentially) Changing Abortion Laws

By Joy M. Napier-Joyce, Natalie M. Nathanson, Melissa Ostrower, Kellie M. Thomas & Monique Warren

June 14, 2022

## Meet the Authors



**Joy M. Napier-Joyce**

(She/Her)

Principal

410-415-2028

Joy.NapierJoyce@jacksonlewis.com



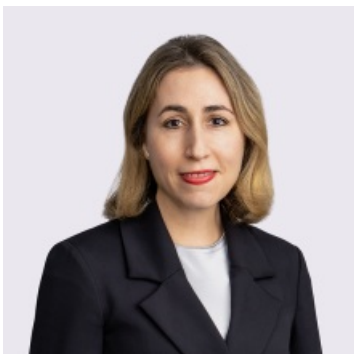
**Natalie M. Nathanson**

(She/Her)

Principal

305-577-7600

Natalie.Nathanson@jacksonlewis.com



On May 2, 2022, a draft opinion from the U.S. Supreme Court case *Dobbs v. Jackson Women's Health* was leaked to the press, and as a result the Court is expected to overturn *Roe v. Wade* and *Planned Parenthood v. Casey*, effectively leaving the issue of abortion rights to the states. Thirteen states currently have laws in place that will automatically ban at least some forms of abortion in their state if *Roe v. Wade* is overturned, and it is expected that thirteen or more additional states will quickly follow suit.

(See [13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned | Guttmacher Institute.](#))

Employers across the country have been contemplating the potential impact of the anticipated decision on their employee benefit plans, and some large national employers have publicly announced their intention to provide travel benefits to defray the costs for employees and other plan participants who travel across state lines where necessary to receive a legal abortion. Below, we highlight some issues employers may want to consider in connection with the coverage of abortion services under their plans.

### Are Employers Required to Cover Abortion?

Generally no. There is no law that requires employer-sponsored group health plans to cover elective abortion services, but many currently do. Abortion is not an “essential health benefit” as defined by the Affordable Care Act, therefore, under current law, even employers sponsoring fully insured plans have broad discretion whether to cover it generally. However, since the *Dobbs* case has been in the spotlight, some employee groups, shareholders, and other stakeholders have pushed employers to take a stand on whether their employer-sponsored health plan will provide access to abortion services.

### Will Group Health Plans Still Be Allowed to Cover Abortions?

It depends. If the *Dobbs* opinion transfers the regulation of abortion rights and services to the states, fully insured plans will need to comply with applicable state law and may not cover abortions in those locations where it is prohibited by law. Self-insured plans generally are not subject to state insurance laws, but generally *are* subject to state criminal and other similar laws. In certain circumstances, ERISA preempts state law to the extent they relate to employee benefit plans. (Watch for our article discussing ERISA preemption of certain state laws.) Therefore, if the *Dobbs* opinion transfers the authority to outlaw or regulate abortion services and rights to the states as expected, employers who wish to continue to cover abortion costs under their employer-sponsored group health plans should carefully consider the full panoply of potential consequences and consult with legal counsel. Options exist for employers with fully-

## Melissa Ostrower

(She/Her)

Principal

212-545-4000

Melissa.Ostrower@jacksonlewis.com



## Kellie M. Thomas

(She/Her)

Principal

410-415-2029

Kellie.Thomas@jacksonlewis.com



## Monique Warren

Principal

(914) 872-8060

Monique.Warren@jacksonlewis.com

## Related Services

Employee Benefits

ERISA Complex Litigation

Healthcare

Wellness Programs

insured plans and self-insured plans to enable them to support participants' choices, but employers should consider all aspects of the assistance and the respective laws that affect them.

### What Are the Potential Legal Issues Employers Should Consider?

Besides the potential state criminal laws aimed at abortions (where applicable), employers must consider numerous other issues related to providing abortion coverage.

#### *Group Health Plan Considerations*

Most employers intend that their group health plans provide tax-free benefits to employees and other participants. Group health plan benefits are tax-free only if they are for the employee's or the employee's federal tax dependent's medical care within the meaning of Internal Revenue [Code Section 213](#). Abortion services need not be medically necessary to qualify as medical care for this purpose, but they have to be *legal* (thus, they might have to be medically necessary to be permissible under state criminal law). Travel to access abortion services constitutes medical care if the travel is principally to obtain a legal abortion by a licensed provider. Under the Code, a travel benefit may be provided tax-free up to specified dollar limits and subject to certain conditions. To the extent the benefit is provided in excess of the tax-free limit, the benefit must be imputed as income to the employee.

If an employer provides a travel benefit *outside* of its group health plan, the employer could unwittingly create another group health plan that would raise numerous compliance issues (Affordable Care Act (ACA) market reforms, ERISA reporting, COBRA continuation rights, HIPAA privacy requirements, and so on). As a result, we generally do not recommend that employers offer travel benefits for medical care outside of their group health plans.

#### *Mental Health Parity Questions*

Employers should also consider whether providing increased travel benefits for abortion services could give rise to a violation of the [Mental Health Parity and Addiction Equity Act](#) by providing more favorable medical/surgical benefits than mental health and substance use disorder benefits. It is our understanding that the Department of Labor (DOL) has not previously analyzed travel benefits for parity. In the event the DOL requires parity for travel benefits, employers have several available defenses including the argument that where the benefit is necessary to solve state law issues, it is not a non-qualitative treatment limitation that violates parity. More guidance from the DOL on this issue is welcome.

#### *Health Savings Account Rules/FSA Considerations*

Participants in high deductible health plans must meet applicable plan deductibles before certain benefits will be paid by the plan. These include most travel benefits. Plan sponsors need to ensure this requirement is satisfied if they offer enhanced travel benefits to cover travel for abortion or other services. In some cases, this will limit the ability of certain participants to utilize the travel benefit. Travel expenses could also be reimbursed from a health savings account or flexible spending account subject to tax-free caps.

## *Anticipating State Law Restrictions on Abortion*

Amending a group health plan to provide travel benefits for participants to receive abortions out of state where abortions are not legal could subject an employer and its employees to potential risk under state law. Offering a broad travel benefit that is not targeted specifically to travel for abortion services could help mitigate this risk. Of course, the broadening of a travel benefit beyond abortion services will also increase its potential cost, so employers will need to consider the financial impact of any amendment.

Another consideration is coverage of medications that can terminate a pregnancy — namely, mifepristone and misoprostol — which can be prescribed via a telehealth visit and sent through the mail. There is some question, however, as to whether certain state laws may prevent a group health plan offering pharmacy benefits from covering the cost of these drugs, particularly if mailed to a participant in a state with restrictive abortion laws.

Ultimately, an employer will need to carefully review applicable state laws and consult with counsel to ensure that its plan provides the desired benefits and complies with all applicable laws.

### **Actions to Consider Immediately**

Depending on an employer's intention regarding abortion services, the employer might need to act immediately to provide uninterrupted coverage. For example, if an employer-sponsored plan currently provides coverage for abortion services and the employer does not want participants to have a gap in coverage for any period in any jurisdiction, the employer may need to add a travel benefit to its plan that becomes effective immediately in the event *Roe* is overturned. Note that an employer could communicate such a change before an amendment is adopted by the plan sponsor (however, the amendment would need to be formally adopted by the end of the plan year for it to have retroactive effect during the plan year of adoption).

### **Conclusion**

The treatment of coverage for abortion services under employer-sponsored group health plans (particularly for multistate employers) is uncertain at this point and will likely remain so for some time following the release of the *Dobbs* opinion. Employers who wish to take action to address the changes in the law should proceed with caution and remain flexible as the state laws, legal challenges and potential legislative and regulatory responses emerge. Please contact a Jackson Lewis Employee Benefits attorney for assistance with navigating these changes.

©2022 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.