Special Report

Novel ERISA Preemption Questions Presented by U.S. Supreme Court's *Dobbs* Decision

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The U.S. Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (June 24, 2022), overruling *Roe v. Wade* and *Planned Parenthood v. Casey,* has far-reaching consequences across many areas. This special report examines the potential impact *Dobbs* will have on employee benefits litigation.

In *Roe*, the Supreme Court found the Constitution protected a woman's right to choose whether to have an abortion as part of a broader "right to privacy." In *Casey*, the Court crafted an "undue burden" standard. Under that standard, a state law restricting abortion was invalid if it placed "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability," which usually occurs around the 24th week of pregnancy.

In *Dobbs*, the Court upheld a 2018 Mississippi law that bans most abortions after the 15th week of pregnancy — significantly earlier than the point of viability. The result of *Dobbs* is that abortion is no longer a constitutionally protected right. Accordingly, the authority to regulate abortion, in the words of the majority opinion, will be left to "to the people and their elected representatives." In other words, post-*Dobbs*, each state will be left to determine whether to permit, restrict, or outright prohibit abortion through criminal and civil regulations. As the Court majority noted, those laws will be entitled to "a strong presumption of validity" and must be upheld, as long as there is a "rational basis on which the legislature could have thought that it would serve legitimate state interests."

The full impact of *Dobbs* will play out over time, and it already has generated significant discussion within the legal community. Regarding employer provided health plans, one immediate question: what, if any, potential liability arises for employers that sponsor health plans based in states that restrict abortion and which cover employees residing in multiple states with differing views on abortion?

Analysis of this implicates novel issues under the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA).

Patchwork of Conflicting Laws

Sixteen states and the District of Columbia have laws that protect abortion rights (either throughout pregnancy or at least prior to viability) through constitutional amendments, state legislation, or rulings from their high courts. Twenty-six states have laws that criminalize abortion. Other states enacted "trigger laws" tied to *Roe* being overturned.

These laws generally exempt the woman having the abortion from criminal liability, but they uniformly apply to those who perform abortions and, in some cases, to those who knowingly "aid or abet" the performance of abortions (including by persuading a

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woman to have the procedure). Potential penalties vary widely from state to state, from fines between $1,000 and $100,000, to imprisonment between one and 20 years.

Texas and Oklahoma also have enacted "bounty hunter" laws that subject abortion providers (and others) to civil suits from private individuals. For example, in Texas, S.B. 8 effectively bans all abortions (with limited exceptions) after the sixth week of pregnancy. The law does not subject violators to criminal prosecution, but it authorizes any person — who need not have any relationship to the woman, doctor, or procedure at issue — to sue for at least $10,000 in damages (plus attorney's fees) anyone who performs, induces, or assists an abortion, as well as anyone who "knowingly engage[s] 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." Oklahoma's S.B. 1503 is substantially similar.

Employers that sponsor health plans that cover abortion or abortion-related services, but are based in states where abortion is now criminally and/or civilly proscribed, need to navigate the questions arising from this patchwork of potential criminal and civil liability. For example, if the employee of an Oklahoma corporation travels to California to obtain a lawful abortion, what liability does the employer, as the plan administrator and sponsor, have if her ERISA plan covers the procedure? Has the employer (as plan sponsor or fiduciary) "aided or abetted" what Oklahoma considers to be an illegal act? Does the analysis change if, in lieu of covering the abortion procedure, the plan covers the employee's out-of-state travel expenses?

While it may take years of litigation to determine, arguably, Congress has provided employers a statutory defense that may allow them to avoid wading into such murky waters: ERISA preemption.

One, Uniform Statute

ERISA promotes uniformity in benefits administration by, among other things, preempting "any and all state laws insofar as they may now or hereafter relate to" any ERISA benefit plan. The statute's preemption provision — known as Section 514(a) — is intended to protect plan sponsors and fiduciaries from operating under a myriad of potentially conflicting state and local regulations on benefits administration.

The scope of state laws that "relate to" an ERISA plan for purposes of Section 514(a) is expansive, encompassing "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." This includes both statutory and common law causes of action. A state law "relates to" an ERISA plan for purposes of Section 514 preemption if it bears either a "reference to," or a "connection with," the plan.

Breaking these categories down, a state law makes an impermissible "reference to" an ERISA plan when:

1. The existence of an ERISA plan is a critical factor in establishing liability; or
2. The court must interpret the plan's terms in order to resolve the claim.

A state law has an impermissible "connection with" an ERISA plan if it:

1. Directly affects the relationship among traditional ERISA entities (*i.e.,* the employer, the plan, and the eligible employees);
2. Interferes with plan administration; or

3. Undercuts ERISA's purpose.

Applying Preemption to State Abortion Laws

Suppose an employee of a Texas-headquartered corporation who lives and works in the Houston office travels to California to have an abortion. The employer's self-funded health plan is considered domiciled in Texas, and its claims administrator receives and pays covered claims *from* Texas. The provider submits a claim to the administrator for the procedure and the plan pays the claim. What happens if an unrelated individual files a civil suit under Texas S.B. 8 against the employer or the plan administrator for "aiding and abetting" an abortion?

The suit may be preempted by Section 514(a). The administrator could argue the plaintiff's claim makes an impermissible "reference to" an ERISA plan because the employer would not have engaged in the alleged actionable conduct (*i.e.,* authorizing the payment of benefits) *but for* the plan. It is the plan's very existence, and the terms and conditions of its abortion coverage, that prompted the conduct that gives rise to the cause of action. The administrator could also argue that the plaintiff's lawsuit is a direct attack on how, and to whom, the administrator provides benefits in accordance with the terms of the plan. This impermissible "reference to" an ERISA plan may therefore trigger Section 514(a) preemption.

The plaintiff's claim also arguably bears an impermissible "connection with" an ERISA plan if it directly interferes with how the employer (the plan administrator) administers benefits in different states. If an employee who resides in Texas travels to California to obtain coverage for an abortion, the administrator could be sued multiple times for statutory damages under the Texas bounty hunter law. Yet, the administrator lawfully could provide coverage to an employee residing in California for obtaining an abortion in her home state. This dichotomy is antithetical to ERISA's stated purpose of bringing employee benefits administration within the purview of a single, statutory regime. Upsetting the balance ERISA struck between plans and participants in this fashion may constitute an impermissible "connection with" an ERISA plan, which likewise should trigger Section 514(a) preemption.

An employer's potential liability under a state's criminal law is perhaps more debatable, although preemption still presents a possible defense. "Generally appliable" criminal laws are exempt (or "saved") from Section 514(a)'s preemptive scope. The purpose of the carve-out is to prevent *general criminal conduct* from being immunized from prosecution simply because it "relates to" an ERISA plan. Accordingly, courts have construed "generally applicable" criminal laws to mean those that proscribe conduct *generally* and apply to the *entire population*. For example, a district attorney is not precluded, under the doctrine of preemption, from prosecuting someone under a state theft statute for stealing from an ERISA plan simply because the prosecution literally "relates to" the plan.

The question becomes whether a state law that criminalizes abortion is "generally applicable." An employer may have arguments that it is not. First, many of the laws are not applicable to the entire state population because, on their face, the woman who has the abortion may not be prosecuted or fined.

Second, a criminal complaint designed to punish the provision of employee health benefits (an otherwise completely lawful and favored activity) could be a direct

impediment to the uniform administration of benefits within that state's borders. Criminalizing an employer's decision to provide coverage or coverage-related expenses for lawfully obtained abortions out of state may not be considered akin to "general criminal conduct" such as larceny or embezzlement. Hence, a criminal prosecution brought under a state anti-abortion law arguably may not be "saved" from ERISA preemption. In that case, Section 514(a) would still apply, and ERISA would preempt the state law.

Not All Plans Are Treated Equally

Employers that wish to continue to cover abortion costs under their ERISA plans need to consider the full panoply of consequences and consult with legal counsel. As it relates to the preemption argument, employers need to understand there is a critical difference between "self-funded" and "fully insured" plans.

Fully insured plans are traditional "insurance policies." The employer pays a fixed premium to a carrier in exchange for the carrier's assumption of the financial risk of employee healthcare. With a s*elf-funded* plan, the employer bears that risk. The employer typically pays an administrative fee to an insurance company to administer the plan (*e.g.,* adjudicate claims on behalf of the plan) and to obtain access to the insurance company's network of medical providers, but the cost of employee healthcare remains entirely with the employer.

The distinction is important because ERISA treats self-funded and fully insured plans differently. ERISA does not preempt state laws that regulate "insurance, banking, or securities." Thus, fully insured plans are subject to both ERISA *and* state insurance codes. Currently, 11 states have insurance regulations that prohibit or severely restrict coverage for abortion. However, state insurance codes generally do *not* apply to self-funded plans, which are not considered "insurance policies."

Now that *Dobbs* has transferred the regulation of abortion rights to the states, fully insured plans will need to comply with the insurance laws of the states in which the policies were issued. Self-funded plans, on the other hand, are not restricted by insurance codes. Moreover, because neither ERISA nor any other federal law requires or prohibits coverage for abortion or abortion-related services, sponsors of self-insured plans have greater flexibility in determining whether, or to what extent, their plans may cover abortion or abortion-related services.

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How employers administer coverage of abortion in their health plans is uncertain post-*Dobbs*. Although there are criminal laws on the books in 26 states, it remains to be seen whether and to what extent those states actually will prosecute people or companies. It also remains to be seen whether employee benefit plans covering employees in and outside of Texas and Oklahoma will become frequent targets of "bounty hunter" civil suits.

Resolution of the issues could take years and employers should consider other defensive actions to mitigate risk with respect to their plans. Employers should tread cautiously. Companies with questions about potential criminal or civil exposure in the administration of benefits can contact a member of our ERISA Complex Litigation Group.