MarshMcLennan Agency

COMPLIANCE CENTER OF EXCELLENCE

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After *Roe v. Wade*

A Guide to Employer Coverage for Abortion-Related Services

As you all know, the U.S. Supreme Court (SCOTUS) ruling in *Dobbs v. Jackson Women's Health Organization* on June 24, 2022 overturned its 1973 *Roe v. Wade* decision that established a legal right to abortion services under the U.S. Constitution.[1] This decision will affect the availability of abortion services throughout the country. Employers are expressing interest in providing affected employees with assistance to access these services, but they are understandably concerned about potential risks.

This Guide reflects our understanding of the issues and the evolving legal landscape, which will likely remain uncertain for some time. We encourage employers to discuss the issues, potential solutions, and associated risks with their legal and tax advisors before choosing a course of action.

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[1] *Roe* initially established the constitutional protection for abortion, but the more recent 1992 SCOTUS decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was the modern standard for abortion protection under the U.S. Constitution and is why SCOTUS refers to both prior decisions in *Dobbs*.

The Dobbs Decision – A snapshot

In a nutshell, SCOTUS:

1. Held by a vote of six to three that a Mississippi law generally restricting abortion after 15 weeks of pregnancy was constitutional,[2] and
2. Held by a vote of five to four that its earlier decision in *Roe v. Wade* was incorrect, that there is no constitutional protection for abortion, and that decisions relating to abortion services belong to the states.

The bottom line

The *Dobbs* decision does not make abortion illegal in the United States or its territories. Instead, it gives states the authority to determine whether and under what conditions to allow access to abortion services. This does set the stage for an inconsistent patchwork of access to abortion services across the U.S., which is already underway.

Note: Whether a state can enforce its own laws outside its own borders is unclear, the source of much anxiety, and will likely be the subject of significant litigation. We will address this in more detail under Enforcement Across State Lines.

[2] Mississippi has a "trigger law" that will prohibit abortion in the state. We will address this in more detail under The State of the States.

The State of the States

We reviewed existing state abortion laws, and we will continue to monitor state activity on this issue. The states currently fall into two general categories: (i) those that are likely to protect access to abortion, and (ii) those that are likely to prohibit or further restrict access to abortion.

States that are likely to protect access to abortion

States with existing protections

A number of states (plus the District of Columbia) have existing protections for access to abortion, which may include protection under a state constitution, by statute, or by a prior state Supreme Court decision unaffected by SCOTUS's *Dobbs* ruling. Most of these states are in the Northeast and on the West Coast, but they also include states such as Illinois, Minnesota, and Colorado.

States with existing protections still have certain limitations on the access to abortion (e.g. requiring an abortion within the first 24 weeks of pregnancy is common).

States signaling an intent to protect access

In a number of states, key stakeholders have signaled an intent to protect the state's existing access to abortion services without further restriction, and they appear to have enough control or sufficient bipartisan support to accomplish this. For this purpose, "key stakeholders" means some combination of the governor, state attorney general, and leaders from the controlling party in the state legislature.

States that appear likely to prohibit or further restrict existing access to abortion

States with pre-*Roe* bans on abortion

Nine states have existing laws prohibiting abortion that were in effect before *Roe v. Wade*: Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin. The laws were unenforceable because of *Roe*, but the states never struck the laws off their books. With *Roe* overturned, the nine states are all over the map (literally and figuratively) in terms of how they are approaching their pre-*Roe* bans on abortion, some of which are a century or more old.

While lawsuits to block enforcement of pre-*Roe* laws have been successful in some states, it appears the remaining pre-*Roe* laws may only remain in effect temporarily. Many of these states are separately moving ahead with other legislative efforts to ban or restrict access to abortion. For example, four of the states also have trigger laws. By contrast, it appears that two of the states (Michigan and Wisconsin) with pre-*Roe* laws may move to protect access to abortion services.

States with so-called "trigger laws"

Thirteen states have so-called trigger laws that prohibit abortion upon the overturning of the federal constitutional protection to abortion by SCOTUS, which occurred with the *Dobbs* decision on June 24, 2022. They are Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming. While the state trigger law effective dates varied, all of them are effective by or before July 24, 2022.

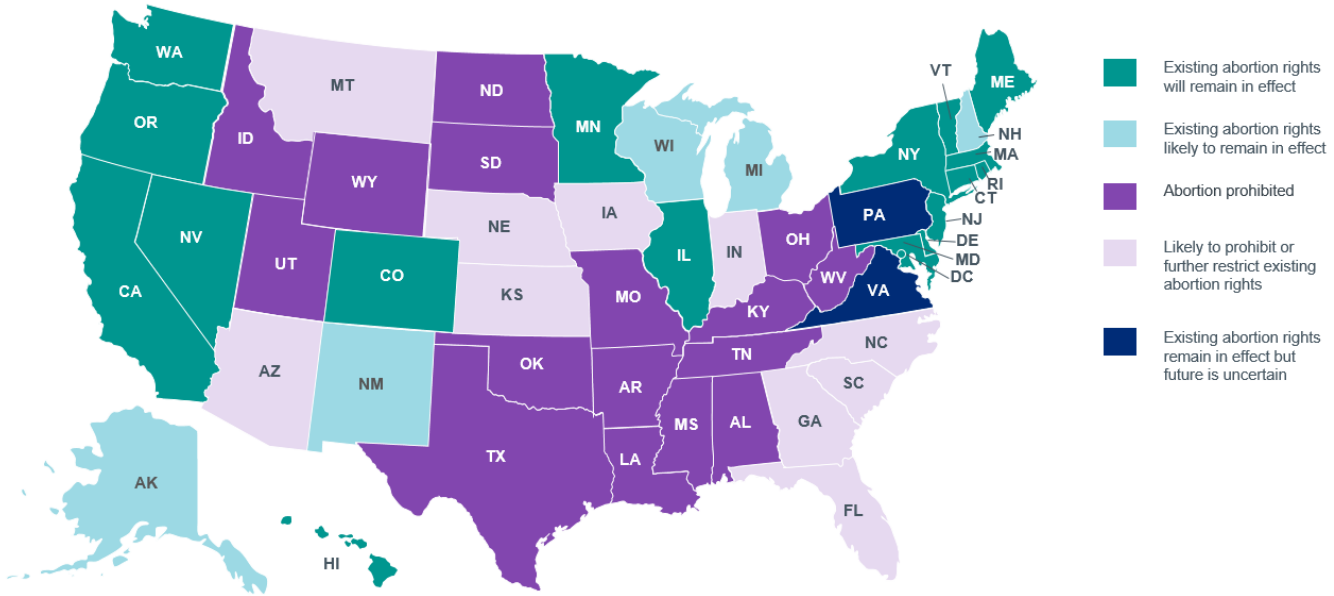
Lawsuits underway seeking to block the trigger laws (primarily on procedural grounds) in roughly half the states. It is unclear whether the lawsuits will be successful, but they may delay the trigger law effective date in one or more states.

States signaling an intent to ban or further restrict access

In a number of states, key stakeholders have signaled an intent to ban or further restrict the state's existing access to abortion, and the parties appear to have sufficient control to accomplish this. As discussed above, "key stakeholders" means some combination of the governor, state attorney general, and leaders from the controlling party in the state legislature.

Projection of state positions on access to abortion by Late Summer of 2022

This map projects the likely position or direction of each state on abortion access by late Summer of 2022. The map reflects information available as of the publication date of this Guide. The position of one or more states may change due to subsequent election results or a ruling by the state's Supreme Court.



Note: A state law prohibiting or restricting access to abortion services may provide limited exceptions, such as in the case of rape or incest and/or when the health or life of the mother is at risk, but this is not always the case.

Geographic gaps in access to services

The map shows that the combination of states that will prohibit access to services and those expected to prohibit or further restrict access to services will create geographic gaps in access to services in significant portions of the South, Midwest, and Mountain West regions of the United States.

Enforcement Across State Lines

The states prohibiting and/or significantly restricting access to abortion-related services are doing so through a combination of civil and criminal laws, and the approaches are not uniform among the states. This section focuses on considerations for employers or employer plan/programs seeking to facilitate access for employees residing in states legally prohibiting abortion-related services to other states where the services are legal.

State civil laws and ERISA

An ERISA plan may generally claim preemption from state law that relates to plan design or administration, such as a law requiring or prohibiting coverage for a particular service or treatment. However, ERISA does not preempt state laws regulating insurance for fully insured coverage, banking, or securities. This is why state insurance law mandates or restrictions apply to fully insured coverage[3] while self-insured ERISA plans have the protection of ERISA preemption.

It appears likely that most states will include the prohibitions or significant restrictions on insurance coverage for abortion-related services in their insurance laws. This has the effect of preventing an employer with a fully insured plan situsedin that state from offering the coverage as part of the plan filed with the state for approval. It is possible that one or more states will take action to prevent fully insured policies situsedin that state from including coverage for abortion-related services elsewhere through the use of riders. In these situations, employers may have to purchase supplemental insurance coverage situsedin a state where the services are legal or consider one of the scenarios described in this Guide.

Two states – Texas and Oklahoma – have civil laws allowing individuals to sue parties who perform or "aid and abet" the performance of an abortion in violation of the law for civil damages. Both laws generally prohibit abortion if a healthcare provider can detect a fetal heartbeat (generally detectable at six weeks), and they are commonly referred to as the Texas and Oklahoma Heartbeat Laws.

Last year, we indicated that the Texas Heartbeat Law might be vulnerable to ERISA preemption claims by both self-insured and fully insured ERISA plans. This is because the Texas Heartbeat Law is part of the Texas Health and Safety Code and is not an insurance, banking, or securities law saved from preemption. This logic also applies to the more recent Oklahoma Heartbeat Law. We are not currently aware of any lawsuit involving an employer plan to date, however the legal landscape remains fluid.

Idaho has a similar law, but the Idaho Heartbeat Law is part of Idaho's criminal statutes (see *State criminal laws* below). An amendment allows relatives of the unborn child to sue a medical provider who attempts or performs an abortion in violation of the law for civil damages, but the amendment does not appear to create a cause of action against an employer or employer plan/program.

State criminal laws

ERISA does not generally preempt state criminal laws. This leaves open the possibility that states could seek to prosecute an employer or employer plan/program that facilitates access to abortion-related services across state lines as an accessory to the crime.

Defenses to enforcement across state lines

There may be defenses available to attempted enforcement across state lines, and employers should discuss their options and associated risks with their legal counsel. Depending upon an employer's particular state and chosen course of action, one or more of the following arguments may be available:

1. ERISA preemption from state civil laws for group health plans that qualify as welfare plans under ERISA;
2. A lack of extraterritorial jurisdiction to enforce the state law for activity occurring beyond its own borders (for constitutional and other reasons); and
3. The U.S. Constitution's full faith and credit clause.

[3] State insurance laws frequently apply to self-insured non-ERISA plans as well.

It is possible that the threat of enforcement may act as a deterrent for a number of insurers, TPAs, and employers until sufficient legal rulings, other guidance, and/or a lack of enforcement activity across state lines instills confidence that the risks or threat is minimal.

Biden Administration Activity

The Biden Administration issued a press release on June 24, 2022, indicating that it will seek to protect the rights of women to travel across state lines to seek abortion-related services. This appears to be a signal of intent that the U.S. Department of Justice intend to intervene in matters involving the enforcement of a state law restricting access to services across state lines into another state where those services are legal. The press release also indicates that the administration intends to protect access to abortifacient medication.

On July 8, 2022, the President signed an Executive Order directing federal agencies to submit a report within 30 days identifying potential actions to protect access to abortion care, abortifacient medication, and data privacy. The U.S. Department of Health and Human Services (HHS) subsequently issued a notice to pharmacies receiving federal financial assistance – including Medicare and Medicaid payments – about their obligations to provide access to reproductive health medication.

Since SCOTUS ruled that states have the authority to determine whether and under what conditions to allow access for abortion services, it is unclear how the federal agencies could work around state restrictions on abortion care (including abortifacient medication) but efforts to protect consumer data privacy have the potential to be more successful.

Separately, HHS issued guidance reaffirming that the HIPAA privacy rules limit situations where a covered entity (including group health plans and most health care providers) must disclose protected health information to a state agency or law enforcement and provides several abortion-related examples. As a reminder, HIPAA does not apply to employer plans or programs that are not group health plans.

Federal and State Legislative Activity

Although there is talk about enacting a federal law to protect access to abortion services, there are significant hurdles to getting such a law passed. A bill could easily pass the current House, but it does not appear any bill could get through the Senate without a change to the Senate's filibuster rules. For now, it appears that Senators Manchin (D-W.Va.) and Sinema (D-AZ) oppose this change.

It is hard to predict what Congress may look like and be able to accomplish after this Fall's elections. We expect state-level legislative activity will continue through 2022 and into 2023. Stay tuned.

Potential Employer Options to Facilitate Access to Services

The following are potential options employers may consider to facilitate access to abortion-related services. Each option carries different levels of risk for employers and participants, and we strongly encourage employers to discuss their options with their legal and tax advisors before choosing a course of action.

This section is not intended to represent an exhaustive list of options. Your legal counsel may provide additional options or further variations on the options discussed below.

The definition of a group health plan

It is helpful to keep the definition of a group health plan and how the IRS defines medical care in mind when discussing the various scenarios an employer might consider if it wishes to provide access to abortion services.

The definition of a group health plan varies somewhat among different laws, but they generally define a group health plan as an employer-sponsored plan that provides or pays for the cost of medical care for employees. It generally

makes no difference if the plan provides the benefits on a tax-free or taxable basis. An employer-sponsored plan, including those that provides coverage for abortion services[4] and certain abortion-related services, is a group health plan.

The definition of medical care under Internal Revenue Code (IRC) §213(d) – often referred to as the definition for "qualifying medical expenses" – includes payment for travel that is primarily for and essential to receiving medical services. An employer-sponsored plan or program, including one specifically conditioning the payment for travel expenses to expenses incurred traveling to/from licensed health care providers to receive medical services, is also a group health plan.

Depending on the employer and type of plan, a group health plan may be subject to a variety of federal and state laws, including ERISA, the Affordable Care Act (ACA), COBRA, HIPAA, and state insurance law.

Traditional medical coverage

Traditional medical plans can provide coverage for abortion and necessary travel expenses to the extent allowed under applicable Federal or State law. It appears each of the major insurance carriers/third party administrators (TPAs) will offer optional coverage for necessary medical travel expenses as an add-on to existing medical coverage, although limitations may apply.

The following statements are solely about flexibility in plan design.

- Self-insured ERISA plans – In general, ERISA preemption allows a self-insured ERISA plan to provide coverage for abortion services where it is legal, as well as necessary medical travel expenses assuming the TPA administer it.

- Self-insured non-ERISA plans – By contrast, a self-insured non-ERISA plan is generally subject to state laws, including those prohibiting coverage for certain services. In the case of state or local governmental plans, the state may also be able to apply other pressure to block coverage, such as withholding funding. It appears likely that few church plans will provide coverage for abortion-related services, subject to certain exceptions and as permitted by state law.

- Fully insured plans (ERISA and non-ERISA) – A fully insured plan situsted (i.e. filed and approved for use) in a state is subject to that state's insurance laws. This is the situs state. If a fully insured plan covers individuals in more than one state, it raises the following questions:

    1. *Can a fully insured plan situsted in a state that prohibits or significantly restricts abortion-related services cover those services for participants in another state that does not?*

        This is ultimately a question for the insurer, but this may be a potential problem for at least the short term. Insurers will not be able to provide this as a service within the core plan itself, because the situs state will not approve the plan. The usual method of attaching riders to provide coverage for services unique to a particular state or states may not be available either. Insurers will likely be reluctant to test a state's ability to enforce its laws across state lines until sufficient legal precedent indicates they cannot. Similarly, there is some risk that one or more states may withdraw their approval for fully insured plans if the insurer offers riders to cover abortion-related services in other states. These risks will likely prevent the fully insured plans from providing coverage for abortion-related travel expenses as well, even if the plan does not cover abortion itself.

        An employer in this situation probably needs to explore one or more of the other options discussed in this Guide or purchase a separate insurance supplement situsted elsewhere to provide this coverage.

[4] This includes coverage for abortifacient medication such as mifepristone and misoprostol.

2. *Can a fully insured plan sitused in a state that generally allows abortion-related services cover those services for participants in another state that does not?*

   Except for possible limited exceptions, the services will not be available in the restricted state. States prohibiting or restricting access may also explicitly modify their situs rules to apply their service restrictions to policies sitused in other states.

Watch Exclusions: It is common for medical plans to exclude coverage for illnesses and injuries sustained while engaging in or participating in an illegal act under federal or state law (or some variation of this language). If a participant travels from a state prohibiting abortions to another state where abortion is legal, is there a risk the medical plan will exclude coverage for later complications related to the abortion? Employers with self-insured plans may be able to adjust their exclusionary language as necessary, but employers with fully insured plans sitused in states prohibiting or restricting services should discuss this potential issue with their insurers.

Quick considerations for the traditional medical coverage approach

1. This approach does not require the creation of a separate plan;
2. The insurers/TPAs will process the claims;
3. If this will be the sole approach, it limits coverage for abortion and necessary travel services to employees eligible to enroll in the employer's medical plan; and
4. Restrictions and/or limitations may apply to certain fully insured and self-insured non-ERISA plans based on where individuals are located and/or the situs state.

Employee assistance programs (EAPs)

Although employers usually think of EAPs in terms of limited behavioral health coverage, this is merely common practice and not a specific limitation under federal or state law. Many EAPs also provide other health and non-health benefits. An employer could structure an EAP to provide a variety of benefits, including reimbursements for medical travel expenses. An EAP that provides medical care is a group health plan with respect to the medical care benefits.

EAPs that meet certain conditions qualify as excepted benefits (under the "EAP exception") and avoid various legal requirements. The most significant of these are the ACA's plan design mandates. To qualify for the EAP exception, an EAP cannot:

i. Provide significant medical benefits;
ii. Require enrollment in, or coordinate benefits with, another group health plan;
iii. Charge a premium to participate; and
iv. Require any cost-sharing for covered benefits.

The available federal guidance does not provide a direct answer about what qualifies as significant medical benefits and merely indicates that the federal agencies will take the amount, scope, and duration of covered services into account. The guidance also indicates that limited short-term outpatient counseling qualifies as an excepted benefit.[5] Based on this guidance, EAPs limiting health benefits to a handful of free behavioral health counseling sessions per year qualify under the EAP exception.

[5] Other IRS guidance also excludes short-term counseling as disqualifying other coverage for HSA eligibility purposes.

This means the determination of whether benefits are significant is largely subjective. The guidance also does not address whether bundling too many otherwise insignificant medical services together causes the EAP to lose the exception. An EAP that only provides coverage for limited medical travel expenses should qualify for the EAP exception. Similarly, an EAP providing access to a small number of behavioral health counseling sessions per year plus limited medical travel should qualify for the EAP exception. It appears less likely that an EAP providing access to medical travel, counseling, and other medical care services will qualify for the exception. Remember, an EAP offering medical care benefits that qualifies for the EAP exception is still a group health plan and is subject to a variety of compliance requirements, such as ERISA's reporting and disclosure rules and COBRA.

Note: An EAP that offers coverage for abortion instead of merely travel expenses will not qualify for the EAP exception.

Quick considerations for the EAP approach

1. The EAP is available on a standalone basis and does not require enrollment in an employer's medical plan (a standalone approach is required for the EAP exception to apply);
2. Many employers can offer the medical care components of EAPs as a self-insured ERISA plan for ERISA preemption purposes.[6]
3. The approach may require significant modification to an existing EAP or the creation of a new EAP;
4. The employer must bear all of the costs for the EAP exception to apply; and
5. In the short run, it may be difficult to find a vendor that is willing or able to administer medical travel reimbursement.

Spending account plans

This subsection addresses the availability of spending account plans to cover abortion and abortion-related services, including travel under the following types of arrangements:

- Health reimbursement arrangements;
- Health flexible spending accounts; and
- Health savings accounts.

Health reimbursement arrangements (HRAs)

There appear to be four types of HRAs that could provide reimbursements for abortion and medical travel, but most employers are likely to find the first two to be the only viable options. HRAs can only reimburse medical travel expenses up to the tax-free limits set by the IRS (see Tax implications for medical travel expenses).

- General purpose HRA – Unless excluded as a covered expense, a general purpose HRA can provide reimbursement for abortion-related services. A general purpose HRA cannot satisfy the ACA's plan design mandates by itself. This means an employer cannot offer this HRA on a standalone basis, and covered employees will need to participate in the employer's group medical coverage or attest that they are enrolled in another employer's group medical plan in order to be able to participate.

[6] California's Knox-Keene Act may require employers to insure the behavioral health benefits under an EAP.

There are no overall annual reimbursement limits applicable to general purpose HRAs, although limits do apply to reimbursements for medical travel expenses (see Tax implications for medical travel expenses).

- Excepted benefits HRA – Unless excluded as a covered expense, an excepted benefits HRA can provide reimbursement for abortion-related services. An employer may offer an excepted benefit HRA on a standalone basis exempt from the ACA's mandates if all of the following are true:

    i. The employer offers traditional medical coverage to the employees, but the employees do not have to elect it;

    ii. The maximum reimbursement is $1,800 for plan years beginning in 2022 (indexed; $1,950 for plan years beginning in 2023);

    iii. Reimbursements are limited to general medical expenses (including medical travel), premiums for COBRA, short-term limited duration insurance, and other excepted benefits coverage; and

    iv. The HRA is available on a uniform basis to all similarly situated employees and is not intended to get high cost claimants to waive coverage.

  The limit may be sufficient if an employer is only trying to cover abortion-related travel expenses, but it may be insufficient for employers attempting to cover broader medical travel.

- Individual coverage HRA (ICHRA) – An ICHRA may be able to pay for abortion services, but this will require an employer to contribute enough toward the ICHRA for employees to pay for their individual coverage and have enough left over for out-of-pocket expenses. Employers *cannot* restrict the use of the ICHRA to specific out-of-pocket expenses. Employers cannot offer traditional medical coverage and ICHRAs to the same class of employees.

- Qualified small employer HRA (QSEHRA) – A QSEHRA may also be able to pay for these services, but QSEHRAs are only available to employers that are not *applicable large employers* (or members of an aggregated applicable large employer group) under the ACA and who do not offer traditional medical coverage to any employees. Similar to ICHRAs, this will require an employee to have enough left over to pay for these out-of-pocket expenses after paying for individual coverage. Unlike ICHRAs, QSEHRAs are subject to annual reimbursement limits (the 2022 limits are $5,450 for individual coverage and $11,050 for family). QSEHRAs are subject to written documentation requirements, but they are not subject to many of the traditional rules applicable to group health plans including the ACA and COBRA.

EAP Exception? There is no fundamental difference between an EAP and an HRA limited to reimbursements for abortion-related travel expenses, except that the HRA cannot reimburse beyond the tax-free limits and an EAP can (the excess is taxable income).

Quick considerations for the HRA approach

1. An employer with an existing general purpose HRA may only need to make minor modifications (or none at all) to provide reimbursements for abortion and medical travel expenses;

2. Employers are free to set their own reimbursement limits for general purpose HRAs (although certain limits apply to tax-free reimbursements for medical travel);

3. A general purpose HRA requires integration with traditional employer group medical coverage;

4. The excepted benefit HRA does not require enrollment in an employer's medical plan;

5. An excepted benefit HRA probably requires the creation of a new plan and has a fairly low reimbursement limit; and

6. Most employers will be able to offer the HRAs as self-insured ERISA plans for ERISA preemption purposes.

Health flexible spending accounts (health FSAs)

Unless excluded as a covered expense, a general purpose health FSA can also provide reimbursement for abortion-related services. Health FSAs can only reimburse medical travel expenses up to the tax-free IRS limits (see Tax implications for medical travel expenses). A general purpose health FSA must meet the following criteria to qualify as an excepted benefit in order to avoid the ACA's plan design mandates:

- The employer must offer major medical coverage to the employee (whether the employee enrolls or not); and

- The maximum annual reimbursement cannot exceed the greater of: (i) twice the employee's health FSA election; or (ii) the employee's health FSA election plus $500.[7]

If the health FSA does not qualify as an excepted benefit, the health FSA cannot satisfy the ACA's plan design mandates by itself, and covered employees will need to participate in the employer's group medical coverage or attest that they are enrolled in another employer's group medical plan in order to be able to participate.

The difficulty with using a health FSA as the main coverage option for abortion-related services is that it unlikely that employees will elect health FSA coverage during open enrollment because they might need coverage for these services later and pregnancy is not a qualifying life event permitting a mid-year election change. Health FSAs are also subject to the use-it-or-lose-it forfeiture rules, so employees will likely not elect coverage "just in case." The excepted benefit rule also significantly restricts employer contributions.

Quick considerations for the health FSA approach

1. An employer with an existing general purpose health FSA may only need to make minor modifications (or none at all) to provide reimbursements for these services;

2. An excepted benefit health FSA does not require employees to enroll in an employer's medical plan in order to participate; and

3. Most employers will be able to offer a health FSA as self-insured ERISA plan for ERISA preemption purposes;

4. For practical reasons, the health FSA is most useful as an additional option to cover abortion-related services rather than used sole coverage option;

5. The reimbursement limits are fairly low and a significant portion of the cost will be borne by the employees from pre-tax payroll deductions; and

6. Unused health FSA balances are subject to the forfeiture rules.

[7] If a health FSA satisfies these requirements and the maximum COBRA premium for the year equals or exceeds the maximum annual reimbursement amount, the health FSA also qualifies for a limited COBRA obligation. The health FSA: (i) does not have to offer COBRA to participants with overspent accounts; and (ii) can limit the COBRA continuation coverage period to the end of the year in which the COBRA qualifying event occurred.

Health savings accounts (HSAs)

HSAs are not group health plans, but we are including them in this section for convenience. An HSA can provide reimbursement for abortion-related services, but it can only reimburse medical travel expenses up to the tax-free IRS limits (see Tax implications for medical travel expenses).

An employer can make HSA contributions to help pay for these services, but:

- It can only provide contributions for employees enrolled in a high deductible health plan (HDHP) and otherwise eligible for an HSA; and
- Employer contributions count toward the individual's annual HSA contribution limit.

We recommend employers considering limiting additional HSA contributions to employees living in gap areas or who need abortion-related services to consult with their legal counsel.

Quick considerations for the HSA Approach:

1. This approach only affects the employer's HSA contribution strategy and not the employer's underlying group health plan(s);
2. HDHP participants do not need a qualifying life event to make mid-year election changes to their own HSA contributions;
3. HSA funds are not subject to forfeiture; and
4. This approach only benefits HDHP participants; and
5. Depending upon employer contributions, a significant portion of the cost may be borne by the employees from pre-tax payroll deductions.

Potential non-group health plan options for travel expenses

Earlier, we indicated an employer-sponsored plan or program specifically conditioning the payment for travel expenses to expenses incurred traveling to/from licensed health care providers to receive medical services is a group health plan. The payment of benefits as taxable income does not automatically mean the program is not a group health plan.

There are three general categories of potential non-group health options:

- Unconditional – An employer could offer a program that reimburses employees for a fixed amount of travel expenses without asking the underlying reason for the travel. The program should collect substantiation for the travel expenses (e.g. hotel and flight receipts) but not the purpose for the travel. This option has the least risk for classification as a group health plan, but it is also the most expensive approach.
- Limited condition – An employer could offer a program that reimburses for specific medical and non-medical travel purposes. An employee must confirm the travel expenses were for one of those purposes, but the employee does not have to indicate which. The program will collect substantiation for the travel expenses but not the purpose for the travel. For example, the program might include reimbursement for the following:
    i. One or more medical-related purposes;
    ii. Sabbatical travel; and
    iii. Travel for continuing education/professional development.

This is largely an honor code program and tricky to police. This approach should avoid classification as a group health plan, but it is obviously more expensive than an approach limited solely to medical travel.

- Unspecified medical travel –Several parties indicate it may be possible for an employer to offer reimbursement solely for medical-related travel and avoid classification as a group health plan if:

    i. The employee does not have to specify the medical reason for the travel;

    ii. The employer only collects substantiation for the travel expenses and not for any corresponding medical procedures;

    iii. The reimbursements are taxable income when paid.

    This approach appears to count on the employer remaining ignorant of the actual medical procedure and the taxable reimbursement to avoid classification as a group health plan. This approach appears to carry significant legal risk, and we recommend against it.

It should be possible to administer at least the first two approaches through a "lifestyle spending account" program if the program includes travel reimbursement as a component.[8]

Quick considerations for the non-group health plan approach

1. Employers can claim no knowledge of the purpose for the travel;
2. The first two approaches should avoid the rules for group health plans and tax qualified benefits;
3. The approaches will generally be more expensive than limiting travel to specific medical purposes;
4. Avoiding group health plan treatment means the reimbursements must be paid as taxable income; and
5. There is no ERISA preemption available from state law.

Tax implications for medical travel expenses

The tax implications for medical travel expenses are complicated. What we might refer to as "travel" expenses are split into three separate qualifying medical expense categories under the IRC: (1) transportation; (2) lodging; and (3) meals. The allowable qualifying medical expenses also differ for each category as shown in the table below.

The required travel time to get to/from a location where services are legal and necessary post-service recovery time may mean a number of individuals will be unable to obtain services within a single day. This makes lodging and meal expenses relevant.

Travel Expense	Allowable Qualifying Medical Expense (QME)
Public Transportation	The full cost of reasonable and necessary transportation in order to receive medical care is an allowable QME.
Personal Automobile	From July 1, 2022 – December 31, 2022, an employer may reimburse an employee for up to 22 cents/mile when the employee uses their personal automobile for medical travel.

[8] We have some concerns with lifestyle spending accounts and the constructive receipt of income doctrine, but this is outside the scope of this Guide.

Lodging	The full cost of lodging provided directly by a health care facility is an allowable QME. The IRC limits the allowable QME for lodging outside a health care facility to $50/day (plus $50/day per essential companion).
Meals	The full cost of meals provided directly by a health care facility is an allowable QME. The cost of other meals is not a QME at all.

Centers of Excellence? We are not aware of any existing family planning/reproductive rights clinic with lodging and meal services, but these may appear in the future.

Plan design and tax-free versus taxable reimbursements

Employers can set limits and parameters for travel expense reimbursement in medical plans, EAPs, and other travel reimbursement programs, such as limiting reimbursement to fixed amounts or limiting travel reimbursement for employees living in certain service gap areas to specific cost-efficient destinations. There do not appear to be incentives for an employer to set specific abortion-related limits or parameters for spending account plans, and employers cannot limit HSAs.

Some plans can provide medical travel reimbursements that are greater than the allowable QME limits, but the excess amounts are taxable income and can be difficult to administer correctly. Other travel reimbursement programs that are not group health plans or HSAs can only provide taxable reimbursements for travel expenses.

Plan/Program	Allowable Reimbursements
Major medical and EAP	Can provide tax-free reimbursements up to the allowable QME limits Can provide taxable reimbursements in excess of the allowable QME if the insurer/TPA can administer this
HRA, FSA, and HSA	Can only provide tax-free reimbursements up to the allowable QME limits
Other travel reimbursement programs	Can only provide taxable reimbursements, but in any amount

An employer can choose to pay all reimbursements as taxable income and leave it to the employees to claim deductions for any allowable QMEs on their personal income tax returns. This is obviously easier for the employer and/or an insurer/TPA to administer, and some insurers/TPAs may only administer programs in this way.

Employees will only benefit by claiming a deduction if the total of their allowable itemized deductible expenses exceeds the standard deduction on their personal income tax returns. Realistically, this means most employees will not experience any tax savings, but the employees are still economically better off with a taxable reimbursement than no reimbursement at all.

Essential companion for lodging purposes

The allowable QME for lodging outside a health care facility is $50/day per individual. An individual can include the participant/patient plus an essential companion.

In general, an essential companion is an individual whose presence is necessary in order for the individual to be able to travel to receive the medical services. Examples include a parent or guardian of a minor child who should not travel alone, and a spouse, partner, or health care provider for an individual who requires medical support while

traveling (easier to conceptualize for medical travel related for transplant surgery). An individual whose primary function is to provide emotional support may not qualify as an essential companion. If an employer wants to explore providing tax-free reimbursements for essential companion lodging, we recommend the employer discuss this with its insurer/TPA, legal counsel, and/or tax advisor.

Essential companions should also qualify for transportation reimbursement as an allowable QME, up to the applicable limits.

Additional benefits compliance considerations

Limiting coverage for spouses and dependents

Several employers have asked if they can limit coverage for these services to female employees. In short, limiting coverage for the medical procedure and/or travel reimbursement solely to female employees while excluding the spouses of employees violates Title VII of the Civil Rights Act.

An employer can generally choose to exclude all dependent children from abortion-related benefits coverage. It is possible that a state insurance law mandates coverage for fully insured medical plans (and potentially self-insured non-ERISA medical plans), but this may not include coverage for travel.

Data privacy issues

Depending upon the type of program and administration, requesting information or substantiation for the abortion-related services may be protected under or otherwise involve one or more of the following laws:

- HIPAA Privacy Rules – Identifiable participant information about a medical procedure or medical travel administered through an existing group health plan is protected health information (PHI). If administered without involvement from the employer or only through incidental contact, there may be few or no required changes to the current HIPAA policies and procedures. Administration through a new self-insured group health plan will require some modification to the policies and procedures. If administered solely through a fully insured plan, the employer should have no HIPAA responsibilities unless the employer will have direct involvement with the PHI.

- Americans with Disabilities Act – Substantiation for medical travel outside a group health plan may be a confidential medical record.

- State data privacy laws – Various state data privacy laws may protect identifiable information about an employee's medical treatment or related travel.

- Title VII of the Civil Rights Act – An adverse employment action based on knowledge of an employee's abortion or other medical treatment may be a Title VII violation. If the information is PHI from a group health plan, this is also a HIPAA violation.

Obviously, identifiable information about abortion-related services is hypersensitive data even if a federal or state law does not apply. Many employees may not feel comfortable sharing this information with their employer frustrating the purpose of facilitating access to services. We strongly encourage employers to limit its need for and access to this information to the best of their ability and to consider treating the information at least as sensitive as PHI under HIPAA.

Parity issues

Providing coverage for medical travel expenses raises a potential issue under the Mental Health Parity and Addiction Equity Act (the "parity rules") if there is no travel coverage for mental health and substance use disorder treatment. However, there are considerations that reduce this parity risk:

- Travel conditioned on accessibility – Many traditional medical plans already provide medical travel reimbursement for transplant services – particularly to transplant centers of excellence – with no

comparable travel for mental health/substance use treatment. The medical travel reimbursement is only available when the participant must travel a long distance to access the facilities.

The parity rules only require comparable travel for *covered* mental health/substance use treatment if those services are similarly inaccessible to a participant without long-distance travel, which will rarely be the case. We believe the same logic applies to travel for abortion-related care, but we recommend employers consider setting minimum distance requirements for travel reimbursements through medical plans.

- EAP Exception – An EAP that qualifies for the EAP exception described earlier is not subject to the parity rules.
- Non-group health plans – The parity rules do not apply to travel reimbursements administered through programs that are not group health plans.

High deductible health plans and disqualifying other coverage

HDHP participants must meet the minimum annual statutory HDHP deductible (2022: $1,400 self-only/$2,800 family; 2023: $1,500 self-only/$3,000 family) before the HDHP or another group health plan can provide coverage for abortion or medical travel reimbursement in order for the HSA holder to remain eligible to make or receive HSA contributions.

It makes no difference if the employee does not actually receive a reimbursement from the other group health plan during the plan year. The disqualifying other coverage rule does not rely on actual utilization. General purpose HRAs, excepted benefits HRAs, and general purpose health FSAs are disqualifying other coverage if they *can* provide reimbursement before the HDHP participant meets the necessary minimum deductible.

By contrast, an EAP qualifying for the EAP exception should not conflict with HSA eligibility, which may include an EAP that can reimburse medical travel expenses before the HDHP participant meets the necessary minimum deductible. Employers should discuss this with their legal counsel before utilizing an EAP to provide reimbursement for abortion services and related expenses.

An employee can receive reimbursements from an HSA without conflict. Travel reimbursement from a non-health plan also does not conflict with HSA eligibility.

Addition of medical travel as a qualifying life event (QLE)

The overwhelming majority of cafeteria plans include the *addition or improvement of a benefit package option* as a qualifying life event permitting a mid-year election change relating to the affected coverage. The cafeteria plan rules indicate the change must be "significant" without defining the term and only providing a single, limited example. This makes the determination largely subjective.

The addition of coverage for abortion services to a medical plan (or the removal of an exclusion to a health FSA) should satisfy this QLE and employers should allow corresponding election changes as allowed under the cafeteria plan. The addition of medical travel for abortion is less clear. Employers may wish to consider discussing the issue with legal counsel before denying a QLE in this situation.

Note: There are no employee contributions for HRAs and most EAPs (including all EAPs qualifying for the EAP exception), and the cafeteria plan QLE rules do not apply to them.

Leaves of absence and paid time off

As indicated earlier, it may be impractical or impossible for individuals in certain service gap areas to obtain services within a single day. Employers may need to consider revising their leave of absence policies to address how the employer will treat these travel absences for employment purposes.

This may include providing additional paid time off (PTO) to account for the additional missed work time. Please note that certain states may prohibit the forfeiture of accrued PTO on termination, at least if the PTO is also available as paid vacation time.[9]

Abortifacient medication and telemedicine

The situation is fluid, but a number of states prohibiting abortion services may define or expand their laws to restrict or otherwise prohibit access to abortifacient medication (e.g. mifepristone and misoprostol). This will significantly limit or completely prevent the prescription and importation of that medication to individuals in that state, whether through in-person or telemedicine visits.

Plan B: Individuals frequently refer to Plan B medication (also known as the morning after pill) as an abortifacient, but it is not. Plan B is actually a type of contraceptive that prevents pregnancy instead of terminating it. State laws prohibiting abortifacient medication should not affect the availability of Plan B. For non-grandfathered plans, Plan B is also a covered preventive service under the ACA.

[9] A discussion of state and local leave law is outside the scope of this Guide.