



Leaked Supreme Court Opinion Overruling Roe v. Wade and Impact on Group Health Plans

On May 5, a preliminary [draft opinion](#) of the Supreme Court of the United States (SCOTUS) opinion in ***Dobbs v. Jackson*** was leaked and published. If the same language in the draft opinion is used in the final opinion, ***Roe v. Wade*** and ***Planned Parenthood v. Casey*** would be overturned and would therefore eliminate a woman's current federal constitutional right to abortion and return the abortion issue back to pre-Roe status at the state level. The official opinion is not expected to be issued until June, and this leak is unprecedented and institutionally shocking. The leaked opinion is only a draft. The final opinion, and the final decision itself, could change between now and the release of the actual decision by SCOTUS. Below is a discussion of employer options and the impact on group health plans if ***Roe*** is overturned—including looking at when an employer can cover abortion through a health benefit plan or reimburse costs incurred when travelling outside of a state to access abortion services.

Without the federal constitutional right to abortion, there are still some federal laws that impact abortions and abortion coverage. Even if the court overturns Roe, there is no indication thus far that there would be changes to the following existing federal rules:

- › Title VII of the Civil Rights Act: Under this act, group health plans may, but are not required, to cover abortions - with the following exceptions:
 - If complications arise during an abortion, such as excessive hemorrhaging, plans are required to pay those costs attributable to such complications. However, the plan is not required to pay for the abortion itself, unless the life of the mother would be endangered if the fetus were to be carried to term.
 - If a plan does elect to cover, it must do so in the same manner and to the same degree as it covers other medical conditions.

- › Hyde Amendment: Since 1977, federal law has banned the use of any federal funds for abortion unless the pregnancy is a result of rape, incest, or if it is determined to endanger the woman's life. This rule, known as the Hyde Amendment, is not a permanent law; rather it has been attached annually to Congressional appropriations bills and has been approved every year by Congress.

Interaction of Federal Laws, State Laws and Group Health Plan Funding

Beyond this general federal legal framework for abortions, the main factors that impact a group health plan's policies and coverage for abortion include: 1) whether the group health plan is self-funded or fully insured and 2) the state(s) in which the employer and employees are located.

- › Self-funded plans are regulated by federal ERISA law that generally preempts state laws and state insurance regulations. Therefore, a self-funded plan has discretion over coverage for abortion and reimbursement for travel expenses related to abortion (discussed more below). If a plan sponsor wishes for their self-funded plan to cover abortions, participants would still be restricted in states that have laws limiting or regulating abortion providers or limit the ability of individuals to receive an abortion. So, employers should ensure that any abortion benefit offered under a self-funded plan is limited to benefits to procure a legal abortion in compliance with the laws of the state in which the medical services are rendered.
- › Fully insured plans are regulated by the state and would be subject to state insurance law requirements or state restrictions on abortion.
 - Some states require fully insured plans to cover abortion, for example: CA, NY, IL, ME, OR, and WA.
 - Other states currently have some level of abortion care restrictions on fully insured plans, for example, trigger bans that will automatically take effect if Roe is overturned, including near-total or total bans where no abortions are allowed under all or nearly all circumstances
 - The Kaiser Family Foundation provides a [webpage](#) that lists state policies protecting or restricting legal status of abortion

In response to the leaked **Dobbs** opinion and prior, or planned, actions in certain states to restrict abortion, some employers have announced they will offer travel expense reimbursements for employees who may need to travel from a state with abortion restrictions to another state to receive an abortion.

Group health plans, HRAs, HSA, and FSAs can reimburse "medical care" as defined under IRC Section 213(d). Medical care under Section 213(d) includes for transportation primarily for and essential to medical care and for lodging (not to exceed \$50 per night per individual) while away from home primarily for and essential to medical care. Therefore, an employer may choose to reimburse employees for travel and lodging for medical care (including abortions) through a self-funded medical plan (including through an HRA).

Steps for an employer wishing to cover or reimburse travel expenses related to abortion include, but are not limited to:

- › Amending a self-funded medical plan to include coverage for travel expenses.
- › Implementing or amending a (self-funded) HRA to include reimbursement for travel expenses.

For employees that are not benefit eligible (or not enrolled), it may be possible to implement a policy to reimburse travel expenses related to abortion care. However, it is unclear if a travel reimbursement policy itself may create an (inadvertent) ERISA group health plan because “medical care” includes in its definition “transportation primarily for and essential to medical care.” The travel benefit policy could arguably be crafted as an EAP excepted benefit, structured as a broader travel benefit not primarily for medical care, or reimbursed on an after-tax basis as imputed income—potentially avoiding ERISA compliance complications. The GBS compliance team is watching for possible future regulatory agency guidance that could help clarify this issue.

ERISA Requirements

Employers should be aware of general ERISA plan compliance requirements if looking to make plan changes associated with abortion coverage or reimbursement of travel expenses through a self-funded medical plan or HRA, especially if making a change mid-plan year. For example: make sure to amend the plan document; provide summary of material modification (SMM), or full amended summary plan description (SPD), to plan participants; draft plan document and SPD if implementing a new HRA (and engage with vendor to conduct nondiscrimination testing); provide notice of material modification for mid-year plan change; and make sure the HRA is appropriately integrated with the group health plan to avoid ACA compliance issues.

Additional State Law Considerations

There are some states that bar entities from aiding and abetting the performance of an abortion (e.g., Texas and Oklahoma). It might be argued that an employer or employer benefit plan might violate these laws if it, for example, reimburses a Texas-based employee for an abortion received in another state (or for the related travel costs). However, it is unlikely an employer would face risk under these aiding and abetting laws for a few reasons: 1) because of ERISA preemption of state laws (to the extent an employer reimburses medical, surgical, and travel costs associated with an abortion through a group health plan or HRA), 2) because of the general presumption against the extraterritorial application of state laws, and 3) because of other constitutional concerns

Issues involving abortion, abortion coverage, and travel for abortions will be developing and changing if and when SCOTUS releases an opinion that formally overturns **Roe**. Various states will pass new laws limiting abortion. Other states will pass laws expanding or protecting abortion access. Employers should continue to monitor the situation closely and engage with competent legal counsel if you have any questions.

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The information herein is educational only and not intended as legal advice.