



DELIVERING **VALUE** SERIES

Hot Topics in Benefits Law: Roe v. Wade Overturned – Implications for Employers

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Welcome

Jeffrey Kluever

Executive Director

Business Health Care Group

Today's Presenter

John Barlament

Attorney & Shareholder, Reinhart Boerner Van Deuren

- Member of firm's employee benefits practice, with a focus on health and welfare plan matters
- Frequent, noted national speaker and author on employee benefits topics (e.g., ERISA, HIPAA, ACA, CAA)
- Best Lawyers in America® (2010–present: Employee Benefits [ERISA] Law)
- Contact information:
 - jbarlament@reinhartlaw.com
 - Office: 414.298.8218



Operationally Navigating the Challenging Legal Landscape While Continually Improving Service to Your Clients

John Barlament

Agenda

- Implications of Roe v. Wade being overturned
- Identifying main risks
- Strategies to minimize risks

Overview

- Roe v. Wade (and later case, Casey) provided minimum guarantees for pregnant women to obtain abortions
- States could include some restrictions on abortions, but rules varied by length of pregnancy
- Employers, TPAs, PBMs and their health plans could essentially ignore most state laws which imposed restrictive obligations
 - Laws were likely unlawful under Roe / Casey, or preempted by ERISA
 - This is why you've probably never delved into this thicket of legal issues before
- Likely entering whole new world of state-by-state compliance

Overview

- Dobbs v. Jackson Women's Health Organization overrules Roe and Case
- No right under U.S. Constitution to any abortions, at any time
- So, total bans; 6-week bans; 15-week bans, etc. possible
- Some state laws are very old – e.g., Wisconsin's is from 1849; Texas has one from 1925
 - Many pre-date health plans or ERISA
 - So, applying old laws to 2022 health plans will not be easy or clean
- Some state laws impose civil penalties
 - E.g., Texas "\$10,000 bounty" law

Overview

- Other state laws impose criminal penalties
- Employers, TPAs and PBMs should care about both, but criminal is of greater concern
- Possible consequences:
 - Reputational harm / loss of business
 - Monetary damages
 - Loss of license (especially for TPA or PBM)
 - Will losing license in one state create “domino effect” and cause loss in another state?
 - Company being charged with criminal claims? Company going out of business? Can criminal risk be “offloaded” by contract?
 - Individuals within company being charged with criminal claims?

Overview

- Additional wrinkle: state laws can be enforced by local prosecutors
- Each county in a state may have own local prosecutor
 - Texas has 254 counties. Potentially many different interpretations of Texas law
 - Will some local, elected prosecutor, in some state, want to be the “tough on abortion” prosecutor? Who “goes after” “out-of-state / foreign companies” which “aid or abet” in providing abortions?
 - Number of counties (and local prosecutors) is in the thousands
 - In Wisconsin, Attorney General Josh Kaul has said he will not enforce Wisconsin’s 1849 ban
 - However, on June 29, Sheboygan County DA Joel Urmanski said that he will enforce the 1849 law (first in WI to say that, apparently)

ERISA Preemption

- ERISA has strong preemption provisions, in general
- ERISA Section 514: It will “supersede any and all State laws” if the laws “relate to” a plan
- Preemption analysis always a bit tricky
 - Supreme Court goes back-and-forth on its scope
- Generally, state law is preempted if the law has a “reference to” or “connection with” the plan
 - Look at whether the law refers to a plan; requires plan to cover a particular benefit; directly impacts plan, etc.

ERISA Preemption

- Texas has a civil penalty which applies to a person who “knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise”
- Would that reference to plan activities (“paying” or “reimbursing”) “relate to” a plan and mean that ERISA would preempt this provision?
 - Seems like a strong argument. No case law on it yet, though

ERISA Preemption

- However, ERISA generally does NOT preempt criminal laws of general applicability
- So, need to look at how “general” the law is
- Alabama law: “Any person who ... aids, abets or prescribes for [a non-life-of-the-mother-saving abortion] shall on conviction be fined not less than \$100.00 nor more than \$1,000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.”
- No reference to plan or activities. Seems like a “general” criminal law, unlikely to be preempted by ERISA

ERISA Preemption

- In contrast, suppose a state passed a law which imposed criminal penalties on specific claims-processing activities of a plan, TPA or PBM
- For example, July 7, 2022 letter from “Texas Freedom Caucus” (a group of Texas politicians) to Sidley Austin (a law firm based in Chicago, but with a Texas office) notes published reports that Sidley will pay for travel expenses for Texas employees
 - To travel to another state to obtain an abortion
- The group believes that this violates Texas law, which imposes criminal penalty on anyone who “furnishes the means for procuring an abortion knowing the purpose intended”

ERISA Preemption

- Group also claims that the law will “extend to drug-induced abortions if any part of the drug regimen is ingested in Texas, even if the drugs were dispensed by an out-of-state” provider
 - So, if pregnant woman takes Mifepristone and Misoprostol during first 10 weeks of pregnancy, this group argues that a TPA / PBM / employer would need to know where each drug was “ingested”, in order to determine legality
 - How can a TPA / PBM / employer determine this? Ask for additional information? Try to include language in SPD that plan enrollee represents that abortion drug was legal? Will that really protect us?

ERISA Preemption

- Texas group states that, in next legislative session, it will introduce a new law to “prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses”
 - Group says it will impose “felony criminal sanctions ... to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law”
 - Odd statement. Group seems to have ERISA preemption backwards, if that is what the future law will say
 - If that law is drafted to specifically apply to self-insured plans, ERISA probably WOULD preempt it, because law would no longer be of “general applicability” (like Alabama law from a few slides ago)

Pregnancy Discrimination Act

- Pregnancy Discrimination Act (“PDA”) requires health plan to cover abortions in one situation (life of mother)
 - Also complications from abortions
- Does NOT extend to “elective” abortions
 - Industry still working on right “terms” here; “therapeutic / life-of-the-mother” abortions versus “elective” abortions. Terms are not well-defined from a legal perspective
- Would PDA also have some preemptive effect? Another argument to add to ERISA preemption argument?
 - Maybe. Limited case law on PDA (never really needed to be used before in this context, because Roe and Casey invalidated these state laws)

Pregnancy Discrimination Act

- Note that current interpretation of PDA limits plan sponsor's choices
- PDA guidance, though, is relatively old (from 1970s) and perhaps could be changed in a future administration
- Would seem to be difficult for most employers to eliminate abortion coverage entirely
 - May be exceptions for religious employers, etc.

Pregnancy Discrimination Act

- IFEBP survey, July 14: What changes are employers considering to abortion coverage?
 - No changes to current coverage levels: 46%
 - Don't know / wait and see: 26%
 - Exploring expansion of coverage: 26%
 - Unable to change due to laws: 2% [Note: Perhaps referring to PDA]
 - Eliminating it: Less than 1%

Preemption Wrap-Up

- Unfortunately, employers, TPAs and PBMs now need to consider hundreds of possibly-applicable state laws
 - Ignoring them seems risky (but some will do that and take a “wait and see” approach)
- Conduct a preemption analysis (ERISA; PDA; for prescription drugs, possible that FDA rules may control over state laws)
- Monitor changes in the law in this area (new laws; court interpretations of old laws, etc.)

Telemedicine and Mail-Order

- Appears that some states view this as a “gap” in their abortion restrictions and are eager to eliminate, e.g., mail-order abortion-inducing drugs
 - Could FDA preemption apply? Being looked at now at federal level
- Could be very difficult for state – and employers – to monitor this
 - For example, suppose that Tess is in Texas and Cindy is in California. Both are pregnant and are friends. Both conduct a telemedicine call with a doctor about obtaining an abortion. Texas wants to bring an action against Tess. Will Texas know where that telemedicine visit took place? Will the employer / TPA be able to “flag” it as an “illegal” abortion, and thereby deny the claim?
 - What if Tess flies to California to visit Cindy and Tess takes the call in California?

Mail Order

- Some states have specific laws prohibiting shipment of abortion-inducing drugs through mail, courier or delivery
- Arkansas: “It is unlawful for any ... person to provide any abortion-inducing drug via courier, delivery, or mail service”
 - Criminal penalties for violation
 - So, ERISA preemption unlikely
- Employers should consider identifying these laws, then working with PBM to see if it can change its procedures
 - Either for those specific states, or maybe it’s easier to do for all 50 states?
 - Make plan enrollees obtain those drugs through doctor / pharmacist?

Inter-State Issues

- Another big question is whether a state can enforce its rules when a resident's conduct takes place in another state
- For example, Joan travels from Missouri to Illinois for an abortion. Can Missouri punish Joan when she returns from the procedure?
 - At least one Missouri lawmaker introduced a bill earlier in 2022 to punish Missouri residents in this situation; bill did not become law then
- Raises difficult questions about powers of states and “right to travel” under U.S. Constitution
 - Justice Kavanaugh, in concurring Dobbs opinion, said this would be protected
 - Would four other Justices agree?
 - Even if state cannot prohibit travel, can it punish woman upon return? Penalize TPA / employer for paying?

Travel Benefits

- Many employer considering whether to implement travel benefit
 - E.g., pay for pregnant woman in Oklahoma to travel to New Mexico for an abortion
- Internal Revenue Code (“Code”) does offer some tax-free benefits for medical travel – but probably will not fully shield all expenses
 - Just because it’s taxable does not mean it’s illegal
- Stay in medical facility – should be non-taxable
- Meals at medical facility – should be non-taxable
- Transportation “primarily for and essential to” medical care – should be non-taxable
 - Geographic limit? E.g., would a flight to Hawaii be non-taxable?

Travel Benefits

- Meal expenses while traveling – probably taxable
- Hotel while traveling – Code usually limits cost to \$50
 - \$100 if necessary companion
- Mileage rate – strangely low 22 cents per mile
- Design it as a “lifestyle fund”? Up to \$x can be used on various lifestyle activities? Not directly tied to abortion (or medical care)?
 - Would someone actually administer it and review claims? Or just go with an employee’s statement that they had \$y in expenses?

Travel Benefits

- Illegal services – tough issue! Code says that a plan cannot provide tax-free benefit for “illegal operations or treatments”
- Can TPA just assume that abortion-related expenses are not “illegal”? Would medical provider really create a “paper trail” for an illegal service?
 - Act of civil disobedience? What if Ohio doctor had performed abortion on 10-year-old rape victim because doctor felt Ohio law was “unjust”?

Travel Benefits

- Does employer have enough information to determine illegality?
 - E.g., Texas letter where politicians argue it is illegal if drug is ingested in Texas (but ok, it seems, if ingested in another state)
- In what state is “illegality” determined?
 - E.g., suppose an abortion for a woman is illegal in Wisconsin but legal in Illinois. Woman drives from Wisconsin to Illinois and obtains abortion. Is “legal / illegal” status based on where woman lives? Where employer is based? Where plan is “based”?
 - Probably determined based on where service received
 - But, that probably only controls for federal tax purposes
- Is service “illegal” under Code (for tax purposes) if only penalty is civil, not criminal?

Travel Benefits

- Could a state provide that it's tax code does not “mirror” federal tax code? Idea is that state does not want to “subsidize” cost (through tax deduction) of abortion-related expenses
 - Almost certainly yes, state could do that
 - E.g., some states like New Jersey still do not follow tax treatment of health savings accounts (“HSAs”), in general
- At least one state, Kansas, makes abortion-related health benefits taxable at state level (not federal level)
- Seems to have required (since about 2013) that health FSA, HRA, health plan treat abortion-related reimbursements as taxable

Travel Benefits

- If benefit is taxable, can TPA track that?
- Will TPA report that to employer? Will this raise HIPAA / medical privacy concerns?
 - Some employers do not want to see this information. But if they must withhold income taxes from paychecks, must they?
- Will employer or TPA / PBM handle tax reporting and withholding?

Travel Benefits

- What “vehicle” should be used to provide the travel benefit?
- Existing health plan
 - Probably good from an administrative perspective
 - But, do not cover certain % of employee population
 - Does employer want to help that %?
- Employee assistance program (“EAP”)
 - Generally cannot provide “significant” medical benefits
 - No guidance yet from federal agencies
- Other types of plans? Separate medical? EBHRA? “Lifestyle plan”?

Abortion “Advertising”

- Many states used to prohibit the “advertising” of abortions
- Seems counterintuitive that an SPD which notes that an abortion is available is an “advertisement”
 - However, need to check how state defines it (e.g., Louisiana has a somewhat-broad definition)
- Arizona: “A person who wilfully writes, composes or publishes a notice or advertisement of any medicine or means for procuring or facilitating a miscarriage or abortion, or for prevention of conception ... is guilty of a misdemeanor”
 - Note that that includes both abortion AND contraception
- Any way to reduce risk?

Other Considerations

- Would paying benefits through a VEBA trust help with some of the criminal law aiding and abetting issues?
 - Make employer “one step removed”? But then who is liable?
- Will some TPAs / PBMs simply refuse to process these claims? Will all these claims get sent to a TPA / PBM in a “pro-choice” state?
 - Does anything like that exist in the marketplace now? Will it exist in the near future?
- Will TPAs / PBMs who refuse to process these claims lose all the business for a client?

Other Considerations

- High-deductible health plan issues if offer abortion / travel benefits on pre-deductible basis
- Mental Health Parity and Addiction Equity Act concerns, if offer travel for this medical benefit, but not for any MH / SUD benefits?
- Don't forget about “smaller” plans
 - E.g., reimbursements through health flexible spending accounts and health reimbursement arrangements
 - Same general rules usually apply (e.g., tax considerations)
 - HSAs: If you offer guidance to plan enrollees, consider what to say here (but no need to offer guidance to plan enrollees)

Questions?

Thank You

**For more information about BHCG programs
and membership, please contact:**

**Jeffrey Kluever
262-875-3312 X1
jkluever@bhcgwi.org**