

Employment Law Alert: Reimbursement or Travel Policies After *Dobbs*

What Employers Should Know

By: Rebecca F. Alperin and Matthew L. Mitchell
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Contemporaneous with the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, employers across the nation announced that they will set up reimbursement or travel policies intended to soften the financial impact for employees seeking out of state abortion access. Industry giants such as Amazon, Disney, Netflix, Microsoft, Dick's Sporting Goods, and dozens more, made such promises primarily by expanding coverage under the company's group health plan. Generally, large employers that pay for the medical bills of covered participants (i.e., self-insured employers) are able to determine for themselves what their plan will cover and the reimbursement amount under ERISA, a federal law which pre-empts state regulation of health plans. However, ERISA pre-emption may not prove to be a strong enough shield against state lawmakers given that such policies may implicate a host of other ERISA and state law considerations governing health insurance, employment, privacy, and state criminal laws. Further, small, and mid-size companies are likely to purchase group health insurance directly from insurance companies, which in turn pay the medical expenses. These fully insured plans are subject to state insurance laws, the landscape of which is changing daily.

Reimbursement or travel policies are rapidly becoming a market benefit and employers are urged to consult with counsel on the legal risks and obligations in order to implement policies that are designed to withstand the multitude of expected challenges. At a minimum, consideration must be given to:

1. *ERISA and State Law Health Insurance Compliance*

- Does the company offer group health insurance and if yes, is it self-insured or fully funded? Although self-funded plans generally fall under ERISA pre-emption, ERISA does not preempt "generally applicable" state criminal law.
- Is the third-party administrator willing and/or able to administer a reimbursement or travel benefit?
- Is the policy run through the health plan or is it intended to stand alone as a separate policy? If the policy is a separate policy outside of the health plan, a separate group health plan may have inadvertently been created which may not satisfy the Affordable Care Act's coverage rules. Alternatively, a pre-determined fixed dollar amount or stipend may be considered.
- Is the policy limited to medical expenses or treatment for medical conditions? If yes, the policy may run afoul of the Mental Health Parity and Addiction Equity Act which requires parity between medical treatments and mental health and substance use disorder benefits.

2. *State and Federal Anti-Discrimination Laws*

- Is the policy applicable to all employees? A policy should be careful not to exclude any employee based upon a protected class under both state and federal law, meaning employers should stay away from policies geared only towards one sex or gender.

Also, any information obtained under these policies should not be used in making employment decisions. As with any policy, those charged with administration should be trained on the fair and consistent administration of the benefits offered thereunder.

3. *State and Federal Privacy Laws*

- Are HIPAA's privacy rules applicable to such policies? Policies that run through the company's group health plan are subject to HIPAA's privacy rules and would fall under the company's established HIPAA policies and procedures. In contrast, HIPAA would not apply to an arrangement outside of a group health plan and therefore a covered individuals' protected health information would not be covered. It is a difficult prospect to ask employees to share personal and medical-related information with their employer – and in some circumstances, ill-advised. In either case, a company's possession of such information triggers additional concerns over how private employee information is held, stored, accessed, and produced. Such concerns may lead to other compliance issues under both state and federal laws, such as the Americans with Disabilities Act, Title VII, and state privacy laws.
- Is the company at risk of discriminating against women under a disparate impact claim?

4. *Potential State Criminal Laws*

- Is a Company sponsor of such a policy at risk for liability under state criminal laws? The lay of the land in this area is rapidly changing and varies by state. It is conceivable that as states further develop their laws, employers that sponsor such policies may (i) have to produce employee health information in response to a subpoena, (ii) be held criminally liable for aiding and abetting, or (iii) be blocked from doing business in a state with restrictive abortion laws.

This client advisory is intended to highlight for employers the need to carefully review such policies with counsel before adoption. It is not intended to express the opinion of the authors or Firm on the merits of the Supreme Court's opinion or state statutes eliminating or restricting the right to abortion.

Please contact [Rebecca Alperin](#) or [Matthew Mitchell](#) should you have questions concerning this subject.