

WEBINAR SERIES

Roe v. Wade: What Businesses Need to Know

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Today's Presenters



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Seth Perretta is a Principal at Groom Law Group, a Washington, DC law firm that focuses exclusively on employee benefit matters. Seth interfaces regularly with federal agency regulators and advises clients on legislative and regulatory developments.

Today's Agenda

- Background/Level Setting
- Notable Recent Federal Developments
- Dobbs – Potential Employer Implications
- Travel Benefits
- Preemption

Webinar Forum

All participants are muted.

Please type questions in the side navigation panel and we will try to address most questions during today's session.

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Background/Level Setting

Roe generally held that:

- statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional;
- that prior to approximately the end of the first trimester the abortion decision must be left to medical judgment (patient + doctor);
- after the second trimester (24-28 weeks) the state may regulate and/or prohibit abortion except where necessary for preservation of life or health of mother

Dobbs v. Jackson Women's Health Organization

- At issue: Mississippi law that bans abortion after 15 weeks of pregnancy (i.e., pre-viability)
- Question presented/granted: “Whether all pre-viability prohibitions on elective abortions are unconstitutional”
- **Court held that the U.S. Constitution does not confer a right to abortion (and thus such prohibitions are constitutional)**
 - **Overrules *Roe* and its progeny**
 - **The authority to regulate abortion is returned to the people and their elected representatives (subject to lowest standard of review, “rational basis”)**

- Extent of coverage requirements for abortion for employers
 - No federal requirement to cover elective abortions
 - For employers with 15+ employees who sponsor a group health plan, the Pregnancy Discrimination Act (“PDA”) requires that the plan cover (1) an abortion where the life of the mother is at risk if the pregnancy is carried to term, and (2) complications arising from an abortion
 - Generally not an essential health benefit (but may depend on state benchmark)
 - Accordingly, employer plans generally have flexibility regarding whether, and to what extent, to cover abortions
 - BUT, remember that state insurance laws are generally not preempted and thus may require a carrier to issue a policy that includes benefit mandates as well as benefit restrictions/prohibitions depending on the state of issuance

State of the State Laws*

In 2022 alone:

- Abortion restrictions were enacted in 11 states
- Protective measures designed to protect access were enacted in another 11 states
- Abortion bans enacted in 6 states
- 3 states restricted access to medication abortions (KY, SD and TN)
- At least 6 states currently require insurance coverage of abortion (CA, IL, ME, NY, OR, WA)
- Many states prohibit insurance coverage of abortion, although the numbers vary depending on the type of coverage (e.g., Exchange coverage, private insurance, public insurance) and there may be exceptions (e.g., life, health)

*As of 7/19/22; the state of state laws may change rapidly; confirm any state law before making decision(s)

State of the State Laws*

But.....many states have pre-2022 laws on the books:

- Civil Laws
 - Give private citizens right to sue
 - Directed at providers (e.g., TX)
 - Aiding and abetting (e.g., TX)
 - States enforce directly
 - Clearly directed at providers (almost all states)
- Criminal Laws (states enforce)
 - Directed at providers (almost all states)
 - Using “any means” intended to cause an abortion (e.g., OK)
 - Furnishing the means to procure an abortion/“aiding and abetting” an abortion (e.g., TX/AL)
 - Publication of a notice or advertisement of abortion-related products or services (e.g., ID)
- *As of 7/19/22, the state of state laws may change rapidly; confirm any state law before making decision(s)



Notable Recent Federal Developments

7/8/22 – Executive Order on Protecting Access to Reproductive Healthcare Services –
Calls on federal agencies to take actions to:

- Safeguard access to reproductive health care services, including abortion and contraception;
- Protect the privacy of patients and their access to accurate information;
- Protect the privacy of patients and their access to accurate information; and
- Coordinate the implementation of Federal efforts to protect reproductive rights and access to health care

HHS Guidance/Releases:

- 6/29/22 – **HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care** (<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html>)
- 6/29/22 – **Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone¹ or Tablet** (<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html>)
- 7/11/22 – **HHS letter to hospitals issuing clarifying guidance on the Emergency Medical Treatment and Active Labor Act (EMTALA) with respect to abortion services in emergency situations**
- 7/13/22 – **Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services** (<https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf>) (From OCR)
- 7/26/12 – **HHS issues proposed ACA section 1557 regulation** (<https://www.hhs.gov/sites/default/files/section-1557-nprm.pdf>)



Dobbs – Potential Employer Implications

Dobbs – Potential Employer Implications

- Employees may lose access to abortion coverage and related services
- May impact coverage/benefits under employer-sponsored plans
- Potential exists for service providers (such as carriers, TPAs, PBMS, and other) to cease administering plan benefits because of potential concerns about civil and criminal liability
- Some employers are considering (or have already begun offering) a travel benefit to assist employees in accessing abortion-related services and medications



Travel Benefits

Travel Benefits – Employer Considerations

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- Tax considerations (“transportation primarily for and essential to medical care” = medical expense under the Code)
- ERISA application
- HSA considerations
- Privacy considerations (e.g., HIPAA and substantiation)
- MHPAEA compliance

Travel Expense Reimbursements

Medical care under Code section 213(d) includes expenses for:

- transportation primarily for and essential to medical care
- amounts paid for lodging (not lavish or extravagant under the circumstances) while away from home primarily for and essential to medical care if—
 - the medical care is provided by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital), and
 - there is no significant element of personal pleasure, recreation, or vacation in the travel away from home

Travel Expense Reimbursements

3 categories:

- Transportation – yes, with certain limits
 - taxis, buses, trains, airplanes, rental cars
- Meals – generally not
- Lodging – yes, up to \$50/day (\$100/day if companion travels)

Travel Expense Reimbursements

Companion travel

- Can be medical care if necessary to enable the person to receive the medical care
- Example where necessary:
 - Parental consent
 - Waiting periods
 - Sedation

Travel Expense Reimbursements

Inside vs. outside the major medical plan/policy

- Inside
 - Limited to employees in the plan or covered by the policy
 - May need to amend the plan or add rider/endorsement in case of insured policy
 - May bolster preemption if states try to limit travel benefits (since that law would be directed at health plan and not the provider)
- Outside
 - Can be available to all employees (and their spouses and dependents and others)
 - But likely creates a mini-group health plan
 - EAP?
 - Could utilize FSA (but note limited nonelective employer contributions)
 - May need to exclude from income even if offered outside the plan/policy



Preemption

- ERISA shall “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ...” ERISA 514(a).
 - The courts have generally construed ERISA’s preemption provision to find that ERISA preempts a state law that has an impermissible ‘connection with’ ERISA plans, meaning a state law that ‘governs ... a central matter of plan administration’ or ‘interferes with nationally uniform plan administration.’
 - *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016) (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). (The Court in *Gobeille* held Vermont’s all payers claim database preempted as to self-funded plans)

ERISA does not preempt:

- State insurance laws (e.g., state benefit mandates)
- Criminal laws “of general applicability”
- Civil laws that have a mere “indirect economic influence” – “An indirect economic influence ... does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself ... Nor does the indirect influence of the surcharges preclude uniform administrative practice or the provision of a uniform interstate benefit package”
 - *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)
- Civil laws that solely result in cost regulation – “[M]ere[] form[s] of cost regulation ... was almost certainly not an object of pre-emption. ... Nor is the effect of Act 900 so acute that it will effectively dictate plan choices.”
 - *Rutledge v. PCMA*, 141 S. Ct. 474, 481 (2020)

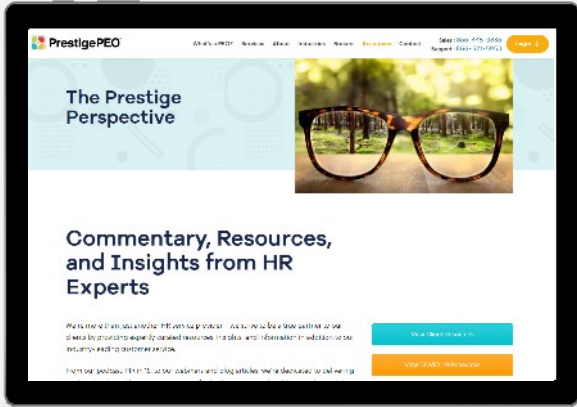
ERISA Preemption Summary

- ERISA would likely preempt:
 - state civil or criminal laws directed specifically at prohibiting a self-insured health plan from covering abortions or providing travel benefits
 - state civil or criminal laws directed at prohibiting plan service providers (such as PBMs and TPAs) from administering benefits related to abortions or travel benefits for abortion
- ERISA may not preempt:
 - state regulation of provider scope of practice
 - state insurance laws directed at prohibiting coverage for abortion or abortion-related travel benefits
 - state criminal “aiding and abetting” type laws
- BUT remember, even if ERISA does not preempt, other defenses (e.g., extraterritoriality, jurisdictional challenges, constitutional defenses) and/or bases for preemption (e.g., under the Pregnancy Discrimination Act) may be available



Questions / Comments / Discussion?

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