

## Blog Post

# Employers Concerned About State Abortion Access Restrictions Weigh Options for Medical Travel Reimbursements

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There has never been an ERISA requirement to include elective abortion medical coverage in ERISA group health plans. Even so, many nationwide employers choose to offer it alongside non-elective abortion medical coverage. Among those employer plan sponsors, there is new concern about how plan participants can practically access this covered medical care, if expensive travel to other states becomes necessary. Between concerns raised by the Supreme Court's ruling in the *Dobbs v. Jackson* case (holding that the United States Constitution does not confer a right to abortion) and a sharp increase in state legislation restricting abortion care, growing numbers of these employers want to proactively address new geographic gaps in healthcare access. As employers continue to consider design options, they will need to evaluate a number of factors, including:

- **Messaging and Tone.** A company's corporate culture will drive much of this conversation, both from the perspective of evaluating options, as well as implementing and announcing any definitive enhanced medical travel offerings. Even in situations in which the company leaders are uniformly supportive of removing barriers to

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abortion access, individual employees and/or their family members may have differing opinions and life experiences that have shaped how they will interpret any employer messages about this sensitive and deeply personal topic. One practical observation on this point relates to the infertility benefits, which may or may not be covered within the employer's health plan. For plans that cover abortion care but which do not cover infertility treatments, empathetic and respectful messaging will be critical, in anticipation of the potentially emotional response of plan participants who may be struggling with infertility, and who may therefore experience a well-intentioned message of support in ensuring continued abortion access as some type of disconnect in corporate support for other aspects of family planning.

- **Existing Benefit Offerings.** Before implementing any abortion travel care benefit, employers should evaluate existing company benefits related to abortion care, reproductive care, and other related benefits. In recent years, many employers in a variety of competitive industries, seeking to recruit and retain top talent have broadened offerings designed to appeal to employees at an individual and family level. Oftentimes these changes have coincided with updates to statutes and other guidance governing a variety of benefits (i.e., paid family leave, gender-affirming care, fertility benefits, etc.). Given the changing legal landscape, it is not surprising that this is a time to focus on abortion access topics. Practically, employers announcing any abortion care travel reimbursement updates should anticipate an uptick in inquiries related to other offerings as well.
- **Group Health Plan Design.** Many employers are offering abortion travel reimbursement (alongside other medical travel reimbursement) under their existing group health plans. Others do not. From a design perspective, for ERISA-governed group health plans, fully-insured plans will need to

comply with state coverage requirements and so will be limited in exercising discretion in this area. In contrast, self-insured plan sponsors that do not currently address travel reimbursements but wish to amend their plans to add broad medical travel funds will likely have more practical flexibility to reach its own decision. To the extent that such an employer decides to move forward with a plan amendment upon the Supreme Court's decision announcement, employers are well advised to prepare to address the following:

- Evaluate the impact of changes on existing plan tiers, like high deductible health plans coupled with health savings accounts (HSAs);
  - Consider implementing a broad benefit that would cover employees who need to travel to access a variety of healthcare services outside of their current geographic region; and
  - Be willing to maintain the flexibility necessary to react to evolving legal questions. For example, courts have yet to interpret the interaction between ERISA's preemption clause and the newer laws restricting abortion access. For example, ERISA does not preempt criminal laws. With the Supreme Court overturning *Roe*, some states are already poised to criminalize actions that "aid" or "abet" abortion. Given that this is an evolving area of the law, employers are working closely with carriers and third party administrators to design reimbursement benefits that keep them in the middle of the pack.
- **Privacy Implications.** Employee medical decisions are protected under a number of federal and state privacy laws. Many employers are navigating a complex set of privacy questions as they design travel reimbursement benefits. One practical observation is that employers may be incentivized to take a "less is more" administrative approach by designing programs that refrain from collecting medical information

at the employer level (including for purposes of granting leave).

- **Tax Implications.** Travel reimbursement benefits are typically taxable unless the benefits are tax-qualified under the Internal Revenue Code. Notably, reimbursement for travel to receive medical services *is* considered a tax-qualified medical expense under Code Section 213(d), to the extent that travel is “primarily for and essential to medical care.”
- **Stand-Alone Offerings.** Some employers are offering abortion travel reimbursement outside of their group health plans – either as “relief funds” or under other ambiguous reimbursement systems. Due to privacy and security concerns, as well as inadvertent group health plan compliance challenges if the population of eligible people differs from the population of the group health plan itself, this option can create challenges. In short, employers should be wary of unwittingly establishing a new group health plan subject to federal regulation, or even collecting information internally that is extremely sensitive and subject to federal and state privacy laws.

Regardless of what employers ultimately decide, it is clear that employers should chart a path forward now. If you have questions about your benefit design options please contact your Akerman attorney.

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