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Employer-Covered Abortion Travel Draws ‘Unprecedented Interest’

By Sara Hansard

May 5, 2022, 5:25 AM

- State abortion bans would affect benefit design
 - Health plans can change coverage rules mid-year
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Large companies that fund their employees' health care are contacting their lawyers about how to continue abortion coverage if the U.S. Supreme Court overturns *Roe v. Wade* as indicated in a leaked draft opinion.

"As attorneys, we're getting unprecedented interest from clients who are looking for ways to continue abortion coverage," Sarah Raaii, a senior associate in the Chicago office of **McDermott Will & Emery** LLP, said in an interview.

"An overturning of *Roe v. Wade* would create a serious challenge for employers who want to provide abortion coverage to employees and their families," she said.

If the high court overturns the landmark 1973 decision, large employers that operate self-funded health plans under the Employee Retirement Income Security Act (ERISA) could add provisions for beneficiaries in states that restrict the procedure to travel to other states to get abortion services. Most self-funded plans don't currently have such provisions, ERISA attorneys say.

Some companies, such as Citigroup and Amazon, have taken steps to help workers access abortion services.

The Guttmacher Institute, which researches sexual and reproductive health and rights worldwide, says 26 states "are certain or likely" to ban abortion without *Roe*.

There could be “a cascading effect,” with more states implementing restrictions, Jamila Taylor, director of health care reform and senior fellow with The Century Foundation, a progressive think tank, said in an interview. For example, Oklahoma Gov. Kevin Stitt (R) signed a bill into law Tuesday modeled after a Texas law (S.B. 8) that bans abortion after six weeks of pregnancy and allows private parties to sue for damages.

‘Continuity of Care’

“Virtually all major medical plans cover some form of pregnancy termination,” James Gelfand, executive vice president of public affairs for The ERISA Industry Committee, which represents large companies that sponsor employee benefit plans, said in an email.

“If *Roe* is overturned, and some states outlaw these services, it is likely that many group health plans will seek to implement continuity of care—either by travel benefits, increased reliance on telehealth paired with mail-order pharmacies, or other means.”

There has been “a limited degree of this in the wake of the Texas law,” Gelfand said. “While none of the state laws so far have attempted to change the terms of ERISA plans, they would certainly affect benefit design,” he said.

What companies can do depends on the type of health plan they sponsor for their employees. If they assume financial risk associated with their employees’ health by paying for the care—as most large employers do—those benefits are subject to ERISA and aren’t governed by state insurance laws.

ERISA doesn’t restrict abortion coverage, and states don’t regulate ERISA plans.

ERISA plans covered 64% of U.S. workers in 2021, according to the consumer data company Statista.

Covering Travel

Most health plans don’t cover travel expenses. If they do it’s usually to medical centers of excellence that provide high-value services, Roberta Casper Watson, a partner in the Tampa, Fla., office of The Wagner Group, said in an interview.

Employers with self-funded plans could change their coverage allowances in the middle of a plan year to allow for travel costs and coverage of non-network abortion providers as long as employee premiums don’t change, Watson said. Employers must give workers notice of benefit changes and wait until a new plan year to tinker with premiums.

Funding for travel could be part of a group health plan, but it’s more likely employers would look to medical expense accounts, such as flexible spending accounts or health reimbursement accounts, to cover travel expenses, Danae Delano, a partner in The Wagner Group’s St. Louis office, said in an interview.

“Travel to receive medical services is considered a medical expense, so it could be expensed under something like that,” Delano said. Those types of tax-advantaged accounts are generally funded by employee contributions and employers may also contribute to them.

Raaii said there would likely be additional administrative burdens connected with reimbursing travel. “Just keeping track of the patchwork of state legislation” would be difficult, she said.

Lawsuit Vulnerability

Employers that provide travel expenses for abortion could run afoul of state laws like the Texas statute that allows citizens to sue providers for abortions performed after a fetal cardiac activity around six weeks, Raaii said.

“If a state wants to interpret this very broadly—and it seems that some of them have indicated that they do—to really just punish anyone involved even peripherally with providing abortion in the states, employers could potentially be at risk.”

Employers that don’t offer self-funded plans need to be aware of changes in state abortion laws because their health plans are covered by state insurance laws rather than ERISA. Those employers offer health benefits in which they pay a premium and an insurance company takes on the financial risk of employee health claims. They’re called “fully insured” plans.

States can regulate “how fully insured plans in their state cover abortion,” Taylor said.

Eleven states have laws in effect restricting insurance coverage of abortion in private insurance plans, like fully insured employer plans, written in the state. Those state laws also cover private plans offered through health insurance exchanges established under the Affordable Care Act.

Six states require abortion coverage in private health insurance plans, Guttmacher says.

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