

# COMPLIANCE BULLETIN

## Employer Considerations for Coverage of Abortion Benefits

In anticipation of the U.S. Supreme Court's decision in [Dobbs v. Jackson Women's Health Organization](#) that overturned *Roe v. Wade*, states have enacted various laws regarding insurance coverage of abortion. Some states have banned or restricted abortion coverage, while other states require plans to cover abortions.

Certain states (such as Oklahoma and Texas) now enable individuals to bring civil lawsuits against anyone who assists in the performance or inducement of abortion, including paying for or reimbursing the costs of the procedure through insurance or otherwise. It is unclear whether individuals can sue companies that cover travel expenses for legal out-of-state abortions.

This Compliance Bulletin outlines the factors for employers to consider regarding providing abortion-related benefits. However, many of the issues surrounding these types of benefits remain open questions at this time. Legal challenges to these laws are already underway, and more are expected in the future.

### Action Steps

Employers may need to closely analyze any abortion benefit offered under their group health plans to ensure full compliance with applicable restrictions. Carriers and third-party administrators may be able to provide information regarding specific plan provisions. Depending on the situation, employers may also wish to consult with an employee benefits attorney regarding compliance.

### Types of Coverage Rules

#### Coverage Mandate

Some states require abortion coverage in private health insurance plans; some require plans to cover abortion with no copayments, while others require abortion coverage if the plan covers prenatal care.

#### Restricted Coverage

Some states limit abortion coverage to certain circumstances, such as where there is life endangerment or in cases of rape, incest or fetal abnormality. States may recognize one or more of these circumstances, and coverage typically depends on the type of plan.

#### Total Ban

Some states prohibit abortion coverage.

### Important Dates

#### June 24, 2022

The Supreme Court overturned *Roe v. Wade*, which held that there is a constitutional right to decide whether to continue a pregnancy and states generally may not regulate a woman's abortion decision prior to fetal viability. Going forward, states can establish their own laws to regulate or prohibit abortion.



## Coverage of Abortion Benefits

There are a number of ways coverage of abortion-related expenses may be provided through a health insurance plan. Several factors may affect the benefits that are offered, such as plan funding (fully insured or self-funded), location, tax considerations and the applicable state regulation (such as whether coverage is required or prohibited).

### Federal Law

Two key laws address abortion benefits at the federal level: the Pregnancy Discrimination Act (PDA), which amended Title VII of the Civil Rights Act of 1964, and the Affordable Care Act (ACA). The PDA applies to employers with **15 or more employees**, including state and local governments.

#### *Pregnancy Discrimination Act*

The [Pregnancy Discrimination Act \(PDA\)](#) protects women from being fired for having an abortion or contemplating having an abortion. It also prohibits adverse employment actions against an employee based on their decision not to have an abortion. For example, it would be unlawful for a manager to pressure an employee to have or not to have an abortion in order to retain their job, get better assignments or stay on a path for advancement.

#### **Insurance Coverage of Abortion**

The PDA makes clear that if an employer provides health insurance benefits, it is not required to pay for health insurance coverage of abortion, except where the life of the mother would be endangered if the fetus were carried to term or medical complications have arisen from an abortion. If complications arise during the course of an abortion, the health insurance plan is required to pay the costs attributable to those complications.

In addition, an employer's health plan is permitted to provide health coverage for an abortion, although not required. If the plan covers the costs of abortion, it must do so in the same manner and to the same degree as it covers other medical conditions. Potential problems could arise, for example, if the plan covers abortions but on different terms and conditions than those that apply to other medical conditions, or if the plan provides comprehensive medical benefits but doesn't cover abortion when the life of the mother would be endangered if the fetus were carried to term.

*Open Issue:* Whether the PDA's protections will play a role in cases involving state anti-abortion laws.

#### *Affordable Care Act*

The Affordable Care Act (ACA) does not require abortion coverage beyond what is already required under Title VII, as amended by the PDA. According to [Executive Order 13535](#), the ACA was intended to maintain the abortion-related restrictions found in existing law ("Hyde Amendment" restrictions) at the time of the ACA's enactment. Under the ACA, federal laws to protect conscience (such as the Church Amendment and the Weldon Amendment) remain intact, and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of or refer for abortions.

### State Law

While there is no specific mandate or ban on covering abortion costs at the federal level, many states have passed their own regulations regarding abortion coverage. In the wake of the *Dobbs* decision, more states are likely to ban or restrict



abortion coverage under all health plans. **The scope of benefits that may be provided by a health plan will depend on the specific restrictions that are imposed at the state level.** This section outlines key state law issues to consider.

## ***Extraterritorial Jurisdiction***

In states like Texas and Oklahoma that bar “aiding and abetting” the procurement of illegal abortions, it remains to be seen how these laws will apply to employers providing benefits for their employees to receive legal out-of-state abortions. While the plain text of the laws state that paying for or reimbursing the costs of abortion “through insurance or otherwise” is prohibited, it is unclear whether, and to what extent, this would apply to coverage of lawful out-of-state procedures. This type of jurisdictional issue will likely need to be decided in court.

***Open Issue:*** The extent to which one state’s insurance laws will apply to employers’ reimbursement of travel expenses for employees to procure out-of-state abortions.

## ***ERISA Preemption***

In general, **self-insured health plans** are not subject to state insurance laws because of the preemption clause of the Employee Retirement Income Security Act of 1974 (ERISA). If a self-insured plan is not subject to ERISA, ERISA’s preemption clause does not apply, and the plan may be subject to state laws. Similarly, state insurance laws generally apply to ERISA-covered **fully insured health plans**.

ERISA preemption could potentially be used as a defense for self-insured health plans providing abortion benefits in states that regulate abortion. However, it is unclear whether a state law criminalizing the practice—or state laws that prohibit persons from “aiding and abetting” the procurement of illegal abortions—could be used against employers providing abortion benefits through self-insured, ERISA-covered plans.

***Open Issue:*** Whether ERISA’s preemption provisions can be used as a defense in any potential criminal or civil case brought under state anti-abortion laws.

## **Tax Considerations**

As with any employee benefit, employers will also have to analyze the tax treatment of abortion-related coverage. Legal abortions are considered a deductible qualifying medical expense (for which Health Savings Account, Health Reimbursement Account and Flexible Spending Account funds may be used on a tax-free basis). However, the open legal questions regarding reimbursing travel-related expenses for out-of-state abortions may also affect tax treatment. Employers may need to consult with a tax advisor on any questions regarding the tax implications of these benefits.