

JULY 14, 2022 | STATE & LOCAL TRENDS

After the Supreme Court's Ruling in Dobbs, Employers Explore Options in Providing Travel-for-Care Benefits



In the wake of the U.S. Supreme Court's decision in *Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization, et. al.*, employers across the country have faced uncertainty in how to navigate the various federal and state laws regarding health-related services for their employees. This is particularly challenging for employers in states that have laws that provide for criminal liability. The *Dobbs* decision may impact how employers modify their employee benefit plans or create new plans to cover the cost of travel and lodging for medical care, including abortion, that require travel out of state.

Texas' bounty law is likely the most novel and we have received many questions on whether a company could face criminal liability under that statute for providing benefits to travel of state. Texas Senate Bill 8 prohibits physicians from performing or inducing abortions if the physician detected a fetal heartbeat or failed to perform a test to detect a fetal heartbeat. Notably, this law authorized a private civil right of action – allowing any individual in the state of Texas to bring a civil action against any person [which while undefined in the Bill, in other contexts in the Texas code, does include corporations] who:

(1) performs or induces an abortion in violation of this subchapter;

(2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or

(3) intends to engage in the conduct described in subdivision (1) or (2).

See TX SB8 Sec. 171.208

If a company wanted to offer coverage for procuring abortions in other states through its health benefit plans, there are several legal considerations that the company should be aware of. First, under TX SB8 Sec. 171.208 (2), it is unlawful for any individual to *aid or abet* an individual in procuring an abortion. The Texas statute specifically prohibits “abortion[s] of unborn child[ren] with detectable fetal heartbeat[s]” and outlaws the

conduct of physicians that “knowingly perform or induce an abortion on a pregnant woman if the physical detected a fetal heartbeat.” The statute itself defines a physician as “an individual licensed to practice medicine in this state.” So, the violations referenced in the statute arguably are limited only to those abortions conducted contrary to the statute by Texas physicians. If an organization’s health plan allows, as a benefit, costs to be recovered for traveling to procure an abortion in another state – then that would not be an action that would incur civil liability by a Texas physician. The statute legislates that abortions performed by Texas physicians are unlawful; it does not refer to travel to other states, and no court has yet opined on the scope of the statute in that context. But, even if a lawsuit was brought under that theory, the company could raise the general presumption against extraterritorial application of state law.

Second, the third subsection in the civil liability clause of the statute creates liability for any individual that “intends to engage” in the conduct described in TX SB8 Sec. 171.208 (1) or (2). It remains an open question as to how courts will define the word “intend,” however, a strict reading of the statute should limit violations to abortions performed solely by Texas physicians. Thus, a policy that assists employees in procuring abortions by non-Texas physicians should not run afoul of the legislation as written.

Additionally, if the benefit plan is subject to ERISA, then the employer should be immune from civil or criminal causes of action brought under state law, to include SB 8. Under Section 514 of ERISA, “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” will be preempted. The Supreme Court has broadly interpreted the “relate to” provision as encompassing any state law that “has a connection with or reference to” an employee benefit plan. In this case, SB 8 would be mandating what the plan might cover, directly relating it to the benefit plan, and preempting it from any cause of action under state law.

In response to SB 8 other states such as California, New York, New Jersey, Connecticut, and Washington have either enacted or introduced laws to counteract any broad interpretation of Texas’ aid and abet clause. For example, California’s AB 166 states that Texas’ law is against public policy in the state, and bars California courts from hearing any litigation based on the Texas statute (though such a suit would not have standing to continue in the state anyway). Whereas Connecticut enacted a law that blocked other states from issuing subpoenas on lawsuits related to those states’ abortion bans. On the other hand, we may see other states take stricter action than the Texas civil private right of action and may try to expressly limit the rights of companies to reimburse for abortion care related travel expenses. Certainly, given the Supreme Court’s decision in *Dobbs*, states across the country will be divided over how they handle these types of issues and will require close monitoring depending on the specific facts and states at play. We expect there will be significant litigation and legislation to come. Assessing the risks associated with expanding or modifying benefits in light of the patchwork of state laws will be critical and companies will be well advised to seek counsel before proceeding, particularly in those states with criminal liability.