



Employee Benefits Considerations for a Post-Roe Workplace

EMPLOYEE BENEFITS CONSIDERATIONS:

- ❑ **How Is Your Group Health Plan Currently Designed?**
 - **Is your group health plan self-funded or fully or partially insured?**
 - » If it is self-funded, consider how ERISA preemption may apply to abortion benefits offered under the group health plan.
 - » If it is fully or partially insured, be aware that state insurance law implications on permissible types of coverage may be relevant.
- ❑ **Medical-Related Travel Expenses and Benefits:**
 - **How are travel expenses described and covered under the group health plan?**
 - » Are travel expenses specific to abortion care or other specified services, or are they provided for medical care in general?
 - » Does the group health plan currently provide categories of coverage for travel for certain types of medical care (e.g., certain surgeries or medical benefits not available geographically or for which standards of care are improved at a distant facility/provider)?
 - **What types of benefit plans provide travel benefits for medical care?**
 - » Are your travel benefits offered in the ERISA group health plan as an ancillary benefit for medical care, under a separate reimbursement plan, or elsewhere?
 - » Consider the types of reimbursement plans that may provide for travel expenses relating to medical care, such as health savings accounts (HSAs), flexible spending accounts (FSAs), and health reimbursement arrangements (HRAs), and whether the travel expenses meet the requirements for reimbursement of travel substantially for medical care.
 - **Where are you offering benefits for medical care or travel expenses?**
 - » Review where your employees reside and what state/local legislation is relevant.
 - » Are you located in a state with “trigger laws” that will go into effect now that *Roe v. Wade* is overturned? There are states with existing laws on the books that were never removed and will go back into effect, states with legislation that will take effect now that *Roe v. Wade* is overturned, and states that have proposed legislation currently being debated by state governments.
 - » What do these state laws prohibit? For example, are the enforcement mechanisms criminal and/or civil?
 - Review how “abortion” is defined and what conduct is prohibited.
 - Ask whether TPAs/employers have criminal or civil liability for inducement, aiding, abetting, or other potential liability in offering abortion services for circumventing abortion laws.
 - Consider whether bounty-hunter laws have any particular implications on TPAs/employers for coverage of abortion services / facilitating access by paying for travel costs, etc.
 - Consider whether any exemptions apply.
- ❑ **Are Any Special Telehealth and/or Health Care Features Applicable to Your Group Health Plan?**
 - Review whether the group health plan covers long-acting reversible contraceptives (LARCs) that may prevent implantation of a fertilized zygote, in vitro fertilization, and other assisted reproductive technologies.
 - Consider how medical providers across the country will receive reimbursement from employer group health plans.
 - Review how group health plans logistically reimburse providers across the country that do not have any relationship with the plan, e.g., are not in-network.
 - Consider TPA/employer liability for coverage of a medically necessary abortion in a state that only permits abortion in strict circumstances (e.g., health/life of the individual giving birth).
 - » Contested medical necessity—how might a TPA/employer be liable if it determines the abortion was medically necessary but another party or the state objects?
 - Analyze the economic impact on the group health plan for coverage of a higher number of pregnancies or coverage of more expensive/high-risk pregnancies.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

If you are a health care provider or life sciences organization with questions about how the decision affects your business, please contact Amy Dow at adow@ebglaw.com. If you are an employer with questions about your workplace policies or benefits offerings, please contact Susan Gross Sholinsky at sgross@ebglaw.com.