Bloomberg Tax

Tax Management
Compensation Planning Journal™

Reproduced with permission from Tax Management Compensation Planning Journal, 50 CPJ 8, 08/05/2022. Copyright © 2022 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

Group Health Plan Abortion-Related Travel Benefits in the Aftermath of Dobbs: Probing the Limits of ERISA Preemption

By Alden J. Bianchi and Marc N. Aspis[*]
Mintz P.C.
Boston, MA

On June 24, 2022, the Supreme Court issued its highly anticipated decision in *Dobbs v. Jackson Women's Health Organization*.[1] The decision explicitly reverses *Roe v. Wade*,[2] thereby radically altering the legal and political calculus of the debate over access to abortion. The Court overturned nearly 50 years of precedent on broad grounds, which, among other things, impacts the rights of women to make decisions and seek medical treatment respecting their reproductive health. In response to *Dobbs*, more than a few employers have signaled a willingness to reimburse travel costs under their group health plans for employees who reside in states that bar abortions to states in which the procedure is permitted.[3] Pushback in the form of state laws seeking to deter the reimbursement of abortion-related travel costs is to be anticipated, and it is indeed already in the works.[4]

It is estimated that some 26 states are now either likely or certain to ban abortion. Certain states have so-called ''trigger'' laws that will quickly cause dormant abortion bans to now take effect. Some states have already enacted laws barring the aiding and abetting of the performance or inducement of an abortion, and other states are likely to follow suit. These laws may aim to hold employers and insurance carriers criminally liable for paying for or reimbursing the costs of abortion and abortion-related services such as travel.

The Employee Retirement Income Security Act (ERISA)[5] generally preempts state laws that seek to constrain the design of employer-sponsored group health plans.[6] ERISA also preempts state efforts to add or adjust remedies for benefit-related claims.[7] States seeking to regulate abortion-related travel benefits must first navigate this formidable federal statutory infrastructure. While ERISA preemption is robust, it is not, however, absolute. Critically, ERISA regulates state civil laws more aggressively than criminal laws. While the former are preempted to the extent that they ''relate to'' employee benefit plans, the latter are preempted only when they target employee benefit plans. State criminal laws of general applicability are not preempted.

---

[*] Alden is the practice group leader of Mintz P.C's Employee Benefits & Executive Compensation Practice. He advises corporate, not-for-profit, governmental, and individual clients on a broad range of executive compensation and employee benefits issues, including qualified and nonqualified retirement plans, stock and stock-based compensation arrangements, ERISA fiduciary and prohibited transaction issues, benefit-related aspects of mergers and acquisitions, and health and welfare plans.

Marc, an associate at Mintz P.C., handles transaction-related tax matters pertaining to employment benefits and compensation and also provides compliance counseling related to employment retirement plans, ERISA, and Pension Benefit Guaranty Corporation (PBGC) regulations. He regularly conducts tax and employee benefits/executive compensation due diligence for mergers and acquisitions and other commercial transactions.

This article may be cited as Alden J. Bianchi and Marc N. Aspis, *Group Health Plan Abortion-Related Travel Benefits In the Aftermath of Dobbs: Probing the Limits of ERISA Preemption*, 50 Tax Mgmt. Comp. Plan J. No. 8 (Aug. 5, 2022).

[1] 142 S. Ct. 2228 (2022).

[2] 410 U.S. 113 (1973).

[3] *See, e.g.*, Karl Evers-Hillstrom, *These Companies will Cover Abortion Travel Costs for Employees*, The Hill (June 24, 2022).

[4] *See, e.g.*, Missouri HB 1987 (2022).

[5] Pub. L. No. 93-406 (codified as amended at ERISA §2 *et seq.*).

[6] ERISA §514. Church and governmental plans are not subject to ERISA, and thus ERISA preemption does not apply to those types of plans.

[7] ERISA §502.

This article addresses the narrow question of enforceability of abortion-related travel benefits in the face of what is anticipated to be a burgeoning number of state laws seeking to bar or even criminalize their adoption — to what extent will ERISA thwart a state's effort to ban not only abortion but abortion-related travel under its civil or criminal laws?[8] There is also the separate, but critically important, issue of the extraterritorial application of state law. Under what circumstances may a state that bans abortion apply its laws, civil or criminal, to abortions procured by its citizens in another state that does not do so? This is an undeveloped area of law that is beyond the scope of this work.[9]

THE REGULATION OF GROUP HEALTH PLANS AND THE IMPACT OF ERISA

The extent to which employers can leverage group health plan design in support of their employees' reproductive rights generally depends on the manner in which the employer health plans are funded:

- Fully insured group health plans, which are subject to state laws regulating insurance, will not be able to reimburse the cost of procuring an abortion under a contract of health insurance issued by a carrier licensed in a state that bans the procedure. Nor, one supposes, would such a contract permit the reimbursement of travel costs associated with procuring an abortion in another jurisdiction that permits it.
- Self-funded group health plans are not subject to state laws due to ERISA's preemptive force. These plans are free to reimburse the cost of procuring an abortion in a state in which abortion is otherwise illegal along with the costs of travel to a jurisdiction in which abortion legal.

This assumes that the travel benefit is question is a part of or rises to the level of an ERISA covered welfare benefit plan. ERISA §733(a)(1) defines the term ''group health plan'' to mean an employee welfare benefit plan[10] to the extent that the plan provides *medical care*.[11] It would include instances where that benefit is provided under a group health plan, or a Health Reimbursement Arrangement (HRA) that is integrated with group health plan coverage, or with an excepted benefit HRA, etc. An all-purpose, taxable, travel benefit, would not have the benefit of ERISA's preemptive force.

ERISA's Preemption Provisions

The ERISA preemption provision is ''one of the broadest preemption clauses ever enacted by Congress.''[12] ERISA makes the regulation of employee benefit plans principally a matter of federal concern by preempting, or rendering inoperative, state laws that ''relate to'' employee benefit plans. The applicable rule from ERISA §514(a) reads in relevant part:

> [T]he provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . .

''State laws'' include not only state statutes, regulations, and common law, but also the laws of any state administrative agency or political subdivision.[13]

While the jurisprudence surrounding ERISA is expansive, the issues presented in this context are relatively straightforward even if the answers are sometimes less than clear. The contours of ERISA preemption have expanded and contracted over time, but within a relatively narrow band. The earlier cases read the provision expansively; later cases less so. Since 1995, with the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*,[14] the categories of state laws that are preempted are those that mandate employee benefit structures or their administration, or bind employers or plan administrators to particular choices or preclude uniform plan administration. ERISA §502, which is not here implicated, separately preempts state laws that provide alternative enforcement mechanisms to ERISA's civil enforcement scheme.[15]

Congress enacted ERISA to establish, among other things, a federal standard to enable uniform plan administration on a national basis. In *Gobeille v. Liberty Mutual Ins. Co.*,[16] the Supreme Court invalidated a Vermont law that required all group health plans (self-

[8] *Dobbs*, 142 S. Ct. 2228, 2309 (Kavanaugh, J., concurring ''may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.'').

[9] *See generally* David S. Cohen, Greer Donley and Rachel Rebouché, *The New Abortion Battleground*. The article, which is in draft form, will be published in the Columbia Law Review.

[10] ERISA §3(1).

[11] ERISA §733(a)(2).

[12] *PM Group Life Ins. v. Western Growers Assur. Trust*, 953 F.2d 543, 545 (9th Cir. 1992) (quoting *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990)).

[13] ERISA §514(c).

[14] 514 U.S. 645 (1995).

[15] *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (holding that ERISA's remedies were exclusive and the states could not modify or supplement them).

[16] 577 U.S. 312 (2016).

© 2022 The Bureau of National Affairs, Inc.
ISSN 0747-8607

funded plans included) to report comprehensive medical claims data. According to the Court, the law had an impermissible effect on plan administration. A law aimed at the coverage of and/or the cost of procuring an abortion, as well as any related travel benefit, appears to act immediately and exclusively on an ERISA plan. Such a law would have a direct impact on a particular, identifiable plan feature, thereby having an impermissible effect on plan administration.

The Texas Heartbeat Act[17] furnishes a current, high profile example of a law that ought to be preempted under ERISA §514. The law prohibits physicians from performing or inducing an abortion once a fetal heartbeat is detected. S.B. 8 does not authorize civil or criminal proceedings against a woman who seeks or receives an abortion. Rather, if a claimant is successful, a court must award, among other things, damages of not less than $10,000 for each abortion performed or induced, and legal costs and attorney's fees. These are civil remedies. S.B. 8 mandates employee benefit structures, binds employers or plan administrators to a particular choice, and precludes uniform administration — all preemption predicates.

Exceptions to ERISA's Preemption Provisions —The Insurance Saving Clause

ERISA §514(b) saves two sets of relevant state laws from ERISA preemption: (i) state laws regulating insurance, banking, and securities; and (ii) state criminal laws of general application.

Under the ''insurance saving'' clause, states can regulate the terms and conditions of contracts of group health insurance issued by a licensed carrier. The power of states to regulate insurance in this context is curtailed in one narrow, but important, respect. Under the ''deemer clause,'' states are barred from treating self-funded plans as insurance, despite the fact that these plans bear insurance risk. The Supreme Court, in *Metropolitan Life In. Co. v. Massachusetts*,[18] recognized that this distinction creates two classes of employer-sponsored health plans, as discussed above, fully insured vs. self-funded.

The import of the insurance saving clause is not hard to miss. Post-*Dobbs*, states are free to amend their insurance codes to bar abortion.

[17] 87(R) S.B. No. 8.

[18] 471 U.S. 724 (1985).

Exceptions to ERISA's Preemption Provisions — Generally Applicable State Criminal Laws

Under the criminal law preemption clause, ERISA does not preempt ''any *generally applicable* criminal law of a State.''[19] A criminal law is not generally applicable, however, if the law is directed at employee benefit plans. In contrast, criminal laws that apply to general criminal conduct such as larceny and embezzlement would fall under the exception, e.g. the prosecution of an executive for embezzling ERISA plan funds would not violate ERISA's preemption clause.

The precedent under ERISA's criminal law exception consists of a handful of cases and a Department of Labor advisory opinion or two. Nevertheless, distinguishing a state criminal law of general applicability from one that is not is not conceptually difficult to understand if the focus is on why Congress included the ''general criminal'' provision in the first instance. Relying on an earlier case decided by the Massachusetts Supreme Court, in a 1983 case involving a New York wage deduction law, a New York District Court in *Trustees of Sheet Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc.*,[20] put it this way:

> [B]y limiting the exclusion from preemption to only those criminal laws of ''general'' applicability, Congress manifested a purpose to supersede criminal laws directed specifically at employee benefit plans.

A Ninth Circuit case, *Aloha Airlines, Inc. v. Ahue*,[21] is in accord. At issue there was Hawaii's wage deduction law, which made it unlawful to deduct employer-required medical examination fees. The Ninth Circuit held that the law in question was not directed at general criminal conduct (such as larceny or embezzlement); rather it impermissibly targeted ERISA-governed benefit plans, and was, as a result, preempted. The Department of Labor reached a similar conclusion in its Advisory Opinion 84-18A involving a Puerto Rico law that, among other things, prohibited specified conduct by employers in their capacity as providers of benefits, which the Department concluded was not a generally applicable criminal law.

Based on this precedent, it appears that a state law targeting group health plans that aid and abet violations of a state law barring abortion would be preempted, because such a law would not qualify as

[19] ERISA §514(b)(4) (emphasis added).

[20] 559 F. Supp. 561, 563 (E.D.N.Y. 1983).

[21] 12 F.3d 1498, 1506 (9th Cir. 1993).

© 2022 The Bureau of National Affairs, Inc.
ISSN 0747-8607

"generally applicable." For example, West's Texas Civil Statutes, article 4512.1 (1974) makes abortion a felony criminal offense in Texas unless the mother's life is in danger. In addition, West's Texas Civil Statutes, article 4512.2 (1974) imposes felony criminal liability on any person who "furnishes the means for procuring an abortion knowing the purpose intended." Neither law appears to rise to the level of general applicability within the meaning of the statute.

It would of course be a trivial matter to expand the scope of laws that criminalize the aiding and abetting of abortion to make them, or to adopt new law that are, generally applicable within the meaning of ERISA §514. This is no small matter, especially since such a law might specifically target an employer's board or its executives in their capacity as corporate officers. Would a corporation's board or senior managers need to avoid traveling to a state with such a law for fear of being perp-walked through the local airport?

Medical Abortion and Telehealth

So-called "medical abortions," i.e., those induced using medication, present an additional set of preemption-related issues and questions. The procedure consists of a multi-step process involving the combination of two prescription drugs, mifepristone (a/k/a RU-486 or the abortion pill) and misoprostol, the latter being taken up to 48 hours after the former. The combined pharmaceutical regimen is an approved U.S. Food and Drug Administration (FDA) protocol for abortion during the first 70 days or up to 10 weeks after the first day of a missed period. There is data to suggest that medication abortions account for more than half of all U.S. abortions.[22]

Before the pandemic, the FDA permitted only medical providers who had received special certification from the manufacturer to prescribe mifepristone and misoprostol and then only directly and in person. Since states are free to regulate their licensed providers and health care facilities, they could effectively bar the use of the procedure. The "in person" requirement was temporarily relaxed during the pandemic, however. And on December 16, 2021, the FDA made the rule permanent. Clinicians are therefore no longer required to dispense these drug in person. Rather, patients can obtain the medication from a retail pharmacy or by mail using a telehealth protocol. This federal rule conflicts with abortion-specific policies in many states[23] that either require abortion patients to come in person to get the service, set their own policies regarding the dispensing of the medications used for abortion care, or directly ban the use of telehealth for abortion care.

The analysis set out above relating to ERISA's preemptive force applies here as well. State medical and clinical licensing laws are generally civil nature. They may well be preempted in this setting as a result. Whether a state law seeking to add criminal exposure would be preemption would depend on whether it is generally applicable. There is, however, a ground for preemption based in the Supremacy Clause of the U.S. Constitution.[24] Federal law is the "supreme law of the land," which means that contrary or inconsistent state laws must yield. There is some guiding precedent.

In 2014, the Commonwealth of Massachusetts sought to ban Zohydro, an FDA-approved painkiller. The ban was in response to the abuse of opioids in the state. In *Zogenix, Inc. v. Patrick*,[25] the Federal District Court for the District of Massachusetts issued an injunction against the state's ban. The court opined that, by imposing its own conclusion about the safety and efficacy of Zohydro, the Commonwealth was obstructing the FDA's constitutionally-mandated charge. The implications are clear and the stakes are high, if state laws purporting to bar medical abortions are preempted, then access to medical abortion would effectively be protected in all 50 states,

WHAT'S AN EMPLOYER TO DO?

Some states can be counted on to outlaw out-of-state abortions for their citizens and to criminalize aiding and abetting irrespective of the jurisdiction in which the enabler resides. Other states will pass laws that endeavor to insulate their employers, providers and residents from out-of-state prosecutions. The constitutional reach and limits of these laws, on both sides, will be tested in the courts.

The analysis above, concluding that state civil laws barring the coverage of abortion-related travel as well as targeted state criminal laws are likely preempted by ERISA, assumes certain bedrock principles of American jurisprudence. These include deference to the role of the judiciary, respect for precedent, and the proper

[22] Rachel K. Jones *et al.*, *Medication Abortion Now Accounts for More Than Half of All US Abortions*, Guttmacher Institute- (Mar. 2, 2022).

[23] *See, e.g.*, Nebraska Criminal Code §28-335 ("[n]o abortion shall be performed, induced or attempted *unless the physician who uses or prescribes any instrument, device, medicine, drug or other substance to perform, induce or attempt the abortion is physically present in the same room with the patient. . .)* (emphasis added).

[24] U.S. Const. Art. VI, cl. 2.

[25] No. 1:14-cv-11689-RWZ, 2014 BL 105518 (D. Mass. Apr. 15, 2014).

© 2022 The Bureau of National Affairs, Inc.
ISSN 0747-8607

scope of judicial review. It is here that we find the consequences of *Dobbs* most unsettling. In assessing their risk on all things abortion-related, employers should be able to assume and to be reliably guided by these principles. The most chilling feature of *Dobbs* (at least our view) is, however, its seeming disregard of these principles. Employers seeking to provide abortion-related benefits are faced with the prospect of having to navigate this challenging and hostile terrain.

© 2022 The Bureau of National Affairs, Inc.
ISSN 0747-8607