ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, Ken Johnson, Amy Heppner, and Laurie Kirkwood provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley, Carolyn, Ken, Amy, and Laurie are senior members in the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

UNCHARTED TERRITORY: FINDING A PATH FOR ABORTION COVERAGE IN A CHANGING LANDSCAPE

The leaked draft opinion in *Dobbs v. Jackson Women's Health Organization* revealed that the U.S. Supreme Court may be moving toward overturning *Roe v. Wade*, which could limit the protection of abortion under the U.S. Constitution and possibly open the door for states to more heavily regulate the procedure.

State legislatures have been active this year introducing a variety of abortion restrictions and bans. Some laws, like the Mississippi law at issue in Dobbs, would regulate the timeframe in which the procedure can be performed.

Other laws, like Oklahoma's HB 4327, may make almost all abortions illegal at the outset. What it means to "aid and abet" an abortion will be relevant under some state laws, as long-arm statutes may attempt to reach procedures that are performed outside a specific state's borders.

It is too early to know which laws will be enacted if *Roe* is overturned, and whether they will withstand scrutiny on other constitutional and legal grounds. Many employer sponsors of group health plans are considering whether to cover the cost of travel if a plan participant lives in a state that bans the procedure.

Tracking these laws and their possible effects on providing abortion benefits under a group health plan is a complex analysis. This article covers the topic of abortion coverage and medical travel benefits at a high level, as many of these issues will undoubtedly need to be worked out on a state-by-state basis.

FEDERALLY MANDATED ABORTION COVERAGE

Abortion cannot be entirely banned under state law. Plans are required to cover abortion under Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act, if the mother's life would be endangered by carrying the pregnancy to term. Plans are also required to cover complications arising from abortion (even if abortion is not covered by the plan), such as excessive hemorrhaging.

State laws—even Oklahoma's "total" ban--are generally drafted to allow for this. A few states have pre-*Roe v. Wade* (and pre-Pregnancy Discrimination Act) bans and restrictions that may spring back into effect if Roe is limited or overturned, while over half of all states have introduced legislation that would further restrict the procedure. On the other hand, several states have introduced legislation aimed at protecting abortion rights, and Vermont even has a protective state constitutional amendment on its November ballot.

TAX TREATMENT OF MEDICAL TRAVEL EXPENSES

Sponsors of group health plans in states that ban or severely restrict abortion may be able to facilitate access to the procedure in a state where it remains legal by covering the travel expenses through an ERISA-covered health plan. ERISA defines group health plans as providing medical care, and Code Section 213(d) allows deductions for medical care.

The Section 213(d) definition also governs the type of expenses that are excludible from employees' incomes if paid under a group health plan. Under both ERISA and IRS rules, medical care includes "amounts for transportation primarily for and essential to" medical care.

Many plans already provide travel benefits, such as to Centers of Excellence (COEs) for specified surgery. The medical care itself also has to be legal in order for the tax-favored treatment to apply.

Some sponsors have already considered the need for a new or increased travel benefit for regionally banned or restricted covered procedures. With certain limitations, travel expenses for abortion should be excludable from income under the federal tax rules as long as the abortion is legally obtained.

There are limits under the federal tax code for how much can be excluded for medical travel. Lodging is capped at $50 per night per person. If traveling by automobile, the medical standard mileage rate is less than the mileage rate for business travel purposes—just 18 cents per mile in 2022. Other modes of travel (train, plane, bus, etc.) are permitted, but in all cases the transportation must be primarily for medical care and not for non-medical purposes. Travel expenses for medically necessary travel companions, such as the parent of a minor child, are also covered under these rules.

PLAN DESIGN CONSIDERATIONS

Expenses for travel for a legally obtained abortion can be reimbursed directly through the employer's group health plan, provided abortion travel is a covered service. In order to avoid disqualifying HSA eligibility, abortion travel should be subject to the same cost sharing and deductible requirements as any other covered benefit.

However, limiting medical travel benefits to only medical/surgical services like abortion (or COEs) could raise issues under the Mental Health Parity and Addiction Equity Act (MHPAEA) if the plan fails to provide similar coverage for travel related to obtain mental health services.

Potentially, a travel benefit that would cover travel for any otherwise regionally impermissible benefit (whether medical/surgical or mental health/substance abuse) may be allowable under MHPAEA; however, if the plan provides travel benefits for COEs or other medical/surgical services, but no mental health services, then the risk remains.

EBHRAS

For employers that want to extend travel beyond their group health plan footprint, potential ACA issues arise. One possible way to structure an abortion travel benefit for employees who are eligible for, but who do not enroll in, the group health plan is through an excepted benefit HRA (EBHRA), which is a relatively new benefit option available since 2020.

EBHRAs can be used by employers of any size to reimburse out-of-pocket Code Section 213(d) medical care and have an annual limit capped at $1,800 (for 2022). Employers offering EBHRAs must make them available to all similarly situated employees, and must make other nonexcepted, non-account-based group health plan coverage available to the EBHRA participants for the plan year. The participants do not actually have to enroll in such primary coverage.

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EBHRAs are excepted benefits, and thus are not subject to the ACA mandates. EBHRAs are not exempt from all compliance mandates, however. EBHRAs are still ERISA plans and are subject to COBRA and Code Section 105(h) nondiscrimination rules.

Also, HIPAA's privacy and security requirements apply to EBHRAs. To limit discrimination claims employers may want to ensure the EBHRA is not restricted to abortion benefits, but rather extends to any regionally prohibited benefits.

In order to receive tax-favored treatment, the travel expenses will need to be substantiated, which will, in all likelihood, involve protected health information (PHI). Employer plan sponsors may not be set up to handle PHI and may need a third party to administer the EBHRA.

EBHRAs can also impact other account-based benefits, like HSAs. EBHRAs can disqualify a person from participating in an HSA because the EBHRA provides a benefit below the HDHP deductible.

STAND-ALONE PLANS

Some employers are considering ways to extend abortion travel benefits to all employees, even those who are not enrolled in or eligible for their group health plan. Offering such a benefit has risks. Even a travel-only benefit could be considered a group health plan that would be subject to the ACA.

Under the ACA, group health plans must cover certain preventive services and cannot impose any annual limits, which is likely beyond the employer's intended scope of coverage for an abortion travel benefit. Tax-favored arrangements also require substantiation to confirm that the travel was for medical care, which would raise HIPAA compliance requirements mentioned above.

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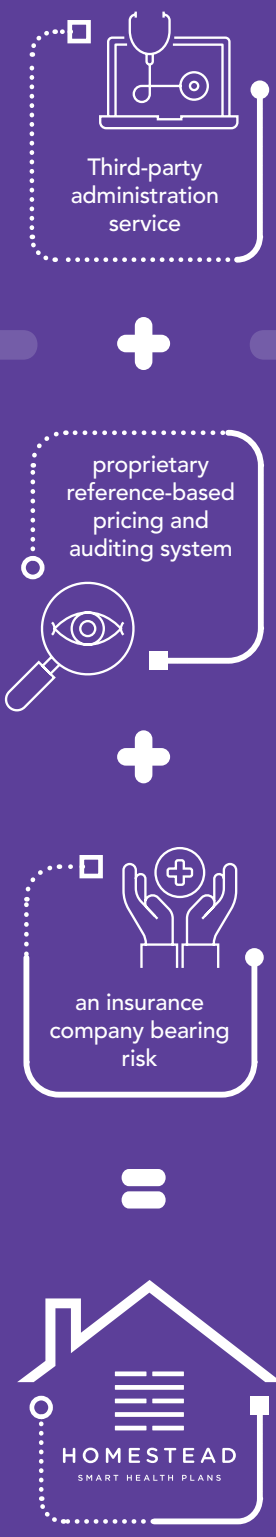

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COBRA would also apply to a group health plan offered by an employer. As with the EBHRA, any coverage for medical care before the deductible for a person enrolled in an HSA would be disqualifying coverage for HSA purposes.

ERISA PREEMPTION

Plan sponsors will face a number of difficult questions as to whether and how abortion and abortion travel can be covered. While ERISA preempts state laws that "relate to" an ERISA plan, the preemption analysis is complicated and is tied to the particulars of the state law in question.

Like other preemption issues, whether any given state abortion restriction or ban impermissibly "relates to" an ERISA plan will be a case-by-case analysis for the courts. Criminal statutes of general applicability are usually not preempted by ERISA, but a preemption argument would stand a better chance as applied to a state criminal law that specifically targets group health plans than a criminal law that broadly bans abortion.

Legislators in at least one state—Texas—have signaled that they may craft legislation that bans in-state employers that pay for out-of-state abortions from doing business in Texas. Whether such a law, if enacted, would survive a preemption challenge remains to be seen.

ERISA preemption favors self-insured plans, because the ERISA "savings clause" allows state insurance regulators to control the policies issued to fully-insured plans.

Self-insured ERISA group health plans may still be able to cover the procedure if it is legally obtained out-of-state, depending on the provisions of the state law itself.

For fully-insured ERISA plans, state insurance law will control whether abortion and related travel can be covered. It is possible that even reimbursements from HRAs integrated with a fully-insured plan could be limited by state insurance regulators.

OTHER ISSUES

Returning abortion regulation to the states will create numerous challenges for plan sponsors, many of which may not yet be apparent. Plan sponsors will need to be vigilant as the law evolves in this area. ■