

Locke Lord QuickStudy: Compliance Considerations for Medical Travel Reimbursement

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Employers may consider offering medical travel and lodging reimbursement to enable employees who live in a state where abortion is no longer legal to travel out of state for such services. There are a number of ways to design a medical travel reimbursement program, each of which poses compliance considerations. Below are some Q&A's briefly describing various options that may be available. Each option has different compliance risks associated with it. In addition, employers should consider state civil and criminal laws that may prohibit the provision of this type of assistance to employees before implementing new benefits.

Can a group health plan pay for an employee's travel and lodging expenses related to accessing reproductive health services?

Yes. A group health plan may cover travel expenses incurred in connection with accessing medical care, including reproductive health and abortion services. The Internal Revenue Code expressly states that medical care includes amounts paid for transportation primarily for and essential to medical care related to the "diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body." The IRS confirmed that because an abortion is deemed to be for the purpose of affecting a structure or function of the body, its cost is an amount paid for medical care. In this regard, expenses for travel to a state where abortion is legal would be eligible for reimbursement as medical care under an employer's group health plan (if otherwise covered under the terms of the group health plan).

Employers should review their existing group health plans to determine whether the plan provides travel benefits. Most employer plans provide some form of travel benefit, usually for transplants or travel to centers of excellence/preferred medical centers. This option may not be available under a fully insured plan issued in a state that restricts abortion access, but could be available under a fully insured plan issued in a state that does not restrict abortion access or for a self-funded plan. It is important to check the terms of the plan carefully, as there may be a general exclusion that could apply to prevent coverage.

Note that any travel and lodging expenses reimbursed through the group health plan would be limited to those employees/dependents who have enrolled in the group health plan. Employers should confirm with their third-party administrator that the administrator will administer any expanded travel benefits and work with their ERISA counsel on any plan amendments that may be necessary.

Can a group health plan reimburse expenses for reproductive health-related travel on a tax-free basis?

Yes, subject to the travel expense limits under IRS guidance. Travel expenses incurred for traveling to a state to receive a legal abortion can be reimbursed as tax-free medical expenses under an employer's group health plan. The tax laws impose limits on the amount of tax-free reimbursement of travel and lodging expenses, and does not allow meals to be reimbursed on a tax-free basis.

Can an employer provide an abortion-related travel benefit for all employees, even those employees not enrolled in its group health plan?

Yes. An employer can provide a travel reimbursement program outside of its medical plan to all employees, either through an existing health reimbursement arrangement (HRA), employee assistance program (EAP), or a health flexible spending account plan (Health FSA).

- Health Reimbursement Arrangement. An employer could offer travel and lodging reimbursement under an HRA. However, to avoid an HRA violating the Affordable Care Act requirements, the HRA must be structured as either an "integrated" HRA or an "excepted" HRA. Integrated HRAs must be offered in connection with a group health plan that meets the ACAs minimum value requirements and can only be offered to individuals covered by such plans (including another employer's group health plan). Excepted HRAs may provide reimbursement for travel expenses related to medical care, including abortion services, but such reimbursement is capped at \$1,800 per year.
- Employee Assistance Program. EAPs are generally offered to all employees (and their dependents) regardless of whether the employee is enrolled in the employer's group health plan. The EAP must be structured to be an "excepted benefit" to be exempt from the Affordable Care Act requirements. To be an excepted benefit (1) the EAP cannot provide "significant benefits in the nature of medical care"; (2) the EAP cannot be coordinated with benefits under a group health plan; (3) benefits under the EAP cannot be financed by another group health plan; (4) no employee premiums or contributions are required as a condition of participation in the EAP; and (5) there is no cost sharing under the EAP.
- Health Flexible Spending Account. Health FSAs can reimburse reasonable medical-related travel expenses. An employee is not required to enroll under the employer's group health plan to contribute to a health FSA. Note that contribution limits for health FSAs are capped at \$2,850 for 2022.

These types of programs must be carefully structured to comply with applicable federal laws, such as ERISA, the Affordable Care Act, COBRA, and HIPAA.

Can an employer limit travel benefits to just abortion-related travel?

Not likely. In the event an employer's group health plan covers any mental health or substance use disorder ("MH/SUD") benefits, the plan must comply with the Mental Health Parity and Addictions Equity Act ("MHPAEA"). Broadly speaking, under the MHPAEA, a health plan cannot impose more restrictive financial requirements or treatment limitations (both quantitative and non-quantitative) on MH/SUD benefits than medical/surgical benefits. Separate treatment limitations that only apply to MH/SUD benefits are prohibited. By making travel benefits available only for individuals seeking an abortion (an MS benefit), the group health plan could be violating the MHPAEA since an individual seeking MH/SUD benefits could not receive a travel benefit and is subject to a more restrictive treatment limitation.

Can an employer provide a taxable abortion-related travel benefit?

While it can potentially be done, a taxable abortion-related travel benefit has various risks. There would be no ERISA preemption argument to attempt to avoid certain state civil law enforcement. Employees may not be comfortable submitting information to the employer in order to receive compensation to pay for the travel, since it is their confidential health information that they should not have to disclose to the employer. The IRS could consider the reimbursement program as an employer payment plan that is a “group health plan” that would not comply with the Affordable Care Act, unless it is incorporated to a major medical health plan that complies with the Affordable Care Act. Further, if it was considered a group health plan, there are other laws that would apply such as HIPAA.

We have a high deductible health plan. Can we pay for abortion-related travel before a participant meets the plan’s deductible?

No. A high deductible health plan cannot pay for any benefits, other than preventive care required by the Affordable Care Act, prior to the participant satisfying the plan’s deductible. If the plan paid for abortion-related travel prior to satisfying the plan’s deductible, the plan would not be considered a high deductible health plan that makes a participant eligible to contribute to a health savings account – and accordingly, the participant would be ineligible to make health savings account contributions as a result.

Could an employer or plan administrator have exposure to civil litigation or criminal violations in states prohibiting or severely restricting abortions?

Possibly. In the wake of the announcements by many businesses of their intent to pay for the cost of travel and cost of out-of-state abortion procedures, abortion-ban proponents in many states have announced their intent to expand the civil and criminal provisions of their abortion laws. While ERISA preempts state laws that relate to employee benefit plans, ERISA does not preempt “any generally applicable criminal law of a State”. The carve-out for criminal law prevents general criminal conduct from being immunized from prosecution simply because it “relates to” an ERISA plan. Accordingly, courts have construed “generally applicable” criminal laws to mean those that proscribe conduct generally and apply to the entire population.

Some state criminal legislation specifically targets employers who pay for elective abortions with felony criminal sanctions. Furthermore, the general criminal state statutes regarding “aiding and abetting” a crime could apply to providing financial assistance to obtaining an abortion, such as a medical travel reimbursement across state lines. However, there is no precedent for criminalization of actions that are expressly permitted by the terms of a group health plan. Whether these criminal laws will be considered “generally applicable” therefore remains an open and state-specific question.

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