

Locke Lord QuickStudy: Dobbs and the Future of Health Plan ?Abortion Coverage

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The Supreme Court's June 24 ruling in *Dobbs v. Jackson Women's Health* eliminating the constitutional right to an abortion, and leaving states to regulate or restrict the procedure, has created a complex and tangled web of federal and state laws surrounding abortion. The challenge is particularly fraught for health plans that wish to provide coverage of medically necessary health care without running afoul of any new or existing federal or state restrictions.

The legal landscape remains complex and fast-changing, and in some instances may involve conflicting requirements. Since the *Dobbs* decision the U.S. Department of Health and Human Services ("HHS") has provided guidance to individuals regarding access to reproductive health care and on July 8, 2022 President Biden signed an Executive Order that seeks to protect access to medical abortion. President Biden recently stated publicly that he is considering the declaration of a public health emergency to increase access to abortion.

The Kaiser Family Foundation has compiled abortion restrictions in each state, including trigger laws to immediately prohibit abortion that took effect following the *Dobbs* decision. Whether a health plan may include abortion coverage will depend on state law. Even beyond health plan coverage, whether enrollees will have access to abortion providers will be dependent on whether abortion providers remain in the state. These challenges will be exacerbated in health plan coverage areas that span across state borders.

There is no federal requirement for health plans to cover elective abortions. The federal Hyde Amendment prohibits the use of federal funding for abortion except in the case of rape, incest, and life endangerment. Therefore, federal matching funds may not be used to pay for abortion under a state Medicaid program. Historically Medicaid has required states to cover abortion in the case of rape, incest, and life endangerment. A 2019 report from the Government Accountability Office found that South Dakota only covers abortion where the life of the mother is endangered. CMS has not taken enforcement action against the state for not providing abortion coverage in the case of rape and incest. It must be noted that a future administration could choose to take an alternative approach in the Medicaid program and implement a more restrictive interpretation.

The Affordable Care Act ("ACA"), in 42 U.S.C. § 18023(b)(2), prohibited the use of federal funds to pay for "non-excepted abortion services," which, based on the current law, are abortion services performed except where the pregnancy is the result of an act of rape or incest, or the life of the pregnant woman is endangered. The ACA

prohibits the premium tax credits and cost-sharing reductions, which reduce out-of-pocket costs for eligible individuals purchasing coverage through an Exchange, from being applied to abortion services.

Where a qualified health plan (“QHP”) does cover abortion services the ACA has strict requirements, including the segregation of funds that are used to pay for abortion care. The ACA and implementing regulations permit stricter state restrictions on abortion coverage, providing that a QHP issuer is required to comply with a State law that prohibits abortion coverage in QHPs. It is also notable that in 42 U.S.C. §18022 of the ACA Congress did not include abortion coverage as one of the essential health benefits required to be provided by non-grandfathered individual and small-group health plans. At the same time, many states have in place longstanding restrictions on the ability for certain health plans to provide abortion coverage.

Self-funded group health plans will retain more flexibility regarding the inclusion of abortion coverage. Historically, self-insured health plans are subject to regulation under the Employee Retirement Income Security Act of 1974, which preempts state laws that “relate to” a health plan. In turn, a state insurance law may prohibit a fully-insured health plan from providing abortion coverage.

An outstanding question remains as to whether it will be permissible for a health plan to provide coverage for an abortion performed out-of-state from where an enrollee resides. While many employers have announced their intention to continue to provide abortion care coverage, private and publicly traded insurers may have other considerations that give pause to adopting such a policy. For instance, Texas has enacted Texas Health and Safety Code § 171.208, which permits private citizens to bring a civil action against any person that “aids or abets” an abortion. However, plan sponsors might take the position that ERISA will preempt some of these state laws.

Health plans must also consider their policies regarding disclosures of protected health information (“PHI”) to law enforcement officials, particularly in states with abortion prohibitions. On June 29, 2022, the U.S. Department of Health and Human Services Office for Civil Rights (“OCR”) issued guidance addressing HIPAA limitations on disclosures without a court order or other mandate enforceable in a court of law. In the guidance OCR reminded covered entities and business associates that disclosures of PHI, in particular relating to reproductive health care, without a court order or other mandate enforceable in a court of law may violate HIPAA. Health plans may also need to consider more restrictive state laws when developing appropriate responses to any court or law enforcement requests for PHI relating to abortion.

The post-*Dobbs* world for health plan coverage of abortion promises to remain complex for the indefinite future. Additional federal and state laws and guidance will be forthcoming and undoubtedly subject to legal challenges. As a result, “the coming ‘interjurisdictional abortion wars’” predicted by the dissent in *Dobbs* will continue to ensnare health plans and require careful attention to an ever changing landscape.

Locke Lord attorneys continue to closely follow the implications of the *Dobbs* decision and its impact on the health care industry.

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