

Compliance Bulletin

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Travel Reimbursements for Legal Abortion Care



Following the U.S. Supreme Court's decision in [Dobbs v. Jackson Women's Health Organization](#), a number of employers announced that they would reimburse travel expenses for employees who must go out of state to obtain a legal abortion. There are a number of different options for employers to consider when structuring a travel benefit, with each option having its own compliance challenges.

Employers may be able to reimburse medical travel expenses tax-free through an employee benefit plan, such as a group health plan, a health reimbursement arrangement (HRA) or an employee assistance program (EAP). Due to ERISA's preemption clause, this approach may help protect employers from state civil laws that prohibit "aiding and abetting" actions related to abortion care. However, employers must abide by certain restrictions that limit the scope of this benefit.

Another option for employers to consider is a standalone program that reimburses travel expenses on a taxable basis. While this approach gives an employer more flexibility, these programs need to be carefully structured to avoid violating the Affordable Care Act (ACA). Also, this approach does not offer any ERISA preemption protection from state "aiding and abetting" laws. To address these concerns, employers should consider programs that reimburse wellness-related travel expenses, and are not specifically for abortion or medical care

Action Steps

Employers who want to reimburse travel expenses for abortion care should work with their advisors to pick the most suitable option for providing the benefit. If an employer wants to provide the benefit on a tax-free basis through an employee benefit plan, they should consult with their third-party administrator or plan vendor to determine whether they can administer the benefit.

Travel Benefits for Abortion

A growing number of employers—including those operating in multiple states or with employees working remotely throughout the U.S.—have announced that they will be reimbursing travel expenses for employees to access legal abortion care. There are a number of different ways for an employer to provide travel benefits, each of which comes with its own compliance concerns.

Pursuant to Section 213(d) of the federal tax code, employers can provide medical travel benefits on a tax-free basis through an employee benefit plan, such as a group health plan, subject to specific dollar limits and rules for the reimbursements.

Limits on Tax-free Reimbursements

Travel for medical purposes can be provided as a tax-free benefit when it is "transportation primarily for and essential to medical care." It can include, for example, reimbursement of mileage, transportation (such as buses, trains, airplanes and rental cars), and hotel costs up to \$50 per individual per night. In general, meals cannot be reimbursed on a tax-free basis. Also, any companion travel benefits are limited to "necessary" companion travel. Reimbursements in excess of these limits would be considered taxable wages, subject to income tax and withholding.

Alternatively, employers who want more flexibility may decide to implement a separate program for taxable reimbursements of travel expenses, although this approach requires careful planning.

State Laws – Possible Impact

In the wake of the Dobbs decision, state laws regarding abortion are expected to continue shifting as new legislation is passed and legal challenges are decided. Employers should carefully monitor applicable state laws regarding abortion to understand their legal obligations. Some of these laws may impact employers, such as laws that ban or restrict insurance coverage for abortion or require fully insured health plans to cover abortions.

Certain states (such as Oklahoma and Texas) enable individuals to bring civil lawsuits against anyone who assists in the performance or inducement of abortion, including paying for or reimbursing the costs of the procedure through insurance or otherwise. In states like Texas and Oklahoma that bar “aiding and abetting,” it remains to be seen how these laws will apply to employers providing benefits for their employees to receive legal out-of-state abortions, including reimbursement of travel expenses. ERISA may preempt state civil “aiding and abetting” laws to the extent that benefits are provided through an ERISA-covered employee benefit plan. However, this is an open issue and will likely need to be decided in court.

Employee Benefit Options Group Health Plans

The most straightforward way for an employer to provide travel benefits for medical care is through its existing group health plan. Employers with self-insured health plans may be able to expand coverage to cover medical travel for legal abortion care. However, this may not be an option for employers with fully insured health plans because they are limited to the coverage offered by their carriers. Also, fully insured health plans (unlike self-insured health plans) are subject to state insurance laws, which may restrict or prohibit abortion-related benefits. Even if an employer can expand its group health plan to include medical travel for legal abortion care, there are some challenges with this approach, such as:

- Only employees (and dependents) who are enrolled in the health plan may be eligible for the travel benefit;
- Limiting the travel benefit to abortion care may violate federal laws that require parity between medical benefits and benefits for mental health and substance use disorders; and
- If the plan is a high deductible health plan (HDHP), enrollees will likely need to satisfy the minimum deductible before receiving the travel benefit.

HRAs

Another way to provide tax-free travel reimbursements for medical care is through an HRA—either an HRA that is integrated with the employer’s group health plan or an excepted benefit HRA (EBHRA). However, both of these options have design limitations, including the following:

- With an integrated HRA, only employees (and dependents) enrolled in the employer’s group health plan may be eligible for the travel benefit.
- EBHRAs can reimburse eligible expenses of all benefits-eligible employees, even if they declined enrollment in the employer’s group health plan. However, EBHRAs cannot be used to pay for expenses of employees who are ineligible for the employer’s group health plan (for example, part-time employees).
- Coverage under an EBHRA is subject to an annual limit (\$1,800 for 2022 and \$1,950 for 2023), which can restrict travel reimbursements.
- HRAs are usually disqualifying coverage for HSA purposes, which means that this approach for providing travel benefits may not be suitable for employers with HDHPs.

EAPs

Employers may also consider providing medical travel reimbursements on a tax-free basis through an EAP that qualifies as an “excepted benefit” under the ACA. With this option, travel reimbursements can be provided to all employees and dependents, not just those enrolled in the employer’s group health plan. Also, as a general rule, employers with HDHPs can offer EAPs without

jeopardizing their employees' eligibility for HSA contributions. However, because EAPs do not typically provide medical travel benefits, employers interested in using this approach should consult with their EAP vendor to determine if they can administer this benefit.

Also, note that the EAP benefit will need to be structured carefully to ensure that the EAP qualifies as an excepted benefit under the ACA. To qualify, the EAP cannot (1) provide significant benefits in the nature of medical care; (2) be coordinated with benefits under another group health plan; (3) require employee contributions; and (4) require any cost-sharing. Based on existing guidance, it is unclear whether medical travel benefits—in addition to any other benefits provided by the EAP—would be considered significant benefits for medical care.

Standalone Travel Reimbursement Programs

Employers who want more flexibility may decide to implement a standalone program to provide taxable travel reimbursements. This approach allows employers to set their own eligibility rules and reimbursement limits. However, by reimbursing expenses outside of an employee benefit plan, the employer cannot rely on ERISA's preemption provision for state laws restricting or prohibiting abortions, including "aiding and abetting" laws.

Moreover, these standalone programs must be carefully structured to minimize the risk of inadvertently creating an "employer payment plan" that would violate the ACA's market reforms. Employers should be able to minimize the risk by implementing a wellness travel reimbursement policy that is not specifically linked to medical or abortion care. Although this type of program would likely be more costly for the employer, it would help protect employees' privacy because employers would not need to know the exact reason for the travel. Similarly, a wellness travel reimbursement program would help protect employers against state laws regarding "aiding and abetting" abortion care.

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