



Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast: Just Compensation

Episode 14
Employee Benefits Post-*Dobbs*: What Kinds of Assistance Can Employers Now Offer in Reproductive Healthcare?

By [Megan Monson](#), [Andrew E. Graw](#), and [Julie Levinson Werner](#)
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Megan Monson: Welcome to the latest episode of Just Compensation. I'm one of your hosts today, Megan Monson, a Partner in Lowenstein Sandler's Employee Benefits & Executive Compensation practice group and I'll hand it over to two of my other Partners to introduce themselves.

Andrew Graw: Hi, I'm Andrew Graw, Chair our Employee Benefits & Executive Compensation practice group.

Julie Levinson Werner: Hi, this is Julie Levinson Werner. I'm a Partner in our Employment Practice Litigation and Counseling group.

Megan Monson: Thank you both so much for joining today. Today's discussion is related to a highly controversial issue that found new ground in a recent Supreme Court decision, access to abortion. The court's decision in *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade* and dissolved federal protection for abortion.

In the wake of this decision, many employers are now considering how they can assist their employees who live in states where access to abortion is not available. In the past few weeks since the decision, we've seen multiple instances of companies announcing new travel benefits for their employees, which could help those individuals travel across state borders for abortion services.

In today's podcast, we will provide a brief overview of some of the legal questions that arise related to providing these potential benefits such as whether providing travel assistance for such purpose is permissible, how travel assistance may be provided, whether and to what extent travel reimbursements are taxable and how such benefit can be provided while addressing an employee's concerns about privacy.

This is not intended to be an exhaustive discussion covering all considerations that may arise when implementing such an arrangement. And as always, we suggest connecting with your legal counsel to discuss your specific facts and circumstances.

The council provided in this episode does not in any way reflect the personal views or opinions the firm has regarding the right to abortion. And it is meant as to provide some high level considerations for companies that may be interested in providing expanded benefits to their employees. Let's dive right into it.

Megan Monson: Andy and Julie, what are some examples you've seen of companies offering these benefits?

Julie Levinson Werner: Well, Megan, it seems like almost daily we're seeing reports of the business community around the country reacting to *Dobbs* and trying to develop new types of benefits to assist their employees. Even before *Dobbs*, employers were taking action in places like Texas and Oklahoma that had enacted laws where they were trying to restrict drivers or prevent drivers in companies like Lyft and Uber and whatnot if they were sued.

So companies like that were trying to work with and help their employees if they were driving a passenger to get an abortion. Companies like Uber and Lyft were offering to fully cover any legal fees of their drivers if they were sued under these laws

Andrew Graw: And a number of companies, very well known companies, such as Microsoft, Nike, Starbucks, Tesla, CVS Health, just to name a few, have announced plans to assist employees who live in states where abortion is restricted so that they can travel out of state to undergo the procedure.

But the benefits vary. Amazon for instance said it will reimburse up to \$4,000 in travel costs for abortions. Bumble announced that it will set up a fund to help organizations that support reproductive rights. And the New York Times said it will expand its medical coverage for employees to include abortion related and gender affirming care travel, not available within a hundred miles of an employee's home.

Megan Monson: Andy, those are great examples. And I'm curious to see how companies are going to actually implement these policies in practice. This is because there's so many different health and welfare plan issues and there's so many federal and state tax laws to consider as well.

Andrew Graw: Right, Julie. Implementing these policies requires careful consideration and a number of decisions must be made that we'll get into. There is no one size fits all approach, however.

Megan Monson: Thank you both. That's a great segue to the core question here. Is it permissible under existing laws for employers to provide abortion related travel assistance? I know that's a bit of a loaded question.

Julie Levinson Werner: Well, that's unfortunately what we're all trying to figure out right now in this constantly evolving time we're in. Currently, as far as we know, there are no state laws that ban interstate travel for abortion. Although there are certainly reports of many states that are trying to consider such a ban.

There are also reports that states with abortion bans might try to assert what's referred to as aiding and abetting criminal laws to try to punish employers that paid the travel costs of workers who are crossing state lines. So employers should definitely keep a close eye on developments as states and other jurisdictions are reacting to *Dobbs*.

Andrew Graw: And from a health benefits perspective, abortion is currently part of the definition of medical care under IRS guidelines, meaning that it can, but is not required to be covered by a group health plan, at least in states where abortion is still legal.

There have been reports that some states will consider prohibiting health plans from covering abortion related services. However, ERISA, the Employee Retirement Income Security Act of 1974, which is the federal law that governs employee benefit

plans generally preempt state laws to the extent the law relates to self-insured plans, which most large employers have.

Andrew Graw: ERISA does not preempt fully insured plans. So the first thing that companies really need to do is determine what kind of health plan that they have. States may have success in applying their state laws to insured health plans since ERISA preemption doesn't apply, but also employers need to be mindful of the fact that ERISA does not preempt a state's criminal laws.

Thus states that have restrictive criminal laws regarding abortion really need to be reviewed to assess whether or not an employer could be held responsible for say aiding and abetting an abortion in those states.

Megan Monson: Are there any limits to an employer providing abortion related travel assistance?

Andrew Graw: Another great question, Megan. Like any other transportation related expenses, an employers group health plan may cover transportation related expenses for abortion care. If abortion itself is covered under the plan.

To be covered under the plan, they have to be primarily and essential to the medical care. However, there are certain limitations to covering transportation related expenses on a pretax basis.

Megan Monson: So employers in these situations have all been pulling out their IRS code rules and looking at what those things are. And I'm not sure what year this was prepared, but apparently it's capped at \$50 a night. I'm not sure where you can find lodging these days for \$50 a night.

But apparently that is what the IRS code will allow for reimbursement of lodging when someone is traveling for the treatment of medical care. And then if an employee is traveling with a companion who cares for them during the procedure, that individual also can receive \$50 worth of lodging.

Obviously still two people getting \$100 to stay overnight anywhere, good luck finding that. And lodging can only be reimbursed if the treatment in question is received from a doctor in a licensed hospital or in a medical care facility that's related to or equivalent of a licensed hospital. The cost of meals during travel is not going to be included as a medical reimbursement.

Andrew Graw: Right, so what should employers do? First thing they should do is review their health plans and policies to see what transportation costs are already covered. Sometimes plans and policies only specifically provide for travel coverage for say, organ transplants.

Employers with self-insured health plans could consider providing or increasing a reimbursement for abortion related transportation under the plan. While employers that have fully insured plans may inquire with their carriers to first determine what travel expenses are covered under the policy.

An employer with an insured health plan could consider establishing a supplemental reimbursement program, but be aware that benefits paid under a supplemental reimbursement program will generally be treated as taxable income to the employee.

There's also a concern that creating a reimbursement program outside of the context of a health plan may accidentally create a separate group health plan under the law,

which would be subject to various requirements of ERISA, the Affordable Care Act, HIPAA and other laws that apply to group health plans.

Julie Levinson Werner: And companies that provide travel assistance to employees for abortions might also consider whether they want to extend the assistance for other procedures and treatments that could also be restricted to some extent under state law, including things like gender affirmation services.

Megan Monson: So Andy, you mentioned HIPAA. Are there employee privacy concerns that companies should be aware of when providing these type of benefits to their workforce?

Julie Levinson Werner: Well, one thing I would just say, Megan, just stepping back and looking at the practical implications of providing abortion related benefits, abortion is obviously a very private and controversial subject. Many people have different points of view and the choice obviously whether to have an abortion is a very personal and private decision.

And I can only imagine that workers are likely to be skittish if they have to approach their employers to request the use of these benefits. Because as we mentioned earlier, depending on how the travel reimbursements are incorporated into an existing health plan, an employee's privacy can be an issue.

I would just say that I know Andy's going to answer your question about HIPAA, but I think that's the practical thing people really have to consider here. Obviously, as companies wanting to be as well meaning as they are is that this is obviously still a very personal issue for employees. And they may be hesitant understandably to go to their employers about this issue,

Andrew Graw: Right, Julie and while HIPAA doesn't generally apply to data collected outside of a group health plan, as you indicated, employees would likely be deterred from using the company's reimbursement services if they feared that the employer or others at the company will find out about the abortion. So employees should consider how to provide travel assistance benefits to be mindful of protecting an employee's privacy.

Julie Levinson Werner: There are federal laws just to be clear like the Pregnancy Discrimination Act, the Americans with Disabilities Act, Family Medical Leave Act, and various state counterpart laws that can protect workers from discrimination or retaliation by their employer with regard to accessing an abortion.

In 2019, New York state passed a law that expressly prohibits employers from discriminating against their employees based on their sexual and reproductive health decisions, but to avoid these implications, the best way that an employer might consider to protect an employee's privacy, even if HIPAA doesn't necessarily apply is to use a third party service to arrange for the abortion procedures so that the third party administrator is the only one who has access to the employee's confidential medical information.

There was a recent article in Bloomberg, I think we've all been following this issue closely and seeing that there are increasingly a number of third party stipend platforms that could be used for a medical travel benefit program and companies that were historically in the fertility space seem to be expressing interest in assisting women with these stipend services as well.

Megan Monson: Thank you both. We've covered a lot of ground today. Is there anything else that you want to say to our listeners on this topic?

Andrew Graw:

I would add that we just need to all keep abreast of what's happening and changes in the law. States are reported to be acting pretty quickly to develop or strengthen abortion restrictions in some states, while others are trying to make it easier for their residents to access abortion care.

So there's going to continue to be an evolving set of laws that come out and I would not be surprised to see the IRS also come out and clarify some of the tax issues associated with providing transportation related expenses for abortions.

Since the Dobb's decision was issued, there's been a lot of activity and that will continue. We all just have to keep our eye on it and be able to act quickly to assess what those new roles are and how employers can manage them.

Megan Monson:

Great. So thank you both so much for joining us today. As Andy mentioned, the law in this area is rapidly evolving. So it's important for our listeners to stay up to date. We will continue to monitor updates on the topic.

And if you are an employer considering how to provide abortion related benefits to your employees, please contact a member of Lowenstein Sandler's executive compensation and benefits group.

Thank you so much for joining us today, and we hope to have you back on our next episode of just compensation.

Julie Levinson Werner: Thank you.

Kevin Iredell:

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