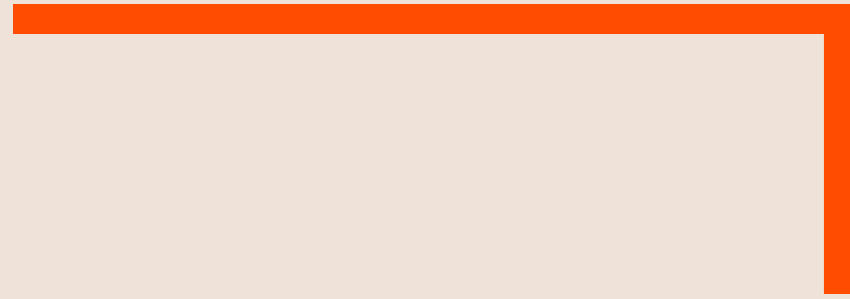


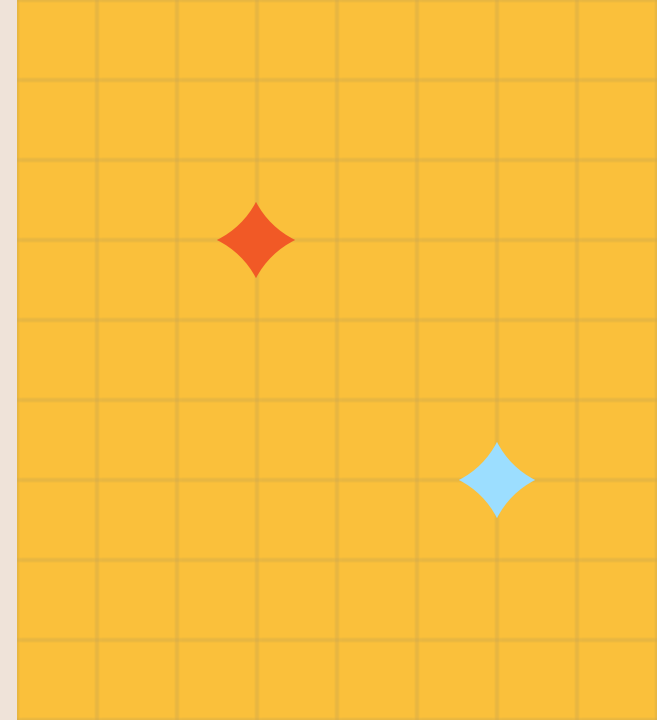
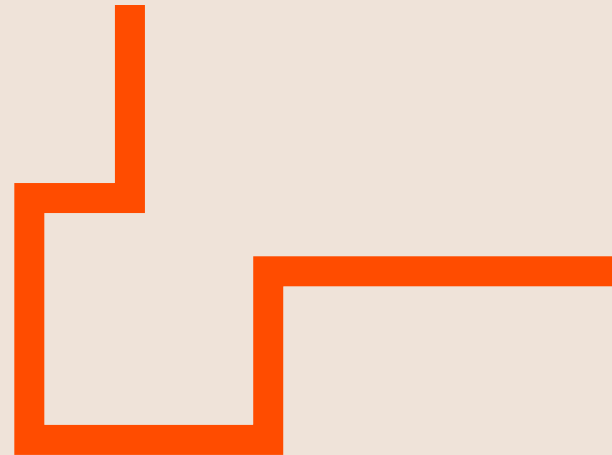
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# Employer Healthcare Benefits in a Post-Roe v. Wade World

Presented by Bethany Lopušnak, SHRM-SCP and  
Kara Govro, J.D., SPHR

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Speakers



Bethany Lopušnak, SHRM-SCP

Manager, Benefits Advisory Services  
Mineral



Kara Govro, JD, SPHR

Chief HR Legal Expert  
Mineral

# Today's Agenda



1. The Dobbs Decision
2. Employer Considerations
3. Options for Providing Care
4. Navigating Related Workplace Issues

# Abortion Rights in the United States

## Level Setting

### Roe v. Wade

In 1973, the U.S. Supreme Court's ruling in *Roe v. Wade* recognized that the decision whether to continue or end a pregnancy belongs to the individual, not the government. *Roe* held that the specific guarantee of "liberty" in the Fourteenth Amendment of the U.S. Constitution, which protects individual privacy, includes the right to abortion prior to fetal viability. It required that any restriction pass the "strict scrutiny" standard.

### Planned Parenthood v. Casey

In 1992, the U.S. Supreme Court upheld *Roe*, but on the question of what level of constitutional protection should be afforded to abortion rights, the Court adopted the lower "undue burden" standard for determining the constitutionality of government restrictions on abortion, replacing the strict scrutiny standard adopted in *Roe*. This opened the door for more state-level restrictions.



# The Dobbs Decision



**The Case Outcome:** The Constitution is no longer interpreted to provide a right to abortion. *Roe* and *Casey* are overruled and the authority to regulate abortion is returned to the people and their elected representatives.

**The Real-World Results:** With no federal protection for abortion, numerous states have implemented restrictions or bans. People seeking abortion in certain states will need to travel to receive them. Doctors may refuse to perform certain procedures to avoid prosecution. Some women may reconsider where they are willing to live and work as a result.

**Not Impacted:** The ACA, provisions regarding abortion coverage per the EEOC under the Pregnancy Discrimination Act, the right to an abortion if provided by a state constitution or not disallowed by state law.

# Accessing Care

## What Should Employers Consider Now?



Should you explore benefit coverage changes or expansions?

- You don't need to make changes aside from those required by relevant state law (which you'll likely hear about from your carrier)



Where are your employees located and what does that mean for access to care?

- Where are they now?
- Where might they be in the future?
- How might your benefits package impact talent attraction and retention?



What services does your health plan offer now and what changed?

- Existing travel options?



If you want to make changes, what makes the most sense for YOUR company?

- Consider cost, how you will administer, privacy issues, and additional compliance considerations.
- Think beyond just abortion-related services.

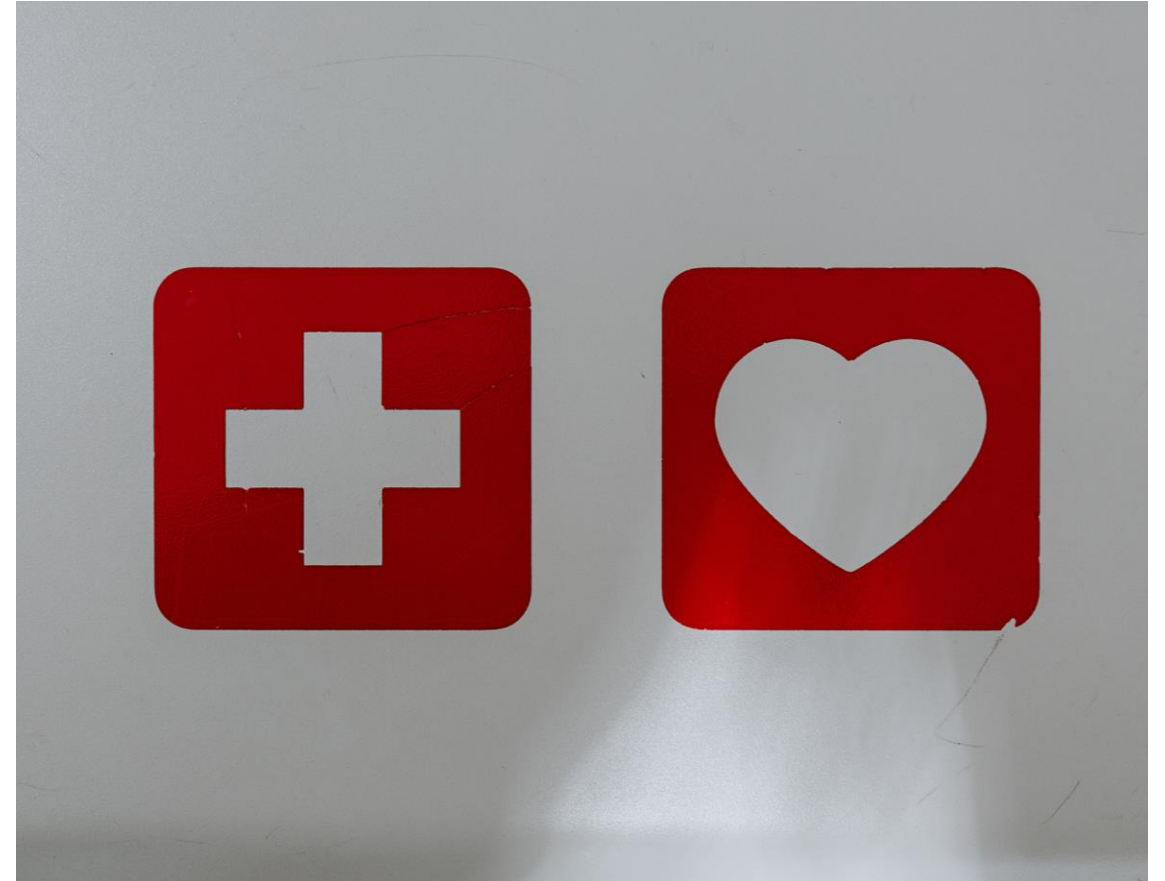


# Options for Providing Care

# Traditional Medical Plan Coverage

## Self-Funded Plans

- Plan sponsors have more flexibility in design and the type of provisions that are included in their plans.
- Self-funded plans enjoy ERISA preemption for most state laws regulating insurance.
- ERISA preemption doesn't cover everything. State laws limiting providers, along with criminal and civil law can still impact options.





# Traditional Medical Plan Coverage

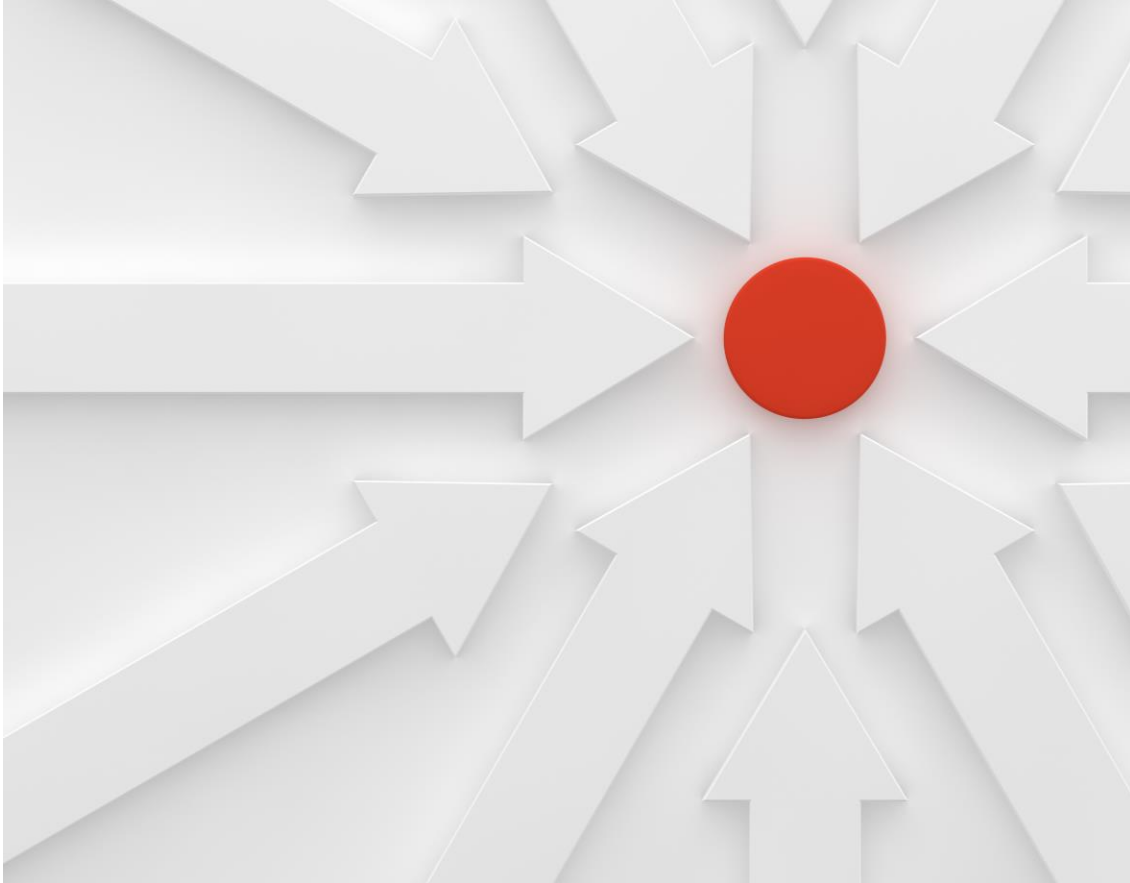
## Insured Plans

- These plans are subject to state insurance laws and any state-specific limits on accessing abortion-related services.
- Insured plans have less flexibility because the insurer is required to comply with state law and may be less willing to be flexible even in other areas.
- What state your plan is written in will impact what options you have.
- Multi-state employers may have difficulty providing a consistent offering with an insured plan.



# Traditional Medical Plan Coverage

## Considerations For Both Self-Funded & Insured Plans



- One benefit of leveraging existing plans is that there is already a structure/process in place for compliance.
- Review any existing travel benefit coverage options to determine (1) what they cover and (2) whether you can expand upon them.
- Assess who is eligible for your plans now and whether changing your eligibility provisions to expand access might make sense.
- Some employers are exploring expanded pharmaceutical benefits, versus surgical abortion, but state restrictions can impact this.

# Traveling for Care

## Health Reimbursement Arrangements (HRA)

- Self-funded group health plans subject to ERISA and Affordable Care Act requirements.
- Can reimburse eligible expenses on a tax-free basis.
- Can cover travel expenses primarily for and necessary to medical care.
- Standard HRAs are "integrated" with other major medical coverage.
  - Only available to people enrolled in the integrated medical coverage.
  - No specific IRS imposed dollar cap on the amount an employer can contribute.



# Traveling for Care

## Health Reimbursement Arrangements (HRA)

- Excepted Benefit HRA (EBHRA) can cover things like dental, vision, and eligible *out-of-pocket health care expenses*.
- Available to those enrolled in OR just eligible for (but not enrolled in) the employer's medical coverage.
- Annual reimbursement limit, indexed for inflation (\$1,950 for 2023)



# Traveling for Care

## Travel Expenses & Tax Treatment



- Eligible transportation expenses can include reasonable bus or airfare, mileage, etc. Limits apply.
  - Current IRS Medical Mileage Limit: \$0.22/mile
- Reasonable lodging expenses. Limits apply and meals are generally not covered.
  - Lodging generally limited to \$50/night per person.
- [IRS Publication 502](#) provides guidance.

# Traveling for Care

## Mental Health Parity

- Most group health plans offering mental health (MH) & substance abuse disorder (SUD) benefits must provide parity between those benefits and medical/surgical benefits.
- Employers offering a travel benefit for abortion-related care need to assess obligations to offer comparable benefits for travel related to MH/SUD benefits.



# Traveling for Care

## Other Spending Accounts



### Health Flexible Spending Accounts (HFSA)

- Employee & employer contributions are possible.
- Some plans are narrowly written in terms of expenses covered.
- May be able to use for medically related travel expenses.

### Health Savings Account (HSA)

- Employee & employer contributions are possible.
- May be able to use for medically related travel expenses.
- Consider potential conflicts with other types of disqualifying coverage (HRA, general purpose HFSA, etc.).

# Traveling for Care

Options with potentially broader reach



## Employee Assistance Program (EAP)

- Typically covers a wider group of employees (often all employees).
- Must meet "excepted benefit" standards under the Affordable Care Act. This means it:
  - Cannot provide *significant* medical benefits
  - Cannot be coordinated with benefits under another group health plan
  - No employee contribution or cost-sharing requirement
- The determination of whether it meets excepted benefit status is a fact specific decision.



# Traveling for Care: Non-Group Health Plans

Programs not subject to ERISA\*

## Travel Expense Reimbursement Policy

- General travel, not tied to medical need.
- Provides flexibility and reduces potential compliance obligations under ERISA, the Affordable Care Act, etc.
- A taxable option that avoids IRS limitations on specific expenses. It's still subject to normal income/payroll taxes.
- Avoids the need to collect medical information that might:
  - a) implicate HIPAA privacy protections, and/or
  - b) reduce the likelihood that employees will take advantage of it.



*\* Plans not subject to ERISA don't have ERISA preemption protections.*

# Traveling for Care: Non-Group Health Plans

Programs not subject to ERISA\*

## Lifestyle Spending Account (LSA)

- Provides flexibility and reduces potential compliance obligations under ERISA, the Affordable Care Act, etc.
- Excludes medical expenses but could focus on "wellness" and include a general travel benefit.
- Provides lots of flexibility in the types of expenses that can be included. You don't have to focus on just health and wellness.
- A taxable option that avoids IRS limitations on specific expenses. It's still subject to normal income/payroll taxes.



*\* Plans not subject to ERISA don't have ERISA preemption protections.*

# Conversations That Are Protected

## The National Labor Relations Act

Employees have a right to talk about the terms and conditions of their employment.

This could include:

- Pay, hours, workplace conditions
- Behavior of managers and owners in the context of work
- Benefits, including what is or is not covered by their health insurance



## Discrimination Based on Protected Classes or Characteristics

If conversations are not related to employees' terms and conditions of employment, you may be able to limit or discourage them, but you should still consider potentially discriminatory impacts.

Are you mostly limiting (or even punishing) the speech of women? Or those with or without a certain religion? People of a particular political party? Employees who have had abortions? Any of these could implicate protected classes.

# Examples We've Seen

- Employee who doesn't like seeing conversations about abortion rights on Slack
- CEO posting inflammatory comments on LinkedIn
- Facebook battles over local protests
- Complaints that the company is taking a "both sides" approach
- Public demands that the company provide specific health care options



# Best Practices for a Respectful Workplace

- Resurface your harassment and equal employment opportunity policies.
- Explain as needed that employees do not have a right to "free speech" in the workplace. The First Amendment right to free speech protects people from having their speech limited by *the government*.
- Endorse and enforce respectful language (even "political correctness") as a basic tenet of professional communication. You can provide respectful conversation guidelines, like the following:
  - ✓ Speak with positive or neutral intent – if your intent is otherwise, don't speak at all.
  - ✓ Assume positive or at least neutral intent from other speakers.
  - ✓ Treat communication as a dialogue, not a debate.
  - ✓ Be an active listener.
  - ✓ Acknowledge that the concepts of "right" and "wrong" are subjective.
  - ✓ Consider tough conversations an opportunity for personal growth.
  - ✓ Be open to learning new things.
  - ✓ Use "I" sentences—speak from your own experience.
  - ✓ Avoid generalizations, such as "all \_\_\_\_\_ are \_\_\_\_\_."
  - ✓ Use respectful, non-inflammatory language.





## Next Steps:

- ✓ Consider what your specific population needs.
- ✓ Determine options within existing plans.
- ✓ If you want to consider alternatives, explore the compliance and tax burden implications.
- ✓ Talk to the relevant parties: your benefits broker, carrier, any vendors or third-party administrators, and legal counsel.
- ✓ Review whether your current approach to workplace discussions follows best practices.

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