

Managing State Law Risks of Employer-Sponsored Abortion-Related Travel Benefits Post-Dobbs

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In previous posts (available [here](#) and [here](#)) we reported on some of the legal consequences from [Dobbs v. Jackson Women's Health Organization](#) on employer-sponsored group health plan coverage of abortion-related travel benefits. This post addresses the larger concern related to the legality of these benefits in the face of a burgeoning number of states seeking to extend their extra-territorial reach to bar or even criminalize individuals who provide abortion-related travel.

At issue here is the question of the extra-territorial application of state law. Under what circumstances may a state that bans abortion apply its civil or criminal law to citizens procuring abortions in other states lacking such bans? And what exposure might an employer face for facilitating out-of-state abortions through travel reimbursement programs that run afoul of such bans?

At first blush, one might wonder what all the fuss is about. Don't U.S. citizens have an unfettered right to travel? Citizens who live in states that ban gambling or marijuana routinely make their way to Nevada and Colorado, respectively without fear of legal liability. This somewhat obvious travel right might be exactly what Justice Kavanaugh was referring to in his concurring opinion in *Dobbs* when he asked whether a state could bar one of its residents from traveling to another state to obtain an abortion. In answering the question, he opined that the answer is no "based on the constitutional right to interstate travel."

Justice Kavanaugh provided no support for his conclusion, however. He could have, for example, cited a 1975 Supreme Court case, *Bigelow v. Virginia*, which held that Virginia could not prevent its residents from traveling to New York to obtain an abortion. But despite this precedent, the extraterritorial application of state law is a fairly undeveloped legal area. The right to travel, among other, related rights, implicates long-debated questions of Constitutional law that involve the Full Faith and Credit Clause, the Due Process Clause of the Fourteenth Amendment, and the Constitution's general federalism principles. These issues and more are dissected at length in a paper that we found particularly insightful, David S. Cohen, Greer Donley & Rachel Rebouché, [The New Abortion Battleground](#). The paper is currently in draft. It will be published in the *Columbia Law Review*.

Background

Our earlier posts addressed abortion-related travel benefits in the context of group health plans, which are governed by the Employee Retirement Income Security Act (ERISA). In general, ERISA preempts state civil laws purporting to regulate group health plans. So a state civil statute barring abortion-related travel would generally not be enforceable if it applied to a self-funded group health plan. A state can, of course, bar abortion or abortion-related travel in a contract of group health insurance issued by a carrier licensed in the state (where such laws are not subject to ERISA preemption), but even here it should be a simple matter to provide the travel benefit under a “split-funded” arrangement (e.g., where a fully insured major medical plan is paired with a health reimbursement account or HRA).

Criminal laws are different. ERISA does not preempt “*any generally applicable* criminal law of a State”. So a criminal law directed only at employee benefit plans would likely be preempted, but a criminal law that applies generally may not. The issue is whether certain laws criminalizing abortion, including the aiding and abetting thereof, are of the general, non-preempted variety.

The threat for employers seeking to provide abortion-related travel benefits arises principally from laws prohibiting “aiding and abetting” of violations of any state law by its residents who travel to another jurisdiction that permits the conduct the home state criminalizes. Where the law of an individual’s domicile criminalizes the aiding and abetting of abortion-related travel, and an employer facilitates travel to a jurisdiction in which abortion is permitted, which law applies—the law of the employee’s domicile or the laws of the state in which the abortion is performed? And how does this conflict of laws pose a risk for employers?

Precedent

The answer to the aiding and abetting question posed implicates the following sources of law:

- *The “Right to Travel”*

Article IV of the Constitution’s precursor, the [Articles of Confederation](#), included an express right to travel (“the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce”). The founders viewed this right as fundamental to and inherent in American citizenship and the nature of the federal union. There is, however, no explicitly enumerated “right to travel” in the Constitution. To the extent that right exists, it comes from the Privileges and Immunities clause of the Fourteenth Amendment, to which all states are expressly bound:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Proponents of a right to travel typically claim that the right to travel encompasses three separate rights: the right of a citizen to move freely between states, rights embedded in the Privileges and Immunities clause, and the right of new arrivals to a state, who then establish citizenship, to enjoy the same rights and benefits as other state citizens.

- *“Dormant” Commerce Clause*

There is no actual “Dormant Commerce Clause” in the Constitution. Rather, the restrictions on state action regulating commerce have been inferred by the Supreme Court from the Commerce Clause in the Constitution. A fulsome discussion of the Dormant Commerce Clause relies on the Supremacy Clause, which makes Federal law the supreme “Law of the Land.” Because Congress has been given power over interstate commerce, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of Federal legislation. So rather than implicating the Federal government’s power to act, the Dormant Commerce Clause restricts states from inhibiting the powers inherent in the Commerce Clause.

- *Full Faith and Credit Clause*

The “Full Faith and Credit Clause” requires states to recognize and accept other states’ public records, judicial proceedings, and legislative acts. It ensures that court decisions in one state will be honored in other states. The clause is primarily pertinent to the enforcement of judgments.

- *Due Process Clause*

Although the Due Process Clause is oft-cited as a likely basis for prohibiting the extraterritorial application of abortion law, no clear legal consensus currently exists in support of this claim. Justice Alito appears to disparage this view by claiming that abortion ought to be distinguished from other rights protected by the Due Process Clause. In addition, Justice Thomas’s *Dobbs* concurrence posits that the Due Process Clause provides no substantive protections.

States have not to date deployed their criminal laws to prosecute people for crimes committed entirely outside of their borders, which seems to support the consensus that doing so would waste valuable state resources. This view’s intuitive appeal is evidenced by the failure of the states to prosecute Las Vegas gamblers or jail Colorado agritourists. A 1999 Massachusetts case (*In re Vasquez*, 705 N.E.2d 606, 610 (Mass. 1999)) went so far as to refer this consensus as “axiomatic,” but it’s not. Another strand of legal precedent analyzes the significance of detrimental effects on the state of an offender’s domicile: does the abortion for which the travel benefit was provided have a detrimental effect in the state that bans it? Under this analysis, a state may claim to exercise jurisdiction over criminal acts that take place outside of the state if the results of the crime are intended to, and do, cause harm within that state. A state that bans abortion would likely claim that requisite harm. This is referred to as the “effects doctrine.” It allows states to prosecute actions that take place outside the state that have detrimental effects in the state. The doctrine was articulated in a 2005 California Supreme Court case, *People v. Betts*: as follows:

Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

States seeking to support the extraterritorial reach of their laws criminalizing abortion-related travel would in all likelihood look to this doctrine to buttress that support.

How Employers May Mitigate Risk in the Absence of Clear Legal Support

Given the uncertainty the extraterritorial reach of state aiding and abetting laws, employers are faced with a “non-zero” risk of criminal liability for facilitating abortion-related travel. This risk, however, might be mitigated in some of the following ways:

- Provide medical travel benefits as covered benefits under a group health plan (aligned to the definition of medical care set out in the Internal Revenue Code, for transportation primarily for and essential to medical care) or as a reimburseable expense from a health reimbursement account to preserve the possibility of an ERISA preemption defense.
- Adopt a broad-based, taxable, generic travel benefit policy up to a desired limit (which does not require substantiation of employee expenses).
- Evaluate offering travel benefits using an EAP or other arrangement administered by a third party that reports only high-level summary data to the plan sponsor that preserves an ERISA preemption defense.
- Explore and purchase if necessary traditional insurance policies that will cover the defense (including damages, fines or penalties) associated with any criminal or civil claims brought against the corporation or its officers, directors and plan sponsors that adopt a travel plan, while recognizing that traditional policies of insurance may not allow criminal conduct to be insured against for public policy reasons.
- Examine applicable and existing bylaws and indemnification rights and obligations available to corporate officers and directors who may be targeted for participating in adopting or administering any of these benefits and determine whether adjustments need to be made to provide for protection.

No plan is foolproof, and there are tradeoffs. A broad-based taxable generic travel benefit will not benefit from ERISA’s preemptive force, which is no small matter. And at least in the case of an excepted benefit EAP, it is not yet clear whether such travel benefits actually satisfy the requirement that the benefit does not provide “significant benefits in the nature of medical care (especially for employers who already sponsor other EAPs). Guidance on these and other benefits presumably will be forthcoming.

Some states are already considering criminalizing out-of-state abortions for their citizens and likewise criminalizing aiding and abetting for out of state enablers. Other states may legislate insulation for residents from out-of-state prosecutions. The Constitutional reach and limits of these laws, on both sides, will invariably be tested.

More challenging still is that, with *Dobbs*, the judicial process has taken on a political gloss. To what extent can *any* precedent now be relied on? Employers need to take this new “political” risk into account as they weigh their plan design options. This calculus extends to directors, officers, and LLC managers, who might be targeted personally.

We will continue to monitor these matters and will update these posts as developments occur.

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