

July 14, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Request for Guidance and Meeting on the Impact of the *Dobbs v. Jackson Women's Health Organization* Decision on Employer Health Plans

Dear Secretaries Becerra, Yellen and Walsh:

The *Dobbs v. Jackson Women's Health Organization* decision has created significant legal and policy concerns and questions for multi-state employers who provide travel related benefits as part of their ERISA covered health plans or as part of an excepted benefit Employee Assistance Program (EAP). The HR Policy Association urges the Departments to strengthen and strongly defend ERISA preemption and provide much-needed guidance to companies who provide self-insured health plans and EAPs. In addition, we would like to meet with you to discuss several outstanding questions that our members have regarding the impact of *Dobbs* on benefits offerings to see how they may be addressed.

The HR Policy Association (Association) is the leading organization representing chief human resource officers of 400 of the largest employers in the United States. Collectively, the Association's member companies provide health care coverage to over 20 million employees and dependents in the United States. The American Health Policy Institute (Institute), a part of the Association, examines the challenges employers face in providing health care to their employees and recommends policy solutions to promote affordable, accessible, high-quality, employer-based health care. The vast majority (94%) of the Association's member companies provide self-insured health plans and many have both self and fully-insured plans.¹ Prior to the *Dobbs* decision, almost 93% of the Association's members covered abortion services in their health plans in either all circumstances (74%) or in some circumstances (19%), and 62% provide travel benefits for a wide variety of medical procedures that are not locally available to plan participants.²

Below are two steps we urge the administration to take in response to the *Dobbs* decision.

¹ HR Policy Association member survey July 2022, available at: https://www.hrpolicy.org/getmedia/f6a0e995-a961-4b73-8d28-1694fa2ee9df/Reproductive_Rights_Survey_Results_2022.pdf.

² *Id.*

Strengthen and Strongly Defend ERISA Preemption

The Employment Retirement Income Security Act (ERISA) created preemption principles that are fundamentally important to the ability of multi-state employers to offer uniform health benefits. Without ERISA, self-insured employer health plans would find it nearly impossible to operate under the wide variety of complicated and potentially conflicting state-based laws.

ERISA's preemption provisions enable employers to obtain lower-cost, nationwide pricing for health care services and allow for uniformity of benefits and equity across an employer's workforce. It also enables large employers to drive innovation in benefit and plan design, foster new health care cost controls, and improve the quality of care including Centers of Excellence benefits and wellness programs. Any weakening of the foundation provided by ERISA preemption not only increases the cost and complexity of health benefits for employees and employers, but also frustrates further health care market innovation.

Multi-state employers often provide travel benefits to obtain medical services that are not available where they live. For example, 31% of the Association's member companies pay for travel to Centers of Excellence for covered procedures and another 31% pay for travel if a covered service cannot be obtained within a certain distance of the employee, including 26% who provide travel benefits for abortion services. These travel benefits are potentially at risk after the *Dobbs* decision.

The Association urges the Department of Labor to strengthen and strongly defend ERISA's preemption provisions, particularly as it pertains to state efforts to pursue civil and criminal actions against health plan sponsors. While there is a strong argument that state statutes purporting to prohibit plans from paying for abortion-related services "relate to" employee benefit plans and are preempted by ERISA, some courts may conclude that a state law criminalizing "aiding and abetting" behavior is a law of general applicability that is not protected by ERISA preemption. On the other hand, other courts may conclude that state aiding and abetting laws targeted to abortion are not laws of general applicability and are preempted by ERISA. The Association urges the Department to issue regulatory and sub-regulatory guidance to reenforce and ensure that ERISA preemption is clear in these circumstances.


Clarify Employers Can Provide Travel Benefits Through an Excepted Benefits Employee Assistance Program

A number of multi-state employers are considering using an EAP to provide travel reimbursement benefits to employees seeking abortion care in other states. Under the Department of Labor's current sub-regulatory guidance, an EAP is considered an excepted benefit and not a group health plan for purposes of ERISA if it does not provide significant benefits in the nature of medical care. Moreover, to be an excepted benefit an EAP cannot be coordinated with benefits under another group health plan, charge a premium for participation, and require any cost sharing for offered services. The Association urges the Departments to clarify that multi-state employers can provide travel benefits as part of an excepted benefits EAP.

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The Supreme Court's decision in *Dobbs v. Jackson Women's Health* raises significant legal and health plan questions for employers regarding civil and criminal liability, travel benefits, the implications for other federal laws (i.e., Title VII, pregnancy discrimination), telehealth benefits and certain medications, and other issues. We would appreciate the opportunity to discuss these critical issues with your respective agencies. Please reach out to me at mwilson@hrpolicy.org or Chatrane Birbal at cbirbal@hrpolicy.org to schedule a meeting.

Sincerely,



D. Mark Wilson
President and CEO, American Health Policy Institute
Vice President, Health & Employment Policy
HR Policy Association



Chatrane Birbal
Vice President, Government Relations
HR Policy Association