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Providing Benefits for Abortion Services Post-Dobbs—Ways to Protect the Plan Sponsor

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Overview

- Overview of the *Dobbs* decision
- Common designs in health plans for the travel and lodging benefits
- Discussion of tax issues, including:
  - What can be included as a non-taxable medical care expense
  - Substantiation requirements
  - High Deductible Health Plan rules (and issues to consider if including the benefit in an employee assistance plan (EAP))
  - Possible Health Reimbursement Arrangement (HRA) designs
- The application of ERISA
- State law considerations and Constitutional and ERISA preemption arguments
- HIPAA privacy guidance regarding reproductive health services
- Possible issues to consider under the Mental Health Parity and Addiction Equity Act
- Recent case regarding medication abortions and recent actions by legislatures
- Protective provisions to include in a health plan
- What may come next…

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

Some Background

- Prior to Dobbs, there were several U.S. Supreme Court ("Court") cases regarding the right to abortion services, including Roe v. Wade and Planned Parenthood of Southeastern Pa. v. Casey.
  - We will not discuss those cases in detail in this webinar
- Roe and Casey sprung out of Griswold v. Connecticut (1965). Estelle Griswold, the executive director of the Planned Parenthood of Connecticut, and Dr. Buxton, a physician, were arrested for giving contraception advice to married couples. At the time, a Connecticut state law prohibited the use of any drug or medicine to prevent conception—and the law punished anyone who assisted, abetted or counseled a person to do so.
- The issue in Griswold was whether a married couple had a federal constitutional "right of privacy" to be counseled in the use of contraceptives. The Supreme Court decided that the State law against contraceptives violated a "zone of privacy" that was inherent in the Constitution.

Roe and Casey

- Roe v. Wade -- In a 7-2 decision, the Court held that prohibiting abortion infringes on a woman's constitutional right to privacy, but also recognized that this right must be balanced against the state's interest in protecting "the potentiality of human life."
- Planned Parenthood of Southeastern Pa. v. Casey Reaffirmed Roe's holding that women have a constitutional right to obtain an abortion (found in the 14th Amendment). Adopted an "undue burden" standard for laws regulating abortion.
  - Held that Roe was entitled to "rare precedential force" as it resolved a "unique, intensely divisive controversy."

Dobbs

- At issue in the Dobbs case, was whether the *Mississippi Gestational Age Act* was permitted under the Constitution.
- That Act provides that "[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks."
  - This law would be unconstitutional under Roe and Casey because it prohibits most abortions prior to fetal viability.

Dobbs -- Holding

- The Constitution does not confer a right to abortion;
  - The Opinion states that the 14th amendment protects "fundamental rights," meaning rights that are "deeply rooted in our history and tradition." It examines the history of abortion restrictions at common law, and American law and concludes that "…the right to abortion is not deeply rooted in the Nation's history and traditions."
- Roe and Casey were wrongly decided and overruled;
  - "*Stare decisis*, the doctrine on which *Casey's* controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."
- The authority to regulate abortion is returned to States and that the States may regulate abortion for legitimate reasons
  - "A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity."... It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."

Dobbs

- After the Dobbs decision, most State laws that regulate or ban abortions will likely be upheld
- It is unclear what impact Dobbs will have on other Supreme Court cases that are based on a constitutional "right to privacy" (e.g., Griswold)
- This will be the basis for a lot of future litigation

COMMON PLAN DESIGNS

Proposed Designs for Self-Funded Plans

- Some plan sponsors have enhanced the travel and lodging (T&L) benefits provided in their self-funded health plans.
- Initial designs included provisions such as $4,000 (or similar dollar amount) if one must travel more than 50 miles (or some similar distance) from home to receive legal abortion services
- Some employees reacted by asking why T&L benefits were not included for other health services
- More recent designs have provided broader coverage of T&L benefits, such as including charges for T&L benefits for a participant to travel for any covered medical or behavioral health service, if the participant cannot access such covered service from a local provider within 50 miles from their home

Proposed Designs for Self-Funded Plans

- Some employers have added a service in their health plans through which an employee can obtain information about:
  - The closest State that provides legal abortion services
  - The limitations on abortion services in that closest State, such as legal abortion services covered up to XXX weeks
- Due to potential litigation issues, it appears that some third-party administrators (TPAs) have cut back on this service
  - We will discuss why in later slides

Proposed Designs—Fully Insured/HMO Plans

- Fully-insured plans that are offered in States that ban abortion services will not cover abortion services:
  - Fully insured plans are subject to state laws and approval by the applicable state insurance department
- The plan sponsor could adopt an HRA that is provided to individuals who are covered by the fully insured plan that would cover abortion services, and associated T&L benefits
  - We will address HRAs in more detail later in this webinar
- To comply with the Affordable Care Act (ACA), the HRA must be "integrated" with the fully insured plan—meaning only those covered by the employer's major medical plan or the major medical plan of a spouse or parent could be covered by the HRA
- It may be hard to find a vendor to administer an HRA that just covers T&L benefits for abortion services

THE INTERNAL REVENUE CODE

Medical Care

- In general, a group health plan can only reimburse, on a non-taxable basis, "medical care" as that term is defined under Internal Revenue Code ("Code") Section 213(d)
  - Code Sections 105 and 106 have additional rules regarding the taxation of medical care provided by group health plans
- The regulations under Code Section 213(d) specifically exclude from the definition of "medical care" any amounts expended for illegal operations or treatments. (Treas. Reg. §1.213-1(e)(1)(ii))
- Generally, the IRS will look at the locality where an item or service was obtained to determine whether it was legally procured (IRS Revenue Ruling 78-325)
- In 1973 IRS Revenue Rulings (73-201 and 73-603), the IRS stated that services for an abortion, in a State where it is legal, are considered medical care under Code Section 213(d)

Travel

- Travel: Code Section 213(d)(1)(B) provides that medical care includes amounts paid "for transportation primarily for and essential to medical care"
  - "medical care" means the amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body
- IRS Publication 502 states that travel can include:
  - "Bus, taxi, train, or plane fares"
  - "Transportation expenses of a parent who must go with a child who needs medical care"

Travel

- Travel: With regard to cars, IRS publication 502 explains it as follows:
  - "You can include out-of-pocket expenses, such as the cost of gas and oil, when you use a car for medical reasons. You can't include depreciation, insurance, general repair, or maintenance expenses. If you don't want to use your actual expenses for 2021, you can use the standard medical mileage rate of 16 cents a mile. You can also include parking fees and tolls." (For 2022, it has been increased from 16 cents to 22 cents.)

Travel

- Travel: Older tax court cases provide that the travel expenses of a caregiver can also be included as a non-taxable benefit
- We have seen some plans add that travel expenses for TWO parents are permitted when the patient is a minor
- We have not found any guidance that supports that position
- We believe that travel costs are limited to the patient and one additional person

Lodging

- Lodging not at a Hospital: Up to **$50** per night will qualify if these conditions are met:
  - (1) the lodging is primarily for and essential to medical care;
  - (2) the medical care is provided by a physician in a licensed hospital or medical care facility related to (or equivalent to) a licensed hospital;
  - (3) the lodging isn't lavish or extravagant; and
  - (4) there is no significant element of personal pleasure, recreation, or vacation in the travel.

  Code Section 213(d)(2)

Lodging

- Lodging not at a Hospital: If a parent is traveling with a child who is the patient, up to $100 may qualify ($50 for each person) (IRS Private Letter Ruling 8516025)
- Again, the limit is for the patient and one caregiver
- Note that amounts reimbursed over the $50 per individual limit will be considered a taxable reimbursement (W2 wages)
- If a plan sponsor decides to exceed the $50 per individual limit, then there would need to be some coordination between the health plan and the company's payroll department
  - The third-party administrator for the health plan generally does not perform payroll functions, like withholding
  - For privacy reasons, the company may not want to exceed the non-taxable limit because it does not want this information to be shared with payroll

Meals

- Meal expenses while away from home undergoing treatment are **not** expenses for medical care under Code Section 213(d) unless they are provided at a hospital or similar institution at which the individual is receiving medical care
- Most plans do not include this expense because it is taxable and not a medical care expense under the Code

High Deductible Health Plan Rules

- For an employee to be eligible to contribute to a Health Savings Account (HSA) or have contributions made on his/her behalf to an HSA, the employee must be covered by a high deductible health plan (HDHP) and not any "impermissible coverage"
- Generally, all benefits must be paid after the deductible is met, with some exceptions
- One exception is for "preventive" care. We do not think that T&L benefits are preventive care
- IRS Notice 2004-50 contains an additional exception:
  - Q-10. Does coverage under an Employee Assistance Program (EAP)…make an individual ineligible to contribute to an HSA?
  - A-10. An individual will not fail to be an eligible individual under section 223(c)(1)(A) solely because the individual is covered under an EAP…if the program does not provide significant benefits in the nature of medical care or treatment, and therefore, is not considered a "health plan" for purposes of section 223(c)(1)....

High Deductible Health Plan Rules

- The examples in that Notice include short-term counseling benefits to identify the employee's problem or a program that monitors laboratory or other test results and provides telephone contacts or web-based reminders of health care schedules
- There is no formal guidance regarding if T&L benefits can be viewed as an EAP-type benefit under this rule
- The concern is that the T&L benefits are more like a slice of a major medical benefit—and not the kind of benefit to be included in this exception

Health Reimbursement Account

- An employer may adopt a Health Reimbursement Account (HRA) that provides T&L benefits
- An HRA is a tax-advantaged arrangement that reimburses individuals for qualified health care costs. HRAs must be entirely employer-funded and they are considered self-funded group health plans under the Code
- Stand-alone HRAs are no longer permitted under the ACA (with some very limited exceptions)
- An HRA can be "integrated" with major medical plan--meaning only those covered by the employer's major medical plan or the major medical plan of a spouse or parent could be covered by the HRA
- An employee's participation in an HRA can cause him/her to be ineligible to contribute to an HSA unless the HRA only pays benefits once the HDHP deductible has been met
  - This will require coordination between the major medical plan and the HRA administrator

Substantiation Requirements

- Medical care provided by an employer is non-taxable, so long as the applicable requirements in Code Sections 105 and 106 are met
- Medical expenses must be substantiated. IRS Notice 2006-69 describes substantiation requirements for debit cards. However, that Notice states that it provides information about the substantiation requirements for all medical reimbursements:
  - That Notice states that Code Section 105 requires, "the substantiation of all medical expenses as a precondition of payment or reimbursement... "Self-substantiation" or "self-certification" of an expense by an employee-participant does not constitute the required substantiation."
- We assume that, at a minimum, the participant must provide evidence that the medical service was obtained and provide receipts for the T&L benefits
  - It seem likely that self-certification that an in-network provider was not within 50 miles of the participant's house should be permitted—as that is a plan rule and not a tax rule

Elect Taxation of Benefit

- Some employers have asked if they can make the reimbursement taxable, as a way around some of these tax rules. In most cases, whether something is taxable is determined by the Code
- This concept was addressed in IRS Notice 2015-17, shortly after the ACA was passed. Employers wanted to continue to reimbursement individual insurance premiums, although that was (mostly) no longer allowed under the ACA. Employers asked if they could reimburse those amounts on an after-tax basis as a way around those ACA rules—and so that the program would not be considered a group health plan. The answer from the IRS was no.
- An employer may consider adopting a general reimbursement plan, that reimburses any T&L—and not just medical care T&L—and try to claim that is exempt from these tax rules
  - We are not sure if that works. Even if it did, the employer would lose the ERISA preemption defense from State law actions—WHICH IS A CRITICAL DEFENSE

Other Strategies

- We understand that some employers are frustrated that the T&L benefit likely should be paid post meeting the deductible in an HDHP
- Consider other benefit designs
- For example, an employer could amend its PPO (non-HDHP plan) to include enhanced T&L benefits and state that they are paid prior to the deductible being met
  - With this new design, the employer may be able to allow employees to elect from the HDHP into the newly enhanced PPO-plan mid-year (see next slide)

Mid-Year Election

- Assume that the employer maintains an HDHP and a PPO
- The employer amends the plans to add T&L benefits
- In addition, the PPO plan is amended so that the deductible is waived for any T&L expenses (i.e., the deductible does not apply to the T&L benefits)
- There is an argument that the amendments to the PPO plan would allow the employer to add a mid-year election right

Mid-Year Election

- The 125 regulations contain a rule that, if adopted by the employer in its Section 125 plan (cafeteria plan), arguably could permit a mid-year election change under the "Addition or improvement of a benefit package option"
- That regulation states:

  If a plan adds a new benefit package option or other coverage option, or if coverage under an existing benefit package option or other coverage option is significantly improved during a period of coverage, the cafeteria plan may permit eligible employees (whether or not they have previously made an election under the cafeteria plan or have previously elected the benefit package option) to revoke their election under the cafeteria plan and, in lieu thereof, to make an election on a prospective basis for coverage under the new or improved benefit package option.
- The regulation does not define a "significant improvement" of coverage
- This regulation does not allow a person to drop health coverage, but rather move to the health plan option that has the improved benefit
- No election change is permitted for the Health FSA
- This could also be the basis to allow an employee to switch from a fully-insured plan that does not cover abortion services to the newly enhanced PPO plan

ERISA-COVERED BENEFIT

ERISA

- Many employer-sponsored health plans are subject to ERISA
  - There are some exceptions, such as a health plan sponsored by an instrumentality of the United States government or by the government of any state or political subdivision may be exempt from ERISA
- To qualify as an ERISA plan, the benefit arrangement must provide one of the benefits listed in ERISA §3(1)
- Among the benefits listed in ERISA is "medical, surgical, or hospital care or benefits"
- There is no all-purpose definition of "medical plan" in ERISA
- However, the definition of "group health plan" in ERISA §733(a) controls for most purposes. That definition uses the same language that is used in Internal Revenue Code 213(d)

ERISA

- A plan that reimburses for T&L benefits related medical services should be considered a group health plan under ERISA
  - This means that it can be added to the employers existing major medical plan
  - An HRA with T&L benefits would be considered an ERISA plan
  - An EAP with T&L benefits would be considered an ERISA plan (but note the other concerns with adding this to an EAP)
- It will also be subject to COBRA, HIPAA Privacy and other federal rules regulating benefit plans

STATE LAW CONSIDERATIONS

CIVIL LAWS

Overview

- In this next section, we will discuss the following:
  - A state civil law that could apply to a plan sponsor that includes abortion services in its health plan
  - Extraterritorial application of state civil laws (i.e., the application of the law of a state outside its boundaries)
  - Constitutional issues regarding the extraterritorial application of state civil laws
  - ERISA preemption of certain state civil laws

Context for Legal Issues for Benefit Designs

- Texas SB 8 prohibits abortions whenever an ultrasound can detect a fetal heartbeat. The exception is if the doctor believes a medical emergency necessitates the abortion.
- The "aiding and abetting" provision of SB 8 states the following:

> Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:
>
> (1) performs or induces an abortion in violation of SB 8;
>
> (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, **including paying for or reimbursing the cost of an abortion through insurance or otherwise**, if the abortion is performed or induced in violation of SB 8, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or
>
> (3) intends to engage in the conduct described by (1) or (2).

Texas SB 8

- SB 8 states that it is enforced exclusively through private civil actions
  - This not a criminal law
  - Some refer to it as a "bounty hunter law" because it incentivizes citizens with a cash "bounty" if they succeed in suing anyone who has helped a person obtain an abortion
- The damages are $10,000 for each abortion performed or induced in violation of this law and for each abortion performed or induced in violation of this law that the defendant aided or abetted. Plus, costs and attorney fees.
- The defendant has the burden of proving an affirmative defense

Extraterritorial Application of State Laws

- It could be argued that a company violates this Texas law when it pays for the travel and lodging costs of a Texas employee to obtain abortion services in another state where abortion is legal
- An initial question is if this Texas civil law would apply to actions taken in another state
- A few states have presumptions against extraterritoriality

Extraterritorial Application of State Laws

- The Supreme Court of Missouri addressed this issue in *Planned Parenthood of Kansas v. Nixon*.
- At issue was a Missouri state law that created a civil cause of action against any person who intentionally causes, aids or assists a minor in obtaining an abortion without parental consent
- Planned Parenthood of Kansas brought the action because it could be sued if it aided or assisted a minor to obtain an abortion without parental consent
- It argued that the application of Missouri law in this situation violated the Commerce Clause of the United States Constitution

Extraterritorial Application of State Laws

- The court stated, "it is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri, and [the Missouri law] cannot constitutionally be read to apply to such wholly out-of-state conduct. Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect."
- The court held that the Missouri state law was, "valid only to the extent that it applies to in-state conduct and not to wholly out-of-state conduct."
- While this case is helpful, it does not address the issue of medication abortion, in which the drugs may be procured legally in a neighboring state, but ingested by the individual while in a State that bans abortion—as the conduct would not be "wholly outside" that applicable State

Extraterritorial Application of State Laws

- As explained in the previous case, the extraterritorial application of state law may raise Constitutional issues
- While not clearly stated in the Constitution, arguably there is a "right" to interstate travel based on the Commerce Clause and the 14th Amendment (Due Process clause and/or the Privileges and Immunities clause)

Interstate Travel

- Justice Kavanaugh, in his concurring opinion in *Dobbs*, stated that:
  - [S]ome of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.
- The dissent in *Dobbs* also addressed this issue.
  - In States that bar abortion, women of means will still be able to travel to obtain the services they need.[25]
  - Footnote 25: This statement of course assumes that States are not successful in preventing interstate travel to obtain an abortion.
  - > The dissent appears more hesitant on the parameters of "constitutional right to interstate travel"

ERISA Preemption of State Civil Laws

- ERISA §514 provides: "Except as provided in [the savings clause], the provisions of [ERISA Title I] shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan."
- A state law with an indirect effect on benefits or plan administration may be preempted if the law affects a central matter of plan administration or interferes with nationally uniform plan administration Gobeille v. Lib. Mut. Ins. Co. (2016)
- State insurance laws that apply to insured plans (and similar entities, like HMOs), are saved from preemption—meaning fully insured plans are subject to state laws

ERISA Preemption of State Civil Laws

- Regarding state civil laws that contain provisions for "aiding and abetting" an individual to receive legal abortion services, there is a good argument that ERISA would preempt those laws for an ERISA self-funded health plan
- The argument is that those state laws "relate" to such plans, as they interfere with nationally uniform plan administration
  - For example, an administrator would need to know if the participant resides in a State that had adopted an abortion ban that contains an "aiding and abetting" provision and if that State law had extraterritorial application—all before reimbursing travel and lodging expenses for a legal abortion
- This will be a litigated issue

STATE LAW CONSIDERATIONS

CRIMINAL LAWS

Overview

- In this next section, we will discuss the following:
  - A state criminal law that could apply to a plan sponsor that includes abortion services in its health plan
  - Extraterritorial application of state criminal law
  - Constitutional issues regarding the extraterritorial application of state criminal law
  - ERISA preemption of certain state criminal laws

Criminal Law

- Some states, such as Texas, have criminal laws regarding abortion services, including that there is felony criminal liability on any person who "furnishes the means for procuring an abortion knowing the purpose intended."
- The first question is if states can prosecute crimes committed outside of their borders. The answer is not clear.
- While the discussion is similar to the civil cases that deal with extraterritorial application of state law, this issue is a bit different—given that it is about criminal actions.
- A California Supreme Court case looked at this issue in People v. Betts (2005). Betts was convicted on a number of counts involving lewd acts to children--some of which were committed in California and some which were committed outside of the state.
- The court stated that a, "…state will entertain a criminal proceeding only to enforce its own criminal laws, and will not assume authority to enforce the penal laws of other states…"

Criminal Law

- The court went on to state, "Although the constitutional limits of state courts' extraterritorial jurisdiction in criminal matters have not been precisely delineated, it is clear that States may extend their jurisdiction beyond the narrow limits imposed by the common law. For example, a state may 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 the state."
  - In this case, the children were residents of California
- One big difference from this case to any potential abortion services case, is that abortion services are legal in some states

Extraterritorial Application of State Laws

- The California Supreme Court noted this issue in People v. Morante (1999)
- In that case, the defendant committed the offense of aiding and abetting in California, but the commission of the crime took place outside of California
- In dicta, the court stated, "We reserve for another day the issue whether a conspiracy in state to commit an act criminalized in this state but not in the jurisdiction in which the act is committed, also may be punished under California law."

Criminal Law

- The Constitutional arguments discussed earlier in this webinar will be a defense to the extraterritorial application of State criminal laws
  - Remember that Justice Kavanaugh said in his concurring opinion in the Dobbs case that there is a constitutional right to interstate travel
  - A threat of criminal action would seem to be a bar to interstate travel

Criminal Law—ERISA Preemption

- ERISA preemption provides a good defense for plan sponsors
  - > YAY ERISA!!!
- Section 514(a) of ERISA, subject to certain exceptions, states that ERISA preempts state laws insofar as they "relate to" any ERISA-covered employee benefit plan. Section 514(b) saves from preemption "any general applicable criminal law of a State."
- The precedent under ERISA's criminal law exception consists of a limited number of cases and a few Department of Labor advisory opinions

Criminal Law—ERISA Preemption

- In one case, plaintiffs, trustees of an ERISA benefit fund, sued the corporation to collect benefit fund contributions due to the fund under the terms of a collective bargaining agreement.
- New York labor law states that an employer who is party to an agreement to pay benefits to a fund must make such payment within 30 days of the due date, otherwise that employer (and its officers) shall be guilty of a misdemeanor. *Trustees of Sheet Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 563 (E.D.N.Y. 1983).
- The court stated that law was preempted by ERISA:
  - [B]y limiting the exclusion from preemption to only those criminal laws of "general" applicability, Congress manifested a purpose to supersede criminal laws directed specifically at employee benefit plans.

Criminal Law—ERISA Preemption

- There is a good argument that a state criminal law targeting ERISA-covered plans that pay for legal abortion services (and the travel to and from a State that permits abortion services) would be preempted by ERISA, because it would not qualify as "generally applicable"

Plan Language

- Some employers have specifically added provisions to their health plans that state that the plan does not cover any services or drugs which are illegal under the law of the applicable jurisdiction in which they are incurred or procured
  - This is to help show no intent for the plan to violate state laws—only to reimburse legal medical expenses

POTENTIAL RESPONSE TO PREEMPTION DEFENSE

Police Power of the States

- Individuals who are trying to enforce these "aiding and abetting" laws may claim that those laws are protected from ERISA preemption (and other challenges) due to the police powers of the State under the 10th Amendment to the Constitution

  > "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

- Police power is granted to the states to establish and enforce laws protecting the welfare, safety, and health of the public

INDEMNIFICATION OF THE TPA

Third-Party Administrator Requests

- Many TPAs are concerned that administering the T&L benefits could cause someone to bring an action against the TPA for "aiding and abetting" an abortion
- Many TPAs are requiring that the employers sign a "hold harmless" agreement that indemnifies the TPA from any state law actions
- Carefully review this language. Do not sign anything that says the T&L benefits are not a part of the ERISA-covered plan
- Be careful that the language does not include other odd requirements about T&L benefits, such as the TPA will not require substantiation for those claims

HIPAA PRIVACY ISSUES

General HIPAA Privacy Rule

- The HIPAA Privacy Rule establishes national standards to protect individuals' medical records and other individually identifiable health information (collectively defined as "protected health information") and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically
- The HIPAA Privacy Rule requires appropriate safeguards to protect the privacy of protected health information and sets limits and conditions on the uses and disclosures that may be made of such information without an individual's authorization
- There are lots of exceptions of when protected health information (PHI) may be disclosed without the authorization of the individual

HIPAA Privacy Rule

- One exception is for "Law Enforcement Purposes." Health and Human Services recently issued the following guidance:
  - "The Privacy Rule permits but **does not require** covered entities to disclose PHI about an individual for law enforcement purposes "pursuant to process and as otherwise required by law", under certain conditions. For example, a covered entity may respond to a law enforcement request made through such legal processes as a court order or court-ordered warrant, or a subpoena or summons, by disclosing only the requested PHI, provided that all of the conditions specified in the Privacy Rule for permissible law enforcement disclosures are met…"
- A TPA may disclose the information in response to a law enforcement action
- The point is that the plan sponsor cannot guarantee that the information will not be disclosed

MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT

Mental Health Parity

- If a group health plan that provides medical/surgical benefits also provides either mental health or substance use disorder benefits, the plan may be subject to the "Mental Health Parity" requirements as set forth by the Mental Health Parity Act and the Mental Health Parity and Addiction Equity Act.
- These rules require a health plan to provide benefits for mental health or substance use disorder benefits that are comparable to the benefits it provides for medical/surgical benefits.
- The Mental Health Parity rules address comparability in both quantitative and nonquantitative terms.

Mental Health Parity

- The quantitative treatment limitation (QTL) rules apply mathematical tests to the plan's cost-sharing provisions and limits on the quantity of care.
- The nonquantitative treatment limitation (NQTL) rules evaluates the processes, strategies, evidentiary standards, or other factors used to apply the nonquantitative treatment limitations.
- We do not think that adding T&L benefits for abortion services will be considered an NQTL
- Adding T&L benefits likely are subject to the QTL rules, meaning that the benefit is considered when running the mathematical tests for this rule

Mental Health Parity

- Note that most health plans have had T&L benefits for many years, such as for traveling to Centers of Excellence for certain surgeries or traveling for specific procedures (such as an organ transplant). In the past, most plans did not include any T&L benefits for mental health or substance use disorder services.
- We are not aware of any plan failing the Mental Health Parity tests because of the T&L benefits provided in the plan
- Our understanding is that the Department of Labor (DOL) has not provided any guidance regarding T&L benefits under the Mental Health Parity rules
- We assume that the DOL will provide some guidance on this issue in the future

MEDICATION ABORTIONS

Medication Abortions

- The FDA passed a rule in December of 2021, allowing for medication abortion to be prescribed via telehealth and delivered in the U.S. mail. This eliminated the previous FDA requirement that the individual appear in person to receive the medication.
- Some States have banned using the drug mifepristone to end a pregnancy, even though the FDA approved the use to terminate pregnancies up to 10 weeks
- At the moment, a patient can obtain a prescription for mifepristone via telehealth from a doctor, when that doctor is located and licensed in a state where medication abortion is legal—and that doctor will only prescribe to a person when that individual is located in that state
- According to many studies, medication abortions account for almost half of the abortions in the U.S.

Medication Abortions

- A federal district court in Mississippi is currently considering a case that deals with access to abortion medication. The case is GenBioPro vs. Dr. Thomas Dobbs, State Health Officer of the Mississippi Department of Health
- Mississippi state law requires that mifepristone be ingested in the presence of a physician who prescribed the patient that drug
- GenBioPro, which manufactures a generic version of mifepristone, is arguing that since the FDA has approved mifepristone for use nationwide, the Mississippi law restricting the drug violates two provision of the Constitution:
  - The Supremacy Clause—which is generally interpreted to mean that when state and federal laws conflict, the federal law will prevail; and
  - The Commerce Clause—which blocks states from passing laws that interfere with interstate commerce
- GenBioPro argues that if the states are allowed to adopt rules regarding which FDA drugs can be prescribed in a state, this would undermine the mission of the FDA

Medication Abortions

- Mississippi argues that its law does not violate the FDA approval because the state is not making any claims that mifepristone is not safe or effective—just that it can't be used for an abortion
- The FDA was created out of the passage of the 1906 Pure Food and Drugs Act, a Congressional Act. A question is if Congress intended for the FDA to be a national drug review system that when a drug is FDA approved, it is accessible to all. Or if the FDA only informs citizens if the drug is safe and effective—which would allow state regulation of the drug
- The case will likely turn on the power of the FDA, and its ability to preempt state laws
- The decision in this case will impact which prescription drugs can be covered in health plans
- For example, if state bans XXX FDA-approved drug, then that drug will not be covered by the health plan for any person attempting to obtain that drug in the state

RECENT ACTIONS BY STATE LEGISLATORS AND OTHERS

Texas Freedom Caucus

- In July, the Freedom Caucus in Texas sent a litigation hold letter to the Sidley Austin law firm
- Sidley Austin announced that it had adopted T&L benefits for employees who left Texas to obtain abortion services
- The letter claims that Sidley Austin violated SB 8 and the Texas criminal laws by "aiding and abetting" illegal abortions
- The Freedom Caucus alleges that although the abortion medication may have been prescribed outside of Texas, it was ingested inside of Texas, in violation of Texas law:
  - Sidley Austin violated Texas law "by paying for abortions (or abortion-related travel) in which the patient ingested the second drug in Texas after receiving the drugs from an out-of-state provider."
- The letter states that "Litigation is already underway to uncover the identity of those who aided and abetted these and other illegal abortions."

Texas Freedom Caucus

- The letter from the Freedom Caucus also contains a list of laws that they intend to introduce to the Texas legislature in January of 2023.
  - …prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs.
  - …allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident, or who pays for or reimburses the costs associated with these abortions—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs
  - …require the State Bar of Texas to disbar any lawyer who has violated article 4512.2 by "furnishing the means for procuring an abortion knowing the purpose intended," or who violates any other abortion statute enacted by the Texas legislature
- It is unclear if there are enough votes in favor of these proposals so that they would become law.

America First Legal

- A non-profit, America First Legal, sent a letter to the EEOC regarding DICK'S Sporting Goods.
- DICK'S adopted a $4,000 benefit for travel and lodging for abortion services.
- The letter claims that it is a violation of Title VII to add a travel benefit for a pregnant woman who chooses to abort her child, while denying the equivalent benefit to a pregnant woman who chooses not to abort her child
- We assume that the claim would be that a pregnant woman who must travel more than XXX miles to obtain pregnancy services/birthing services should be provided with the same T&L benefit offered for abortion services.
- We are not sure if that is a viable claim under Title VII or if the EEOC will even respond to the letter. (There would not be any ERISA preemption argument because Title VII is a federal law—and not a state law.)

Contraception

- New FAQs were issued by the DOL, IRS/Treasury and HHS regarding the contraception benefit required under preventive care rules of the Public Health Services Act (PHS Act) and the ACA
- Health plans must cover, without cost sharing, at least one form of contraception from each of the following categories: (1) sterilization surgery for women, (2) surgical sterilization via implant for women, (3) implantable rods, (4) copper intrauterine devices, (5) intrauterine devices with progestin (all durations and doses), (6) the shot or injection, (7) oral contraceptives (combined pill), (8) oral contraceptives (progestin only), (9) oral contraceptives (extended or continuous use), (10) the contraceptive patch, (11) vaginal contraceptive rings, (12) diaphragms; (13) contraceptive sponges, (14) cervical caps, (15) female condoms, (16) spermicides, (17) emergency contraception (levonorgestrel), and (18) emergency contraception (ulipristal acetate); and additional methods as identified by the FDA.

Contraception

- In addition, the FAQs reiterate that health plans are required to cover without cost sharing any FDA-approved, contraceptive products that an individual and their attending provider have determined to be medically appropriate for the individual, whether or not those services or products are specifically identified in the categories listed in the previous slide
  - However, the plan can use medical management techniques for certain contraception
- The ACA contains a specific preemption provision for preventive care (ERISA Section 731 and PHS Act 2724). The FAQs remind heath plans that the ACA's preventive care rules (including coverage of contraceptives) preempts ANY state law that prevents the application of those ACA preventive care rules.

PROTECTIVE PROVISIONS

Considerations for Plan Sponsors

- Before adopting new T&L benefits for abortion services, ensure that the legal department of the company understands the risks
- Put the benefit in an ERISA-covered plan!!! Plan sponsors will want to claim ERISA preemption from State civil and criminal laws
- Consider adding language to the plan that the plan does not cover any services or drugs which are illegal under the law of the applicable jurisdiction in which they are incurred or procured
- Look at the governing law in the TPA agreement and consider if there is a reason to change it to a state with more protective privacy laws/has laws that permit abortion services

Considerations for Plan Sponsors

- Don't make promises to employees that the HIPAA Privacy Rule prevents the information from ever being disclosed —as it may be disclosed due to a criminal action brought against an employee
- Consider having the T&L benefit cover more than just abortion services as a way to deal with any potential mental health parity issues or other discrimination claims
- Remember that there are other legal requirements if the plan sponsor wants to adopt T&L benefits, such as compliance with the ACA, tax rules, HSA/HDHP issues, etc…
- But if you cannot remember anything else from this webinar, remember ERISA-preemption is KEY!

WHAT MAY COME NEXT

What May Come Next

- The extent to which States can ban or limit FDA approved drugs will be determined by the courts
- The courts will determine the scope of ERISA preemption and the right to interstate travel
- The DOL may provide guidance on how T&L benefits are to be viewed under the Mental Health Parity rules
- The EEOC may provide guidance on if Title VII impacts the scope of any T&L benefits
- Essentially, there will be a lot of litigation regarding abortion services over the next decade

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