TRUCKER ✦ HUSS

A PROFESSIONAL CORPORATION
ERISA AND EMPLOYEE BENEFITS ATTORNEYS

# Abortion Services and Possible Design Changes for Self-Funded Health Plans

**Presented by: Mary Powell & Sarah Kanter**

May 26, 2022

## Technical Issues

- If you experience technical difficulties during this webinar please call 415-277-8050.

## Issues Accessing Materials

- If you have any issues accessing materials, please call 415-277-8067 or email at webinars@truckerhuss.com

## MCLE Credit

- This program is eligible for Continuing Legal Education (CLE) credit. Please contact Joe Harrison at jharrison@truckerhuss.com to receive a CLE certificate of completion.

# Overview

- A draft opinion from the Supreme Court of the United States (the "Court") in *Dobbs v. Jackson Women's Health Organization* would overturn the constitutional right to certain abortion services initially established under *Roe v. Wade*
- This is only a draft opinion – it could change
- A final opinion is expected in June
- If the Court does overturn *Roe v. Wade,* each State will determine if, and to what extent, abortion services will be permitted in that State

# Overview

- In this presentation, we will discuss the following:
  - Select Court cases regarding abortion services
  - Self-funded health plans:
    - Enhancing travel and lodging benefits for abortion services;
    - Adding a service for participants to obtain information about the nearest state that offers abortion services; and
    - Evaluating the ability to enhance telehealth and prescription drug services for medication abortions.
  - Tax considerations for added benefits
  - Possible mid-year election change rules under Internal Revenue Code Section 125
  - State law considerations
  - Privacy issues

# Why Consider This Issue for Health Plans?

- There are many reasons why this is a topic worth discussing
- Importantly, abortion is a health service used by many under health plans

## Example of a Current Law—What Are We Discussing?

- As a point of reference, consider Texas SB 8
- The law prohibits abortions whenever an ultrasound can detect a fetal heartbeat (around 6 weeks)
- The exception is if the doctor believes a medical emergency necessitates the abortion

# Texas SB 8

- 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).


Telephone: 415-788-3111 | Facsimile: 415-421-2017 | www.truckerhuss.com

# Texas SB 8

- SB 8 states that it is enforced exclusively through private civil actions
  - This not a criminal law
- 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

# A LITTLE HISTORY

# A Little History

- Griswold v. Connecticut (1965). This is the first landmark case. 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 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 was whether a married couple had a federal constitutional "right of privacy" to be counseled in the use of contraceptives.
- The Supreme Court, in a 7-2 decision, decided that the State law against contraceptives violated a "zone of privacy" that was inherent in the federal Constitution. The Supreme Court found Constitutional protection emitting from "penumbras" or shadows within several amendments to the Constitution. Under this "penumbra" theory, the Supreme Court discussed the various "zones of privacy" which, in this case, referred to "marital privacy."



Telephone: 415-788-3111 | Facsimile: 415-421-2017 | www.truckerhuss.com

# A Little History

- Roe v. Wade (1973). Norma McCorvey (using the alias Jane Roe) discovered she was pregnant and attempted to obtain an abortion in Texas. However, a Texas statute allowed abortion only "for the purpose of saving the life of the mother." A case was filed challenging the Texas law and it was ultimately heard by the Supreme Court.
- In a 7-2 decision, the Court determined that prohibiting abortion infringes on a woman's right to privacy, but also recognized that this right must be balanced against the state's interest in protecting "the potentiality of human life."

# A Little History

Roe v. Wade (1973)—Continued.

- In striking this balance, the Court ruled:
  - A State may not restrict abortion at all in the first three months of pregnancy (first trimester).
  - A State may establish guidelines only to protect the mother's health during the next three months (second trimester).
  - After "viability," when the unborn child could survive if delivered (which the Court placed at 24 to 28 weeks of gestation), a State may prohibit abortion unless it is deemed necessary to preserve the mother's "life or health."

# A Little History

- Planned Parenthood v. Casey (1992) In 1988 and 1989, Pennsylvania enacted new abortion statutes that required:
  - a woman seeking an abortion must give her informed consent prior to the abortion procedure,
  - a minor seeking an abortion must obtain parental consent,
  - a married woman must notify her husband of her intended abortion unless certain exceptions applied, and
  - clinics must provide certain information to a woman seeking an abortion and wait 24 hours before performing the abortion.

# A Little History

- Planned Parenthood v. Casey (1992) – Continued
- The Court, in a 5-4 decision:
  - reaffirmed Roe's holding that women have a constitutional right to obtain an abortion prior to fetal viability;
  - rejected Roe's trimester-based framework and use of "strict scrutiny" for evaluating government regulation of abortion; and
  - adopted an "undue burden" standard for laws regulating abortion: a law is invalid if its "purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."
- Under the above framework, the Court upheld all the provisions of the Pennsylvania statute except for the requirement of spousal notification.

# Leaked Draft Opinion—*Dobbs v Jackson*

- In 2018, Mississippi enacted the *Gestational Age Act*, which bans abortions after 15 weeks since the first day of the last menstrual period (i.e., before fetal viability) except in medical emergencies and in cases of severe fetal abnormality, and without an exception for pregnancies resulting from rape or incest
- Mississippi is asking the Court overrule *Roe* and *Casey* and permit states to prohibit abortions at a point earlier than the current viability standard (a fetus is typically considered viable between 24-28 weeks of pregnancy).
  - The draft opinion describes the issue before the Court as: "whether all pre-viability prohibitions on elective abortions are unconstitutional"

# Leaked Draft Opinion—*Dobbs v Jackson*

- The first half of the draft opinion examines the past 49 years of case law supporting the constitutional right to abortion. The draft opinion would hold that those cases were wrongly decided and that the right to obtain an abortion is not an aspect of the "liberty" protected by the due process clause of the 14th Amendment.
  - The draft opinion also provides examples of prior important Constitutional decisions being later overruled and describes five factors that weigh "strongly in favor" of overruling *Roe* and *Casey.*
- The draft opinion states that laws regulating abortion would be entitled to a "strong presumption of validity" and that State legislatures have legitimate interests in "respect for preservation of prenatal life at all stages of development."
  - The draft opinion would uphold Mississippi's abortion law—even though it applies before viability and only allows an exception when there is a "medical emergency" or "severe fetal abnormality"



Telephone: 415-788-3111 | Facsimile: 415-421-2017 | www.truckerhuss.com

# State Laws

- Assuming that the Court issues an opinion that is similar to the *Dobbs* leaked draft opinion, each State will have the ability to determine if abortion services are legal in that State
- Currently, eighteen states have "trigger laws" to ban abortion if *Roe* is overturned or have pre-*Roe* abortion bans still on the books
- In addition, some states have laws, not yet in effect, that ban abortion after six to eight weeks of pregnancy
- States that continue to allow abortion services could see an influx of patients seeking care. In the final four months of last year, it has been reported that clinics in states near Texas reported a nearly 800% increase in abortion patients from Texas compared to the same period in the prior year
- These statistics are worth considering when evaluating if/how to enhance abortion services in a health plan

# PROPOSED DESIGNS

# Proposed Designs

- Many companies are considering the following design changes to their health plans:
  - $3,000 if one must travel more than 100 miles from home to receive an abortion
  - $4,000 if one must travel more than 100 miles from home to receive an abortion
  - No dollar cap—travel and lodging within the U.S. for those who need access to healthcare that is not available in their home state
    - This last one is very broad. Consider possible limitations, such as how far one can travel or if there should be any dollar limits

# Proposed Designs

- The media has reported the following changes that certain employers are making to their health plans:
  - Amalgamated Bank--reimburse travel-related costs should employee/dependent need to leave their home state for reproductive healthcare
    - Outside the health plan, will reimburse up to five days of childcare expenses incurred during the travel time
  - Amazon--up to $4,000 in travel expenses related to medical procedures including abortion services
  - Bloomberg--cover out-of-state travel for medical services, including abortion, for which there is no licensed provider in employees' state of residence
  - Microsoft—cover travel costs if an employee could not access healthcare because it was not available nearby
  - Starbucks--reimburse travel expenses for employees and their dependents should they need to travel more than 100 miles to receive an abortion
  - Tesla--cover travel and hotel costs for employees who had to travel out-of-state for healthcare



Telephone: 415-788-3111 | Facsimile: 415-421-2017 | www.truckerhuss.com

# Proposed Designs—Other Benefits

- Some employers have added a service in their health plans 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
  - Clinics that have open appointments within the next 7-10 days
- Several months ago, it seemed that there would be numerous vendors in this space. However, due to concerns about being sued under state laws (discussed later in the presentation), there does not appear to be many vendors offering this service

# Proposed Designs—Other Benefits

- Employers are obtaining information from vendors about the ability to have any expanded telehealth services for medication abortions
- Medication abortion involves taking two different drugs, Mifepristone and Misoprostol, that can be safely used up to the first 70 days (10 weeks) of pregnancy
- In 2021, the FDA removed the requirement that the prescriber could only dispense these pills to patients in "health care settings" and made permanent a policy allowing abortion pills to be prescribed via telehealth and distributed by mail in states that permit telehealth for medication abortions
- However, State licensure is a gating issue for the provision of telehealth services, as those laws often prohibit providers not licensed in the state in which the patient is located from providing care to that patient

# Proposed Designs—Other Benefits

- In the early part of the COVID-19 pandemic, many states relaxed or waived in-state licensure requirements, or otherwise granted temporary licenses to out-of-state practitioners
  - In recent months, many states have removed these relaxed rules
- As of today, about 20 states prohibit telehealth for medication abortions and some make a violation of those laws a felony
- Whether a telehealth provider can prescribe and distribute medication abortion pills across state lines will be a state-by-state decision

# Proposed Designs—Other Benefits

- This presentation does not focus on fully insured plans
- However, for fully-insured plans that are offered in States that ban abortion services, those plans will not cover abortion services
  - Fully insured plans are subject to state laws
- The plan sponsor could adopt an HRA that is provided to those individuals who are covered by the fully insured plan
  - An HRA is a self-funded health plan
- Due to restrictions under the Affordable Care Act (ACA), the HRA would need to 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

# Proposed Designs—Other Benefits

- For a fully insured plan, if an integrated HRA is offered, there may be some administrative challenges, such as:
  - The insurance carrier would not likely administer the HRA
  - For a high deductible health plan (HDHP), the coverage could not begin until the HDHP deductible was met—so there needs to be some coordination with the major medical plan
  - Employers may not want to self-administer the HRA due to the sensitive information that must be received for claims

# Proposed Designs—Other Benefits

- As we will discuss later, the cost of travel and lodging are considered "medical care" under federal law
- The offer of medical care should be part of an ERISA health plan document—and NOT a stand-alone policy
- A plan sponsor will want to be able to argue for the protection of ERISA preemption from certain State laws
  - The importance of ERISA preemption will be discussed later this presentation
  - Remember to put this benefit in an ERISA health plan!

# Proposed Designs

- While this webinar does not address issues related to gender-affirming care, it is an area of healthcare that plan sponsors may want to consider at this time, given the state restrictions for this care
- Some employers are enhancing travel and lodging benefits for gender-affirming care

# Proposed Designs

- Gender-affirming care for minors is not offered in all states
- Alabama, Arkansas and Texas have laws that severely restrict gender-affirming care for minors
- It has been reported that 12 other states are considering passing laws that restrict gender-affirming care for minors (Arizona, Georgia, Iowa, Kansas, Kentucky, Louisiana, Missouri, North Carolina, Ohio, Oklahoma, South Caroline and Tennessee)
- Alabama is the first state in U.S. to make gender-affirming care for minors a felony, punishable by up to 10 years in prison and fines of up to $15,000 for anyone providing that care to someone under 19
  - A federal judge has blocked Alabama's felony ban from being enforced

# ISSUES TO CONSIDER UNDER 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)
- 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 abortions, 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"

# 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)

  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)
- Note that amounts reimbursed over the $50 per individual limit will be considered a taxable reimbursement (W2 wages)
- A TPA may not be able to administer this and want to provide this information to the employer's payroll department to handle

# Meals

- 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

# MID-YEAR ELECTION CHANGES

# Internal Revenue Code Section 125

- Assume that *Roe* is overturned by the *Dobbs* case. Also assume that the employer maintains a self-funded plan (that has national coverage) and regional HMOs
- Assume the self-funded plan covers abortion services in certain states and that the HMOs are in states where abortion is banned
- Could an individual who is covered under the HMO make a mid-year election change to the self-funded plan if *Roe* is overturned?
- The short answer is maybe
- The 125 regulations contain rules that, if adopted by the employer in its Section 125 plan (cafeteria plan), arguably could permit a mid-year election change

# Internal Revenue Code Section 125

- Option #1--Significant Curtailment Without Loss of Coverage. A cafeteria plan may allow a mid-year election change on account of a "significant curtailment without loss of coverage." The regulations define the rule as follows:

  If an employee (or an employee's spouse or dependent) has a significant curtailment of coverage under a plan during a period of coverage that is not a loss of coverage…for example, there is a significant increase in the deductible, the copay, or the out-of-pocket cost sharing limit…the cafeteria plan may permit any employee who had been participating in the plan and receiving that coverage to revoke his or her election for that coverage and, in lieu thereof, to elect to receive on a prospective basis coverage under another benefit package option providing similar coverage. Coverage under a plan is significantly curtailed only if there is an overall reduction in coverage provided under the plan so as to constitute reduced coverage generally. Thus, in most cases, the loss of one particular physician in a network does not constitute a significant curtailment.

# Internal Revenue Code Section 125

- Note that the regulation states that "coverage under a plan is significantly curtailed only if there is an overall reduction in coverage provided under the plan so as to constitute reduced coverage generally." Thus, the analysis is an objective one -- looking at the plan as a whole.
- What is meant by "significant curtailment." What degree of change is required to be significant? Would ceasing to have a network of abortion services specialists, due to the passing of a state law, be enough? There is no guidance on this issue.
- Note that this regulation does not allow a person to drop health coverage, but rather move to another health plan option offered by the employer
- No election change is permitted for the healthcare flexible spending account (Health FSA)

# Internal Revenue Code Section 125

- Option #2--*Addition or improvement of a benefit package option*. The regulation states the following:

> 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.

# Internal Revenue Code Section 125

- Assume that the plan is amended mid-year to add or enhance travel and lodging benefits
- The regulation does not define a "significant improvement" of coverage
- An example in the regulation indicates that a decrease in copayments could be a significant improvement of coverage
- Not clear if the addition of travel and lodging benefits would come under this regulation
- This regulation does not allow a person to drop health coverage, but rather move to the health plan option that has the improved benefit
- The rule also allows those who did not elect health plan coverage, the ability to elect the health plan option that has the improved coverage
- No election change is permitted for the Health FSA

# Internal Revenue Code Section 125

- If a plan sponsor is considering the impact of *Roe* being overturned on its health plan, it should:
  - Determine if the *Dobbs* decision causes a loss of providers in the applicable states where participants reside;
  - Determine if it will amend the plan to offer enhanced benefits and if those enhanced benefits are considered a significant improvement;
  - Determine if mid-year elections could be permitted under the Code Section 125 regulations—and if yes, for what period of time and what changes would be permitted;
  - Review the terms of the Code Section 125 plan to see if the permissible election change rules are in the plan document; and
  - Inform employees of any possible mid-year election change opportunities.

# STATE LAW CONSIDERATIONS

# Extraterritorial Application of State Laws

- As discussed earlier in the presentation, some of the States, such as Texas, have passed laws that prohibit anyone from "aiding and abetting" the performance of an abortion
  - This is a civil law and not a criminal law
- 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 an abortion in another state where abortion is legal
- An initial question is if Texas law would apply to actions taken in another state
- A few states have presumptions against extraterritoriality

# Extraterritorial Application of State Laws

- The California Supreme Court has stated that state statutes are presumed to operate only within the state "unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history." (Sullivan v. Oracle Corp. (Cal. 2011))

# Extraterritorial Application of State Laws

- Other state courts have resolved questions of geographic scope by relying on the purpose of the statute, without a presumption against extraterritoriality. For example, a Tennessee court relied on "the purpose" of state antitrust law "to protect the state's trade or commerce affected by the anticompetitive conduct" to hold that state antitrust law applies to conduct outside state that causes substantial effects inside state (Freeman Indus., LLC v. Eastman Chem. Co. (Tenn. 2005))
- The extraterritorial application of state law may raise Constitutional issues under the Due Process Clause and the Full Faith and Credit Clause

# Extraterritorial Application of State Laws

- If state laws purport to operate "extraterritorially" (*i.e.*, outside their borders), that may strengthen the ERISA preemption argument (discussed next) due to the potential impact on plan administration for an ERISA self-funded plan
- This is a complicated issue and will likely be a key issue for determining the impact of these state laws on ERISA self-funded health plans
- There is not a clear answer to this question at this point
- We assume that this will be a litigated issue

# ERISA Preemption

- ERISA may preempt state laws that purport to preclude self-funded plans from allowing reimbursement for participants' travel and lodging costs to obtain a legal abortion
- 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."
- 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

- A state law "relates to" an ERISA plan if "in the normal sense of the phrase" it has a "connection with" or "reference to" such a plan (D.C. v. Greater Wash. Bd. of Trade (1992))
- The Court has held that a state law that bears indirectly (but substantially) on an ERISA plan can "relate to" the plan for purposes of the express preemption provision (Metro. Life Ins. Co. v. Mass. (1985))
- 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)

# ERISA Preemption

- 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 before reimbursing travel and lodging expenses for a legal abortion
- This will be a litigated issue

# ERISA Preemption

- Many TPAs are concerned that administering the travel and lodging benefits could cause someone to bring a civil action against the TPA for "aiding and abetting" an abortion
- In our experience, the TPAs are requiring that the employers sign a "hold harmless" agreement essentially stating that the employer will indemnify and hold the TPA harmless for any state law action brought against the TPA for administering these benefits

# ERISA Preemption

- ERISA §514 states that ERISA preemption "shall not apply to any generally applicable criminal law of a State"
- There is not a lot of guidance under this Section of ERISA
- A few courts have interpreted this provision narrowly, to encompass laws that were passed for general conduct, such as larceny
- The idea is that the savings provision for state criminal law was needed to ensure that otherwise illegal activity does not escape prosecution because a state criminal law may 'relate to' an employee benefit plan

# ERISA Preemption

- Oklahoma passed the following law, which becomes effective in August of 2022:
  - Notwithstanding any other provision of law, a person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency
  - A person convicted of performing or attempting to perform an abortion shall be guilty of a **felony** punishable by a fine not to exceed One Hundred Thousand Dollars ($100,000.00), or by confinement in the custody of the Department of Corrections for a term not to exceed ten (10) years, or by such fine and imprisonment
- This Oklahoma criminal law does not contain an aiding and abetting provision (although there may be a general aiding and abetting provisions in Oklahoma's criminal laws)

# ERISA Preemption

- The crime is the performance of an illegal abortion in Oklahoma
- The argument is that the ERISA self-funded health plan is not aiding in the performance of an illegal abortion
  - It is reimbursing travel and lodging costs associated with a legal abortion
- It seems unlikely that a state criminal law interpreted to prohibit an employer-sponsored plan from paying for legal medical care and imposing criminal liability on individuals who administer those plans, would be viewed as a "generally applicable" criminal law

# Police Power of the States

- Individuals who are trying to enforce these civil "aiding and abetting" laws may claim that those laws are protected from ERISA preemption 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

# Police Power of the States

- The Supreme Court has stated, in past cases, that historic police powers of the States were not preempted by a Federal Act unless that was the clear and manifest purpose of Congress

- Again, this is likely to be a litigated issue

# Additional State Laws?

- So far, certain states have passed civil laws that severely restrict or ban abortion
- Oklahoma has passed a criminal law that makes the performance of an abortion in that state a felony
- What other laws are being considered?
- 14 Texas lawmakers provided information about possible laws that may be introduced to the Texas legislature in the fall

# Additional State Laws?

- The background is that the CEO of Lyft, Logan Green, stated that Lyft will, among other things, amend its ERISA health plan to include travel and lodging costs for anyone covered by the plan who must travel over 100 miles to find an in-network abortion provider
- A letter to Green from Representative Cain (signed by an additional 13 members of the Texas House of Representatives) stated that these 14 Representatives would introduce legislation in the next session that bars corporations from doing business in the State of Texas if they pay for abortions or reimburse abortion related expenses
- The legality of such a law is unclear. In addition, it is unclear if it has any support beyond these 14 Representatives
- The point here is that States may pass additional laws if *Roe* is overturned

# State Laws

- As a reminder, if your company wants to adopt travel and lodging benefits for abortion services, make sure that is in an ERISA-covered health plan
- As discussed earlier, that is needed for various reasons, such as compliance with the Affordable Care Act, HSA/HDHP issues, etc…
- Importantly, a company that adds these benefits will want to argue ERISA preemption, in the event of a civil action against the plan and plan sponsor

# PRIVACY CONSIDERATIONS

# Privacy Considerations

- Paying for the travel and lodging for abortion services will be considered the reimbursement of medical care
- In almost all cases, the payment of these expenses will be considered "protected health information" under the HIPAA privacy rules
- Consider this issue if the company's payroll team needs information about the payment of this benefit because some of it is taxable (and considered W2 wages)
  - Ensure everyone understands how to comply with the HIPAA privacy and security rules
  - Also consider how employees will react to knowing that certain individuals in the company's payroll department may have access to this information

# ACTION ITEMS

# Action Items

- Consider possible designs
  - Are there any dollar or travel limitations?
  - Who will administer this benefit?
- Make sure these benefits are in an ERISA-covered health plan
- Understand the tax issues—how will the company handle the portion of the reimbursement that is taxable?
- Review Code Section 125 (and your Code Section 125 plan) and determine if your plan design change (or a state law change) could allow for a mid-year election change
- If a plan design change will occur, draft a plan amendment and a summary of material modifications that clearly explains the new benefits
- Inform the legal department or executives at the company of the potential legal issues and risk of litigation
- Consider privacy issues

# Contact


- Mary Powell, Esq.
  Trucker ✦ Huss, APC
  135 Main Street
  9th Floor
  San Francisco, CA 94105

  (415) 788-3111

  mpowell@truckerhuss.com

  www.truckerhuss.com

- Sarah Kanter, Esq.
  Trucker ✦ Huss, APC
  135 Main Street
  9th Floor
  San Francisco, CA 94105

  (415) 788-3111

  skanter@truckerhuss.com

  www.truckerhuss.com

# Disclaimer

- These materials have been prepared by Trucker ✦ Huss, APC for informational purposes only and constitute neither legal nor tax advice
- Transmission of the information is not intended to create, and receipt does not constitute, an attorney-client relationship
- Anyone viewing this presentation should not act upon this information without first seeking professional counsel
- In response to IRS rules of practice, we hereby inform you that any federal tax advice contained in this writing, unless specifically stated otherwise, is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding tax-related penalties or (2) promoting, marketing or recommending to another party any tax-related transaction(s) or matter(s) addressed herein


Telephone: 415-788-3111 | Facsimile: 415-421-2017 | www.truckerhuss.com