

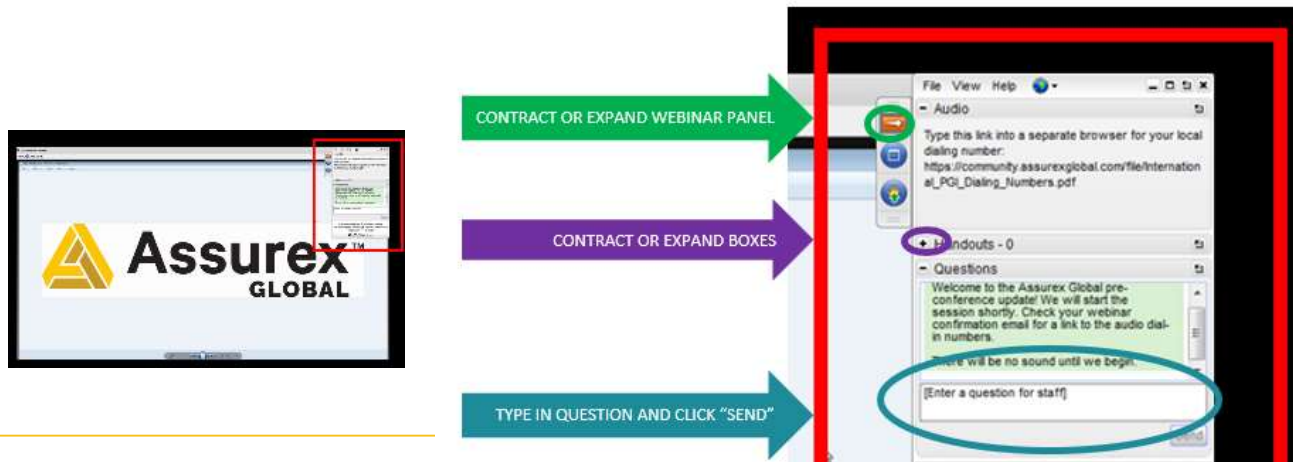
2022

SCOTUS Decision on Abortion

Presented by Benefit Comply

SCOTUS Decision on Abortion

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



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Agenda

- Background
- Abortion Coverage Options
- Travel Benefits
- Taxation
- Contraceptives
- Employer Considerations

Background

Background

Roe v. Wade (1973)

Planned Parenthood v. Casey (1992)

- Constitution protects a woman's liberty to choose to have an abortion
- Limited federal and state laws attempting to restrict abortions

SCOTUS Decision

- Dobbs v. Jackson (2022)

SCOTUS ruled that women do not have a constitutional right to abortion, and therefore states may determine when abortions may be performed, if at all



Opinion does not directly affect group health plans

Depending how state laws are written, group health plans may be required to provide, or prohibited from providing, coverage for abortions

- State Action
 - State law will evolve over the next several years
 - States may attempt to exert extra-territorial (out-of-state) authority as well

Federal Requirements

- Existing Federal Abortion Requirements/Restrictions
 - Emergency Medical Treatment and Labor Act (EMTALA)
 - Must perform abortion to save life of woman, even if prohibited by state law
 - Recently clarified by HHS
 - Title VII
 - Group health plan must provide coverage for abortion if mother's life is endangered or if complications arise during an abortion
 - Pregnancy Discrimination Act (PDA)
 - Interpreted to include abortion, so cannot discriminate in employment related to abortion
 - Hyde Amendment (1977)
 - Congressional amendment passed annually barring use of federal funds to pay for abortion (exception to save the life of a woman, or if pregnancy tied to incest or rape)

Federal Requirements

- Evolving Federal Abortion Requirements/Restrictions
 - Biden's Executive Order – Agency Responses
 - Promises protection to the extent permitted within the current framework
 - Proposed Legislation
 - Unlikely to pass

State Requirements

- Evolving State Abortion Requirements/Restrictions
 - States have passed laws, both protecting and restricting abortions
 - Several with “trigger laws” to further restrict abortions upon reversal of Roe v. Wade

Examples of Protections

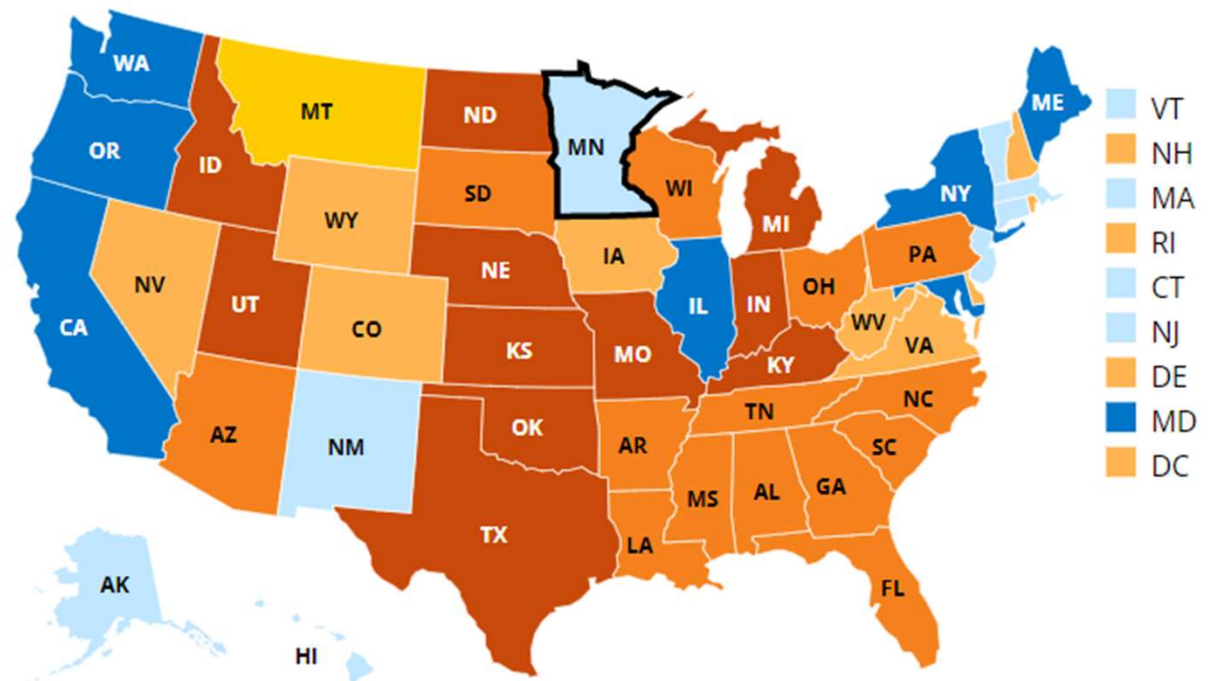
- Require abortion coverage in Medicaid, private insurance and Marketplace plans
- Protections for abortion providers
- Protections for interstate travel

Examples of Restrictions

- No Medicaid, private insurance or Marketplace plan coverage permitted
- No abortions permitted beyond a certain gestational age
- Mandatory ultrasounds, waiting periods
- Penalties for any individuals who aid or abet an abortion

State Comparisons – Current Laws

- <https://www.kff.org/womens-health-policy/issue-brief/interactive-how-state-policies-shape-access-to-abortion-coverage/>



- No coverage limitations or requirements, state funds pay for Medicaid abortions
- Requires Abortion Coverage in Medicaid, Private, and ACA Marketplace Plans
- Marketplace Limitations Only
- Medicaid Limitations Only
- Medicaid and Marketplace Limitations
- Medicaid, Private, and Marketplace Limitations

State Comparisons – Current Laws

Other Resources

<https://states.guttmacher.org/policies/>

<https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>

Abortion Coverage Options

Coverage Options (Not Exhaustive)

Group Medical Plan

HRA (or excepted benefit HRA)

Telehealth

Employee Assistance Program (EAP)

Health FSA or HSA

Lifestyle Account

Travel Reimbursement Program

Group Health Plan Coverage

Fully-Insured

- Must follow state law where policy is issued
- May have to follow other state law attempting to exert extra-territorial authority

Self-Funded

- ERISA preemption allows plan to ignore state insurance law
- Not clear if ERISA preemption protects against criminal penalties imposed by state law

Group Health Plan Coverage

States Allowing Abortions

Fully-insured plans issued in the state and self-funded plans may provide coverage for abortions obtained in the state

Fully-insured and self-funded plans could also provide coverage for legal abortions obtained in other states depending on network

- Consider network access
- What about medical abortions???

States Prohibiting Abortions

Fully-insured plans issued in the state will probably not provide coverage

Self-funded plans could provide coverage for legal abortions obtained in other states depending on network

Employers may be interested in providing travel/lodging reimbursement

Group Health Plan Coverage - Summary

Fully-Insured Plans

- Carriers will determine coverage based on state law
 - Could choose to supplement fully-insured plan (e.g., HRA)

Self-Funded Plans

- ERISA preemption likely allows plans to cover or not as desired
 - Be careful if employees reside in restrictive states imposing penalties on “aiding and abetting”
- Many employers will not make any immediate changes

Travel Benefits

Travel Benefits

- §213(d) Qualifying Medical Expenses— IRS Pub. 502
 - Travel and lodging expenses incurred primarily for and essential to medical care
 - Actual cost of travel, or mileage reimbursement rate
 - Lodging not to exceed \$50/night (or \$100/night if a travel companion is required)

QUESTIONS???

- Is reimbursement of travel and lodging benefits related to medical care “significant medical benefits?”
- Does such reimbursement create a stand-alone group health plan?
- Is the arrangement subject to ERISA?
- Is such coverage disqualifying coverage for purposes of HSA-eligibility?
- How do mental health parity rules apply?
- What about HIPAA privacy and security and other privacy concerns?
- When should the reimbursement be taxable?

Travel Benefits

Group Medical Plan or HRA

ERISA group health plan
HRA must be integrated (ACA)
HIPAA privacy and security
Mental health parity
Must meet deductible for HSA-eligibility

Employee Assistance Program (EAP)

ERISA group health plan
HIPAA privacy and security
Significant medical benefits???

Travel Reimbursement Program

Taxable
Not subject to ERISA or ACA
Not subject to HIPAA privacy and security
No issues with HSA-eligibility

Taxation

Taxation

Federal

- Qualifying medical expenses may be covered or reimbursed on a tax-favored basis
 - Abortion is a medical procedure allowing tax-favored treatment, but not if illegal where performed
 - Travel and lodging may qualify for tax-favored status if provided via group health plan

State

- State taxation likely to follow state's position on abortions

Contraceptives

Coverage for Contraceptives

- ACA Requirements

Non-grandfathered group health plans must provide coverage with no cost-sharing

- Exemptions for religious organizations and for employers with religious or moral objections

Full coverage required for all contraceptives approved by the FDA

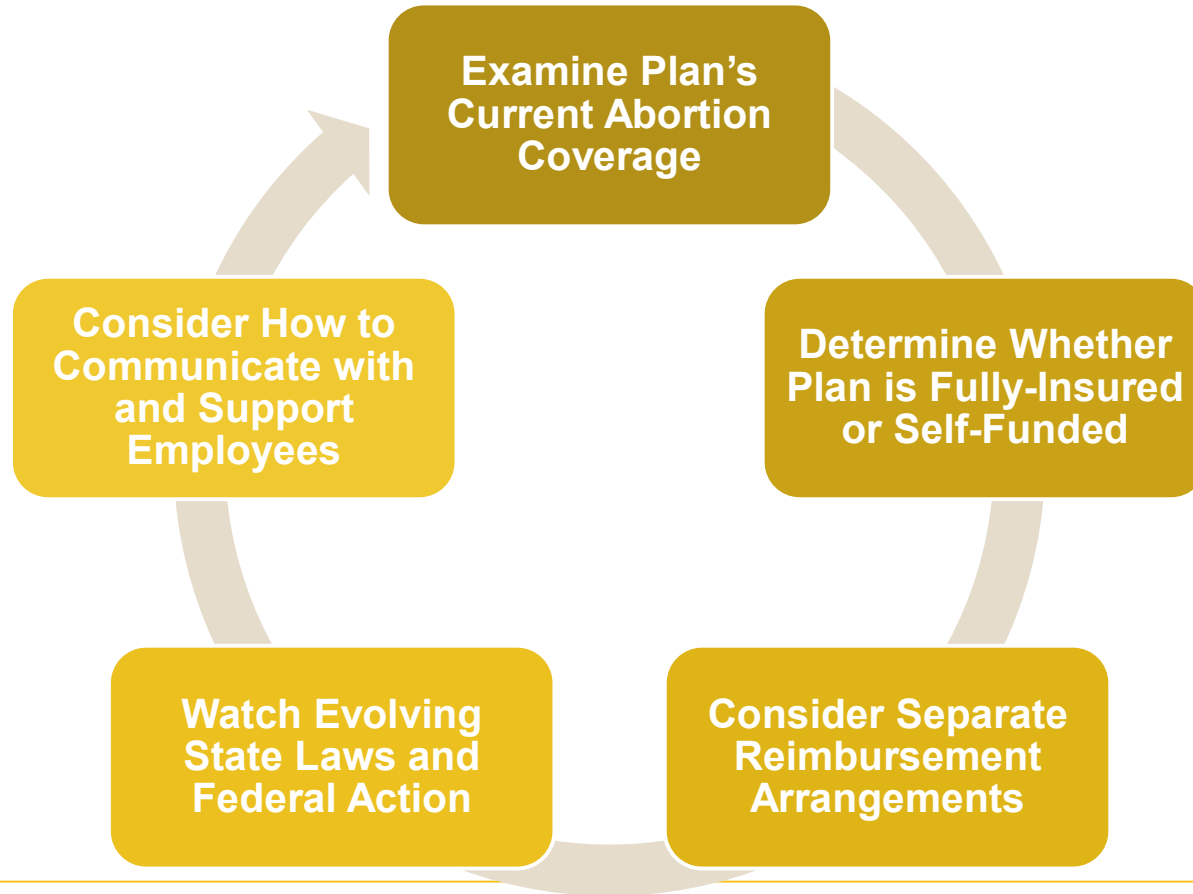
- Must cover at least one form of contraception in each contraceptive category
- Must cover any contraceptive deemed medically appropriate or necessary by medical provider
 - Develop an “*easily accessible, transparent, and sufficiently expedient exceptions process*” if medical management techniques limit which contraceptives are automatically covered

- Agency Enforcement

- Various FAQs over past decade
- June 27, 2022 letter threatening “*enforcement or other corrective actions as appropriate*”

Employer Considerations

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