



# Roe Overturned: What Employers and Plan Sponsors Need to Know

July 20, 2022

# Today's Panel



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# Agenda

**The Dobbs Decision and State Law Developments**

**Federal Government Developments**

**Clinical Discussion**

**Plan Sponsors Surveyed on Reactions**

**Plan Sponsor Considerations**

# The *Dobbs* Decision and State Law Developments

# *Dobbs v Jackson Women's Health Organization*

- In a 6–3 decision released on June 24, 2022, the Supreme Court majority overturned *Roe v. Wade*, holding that the authority to regulate abortion belongs to the states and not the federal government
- The Court majority found that obtaining an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our nation's history
- Consequently, many state laws regulating abortion, including the Mississippi law, are constitutional

# State of the States

- According to the New York Times, abortion is now banned in at least nine states, as laws restricting the procedure take effect following the Supreme Court's decision in *Dobbs*
- More bans are expected in the coming weeks, and in many states the fight over abortion access is taking place in courtrooms, where lawsuits are ongoing over the interpretation and application of state law
- Lawmakers in many states also have proposed new laws either to restrict or to protect abortion access
- Two states permit civil action for “aiding and abetting” the performance of or payment for an abortion

# ERISA Preemption

- Generally, ERISA preempts state laws that relate to an employee benefit plan
- Consequently, self-insured group health plans can continue to design benefits without complying with state insurance law
  - However, state insurance law would generally apply to fully-insured group health plans
- Criminal laws are not generally preempted by ERISA but the issue will depend on how the law is written and applied
- ERISA preemption application in the state abortion law area has not yet been litigated



# Federal Government Developments

# Executive Order

- On July 8, 2022, the President issued an Executive Order on Protecting Access to Reproductive Healthcare Services
- Executive Order declares intent to protect healthcare service delivery, promote access to critical reproductive healthcare services, including abortion
- Includes education, privacy protections, emergency care guidelines, and creation of a Reproductive Rights Task Force
  - Task Force creation announced by the Justice Department on July 12, 2022

# Employee Privacy Protections

- The Department of Health and Human Services' Office for Civil Rights (OCR) issued guidance June 29, 2022, reminding covered plans and providers that an individual's Protected Health Information cannot be disclosed without an individual's authorization, except in certain circumstances
  - Disclosure must be specifically required by a law in order to allow disclosure "by law"
  - Disclosure for law enforcement purposes requires a subpoena or warrant in most circumstances
- Employers also have privacy obligations under the Americans with Disabilities Act, Family and Medical Leave Act, and Genetic Information Nondiscrimination Act

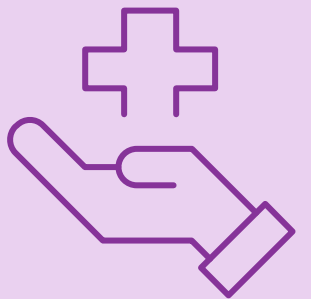
# EMTALA Guidance

- HHS Secretary Becerra published a letter on July 11, 2022, concerning enforcement of the Emergency Medical Treatment and Active Labor Act (EMTALA)
- States EMTALA requires all patients receive an appropriate medical screening exam, stabilizing treatment and transfer if necessary, irrespective of state law
  - Emergencies include ectopic pregnancy, complications of pregnancy loss, or emergency hypertensive disorders, such as preeclampsia
- If a physician believes that a pregnant patient presenting at an emergency department is experiencing an emergency and abortion is the stabilizing treatment, the physician must provide that treatment

# Clinical Discussion

# Abortion-Related Medical Benefits

- Plan benefits for medical abortion
- Emergency care
- Implications for physician training
- Telehealth benefits
- Mental health impacts



# Medication Abortions

- Medication abortion is FDA approved for use up to 10 weeks of pregnancy and in 2020 accounted for 54% of US abortions
- FDA-approved medication abortion regimen involves the following two drugs:
  - Mifepristone
  - Misoprostol taken 24 to 48 hours after mifepristone
- In December 2021, permanently lifted the “in-person” requirement, allowing mifepristone to be dispensed by pharmacies and mailed directly to patients
- *GenBioPro, Inc. v. Dobbs* (S.D. Miss. 2020) could address conflict between FDA rules and state law requiring in-person prescriptions
- Medication abortion vs. Emergency contraception

# Contraceptive Coverage

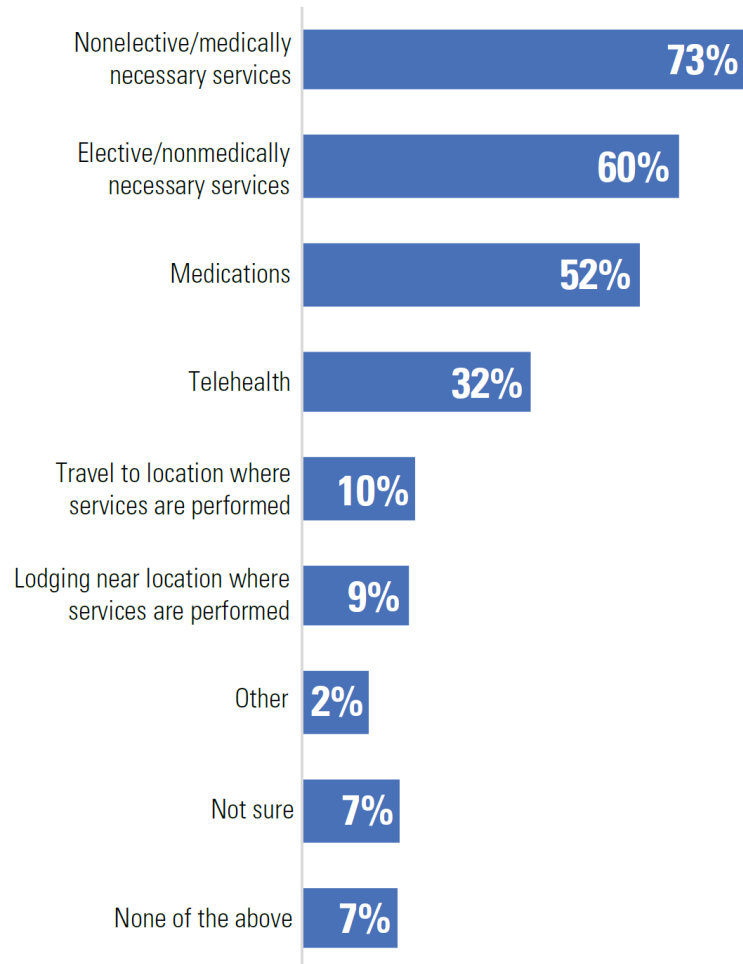
- Affordable Care Act requires non-grandfathered group health plans and issuers to cover, without cost sharing, at least one form of contraceptive in each method for women currently identified by the U.S. Food and Drug Administration
  - <https://www.fda.gov/consumers/free-publications-women/birth-control-chart>
  - Plans must have medical exceptions process
  - Free coverage may be limited to in-network
  - Coverage includes Plan B (emergency contraceptives)
- Secretaries Walsh, Becerra, and Yellen have announced an enforcement initiative
  - <https://www.cms.gov/files/document/letter-plans-and-issuers-access-contraceptive-coverage.pdf>



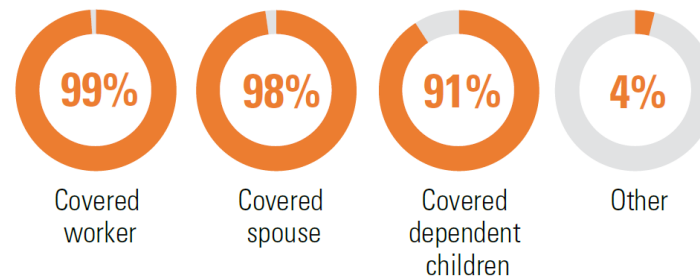
# Plan Sponsors Surveyed on Reactions

# Post-Dobbs Employer Coverage: July 2022 Pulse Survey

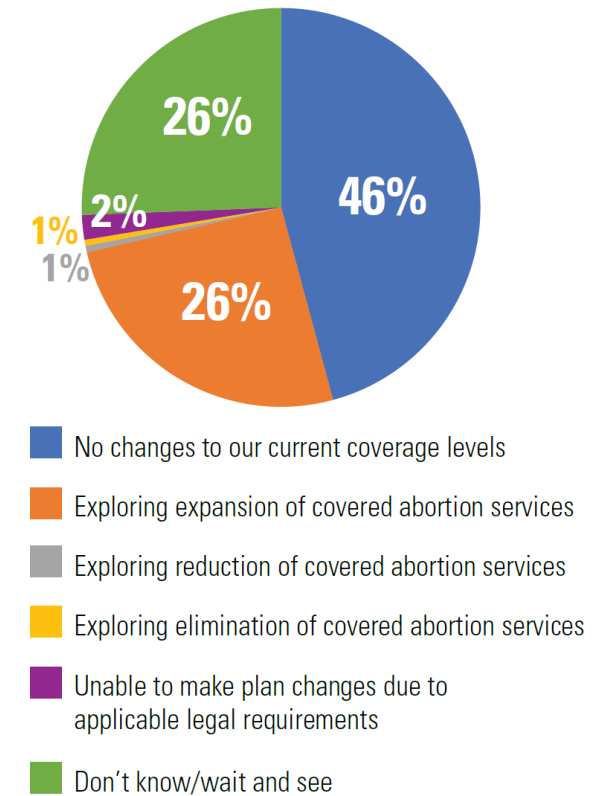
## Services Covered Under Health Plan (n=395)



## Workers Currently Eligible for Covered Services (n=339)

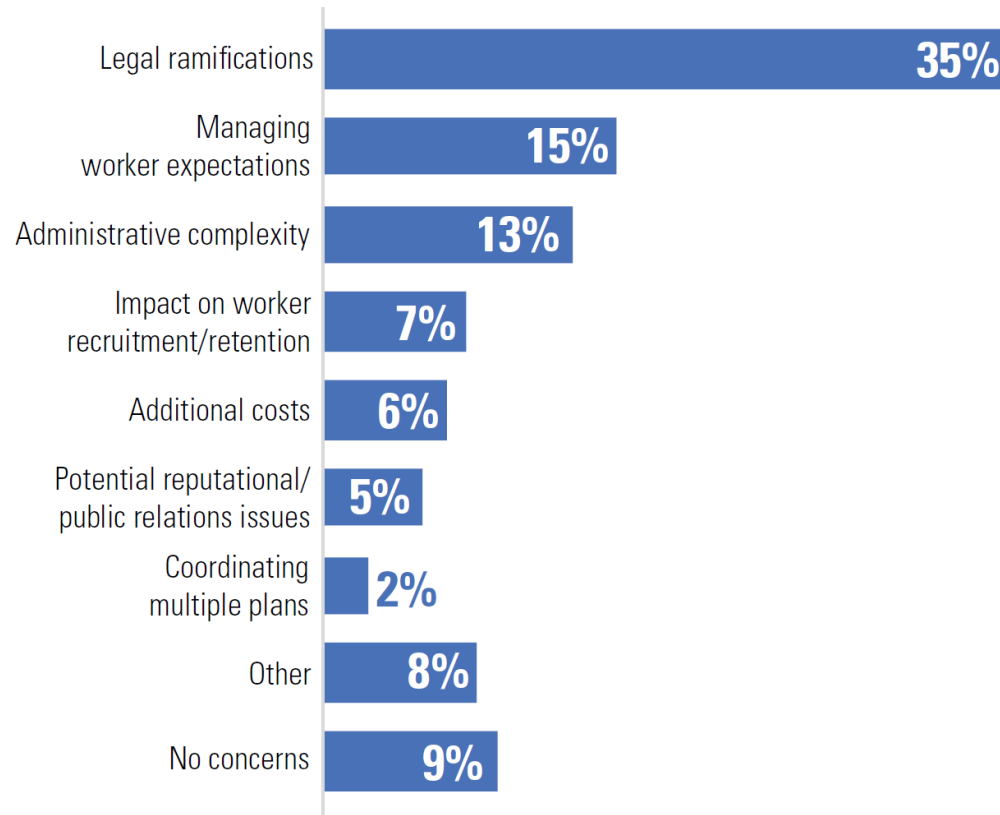


## Considering Making Changes to Current Coverage for Abortion Services (n=395)

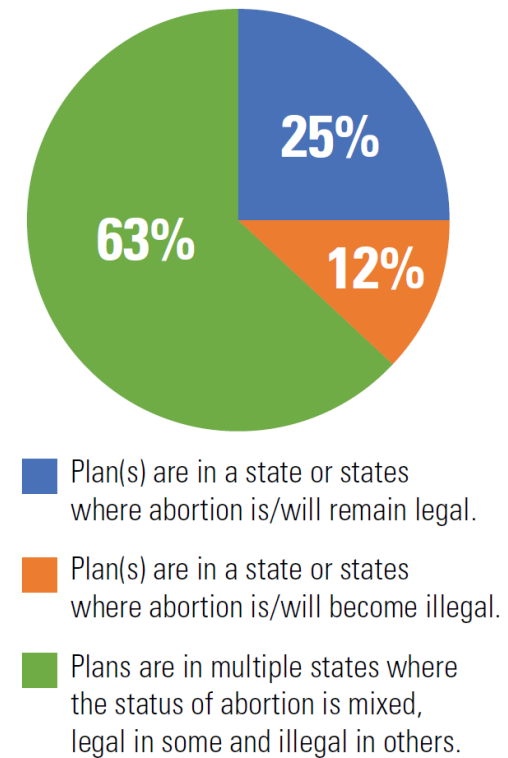


# Post-Dobbs Employer Coverage: July 2022 Pulse Survey

## Greatest Concern Regarding Supreme Court Dobbs Decision (n=395)



## Respondent Health Plan Location (n=395)



# Plan Sponsor Considerations

# Considerations

## How does the plan cover items and services today?

- Abortion
- Medication abortion
- Contraceptive coverage (all FDA methods including Plan B required for non-grandfathered plans)
- Travel benefits
- Coverage for dependent children
- Health Reimbursement Arrangement (HRA) coverage

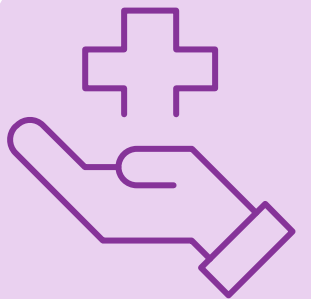
# Travel Benefits

**The Internal Revenue Code allows for tax-free reimbursement of travel and lodging expenses incurred as a result of receiving necessary medical care, subject to IRS limits**

- Lodging up to \$50 per night per individual
- Transportation cost for essential medical care includes bus, taxi, train, and plane fares; medical standard mileage rate is \$0.22 per mile for expense on or after July 1, 2022
- Reimbursement for companion transportation costs (but not for meals or lodging) if needed for medical reasons when a patient is unable to travel alone
- Meal expenses generally not reimbursable unless the meal is provided in a hospital or similar institution as part of inpatient care
- Reimbursements in excess of the IRS limits could result in taxable income

# Additional Benefits

- Paid leave
- Dependent care and caregiver benefits
- Education benefits
- Adoption benefits



# Family Building Benefits

- Fertility coverage benefit options through both carriers and carve-outs
- Implications of *Dobbs* on fertility coverage





# Healthy Mothers and Children

- Each year in the United States, about 700 people die during pregnancy or in the year after; another 50,000 people have unexpected outcomes of labor and delivery with serious short- or long-term health consequences
- Black women are three times more likely to die from a pregnancy-related cause than white women
- Social determinants of health prevent many people from racial and ethnic minority groups from having fair opportunities for economic, physical, and emotional health

# Ways to Improve Maternal Healthcare

- Help patients manage chronic conditions or conditions that may arise during pregnancy like hypertension, diabetes, or depression
- Consider incentives for participating in healthy pregnancy programs
- Provide care coordination services during and after pregnancy
- Consider coverage for Doula, lactation assistance
- Monitor delivery of quality prenatal and postpartum care
- Recognize social determinants of health that may affect your population

# Conclusion

- Understand current benefit coverage
- Determine whether plan changes are desired
- Consider other benefits related to maternal health



# Thank You

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