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Employer Travel Assistance for Reproductive Health Care

by Martha L. Sewell

Since the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* in June, employers have been evaluating ways to protect reproductive health care rights for their employees in those states which ban or severely restrict abortions. One approach that has gained favor is reimbursing employees for travel-related expenses which are incurred when seeking an out-of-state legal abortion. Looming in the background, however, is the question of what civil and/or criminal liability may await employers who provide such benefits.

State "Aiding and Abetting" Laws

A few states have passed laws which directly prohibit individuals from "aiding and abetting" an abortion. Texas allows private citizens to file suit against any person who:

> "knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter. . . ."

See Tex. Health & Safety Code § 171.208, also known as the "Texas Heartbeat Act." In July, a group of Texas state legislators sent a letter to a handful of Texas employers in response to their announced assistance to employees for out-of-state abortions. The letter expressed their intent to introduce legislation in January 2023 criminalizing employer assistance for out-of-state abortions and banning employers from operating in the state if they provide abortion assistance. The letter also alleged that that employer assistance for out-of-state abortions violates Texas law which makes it a felony to "furnish the means for procuring an abortion." *See* Texas Rev. Civ. Stats. Ann. Art. 4512.2. The Texas Attorney General has not yet weighed in with his view on this issue, but a class action was recently filed seeking to block enforcement of Texas laws which would prohibit providing abortion assistance.

Oklahoma enacted a law similar to the Texas Heartbeat Act earlier this year, and now has one of the strictest abortion laws in the nation. Oklahoma allows a civil action to be brought against any person who:

> "engages in conduct that aids or abets the performance or inducement of an abortion including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this act, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this act. . . ."

See Okla. S.B. 1503 (2022) and H.B. 4327 (2022). Oklahoma also passed a law making it a felony for a person to advise or provide any other means for a woman to procure an abortion. The Oklahoma

Attorney General issued a memo on August 31, 2022 in which he suggested that this law *may* reach employers who provide travel-related benefits, but clarified that it does not reach individuals "engaging in general advocacy in favor of abortion."

> "District attorneys and law enforcement may consider pursuing a case, however, where a person has advised or encouraged a woman to obtain an unlawful abortion in some imminent way, especially if the third party has taken an overt or tangible action toward that goal. But, again, should such a situation arise, district attorneys and law enforcement are encouraged to consult with the Attorney General's Office before initiating prosecution."

In those states without a law that directly prohibits aiding and abetting an abortion, other laws may apply such as a state's criminal conspiracy laws. For example, in Alabama, it is a felony when "[a] conspiracy formed in this state to do an act, which, if done in this state, would be a criminal offense, is indictable and punishable in this state in all respects if such conspiracy had been to do such act in this state." *See,* Ala. Code § 13A-4-4. There are differing views as to whether this applies to an employer who provides travel-related abortion assistance to someone who seeks an abortion outside of Alabama. One view is that it does not apply because there is nothing that makes it illegal for someone to provide assistance to someone seeking an abortion in Alabama. The Alabama State Attorney General's office has announced that it is studying this issue.

While there are only a few states which directly prohibit aiding and abetting an abortion, most state legislatures are not in session currently. When state legislatures convene in the next session (generally commencing in January 2023), it is expected that additional laws will be passed which address aiding and abetting an abortion directly.

Employer Defenses to State Aiding and Abetting Laws

There are a number of unanswered questions relating to enforceability of state aiding and abetting laws against employers who provide travel-related abortion assistance to their employees.

At the forefront is the question of whether state laws which prohibit an individual from seeking a legal abortion in another state or prohibit providing assistance to such an individual are constitutional. There is limited precedent on that issue, and there is ongoing discussion in the legal community as to the various constitutionality arguments that may be asserted. This article does not purport to cover these arguments in detail.

Explained succinctly as possible, if "aiding and abetting" laws were constitutional, then taking this to its logical conclusion, a police officer in State A could give a speeding ticket to a resident of State A for a speeding violation that occurs in State B, but using State A's speed limits. This, of course, sounds preposterous – which is likely why it has not ever been tested in the courts. However, in support of the position that such laws are not constitutional, some assert that states are sovereign entities, and one state cannot pass a law that surpasses the laws in another state. There is also the argument that citizens have the constitutional right to travel, and an abortion ban in one state extending to abortions in other states would limit that right. In the concurring opinion to the *Dobbs v. Jackson Women's Health* decision, Justice Kavanaugh expressed his support for that view. Some also point to the Constitution's "full faith and credit" clause and "dormant commerce clause" for support of the position that such "aiding and abetting" laws that would apply to out-of-state conduct are unconstitutional.

Employers providing travel-related abortion benefits frequently do so through an employer-sponsored health plan, such as the employer's primary medical plan or an HRA. In that situation, the employer may

be able to argue that a state's aiding and abetting law is preempted by ERISA. ERISA preempts all state laws that "relate to" an ERISA-covered plan, with some exceptions, such as state insurance laws. In general, a state law "relates to" an ERISA plan if it has a "connection with" or "reference to" an ERISA plan. There is a reasonably strong argument that state laws that impose civil liability on employers for providing travel-related abortion benefits are preempted because they directly impact the plan and interfere with uniform plan administration as the employer would have to track the laws in multiple states and adjust benefits accordingly. ERISA does not, however, preempt a state's criminal laws of general applicability. As a result, if a state's aiding and abetting law imposes criminal penalties and is not directed at employee benefit plans, it may not be preempted. Organizations have asked the Departments of Labor, Treasury and Health and Human Services to provide guidance which confirms and clarifies the scope of preemption in this situation.

On the other side of the spectrum, a number of "pro-choice" states have enacted laws or issued executive orders designed to protect reproductive health care rights, including those who provide assistance to someone who is seeking a legal abortion. States adopting these types of measures include California, Connecticut, District of Columbia, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania and Rhode Island. The types of protections that have been adopted include:

- Prohibiting enforcement of a civil judgment obtained under another state's law on account of aiding and abetting an abortion.
- Allowing persons who are sued for aiding and abetting a legal abortion to recover damages from the person that brought the action.
- Prohibiting the state from cooperating with investigations or proceedings that seek to impose civil or criminal liability for aiding and abetting a legal abortion.
- Prohibiting the state from agreeing to extradition of an individual if the charged criminal conduct is related to reproductive health care which is legal in the state.
- Prohibiting the disclosure of information relating reproductive health care services without the consent of the individual.

It is unclear whether these measures will be enforceable, but they provide another avenue by which employers who provide travel-related abortion assistance can seek protection from state aiding and abetting laws.