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Employer Travel Benefits for Abortion Access: Plan Design Considerations

At least 14 states already have banned abortions or imposed restrictions that would not have been permitted before the Supreme Court's June 24, 2022 decision in *Dobbs v. Jackson Women's Health Organization*. With as many as 12 more states expected to take similar actions in the near future, some employers are looking for ways to help employees pay the cost of traveling outside of their home states to obtain legal abortions. But there are numerous issues for employers to consider when designing a travel program.

Overview

In general, a group health plan – including a health reimbursement arrangement (HRA) or health flexible spending arrangement (FSA) is permitted to reimburse participants' travel expenses incurred "primarily for and essential to medical care." This can include lodging expenses in certain circumstances, subject to a $50 per night limit. Certain meals may be reimbursable as well.

Some group health plans may already allow coverage for travel expenses incurred for medical care, while others may need to be amended to add such a benefit. Either way, there are a number of potential issues employers will have to consider.

Travel Benefits as Part of a Comprehensive Group Health Plan

A travel benefit that is part of a comprehensive group health plan will only be available to employees enrolled in the group health plan. Employers that also want to help employees who are not enrolled in their group health plans, either because they have other coverage or are not eligible, will need an alternative.

ERISA generally preempts state laws that "relate to" employee benefit plans that are subject to ERISA. However, states are still permitted to regulate insurance. That means states could prevent fully-insured ERISA plans (as well as non-ERISA plans) from covering abortion services, including travel and other expenses associated with obtaining abortions elsewhere. These types of restrictions presumably would not apply to self-insured ERISA plans.

What About HRAs and Health FSAs?

HRAs and health FSAs are self-insured plans that could pay these expenses, as noted above. However, HRAs and health FSAs generally must be integrated with major medical coverage. That means these accounts generally are available only to employees enrolled in the employer's comprehensive group health plan.

There is an exception for HRAs and health FSAs that are "excepted benefits." But FSAs are subject to an annual elective deferral limit of $2,850 (2022), and employer contributions are limited to no more than $500 for FSAs to be "excepted benefits." Additionally, unused FSA balances typically are forfeited at the end of each year.

HRAs are fully funded by employers and unused balances can be carried over from year-to-year, but there is a $1,850 annual addition limit on excepted benefit HRAs.

So, while HRAs and health FSAs might be helpful in certain circumstances, they generally are not ideal tools for employers that want to provide a more comprehensive benefit.

Employee Assistance Plans

An excepted benefit employee assistance plan (EAP) could be a viable alternative for some employers. EAPs are not subject to the same dollar limit restrictions as health FSAs or HRAs and must be made available to employees regardless of whether they are enrolled in the comprehensive group health plan in order to qualify as an excepted benefit.

What About State Law?

The other issue for employers to watch is what steps states might take to discourage third-parties from helping their residents seek abortions in other jurisdictions. Two states – Texas and Oklahoma – already have so-called "aiding and abetting" laws, which create a civil cause of action that private citizens can use to sue entities that help residents obtain abortions not permitted under state law. So far, these laws have not been tested, and their scope isn't clear. However, employers will need to carefully watch the evolution of these and other state laws as they move forward in this area.

EEOC Finds that Employer Violated GINA by Collecting Employees' Family Members' COVID-19 Test Results

The Equal Employment Opportunity Commission ("EEOC") entered into an agreement with the employer whereby it pledged to cease collecting employees' family members' COVID-19 test results and provide compensation in some cases.

Overview

The EEOC announced in a July 6, 2022 press release that, after an investigation, it had entered into a conciliation agreement with Brandon Dermatology, a Florida medical practice that collected COVID-19 test results from its employees' family members. The collection of such data violates the Genetic Information Nondiscrimination Act ("GINA"), which generally provides that employers may not discriminate against employees or applicants on the basis of genetic information and may not request, require, or purchase employees' genetic information. GINA's definition of "genetic information" includes information about the manifestation of a disease or disorder in an employee's or applicant's family members. The EEOC, which is responsible for enforcing GINA, had previously determined that the collection of COVID-19 test results of employee's family members falls within the scope of the law.

As part of the conciliation agreement, Brandon Dermatology agreed to compensate its affected employees through restoration of leave time or back pay and provide compensatory damages. Brandon Dermatology must also

review its COVID-19 policies, conduct training on EEO laws as they pertain to COVID-19, and post a notice of the agreement.

Takeaways for Employers

This case serves as a reminder to employers that they are prohibited from collecting COVID-19 test results from their employees' family members. In its press release, a coordinator for the EEOC's Miami District had this message for employers: "Although GINA charges comprise a small portion of the EEOC's charge receipts each year, employers nonetheless need to be aware of the law's prohibition on collecting genetic information."

Employers should review their COVID-19 policies as well as the EEOC's COVID-19-related "Technical Assistance" guidance to ensure compliance with federal EEO laws. According to the Technical Assistance, employers may, for example, ask all employees who are physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19 and if they have been tested for COVID-19. However, employers are prohibited under GINA from asking an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19. But, an employer does not violate GINA by asking employees whether they have had contact with anyone diagnosed with COVID-19.

Discouraging Employee from Taking FMLA Leave Can be Unlawful Interference, 7th Circuit Rules

Simply discouraging an otherwise eligible employee from taking FMLA leave, even if an FMLA leave request is never made and denied, can be sufficient for an employee to claim unlawful interference with their FMLA rights, according to the 7th Circuit Court of Appeals.

Case Summary

At issue in *Ziccarelli v. Dart*, No. 19-3435 (7th Cir., June 1, 2022), was an employee who approached their employer's FMLA manager to discuss possibly taking FMLA leave to pursue treatment for his post-traumatic stress disorder (PTSD). The employee, who had used FMLA leave in the past for a series of serious health conditions, claimed he was told that he would be disciplined if he took any more FMLA leave. Ultimately, the employee decided to retire and never formally sought to take FMLA leave.

The employee sued pursuant to FMLA Section 2615(a), which prohibits employers from "interfering with, restraining, or denying the exercise of FMLA rights." A federal district court granted the employer's motion for summary judgment because the employee failed to show an actual denial of FMLA benefits. On appeal, the 7th Circuit Court of Appeals reversed.

According to the 7th Circuit, an employee must establish five elements to support an FMLA interference claim. These are: (i) the employee was eligible for FMLA protections; (ii) the employer was covered by the FMLA; (iii) the employee was entitled to leave under the FMLA; (iv) the employee provided sufficient notice of intent to take FMLA leave; and (v) the employee suffered prejudice (i.e., harm) from the employer's actions, regardless of whether there was an actual denial of FMLA benefits. In other words, "denial of FMLA benefits is not required to demonstrate an FMLA interference violation." Specifically, "Interference or restraint alone is enough to establish a violation, and a remedy is available … if the plaintiff can show prejudice from the violation."

Because the employee in this case presented evidence that the employer discouraged him from taking FMLA leave that he otherwise was eligible to take, the 7th Circuit reversed the district court's grant of the employer's summary judgment motion. The case now goes back to the district court for trial, where it will be incumbent upon the employee to prove he was discouraged from taking FMLA leave. That may be an uphill climb because, as the Court's opinion notes, the employer does not agree with the employee's allegations.

Why Does this Case Matter?

As the 7th Circuit's opinion illustrates, there is some confusion around what facts an employee must establish to successfully plead an FMLA interference claim. But the 7th Circuit's opinion makes clear that an interference claim can be sustained without a formal request for FMLA leave ever being made or denied. As such, employers should take care whenever discussing even the possibility of an employee taking FMLA leave and be sure not to say or do anything that could be perceived as discouraging an employee from exercising their FMLA leave rights.

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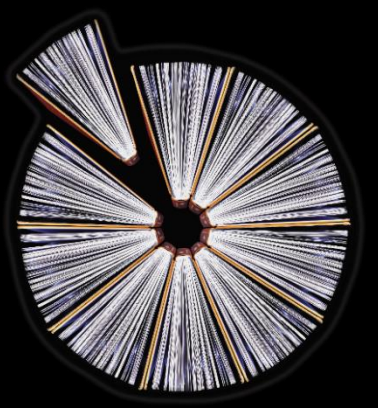

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