FENWICK

Considerations for Employers Reimbursing Out-Of-State Travel for Abortion Procedures

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In the wake of the Supreme Court's *Dobbs v. Jackson Women's Health Organization* decision (***Dobbs***), several states have already begun outlawing abortions and more states are expected to do so. Some states are also considering enacting new laws that would regulate employers' ability to provide travel reimbursement benefits for abortions or other procedures relating to reproductive care. Absent congressional action, the current and future state of reproductive rights in the U.S. is in flux.

Advocates have called upon the Biden Administration to take action to protect access to abortion. Accordingly, two weeks after the *Dobbs* decision, President Biden signed the "Executive Order on Protecting Access to Reproductive Healthcare Services" (***Executive Order***), which calls upon the secretary of Health and Human Services to submit within 30 days of the Executive Order a report that identifies potential actions to protect and expand access to abortion care and reproductive healthcare services.[1] As of the date of this alert, none of the provisions of the Executive Order impact legal avenues available to employers seeking to provide abortion-related benefits to their employees.

Many companies are eager to address their employees' healthcare needs as states take different approaches to abortion and reproductive rights. This alert discusses many key issues and potential action items, across multiple legal disciplines, that employers will need to consider when providing abortion-related benefits to their employees in a post-*Roe v. Wade* legal landscape.

How May Employers Provide Employees with Travel Reimbursement?

The permissible manner in which employers may offer employees out-of-state travel benefits in order to access reproductive care depends on the type of existing healthcare plan. Companies should note that any travel benefit that is integrated with a medical benefit could be subject to the Employee Retirement Income Security Act of 1974 (***ERISA***), the Affordable Care Act (***ACA***), and and the Health Insurance Portability and Accountability Act (***HIPAA***).

A. Fully-Insured Plans

Fully-insured plans, purchased by employers from commercial insurers or carriers, are subject to state law regulation. Fully-insured plans cannot cover abortion services in states that criminalize abortion within their borders. Although these plans are also subject to ERISA, ERISA does not preempt state laws that regulate insurance.

B. Self-Funded Plans

Self-funded or self-insured plans are directly funded by companies and are regulated under federal laws, including ERISA. As discussed below, ERISA contains a provision preempting state laws that relate to employee benefit plans. Therefore, employers offering abortion services under self-funded healthcare plans that are covered under ERISA should likely be able to continue offering coverage under their respective plans for services to procure a legal abortion, including travel expenses to states where abortion would be legal.

C. Self-Funded "Tack-on" Arrangements

If the existing underlying health plan, whether fully-insured or self-funded, does not cover abortion-related benefits, employers may want to consider adopting supplemental self-funded arrangements, including Health Reimbursement Accounts (***HRAs***), Health Savings Accounts (***HSAs***), or Flexible Spending Accounts (***FSAs,***) (collectively, ***Tack-on Arrangements***). These Tack-on Arrangements typically must comply with specific nondiscrimination requirements.

There are multiple types of HRAs, including Excepted Benefit HRAs (***EBHRAs***) and Integrated HRAs:

- EBHRAs may be offered to health-plan-eligible employees who elected not to participate in the plan, and reimbursements are capped at $1,800 per year (indexed in 2022). However, an EBHRA cannot limit reimbursements for travel only to employees who are seeking an abortion out-of-state; it must generally provide reimbursement for travel expenses related to medical care on a broad basis or risk running afoul of other state or federal statutes.
- Integrated HRAs are available only for employees who are already enrolled in a group health plan offered by the company or from another source, with no cap on reimbursements. An Integrated HRA, under certain conditions, may be permitted to restrict expense reimbursements to certain medical expenses.
- FSAs may be added to existing group health plans, or a group health plan with existing FSAs may expand its eligible expenses to cover medical-related travel expenses (including for abortion). An employee need not enroll under the employers' underlying medical plan to contribute to FSAs on a pre-tax basis. Contribution limits for FSAs are capped at $2,850 in 2022.

The interplay of the HRA, HSA, and FSA rules are extremely complex. Some of these arrangements may not be offered concurrently without adverse tax consequences. For example, an individual covered under a high deductible health plan will only be eligible to contribute to an HSA offered in conjunction with a limited purpose health FSA, a limited purpose health HRA, a post-deductible health FSA, or a post-deductible HRA. Employers should consult with legal counsel and their benefits broker before adding or changing any of their existing arrangements.

D. "Stand-alone" Programs

Employers should be wary of establishing separate medical reimbursement accounts for travel that are not Tack-on Arrangements. While seemingly simple, these medical reimbursement accounts run the risk of being treated as a "group health plan" that is subject to federal mandates under ERISA, ACA, HIPAA, and the Consolidated Omnibus Budget Reconciliation Act (***COBRA***).[2] This is true for stand-alone programs that are pre-tax, such as HRAs, and those that are post-tax.[3] These stand-alone programs then likely become impractical to administer, and specifically must comply with (1) prohibitions against annual or lifetime limits on the dollar amount of benefits on essential health benefits, (2) requirements for nondiscrimination testing, (3) ERISA's fiduciary duty rules and reporting and disclosure requirements, and (4) stringent claims procedures. There may be substantial penalties for not complying with ACA and other federal mandates.[4]

If a stand-alone program were deemed subject to HIPAA, an employer maintaining the stand-alone program would need to treat all information related to individuals participating in the program as protected health information (***PHI***). This means that the employer would need to provide participating employees with HIPAA privacy notices and would also have to protect such PHI from disclosure to third parties, including law enforcement authorities, without the participating employee's consent.

Despite these administrative costs and risks, there may be potential advantages. The U.S. Department of Health and Human Services (***HHS***) recently issued guidance reaffirming that entities subject to HIPAA (health plans, hospitals, etc.) are not only responsible for protecting the privacy of an individual's information relating to abortion and other sexual and reproductive healthcare but can also *choose not to comply* with law enforcement authorities' requests to disclose PHI related to such information, unless such disclosure is compelled by a court order.[5]

E. Wellness-Type Arrangements

Finally, employers may want to consider wellness-type arrangements such as those that provide stipends to all company employees for general wellness. These wellness policies should not be tied to medical procedures (e.g., employers should not require receipts from doctor's offices), which can result in overpayment to employees and an inability to monitor actual employee spending.

State Law Interference with Travel Reimbursements and Federal Preemption

Employers may be concerned about state laws that prohibit employers from reimbursing their employees for the costs of travel to another state to obtain an abortion.

A self-funded plan (including a Tack-on Arrangement) that incorporates travel reimbursement benefits may likely gain more protection from state regulation than a fully-insured plan or a generalized wellness benefit. This is due to broad ERISA preemption of state law interference with self-funded medical benefits.[6]

Section 514 of ERISA preempts any state laws that may "relate to an employee benefit plan." The Supreme Court has interpreted "relate to" to mean that any law that "has a connection with or reference to such a plan" is preempted by ERISA.[7] This preemption generally applies to state statutes that attempt

to (1) mandate certain employee benefit plan structures, (2) alter or attempt to alter ERISA's claims procedures and participant rights and remedies, or (3) impose additional reporting and disclosure requirements. However, there are notable exceptions to ERISA preemption, including:

A. Insured Plans

ERISA does not preempt state regulation of the insurance industry (e.g., licensure requirements, product design regulations, etc.), but self-funded medical plans are deemed not to exist within that industry. This is because ERISA's "savings" clause "saves" state regulation of the insurance industry, while ERISA's so-called "deemer" clause prevents states from "deeming" self-funded medical plans as insurance companies.

Since states may regulate insured plans, *Dobbs* now requires a closer look at cases differentiating plans as insured versus self-funded, when they have mixed features, including:

- ***Ancillary Insured Benefits***: Some self-funded medical plans may include insured ancillary benefits (e.g., dental or vision). Courts have generally upheld these as self-insured, provided that the self-funded portions of the plan are separate and distinct from the fully-insured portions.[8]
- ***Stop-Loss Coverage***: Some self-funded plans include a stop-loss insurance contract that is designed to reduce an employer's exposure to catastrophic or unpredictable health cost claims by covering claims that exceed a set amount, known as an attachment point. If an attachment point is too low, a court could deem the plan to be insured rather than self-funded, and thus subject to state regulation.[9] Courts have not yet established a standard for determining the attachment point that would create an amount of stop-loss insurance that would transform a self-funded plan into insurance. However, in 2021, a New Jersey District Court ruled that a stop-loss policy with an attachment point of more than $125,000 per participant remained a self-funded plan.[10]

B. Generally Applicable Criminal Laws

ERISA does not preempt "generally applicable state criminal law[s]." Many federal courts have been reluctant to decide what constitutes a "generally applicable criminal law."[11] The Ninth Circuit, however, has interpreted the phrase to mean laws that are not directed at employee benefit plans but instead address more general criminal conduct, such as laws prohibiting burglary, suggesting preemption of laws that govern a central matter of plan administration and so interfere with specific relationships that ERISA seeks to govern (e.g., the relationship between a plan and plan participant as to an essential ERISA plan benefit).[12] Several state and federal courts have echoed this analysis and have examined who the law affects when determining if it is a "generally applicable" criminal law.[13]

Certain states have expressed an intent to penalize those who "aid or abet" abortion seekers, which may take aim at employer reimbursement programs. However, to the extent those laws target the administration of a self-funded medical plan's travel features for an essential benefit, there may be an argument that they are not "generally applicable" and ERISA preemption applies.

Another factor to consider is whether state criminal statutes that include an implied civil action or remedy will be preempted.[14] This may be particularly relevant in the area of reimbursing employees for travel to get an abortion since some states have already passed laws that rely on civil enforcement mechanisms, rather than criminal ones.

Companies should continue to monitor state laws in the states where they are located for criminal laws or civil penalties related to abortion. Although the issue is likely to be litigated in the future, Justice Kavanaugh's concurring opinion in *Dobbs* suggested that the constitutional right to interstate travel may prohibit states from criminalizing travel to other states to receive an abortion. There is a difference, however, between an individual's right to interstate travel and a state's right to impose restrictions on those who fund the travel. The constitutional right to interstate travel is not explicitly mentioned in the Constitution but has been found in Supreme Court precedent.[15] This precedent does not address the issue of whether a person has a constitutional right to fund another's interstate travel.[16] It will be important for employers to monitor whether courts will be willing to defer to states on this issue in the same way that they have allowed them to decide on the issue of abortion or if there will be a uniform rule that is more similar to the right to interstate travel.[17]

Federal Tax Treatment of Abortion-Related Benefits[18]

The IRS has ruled that legal abortions are treated as medical care for the purposes of determining the deductibility of related expenses for U.S. federal income tax purposes.[19]

Amounts paid or accrued for employee medical expenses generally (1) are deductible to the employer as ordinary and necessary business expenses and (2) are not treated as wages for the purposes of income taxes and social security.[20] The same is generally true for amounts paid to reimburse an employee (or the employee's spouse or dependents) for medical care for the employee, the employee's spouse, the employee's dependents, or the employee's children who will not reach age 27 by the end of the year.[21] This tax treatment does not generally depend on the vehicle by which the reimbursement occurs: the reimbursement should generally remain tax free to the employee whether the payment occurs in a fully-insured plan, self-funded plan, Tack-on Arrangement, or as a stand-alone specific program.[22]

Amounts paid to reimburse transportation costs are also excluded from employee income if the transportation is primarily for and essential to such medical care.[23] Transportation reimbursements excluded from income include up to $50 a night per person in lodging but do not include reimbursements for the cost of any meals while away from home receiving medical treatment, other than meals received as part of in-patient hospital care. Travel expenses are excludible for the patient and a companion when the companion's travel is necessary to the patient's medical care, such as a parent traveling with a child who needs medical care or a nurse or other person who can give injections, medications, or other treatment required by a patient who is unable to travel alone.[24] Thus, an employee generally could exclude from income and an employer generally could deduct costs primarily for and essential to transportation necessary for the employee, spouse, dependent, or child to obtain an abortion in another state in which the abortion is legal, but any reimbursement for meals (other than as part of in-patient hospital care) generally would be treated as wages paid to the employee.

If the abortion is illegal, expenses paid for that abortion are not treated as medical expenses, and employee reimbursements would be taxable as income to the employee. Note, however, that the applicable regulation facially appears to tie deductibility to the legality of the abortion, in the jurisdiction where it is performed, rather than the legality of an abortion in the state where the employee lives or works. Reimbursement for travel to a state in which an abortion is legal, and for the costs of an abortion in that state, would be reimbursements for medical expenses and therefore would generally be excluded from the employee's income for U.S. federal income tax purposes.

Abortion-related payments generally are taxable to an employee if they are paid pursuant to a wellness plan or other arrangement that includes reimbursement of non-eligible medical expenses or on behalf of non-eligible beneficiaries.[25]

The employer's ability to deduct reimbursements for abortion-related medical expenses may depend on whether the state in which the employee works outlaws such reimbursements. The deduction for ordinary and necessary business expenses does not apply to an "illegal payment" under a "generally enforced" state law that subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business. For this purpose, a law is treated as generally enforced unless it is never enforced or the only persons normally charged with violations are infamous or those whose violations are extraordinarily flagrant.

Discrimination Law Considerations

Dobbs shines a renewed light on workplace discrimination laws as well. Title VII prohibits discrimination against women for having, refusing to have, or contemplating abortion.[26] Title VII guidance from the EEOC further states that an employer that offers health insurance is not required to pay for coverage of abortion, except where the life of the mother would be endangered if the fetus were carried to term or medical complications have arisen from an abortion.[27] Although not required to do so, an employer is permitted to provide health insurance coverage for abortion. When messaging and rolling out an abortion travel policy, employers should be mindful that not all employees will support such a policy, and some may openly object, including on religious grounds. Adverse action against such objectors could constitute religious discrimination, implicating Title VII as well as state anti-discrimination law.

Corporate Considerations

A company's board of directors should consider the potential corporate governance ramifications resulting from the decision to provide abortion-related benefits to employees, including the risk of fiduciary duty litigation arising from such a decision.

Under Delaware law,[28] directors owe the corporation and its shareholders two core fiduciary duties: (1) the duty of care and the (2) the duty of loyalty.[29] The duty of care requires informed, deliberative decision-making based on all material information reasonably available. The duty of loyalty requires directors to act on a disinterested and independent basis, in good faith, with an honest belief that the action is in the best interests of the company and its shareholders.[30] A decision relating to employee benefits would generally implicate only the duty of care. Delaware law affords directors making business decisions a set of presumptions – known as the "business judgment rule" – which presume that directors act in accordance with their fiduciary duties when making decisions. Thus, under the business judgment rule, as long as a majority of the directors have no conflicting interest in the decision, their decision will not later be second guessed by a court if the decision is made on an informed basis and in an honest belief that the action taken was in the best interests of the company.[31]

Although decisions related to a company's employee benefits are generally determinations made by management and do not require board approval, because abortion is a contentious issue, a company's adoption of abortion-related benefits should likely be reviewed and approved by the board. Boards should take the following steps to document their compliance with the duty of care:

1. The board should be informed as to the decision to adopt the assistance programs. This should ideally be documented in the minutes of a board meeting.

2. The board should be informed as to the reasoning in favor of adopting the reimbursement program. Ideally, this should be documented in the minutes of and materials circulated in connection with a board meeting.

3. The board should ensure the reasoning in favor of adopting the reimbursement program is impartial as to any officer's or director's own personal beliefs and provides veritable benefits to the corporation. Examples of such veritable benefits could include, for example, higher employee retention, particularly of women, which in turn leads to reducing employee turnover cost; the attraction of top talent by having a wider variety of benefits available; and aggregate lower employee healthcare costs. Incorporating qualitative and quantitative data would further support this element. Ideally, this should be documented in the minutes of a board meeting.

4. The board should ensure that their determination to support the decision to adopt the reimbursement program was due to its reasonable belief that the action taken was made in the best interests of the corporation. Ideally, this should be documented in the minutes of a board meeting.[32]

Companies should also keep a close eye on potential future changes in state fiduciary duty law that might change this analysis. For example, in a May 6, 2022 letter to Lyft's CEO, a group of Texas state representatives threatened to introduce legislation that, among other things, would change Texas corporate law to make payment for elective abortions or reimbursement of abortion-related expenses as acts constituting a *per se* breach of fiduciary duty and would prohibit directors and officers from invoking the business judgment rule as a defense. Such legislation would clearly impact companies incorporated in Texas. What is less clear, however, is whether Texas could attempt to apply its fiduciary duty laws to foreign corporations – such as to companies incorporated in Delaware that do business in Texas. Currently, Texas strictly adheres to the "internal affairs doctrine" – a choice of law doctrine that mandates that courts apply the law of the state of incorporation to questions regarding the internal affairs of a corporation including fiduciary duties.[33] Texas could attempt to end run the internal affairs doctrine by expressly applying these proposed revisions to both Texas and foreign corporations. Notably, this maneuver is not without precedent.[34] It is uncertain, however, whether such an end run around the internal affairs doctrine would ultimately withstand constitutional scrutiny.[35] In any event, the passage of laws such as those proposed in the Texas letter will result in much uncertainty and litigation.[36]

Next Steps for Employers

- **As a first step, contact the provider of your underlying medical plan or the claims administrator of your self-funded plan** to see what abortion-related expenses and travel reimbursements for medical expenses are currently offered. There may be enhancements that can be made to the policy, provided reimbursements for abortion expenses are limited to the states where such reimbursements are legal or if the underlying medical plan is self-funded.

- **Contact your self-funded plan's stop loss insurer** to determine whether the individual or aggregate attachment point at which the stop loss coverage starts reimbursing is so low that the stop-loss policy serves as a replacement for health insurance benefits, which could create an argument that the plan is fully-insured and subject to state regulation.

- **Consider adding self-funded Tack-on Arrangements,** such as FSAs or HRAs, in tandem with your current group health plan. Note that some of these arrangements may not be offered concurrently without adverse tax consequences.
- **Review the way your medical plan is funded** to determine whether moving to a self-funded medical plan that would afford greater ERISA protection is a viable alternative for your company. There are complexities and significant financial considerations involved, as the company will be assuming the claim risks similar to an insurer.
- **Explore a taxable general expense reimbursement arrangement such as a "wellness stipend."** Such an arrangement should be structured to reimburse for general wellness expenses, similar to existing general policies that provide gym membership, exercise class, and other health reimbursements, and should not be tethered to an underlying medical procedure or the company's medical plan to avoid noncompliance with federal laws governing health plans, such as the ACA.
- **Consider updating handbooks and policies** to ensure that employees understand that discrimination against coworkers for having an abortion (even if the abortion is illegal in the state where either works) remains illegal and sanctionable by the employer.
- **Continue monitoring the laws regulating abortion access in the states in which your employees are located** to ensure you are providing them with options that are both effective and legal.
- **Involve the board** in reviewing and adopting any policy related to travel reimbursement benefits for abortions or other procedures relating to reproductive care. Document the reasoning behind the decision to provide such benefits, ensuring such decisions are in the best interests of the corporation. Formal board approval may provide more protection in the event of stockholder claims.

Endnotes

1 The Executive Order also calls for the attorney general and the secretary of Homeland Security to consider actions to ensure the safety of patients, providers, and third parties providing reproductive healthcare services. Specifically, the secretary of Health and Human Services should provide guidance under the Health Insurance Portability and Accountability Act (***HIPAA***) and other statutes to strengthen the protection of sensitive information related to reproductive healthcare services and bolster patient-provider confidentiality. The Executive Order mandates that the secretary of Health and Human Services and the director of the Gender Policy Council create an Interagency Task Force on Reproductive Healthcare Access, which will identify and coordinate activities to protect and strengthen access to essential reproductive services. Finally, the attorney general is tasked with providing technical assistance concerning federal constitutional protections to states seeking to afford legal protections to out-of-state patients and providers who offer legal reproductive healthcare.

2 In 2013, the IRS released guidance regarding the reimbursement for medical care that took a broad view of what reimbursements would constitute a group health plan. Application of Market Reform and other Provisions of the Affordable Care Act to HRAs, Health FSA, and Certain Other Employer Healthcare Arrangements, I.R.S. Notice 2013-54 (stating that an arrangement involving payments that that are dedicated to providing medical care, such as cash reimbursements for the purchase of an individual market policy, is itself a group health plan that is subject to the Affordable Care Act). See Napier-Joyce, Nathanson, Ostrower, Thomas & Warren, Group Health Plan Considerations in the Face of (Potentially) Changing Abortion Laws, Jackson Lewis LLP, (June 14, 2022) (providing a standalone travel benefit could create a health plan that must comply with the ACA, ERISA, COBRA, and HIPAA); *see also* IRS ALE Info Center: Employer Health Care Arrangements, IRS.gov (updated Nov. 23, 2021).

3 Guidance on the Application of Code § 4980D to Certain Types of Health Coverage Reimbursement Arrangements, IRS.gov, 6 (Mar. 6, 2015), (stating that an arrangement that provides reimbursements that are dedicated to providing medical care is subject to the ACA regardless of whether an employer treats it as pre-tax or post-tax to the employee); *see also* FAQs About Affordable Care Act Implementation (Part XXII), U.S. Dep't. of Lab. (Nov. 6, 2014) (an employer's payment arrangement that provides cash reimbursement for an individual market policy is part of a plan regardless of whether the employer treats the reimbursement as pre-tax or post-tax).

4 *See e.g.* Guidance on the Application of Code § 4980D to Certain Types of Health Coverage Reimbursement Arrangements, IRS.gov, 6 (Mar. 6, 2015) (clarifying that such arrangements cannot be integrated with individual policies to satisfy the market reforms, and such arrangements fail to satisfy the market reforms and may be subject to a $100/day excise tax per applicable employee ($36,500 per year, per employee) under section 4980D of the Internal Revenue Code); *see also* Application of Market Reform and other Provisions of the Affordable Care Act to HRAs, Health FSA, and Certain Other Employer Healthcare Arrangements, I.R.S. Notice 2013-54 (stating that group health plans that reimburse employees for stand-alone medical plans must comply with ACA).

5 *See* HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, (updated June 29, 2022) (explaining that the HIPAA Privacy Rule would permit but not require a reproductive health clinic to disclose protected health information requested by law enforcement officials under a court order).

6 *Gen. Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521 (9th Cir. 1993) (discussing broad ERISA preemption of generally applicable state laws and holding that state laws regulating relationships that ERISA is meant to regulate will be preempted).

7 *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983); *compare Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480 (2020) (holding that state laws that do not force medical plans to adopt a particular scheme of substantive coverage do not have an impermissible connection with ERISA plans and are not preempted); *see also Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 325 (2016) (holding that Vermont law requiring medical plans to report detailed information about administration of benefits was preempted because it was a "direct regulation of a fundamental ERISA function").

8 *White Consol. Indus., Inc. v. Lin*, 859 A.2d 729, 733 (N.J. Super. Ct. App. Div. 2004) (affirming that medical plan was still self-funded despite presence of some insured components since these components were "separate and distinct" from the rest of the plan); *Ariz. Health & Welfare Tr. v. Pacyga*, 801 F.2d 1157, 1161 (9th Cir. 1986) (holding that life insurance and accidental death and dismemberment benefits that were paid partially with insurance were sufficiently separate and distinct from the rest of the plan so that it remained self-funded).

9 *Bill Gray Enters., Inc. Emp. Health & Welfare v. Gourley*, 248 F.3d 206, 215 (3d Cir. 2001) (holding that, although plaintiff self-funded plan with stop-loss insurance remained self-funded, where there is evidence of fraud between the subrogor and the third party that is intended to defeat subrogation rights, it is inequitable to permit the third party to assert payment in full as a defense to the subrogee's suit).

10 *Hua v. Bd. of Trustees*, No. CV20748MASTJB, 2021 WL 2190906, at *4 (D.N.J. May 28, 2021) (holding that stop-loss insurance attachment point of $125,000 per plan participant was not large enough for plan to no longer be self-funded); *see also Pacyga*, 801

F.2d at 1161 (holding that stop-loss insurance purchased by medical plan was not paying benefits directly to plan participants and therefore the plan remained self-funded).

11 *See e.g.*, *Nat'l Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil*, 784 F.2d 817, 822 (7th Cir. 1986) ("The issue we are most reluctant to decide is whether the Illinois wage payment act is preempted by ERISA."); *see also Altshuler v. Animal Hosps., Ltd.,* 901 F. Supp. 2d 269, 279 n.16 (D. Mass. 2012) (holding that ERISA preemption did apply under the "generally applicable criminal law" exception because plaintiff's case was a civil action instead of a criminal action); *Brincefield ex rel. Morton G. Thalhimer, Inc. Emp. Stock Ownership Plan v. Studdard*, No. 3:17-CV-718-JAG, 2018 WL 6323071, at *6 (E.D. Va. Dec. 4, 2018) (holding that plaintiff's claim alleging conspiracy against defendants was a civil action not a criminal prosecution as contemplated by ERISA).

12 *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1506 (9th Cir. 1993) (holding that state criminal law directed at employee benefit plans was not a "generally applicable criminal law," that "generally applicable" refers to criminal laws that apply to general conduct like larceny and embezzlement, and that ERISA preempted the Hawaii Payment of Wages law).

13 *Trustees of Sheet Metal Workers Int'l Ass'n Prod. Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 562-63 (E.D.N.Y. 1983) (holding that "generally applicable" laws have a "general application to all of the inhabitants of the state" and claims brought under statute criminalizing the non-payment of employee benefit funds under a collective bargaining agreement was not a generally applicable law so was therefore preempted); *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337, 341 (N.D. Ill. 1983) ("State criminal laws aimed specifically at employee benefit plans were not meant to be left intact by [ERISA]."); *Sasso v. Vachris*, 116 Misc. 2d 797, 801 (N.Y. Sup. Ct. 1982), *aff'd as modified*, 106 A.D.2d 132 (1984), *rev'd*, 66 N.Y.2d 28 (1985) (holding that New York law was generally applicable because it affected all employers within the state); *Com. v. Federico*, 383 Mass. 485, 490 (1981) (explaining that ERISA preemption applied to state law that was aimed specifically at employee benefit plans because the law was not generally applicable).

14 In at least one case, a state court has held that such laws will be subject to ERISA preemption. *Calhoon v. Bonnabel*, 560 F. Supp. 101, 109 (S.D.N.Y. 1982) ("Therefore, the criminal law exemption to [ERISA] cannot be interpreted to permit implied civil actions or remedies which otherwise would be preempted.").

15 *Interstate Travel*, Cornell L. Sch. Legal Info. Inst.; *see also United States v. Guest*, 383 U.S. 745, 758 (1966) ("[a]lthough the Articles of Confederation provided that 'the people of each State shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution.")

16 *But see Dobbs*, 597 U.S. at 184 (Breyer, J., dissenting) (arguing that the majority opinion will create "interjurisdictional abortion wars" because of the constitutional protection over free speech and interstate travel).

17 *See Crandall v. State of Nevada*, 73 U.S. 35, 46 (1867) (holding that Nevada law taxing people leaving the state or people "employed in the business of transporting passengers for hire" improperly infringed on the constitutional right to travel between states); *Saenz v. Roe*, 526 U.S. 489, 500-504 (1999) (recognizing a constitutional right to interstate travel based on the right to cross state borders, the right to enjoy the privileges and immunities or citizens from other states, and the inability of states to abridge these privileges and immunities based on the Fourteenth Amendment).

18 This alert does not discuss the deductibility of expenses for state tax purposes; deductibility for state tax purposes depends on the law of the applicable state. State laws treating abortion related expenses as criminal need to be carefully monitored.

19 Rev. Rul. 73-201, 1973-1 C.B. 140.

20 I.R.C. § 105(b) (exclusion from employee income); Treas. Reg. § 1.162-10(a) (1960) (deductibility to employer). Amounts paid from an employer plan or otherwise reimbursed by an employer are treated as income to an employee if the employee could have deducted those costs in a prior taxable year. I.R.C. § 105(b).

21 I.R.C. § 105(b); Treas. Reg. § 1.105-2 (1960)

22 Limitations apply to the deductibility of amounts paid to a highly compensated individual under a self-insured medical reimbursement plan that discriminates in favor of highly compensated individuals. *See* I.R.C. § 105(h). Furthermore, if an HRA permits amounts to be paid as section 213(d) medical benefits to a designated beneficiary other than the employee's spouse or dependents (other than pursuant to a qualified HSA distribution), none of the payments made from the HRA to any person, including amounts paid to reimburse the medical expenses of an employee or the employee's spouse or dependents, is excludable from gross income. *See* Rev. Rul. 2005-24, 2005-1 C.B. 892; Rev. Rul. 2006-36, 2006-36 I.R.B. 353 (as modified by Notice 2007-22, 2007-10 I.R.B. 670).

23 I.R.C. § 213(d)(1)(B). For example, when a patient traveled from Buffalo to Boston from July 4-8, 1992 for treatment received on July 7 and 8, 1992, the U.S. Tax Court held that only two of the four nights of lodging expenses were medical expenses, as the others were not essential to the patient's medical care. *Schafler v. Comm'r*, 75 T.C.M. (CCH) 1897, 1900 (1998).

24 *See* Cohn v. Comm'r, 38 T.C. 387 (1962) (holding that travel costs for the patient's wife were medical expenses if her presence was "indispensable"); *see also* Rev. Rul. 58-533, 1958-2 C.B. 108 (ruling that if, on the basis of competent medical advice, it is deemed necessary for parents to visit their child at regular intervals as a part of her therapy and medical management, their transportation costs are medical expenses).

25 *See* Rev. Rul. 2002-3, 2002-1 C.B. 316. In addition, amounts paid to an employee under a reimbursement plan that provides for the payment of unused reimbursement amounts in cash or other benefits are not excludable from gross income. Rev. Rul. 2005-24, 2005-1 C.B. 892.

26 42 U.S.C. § 2000e(k). *See* Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 app., Question 34 (1978) («An employer cannot discriminate in its employment practices against a woman who has had an abortion.»); H.R. Rep. No. 95-1786, at 4 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4766 («Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.»); *see also* Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008) (holding that the Pregnancy Discrimination Act prohibited employer from discriminating against female employee because she exercised her right to have an abortion); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1214 (6th Cir. 1996) (holding that the discharge of pregnant employee because she contemplated having an abortion violated Pregnancy Discrimination Act).

27 *See* Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 app., Question 34 (1978).

28 Because many companies are incorporated in Delaware or in states whose fiduciary duty laws are substantially similar to Delaware law, this section focuses on the law as it exists in Delaware. Companies should, however, evaluate these issues under the law of their state of incorporation.

29 United Food &and Comm.ercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1049 (Del. 2021).

30 *Id.* at 1050.

31 Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009)).

32 To the extent a shareholder claims that the board breached its duties because the decision to cover abortion-related costs negatively impacted the company's bottom line, that argument would likely fail. Delaware has repeatedly held that a board has no *per se* duty to maximize short-term profits and shareholder value of a corporation. In other words, a court will not hold directors liable solely on the basis of a business decision that turns out to be less profitable. *See* Air Products v. Airgas, 16 A.3d 48 (Del. Ch. 2011); *see also* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1153 (Del. 1990). A claim for corporate waste based on the same allegations would also likely fail. *See* Freedman v. Adams, 58 A.3d 414, 417 (Del. 2013) (stating that a claim for waste is subject to an "onerous standard" and "will arise only in the rare, unconscionable case where directors irrationally squander or give away corporate assets.").

33 Tex. Bus. Orgs. Code Ann. § 1.102 (West) (codifying the internal affairs doctrine); *see* Hollis v. Hill, 232 F.3d 460, 464-65 (5th Cir. 2000) ("Texas, like most other states, follows the 'internal affairs doctrine.' That is, the internal affairs of the foreign corporation, 'including but not limited to the rights, powers, and duties of its board of directors and shareholders and matters relating to its shares,' are governed by the laws of the jurisdiction of incorporation."); Klinek v. LuxeYard, Inc., 596 S.W.3d 437, 449-50 (Tex. App. 2020), *review denied* (Aug. 28, 2020) (finding that Delaware law on breach of fiduciary duty applied to a Delaware corporation, "[b]ecause a corporation's 'internal affairs' include 'the rights, powers, and duties of its governing authority, governing persons, officers, [and] owners' as well as 'matters relating to its ... ownership interests'").

34 *See, e.g.*, Cal. Corp. Code § 2115; Cal. Corp. Code § 1601; N.Y. Bus. Corp. Law § 1315.

35 *Compare* Juul Labs, Inc. v. Grove, 238 A.3d 904, 913-18 (Del. Ch. 2020) ("Under constitutional principles outlined by the Supreme Court of the United States and under Delaware Supreme Court precedent, stockholder inspection rights are a matter of internal affairs. Grove's rights as a stockholder are governed by Delaware law, not by California law. Grove therefore cannot seek an inspection under Section 1601."); *with* Valtz v. Penta Inv. Corp., 139 Cal. App. 3d 803, 806-10, (1983) (upholding as constitutional Cal. Corp. Code § 1600's provision applying California's shareholder inspection statute to foreign corporations) and Sadler v. NCR Corp., 928 F.2d 48, 55 (2d Cir. 1991) (holding that N.Y. Bus. Corp. Law § 1315 applied equally to foreign and domestic corporations).

36 Another issue that will likely be subject to litigation is whether statutes – such as the one proposed by the Texas letter – would be preempted by ERISA. *Compare* 29 U.S.C.A. § 1144(a) (ERISA preempts any state laws that may "relate to an employee benefit plan") *with* Halperin v. Richards, 7 F.4th 534, 539 (7th Cir. 2021) ("ERISA does not preempt the plaintiffs' claims against the directors and officers ... who serve dual roles as both corporate and ERISA fiduciaries."); Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1470 (5th Cir. 1986) (ERISA did not preempt Texas state corporate fiduciary duty law where state law's effect on benefit plans was "too tenuous, remote, and peripheral" to warrant a finding that it "related to" the plan).