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Insurance Tips For Cos. Offering Reproductive Health Benefits

By **Heather Habes and Gretchen Hoff Varner** (August 9, 2022, 1:05 PM EDT)

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In the wake of the U.S. Supreme Court's recent decision in Dobbs v. Jackson Women's Health Organization, an increasing number of states have passed or are considering legislation that purports to permit individuals and state governments to pursue legal action against anyone who aids or abets or otherwise facilitates an abortion.

These statutes — and future legislative initiatives — may result in lawsuits against companies and company representatives that provide travel or other benefits related to reproductive health for their employees. These recent post-Dobbs developments serve as a reminder that corporate insurance doesn't necessarily work when you just set it and forget it.

Corporate insurance policies, like the corporations and insured persons they protect, must be dynamic and adjust to newly presented risks of all kinds. As laws change — and as companies respond — it is crucial to confirm that insurance policies offer the expected protections against the new circumstances a policyholder may face.

Employers should analyze the language of their insurance policies to determine whether they afford sufficient protection for any novel claims, whatever those may look like, as well as for any threatened litigation, notwithstanding the strength of substantive defenses.

Faced with the novel claims, corporate employers will need to make sure they can still turn to their insurance for defense and indemnification of such claims. As detailed below, for employers providing or contemplating travel or other benefits related to reproductive health, we offer five tips for navigating their insurance coverage in a post-Dobbs world.

Provide prompt notification of all claims and potential claims.

As a matter of best practice, employers should consider giving prompt notice under all potentially applicable insurance of any potentially covered claim — as defined by the policy. That is because the insurance coverage most likely to be implicated by post-Dobbs claims — e.g., directors and officers liability coverage, fiduciary liability coverage — typically applies on a claims-made basis, meaning that it will apply only to a claim made during the policy period.

But many such policies purport to deem all claims to have been made when the earliest related claim was received. Insurers often rely on earlier, similar claims received during a previous policy period to deny coverage under the current policy, on the theory that the more recent claim is related to the earlier claim.

Relatedly, even if no formal demand has been made, a policyholder may provide a "notice of circumstances likely to give rise to a claim" and thereby assert coverage under the current policy, in case the policy in effect when a formal claim is actually received provides less favorable terms.

To illustrate, an employer might give such a notice of circumstances regarding a letter that it receives threatening recourse under an anti-aiding and abetting statute, even if the letter did not include any formal demand for monetary or nonmonetary relief.

Ensure any potentially applicable exclusions are appropriately limited.

After notice is given, insurers might argue certain exclusions limit or bar coverage for claims that arise from employers' provision of benefits, including exclusions for claims arising from bodily injury, intentional violation of the law and the Employee Retirement Income Security Act.

Now is the time to confirm that any such exclusions are narrow in scope and subject to appropriate limiting language that would not foreclose an insurer's duty to pay for the defense of claims that potentially trigger coverage — or that policies in other lines of coverage cover the excluded risk without gaps.

For example, directors and officers, or D&O, liability coverage typically — though not always — limits the application of willful or unlawful conduct exclusions to cases where a final adjudication has been reached in the underlying litigation. Absent such final-adjudication language, the insurer might exploit the misconduct exclusion to try to deny coverage by unilaterally characterizing payment of employees' travel expenses for reproductive health care as an intentional violation of a particular state's law — regardless of the actual validity of that law's application to the circumstances.

In addition, D&O coverage often pays defense — as opposed to judgment — costs notwithstanding allegations in the underlying case that would implicate misconduct or other exclusions. The value of such language is that defense coverage can be assured regardless of whether an exclusion is ultimately determined to be applicable.

But note that some D&O coverage permits an insurer to claw back defense costs paid following an establishment of willful or unlawful conduct by final adjudication. Thus, these types of final-adjudication and defense-notwithstanding provisions can be critical in preserving the insured's right to defense and settlement coverage.

Confirm the existence and scope of any fiduciary liability coverage.

Many companies that offer employee benefit plans also have fiduciary and employee benefits liability coverage, which typically protects the insured individuals and the corporation against claims arising from:

- Any breach of fiduciary duties imposed by ERISA;

- Any negligent act in the administration of the plan — e.g., advising, counseling or interpreting the plan, or handling records effecting enrollment, termination or cancellation — and

- The insured's service as a fiduciary of the plan.

Similar to D&O coverage, a variety of potential claims arising from the provision of travel and reproductive care benefits could trigger fiduciary coverage, which may well cover risks excluded under other lines of coverage.

Policyholders should make sure the wording of their fiduciary coverage meshes seamlessly with the wording of any so-called dovetailing exclusions in other policies; and they should remember to give notice of a post-Dobbs claim under their fiduciary coverage when they notify their other lines of coverage.

Understand who is an insured.

At this point, it is not clear who might be the target of any future litigation efforts aimed at employer-provided reproductive health care benefits. Policyholders should carefully review the definition of "insured" under the potentially applicable policies and consider whether relevant individuals involved in the company's benefits are included in the definition.

Keep a sharp eye out at renewal.

Insurers might soon begin adding exclusions or other restrictive terms to hedge against the potential novel litigation risks presented in the post-Dobbs world. To that end, we anticipate insurers may start pressing policyholders, in particular around the time of annual renewal, for details about any travel or other benefits provided to employees and dependents needing reproductive health care, and the persons involved.

Policyholders should review renewal proposals and binders carefully, and analyze the matter further if the insurer seeks to add any new terms or limitations in connection with claims arising out of benefits related to reproductive care provided by employers.

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