



## Podcast Transcript

### *Dobbs* on Demand: Approaching Benefits in the New Legal Environment

**Date:** August 2, 2022

**Guests:** Ann Caresani and Stefan Smith, **Host:** Amy Kattman

**Run Time:** 15:11

**For questions and comments contact:**



**Ann M. Caresani**

Partner

Cleveland

T: 1.216.861.6294 | [acaresani@bakerlaw.com](mailto:acaresani@bakerlaw.com)



**Stefan P. Smith**

Partner

Dallas

T: 1.214.210.1202 | [spsmith@bakerlaw.com](mailto:spsmith@bakerlaw.com)

---

Kattman:

Since the recent *Dobbs* decision which overturned *Roe v. Wade*, companies have been impacted nationwide and had several new legal angles to consider as it relates to their employees and their businesses. With that in mind, we've created a new podcast series, *Dobbs* on Demand, designed to help you navigate this new and evolving landscape. We'll feature partners from our Labor and Employment, Employee Benefits, White Collar, Digital Assets and Data Management, and Healthcare practices as we break down the top issues and changes in law. I'm Amy Kattman and you're listening to BakerHosts.

On this episode of *Dobbs on Demand*, we will discuss several legal perspectives that employers should consider in light of the *Dobbs* Decision. Our guests today are Ann Caresani and Stefan Smith partners in our Employee Benefits practice and members of our *Dobbs* Decision Task Force. Welcome to the show Amy and Stefan.

Caresani: Happy to be here with you today, Amy.

Smith: Yeah, thanks for having me.

Kattman: Ann I'd like to begin with you does the *Dobbs* decision mean that employers can no longer offer coverage for abortion services under any circumstances?

Caresani: No, Amy, the *Dobbs* decision does not directly impact what employers can offer, but it does open the door to allowing states to attempt to limit what employers can offer and what insurance companies can offer.

Kattman: Ann does the *Dobbs* decision affect different group medical plans differently?

Caresani: Oh, certainly, employers can be in very different circumstances. So just because you hear certain large employers make announcements about what they are doing, that does not mean that another employer can simply follow suit and do the same thing. So as a starting point, employers with insured healthcare plans are in a different, very different place than employers with self-insured plans. State insurance laws will apply to the insured plans and insurers will be making decisions about what they are doing and what alternatives they may be offering to employers. So, we need to have a little patience there to see what is going to happen. The large employers with self-funded plans will have more flexibility and more decisions to make.

Smith: Ann, this is a very good point. A lot of what will be permissible will be dependent on factors that are really entirely individual to the employers and their plans. Employers will need to be cautious about simply changing their plans or implementing new benefits based on what they hear others are doing, because the laws as they apply to their own plans, their own employees, and their own locations can be very different from other employers. So just because we're dealing with the central common issue of abortion-related services, the application of the law could be wildly different depending on you know from one employer to another.

Kattman: Stefan, can an employer cover all of an employee's abortion-related travel expenses for procedures and other states through a group medical plan?

Smith: So Amy, this has received a lot of attention lately and there are a number of different ways that an employer can provide travel benefits, but all of them have possibly different legal ramifications depending on the laws that apply to them. So, travel benefits have always been able to be provided under a health plan, provided those travel, that the travel itself is necessary and it is reasonable, and it is related to the services that are being covered under the plan, but as a

tax-exempt benefit, it is very narrow in scope. The dollar amounts that can be provided and not have a tax impact on the employee are quite low. So, it may not be functionally as usable of a benefit for out-of-state travel for the services that are being discussed now. But if you look at the issue more broadly with respect to the tax law, travel benefits could be provided as more of an employee fringe benefit rather than specifically a group health plan benefit; and fringe benefits are just any non-cash benefits that can be provided to employees, but many of those fringe benefits are themselves taxable. So if an employer provides a taxable travel fringe benefit, the value of the travel would be included in the employee's income for tax purposes.

So that could have an economic and a financial impact on employees that they may not necessarily be aware of and the employers may not necessarily be aware of. So employers really need to evaluate in whether the travel fringe benefits will be provided to employees under a health plan with very limited scope or more broadly as a taxable benefit, and they'll need to look at not only what the financial impact that has on the employee, but also the financial impact from a budgeting standpoint, that that has on the employer. It also raises other issues regarding employment tax, and reporting, and other systems that employers may need to update to make sure that they can comply with the tax requirements; but separately, employers also need to evaluate whether or not these benefits should be provided to employees, regardless of their gender and regardless of the nature of the care for which the individual is traveling, because many employers have, have been looking at whether or not providing just a broad-based travel benefit would be less risky than just simply providing a benefit that is so targeted specifically on abortion-related services.

Kattman: Thanks Stefan. Ann, do you have any additional thoughts on abortion-related travel expenses?

Caresani: I do, so there are a variety of existing federal laws, and state laws, that need to be considered regarding providing benefits, and none of those laws are changed by the *Dobbs* decision. For example, HIPAA. So, employers need to confirm that any changes they are making do not violate the existing laws.

Kattman: Stefan, can abortion-related benefits be provided outside of a major medical plan to avoid all the complicated health plan issues?

Smith: Well, the simple answer to that is no, and part of the reason for that is because the federal laws, including ERISA, the tax code, and other laws apply to the benefits themselves, not just the manner in which they are provided. So, the federal laws define what benefits are treated as health and welfare benefits, and so the laws applicable to health and welfare benefits will apply to those, regardless of whether the employer says we are not providing this under the terms of our medical plan, per se, so they would still apply. The laws would still apply to the benefits themselves. The employer can't avoid the application of the law just because they sort of remove this benefit coverage itself out from under sort of the umbrella of their "group medical plan". So even if a particular procedure is covered by the employer outside of the plan, ERISA and other laws

would still attach to it and apply to the benefit, if it satisfies the definition of being a welfare benefit. And in addition, health and welfare benefits will very likely also be subject to other laws and regulations, so any change to a benefit or the adoption of a new one really has to be analyzed closely to see what impact that new benefit, or that changed benefit, can have on the employer's compliance across the board.

Kattman: Ann, do you have an example of this that you could share with us?

Caresani: Well, let me give you an example of something that does not work. An employer may provide a health savings account for an individual covered by a high-deductible healthcare plan, and in that case the employee is required to cover their share of the deductible and the co-pay. So, the tax code permits an individual to pay for legal abortion and abortion-related services from the health savings account proceeds; so the individual can use health savings account funds to pay for this. However, as I mentioned, the individual still has to satisfy the plans deductible out-of-pocket maximums, so the employer cannot just make a contribution to pay for those reproductive services before the deductibles out-of-pocket maximums are satisfied.

Kattman: Stefan, how are state criminal laws applicable to the issue of providing abortion services under a health plan?

Smith: Amy, this has gotten a lot of attention, and many states have existing criminal statutes that could be applied to providing access to abortion services, and other states are also considering new criminal legislation that could be applicable. The enforcement of these laws, however, is not necessarily a benefit plan issue, and the laws may not make any reference to plans at all, but they could affect company officers and benefits professionals in connection with the coverage by an employer's plan or by an employer of abortion procedures that are otherwise prohibited by state law. You know, this is one area of the law that we know the least about at this point, but employers with employees in states where abortion is or will be prohibited, must be mindful that this is a really unique compliance issue that that really needs to be monitored. And I believe the application of the criminal statutes to abortion services and related benefits will be the subject of a of another podcast in this series, so stay tuned.

Kattman: As a final question, I'd like to know, does ERISA preempt state prohibitions on abortion? Ann, let us start with you.

Caresani: Well, Amy, that is a great question. ERISA was enacted to protect employees, and to allow employers to provide employee benefits on a uniform basis across the U.S. It used to be that ERISA provided very broad preemption of state laws, which was especially beneficial to self-insured healthcare plans. However, recently states have been more aggressive about enacting statutes impacting benefits, particularly in healthcare space, and this was before the *Dobbs* decision. In a recent U.S. Supreme Court decision, the court held that state law regulating pharmacy benefit managers was not preempted by ERISA, despite its

impact on healthcare plans, including self-insured plans. So, it remains to be seen how laws will be written, and how ERISA preemption might apply.

I mentioned that other federal laws remain in place. Some of them may be helpful for employers. For example, an employer may be able to offer reproductive care or travel healthcare without knowing the details, and then might use HIPAA privacy to protect against a demand for information on abortions, information that the employer does not actually have. So I should mention that the Business Group on Health and the HR Policy Association both sent letters to the Secretaries of Health and Human Services, Department of Labor, and the Treasury asking for guidance on issues related to the *Dobbs* decision, with a particular focus on ERISA preemption, HIPAA privacy, and tax law. So, it remains to be seen how these agencies will be responding. Now, I should mention ERISA does not preempt, and I'm going to quote this, "Any generally applicable criminal law of a state." So, we will need to see how laws are written, and whether ERISA may arguably preempt them.

Kattman: Stefan, what are your thoughts?

Smith: Yeah, this is a really interesting point, and as Ann pointed out earlier, employers will potentially face much different circumstances depending on whether their plans are fully-insured or self-funded. And ERISA preemption is a big reason for this. The state laws that regulate insurance are in many cases, and in most cases, exempted from ERISA preemption, whereas a self-funded plan is completely subject to ERISA, not state insurance laws, which is the reason why in the one of the, I guess it was the opening question, that is the reason why Ann pointed out that there was this sort of dichotomy between employers with these two types of plans.

So, the abortion services issue will really be unique, since many of the underlying statutes at issue will address abortion itself. These are not benefit plan statutes, and the ERISA preemption issue really hinges on to the extent that the state law is intending to regulate benefit plans, and if the state laws are regulating abortion services as a healthcare procedure, these are not benefit plan statutes necessarily. And there is a history of reading these federal preemption statutes narrowly, to the extent that state laws are not attempting to directly regulate the benefit plans themselves. So, the insurance and the criminal law exceptions from preemption will really be key to any abortion-related analysis that we'll be doing coming up here in the near future.

Kattman: Ann and Stefan, thank you for joining us today.

Caresani: Thank you Amy. It was great to speak with you and Stefan today.

Smith: Yeah, thank you Amy, and thank you Ann. This was a lot of fun. Thank you.

Kattman: If you have any questions for Ann or Stefan, their contact information is in the show notes. For more information on the impact of the *Dobbs* Decision, visit the Post-Roe Resource Center on bakerlaw.com, and check out all *Dobbs* on

Demand episodes by subscribing to BakerHosts wherever you get your podcasts. Tune in to our next episode, where attorneys from our White Collar Practice will discuss criminal implications multi-state entities face when navigating the patchwork of specific-state abortion laws. As always, thanks for listening to BakerHosts.

Comments heard on BakerHosts are for informational purposes and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act upon the information provided on BakerHosts without first consulting with a lawyer directly. The opinions expressed on BakerHosts are those of participants appearing on the program and do not necessarily reflect those of the firm. For more information about our practices and experience please visit [bakerlaw.com](http://bakerlaw.com).