



Dobbs Ruling: Employer Groups Call for Agency Guidance on ERISA Preemption

On July 14, 2022, the HR Policy Association (HRPA), an organization representing the chief human resource officers of 400 of the largest employers in the U.S., sent a letter urging three federal agencies (Health and Human Services, Labor, and Treasury) to issue guidance that strengthens and defends ERISA preemption following the Supreme Court’s ruling in *Dobbs v. Jackson Women’s Health Organization*. HRPA members are concerned about running afoul of the law in states that prohibit “aiding and abetting” an individual seeking an abortion.

The purpose of ERISA’s broad preemption clause is to ensure that plans are subject to a uniform body of benefit law, minimizing the administrative and financial burden of complying with conflicting requirements of various states. As a result, ERISA preempts any and all state laws that “relate to” an ERISA plan. Any weakening of the foundation provided by ERISA preemption not only increases the cost and complexity of group health plans, but also frustrates further health care market innovation, HRPA noted.

Consequently, HSPA urged the agencies to strengthen and strongly defend ERISA's preemption provision, particularly as it pertains to state efforts to pursue civil and criminal actions against group health plan sponsors. There is a strong argument that state laws enacted to prohibit health plans from paying for abortion services relate to the plan and, therefore, are preempted. However, some courts may conclude that a state law criminalizing aiding and abetting behavior is a law of "general applicability" that is not protected by ERISA preemption. Accordingly, HSPA urged the agencies to issue regulatory and sub-regulatory guidance to reinforce and ensure that ERISA preemption is clear in these circumstances.

On July 7, 2022, the Business Group on Health (BGH) sent a separate letter urging the same three federal agencies to strengthen and defend ERISA preemption, but also asked the agencies to undertake accelerated rulemaking to update HIPAA's privacy protections to ensure that covered entities are able to protect private health information (PHI) regarding medical procedures and related benefits when lawfully undertaken in the jurisdiction where performed.

BGH anticipates litigation over the disclosure of PHI for law enforcement purposes related to state-level abortion restrictions or bans and fears that group health plan sponsors will be caught in the middle facing untenable options. Employers may face an interminable period of personal and corporate uncertainty operationally, financially, and with respect to criminal charges involving incarceration – their personal civil liberties. Therefore, BGH urged the agencies to take immediate regulatory, sub-regulatory, and other available action to bolster the reliability and defensibility of HIPAA privacy-based protections for group health plan sponsors, business associates, and the PHI of protected individuals.

[Full text of letter to Treasury, HHS, DOL \(HR Policy Association, July 14, 2022\)](#)

[Full text of letter to Treasury, HHS, DOL \(Business Group on Health, July 7, 2022\)](#)

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