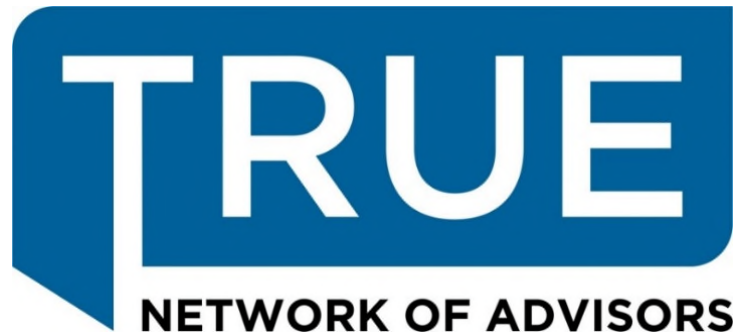


***Dobbs v. Jackson
Women's Health Org.:
How Can Employers
Respond?***



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Dobbs vs. Jackson Women's Health Org.

- ▼ Challenge to a Mississippi law prohibiting abortion after 15 weeks
- ▼ USSC: no constitutional right to obtain an abortion under the 14th Amendment
- ▼ Overturns *Roe v. Wade's* and *Planned Parenthood v. Casey's* constitutional limits on state laws regulating abortion access
 - ▼ *Roe* and *Casey* restricted states' ability to impose undue burdens on the right to access an abortion
- ▼ Post-*Dobbs*: access to abortion will be regulated by individual state laws

Post-*Dobbs* Landscape on Abortion Access

- ▼ **26** states will (or are likely to) significantly restrict or ban abortion
- ▼ **13** states with “trigger laws” – automatic ban upon *Roe*’s reversal:
 - ▼ **AR, ID, KY, LA, MS, MO, ND, OK, SD, TN, TX, UT, WY**
- ▼ These laws will vary in their implementation timelines, mechanisms, and scope, but all intend to ban abortion with limited exceptions
- ▼ Federal Response: Executive Order on abortion pills, birth control, patient data, and legal assistance

Landscape on Coverage for Abortion Services

- ▼ Title VII and Pregnancy Discrimination Act
- ▼ Other than certain PDA limits, no federal law requiring abortion coverage
- ▼ Employer group health plans generally have flexibility to provide or not provide abortion coverage and to determine the extent of such coverage
- ▼ Potential limits to this flexibility:
 - ▼ Type of Coverage
 - ▼ Fully-Insured or Self-funded
 - ▼ State Law
 - ▼ ERISA Preemption
 - ▼ Fully-insured plans are subject to state law insurance regulations
 - ▼ “Generally applicable criminal law” of a state

What options do employers have Post-Dobbs?

- ▼ Can employer plans continue to provide coverage for abortion services?
- ▼ Can employers expand or establish benefits to cover abortion-related expenses, including travel, for employees and dependents residing in states where abortion is restricted?
- ▼ Can employers stop covering abortion services?

Post-Dobbs Coverage Options

- ▼ *Can employer plans continue to provide coverage for abortion services?*
 - ▼ **It depends**
- ▼ *Dobbs* does not prohibit plans from covering abortion and abortion-related expenses
- ▼ This is dependent on plan type (fully-insured or self-funded) and applicable state law
- ▼ Fully-insured plans in states with access or coverage bans should consider self-funded alternatives

Post-Dobbs Coverage Options

- ▼ *Can employers expand or establish benefits to cover abortion-related expenses, including **travel expenses**, for employees residing in restricted states?*
 - ▼ **Yes, subject to certain limitations**
 - ▼ **E.g., Dick's, Starbucks, Disney, Netflix, Meta, JPMorgan Chase**
- ▼ **Legally** obtained abortion services are “medical care” under IRC Sec. 213(d) and can be covered under a GHP on a tax-free basis and are eligible for reimbursement as “medical expenses”
- ▼ **Travel and lodging expenses** that are essential to obtain legal medical care, including abortion, may also be covered on a tax-free basis and are eligible for reimbursement

Post-Dobbs Coverage Options

- ▼ **Travel and lodging expenses** essential to obtain a legal abortion are reimbursable medical expenses, subject to certain **IRS limits**:
 - ▼ Mileage: \$0.22 per mile effective 7/1/22
 - ▼ Plane, Train, Bus Tickets: reimbursed if reasonably priced and essential
 - ▼ Lodging: reimbursed up to \$50 per night per person if essential
 - ▼ Meals: not a tax-free expense
- ▼ Excess reimbursements would be taxable wages and subject to withholding

Post-Dobbs Coverage Options

- ▼ *How can employers cover abortion-related expenses, including **travel expenses**?*
- ▼ Add coverage to existing GHPs
 - ▼ Coordination with insurers, TPAs, stop-loss carriers
 - ▼ HDHP: annual deductible limitations
 - ▼ Eligible for reimbursement under existing FSA, HRA, HSA
- ▼ Establish an HRA: Integrated or Excepted Benefit
- ▼ Establish an EAP: avoid “significant benefits”
- ▼ Direct taxable reimbursement—“pay as you go”

Post-Dobbs Coverage Options

- ▼ *Can employers stop covering abortion services?*
- ▼ Fully-insured plans must check state insurance law:
 - ▼ *Is abortion coverage required?* **California**
 - ▼ *Is abortion coverage prohibited?* **Texas**
- ▼ Is abortion **access** restricted in the state?
- ▼ Discrimination Concerns
- ▼ Employee Relations Concerns

Additional Considerations

- ▼ Fluidity of State Action & ERISA Preemption Issues
 - ▼ Laws criminalizing “aiding and abetting” & “counseling”
 - ▼ Traveling across state lines
- ▼ Mental Health Parity
- ▼ Employee Privacy Concerns
 - ▼ HIPAA & PHI
 - ▼ State law privacy causes of action
- ▼ Employee Discrimination Concerns
 - ▼ Adverse employment actions & disparate treatment

Additional Considerations

▼ Contraceptive Coverage

- ▼ *Dobbs* did not address contraception or medication abortions
- ▼ ACA's preventive services mandate requires coverage of cost-free contraceptives; remains in place post-*Dobbs*
 - ▼ June 27th Letter from DOL, Treasury, and HHS:
<https://www.cms.gov/files/document/letter-plans-and-issuers-access-contraceptive-coverage.pdf>
- ▼ Covers birth control pills, tubal ligation for women, and emergency contraception (Plan B)
 - ▼ Does not include abortion medications
 - ▼ FDA approved changes to obtain abortion medication through the mail via telemedicine
 - ▼ Biden EO instructs HHS to protect and expand access to abortion, including through FDA-approved medication
 - ▼ States will work to restrict such medications

Employer Action Items

- ▼ Decide what you do/do not want to cover
- ▼ Review group health plans for current coverage limits
- ▼ Determine what laws apply to the plan
- ▼ Evaluate the risks of desired response
- ▼ Determine necessary and permitted updates to plan documents and communications
- ▼ Communicate with employees on any benefit changes
- ▼ Continue to follow state and federal developments
- ▼ Lean on your **TRUE Network** consultants, legal counsel, TPAs, and carriers

Updates to ACA Employer Mandate

	For 2022 Plan Years	For 2021 Plan Years	Impact
Code Section 4980H(a) Penalty	\$2,750	\$2,700	\$50 increase
Code Section 4980H(b) Penalty	\$4,120	\$4,060	\$60 Increase
Affordability %	9.61%	9.83%	<p>Decrease of .22% = Employer pays <i>more</i>. Coverage not <i>affordable</i>—and employee may be eligible for PTC for exchange coverage—if employee’s required contribution for self-only coverage exceeds 9.61% of the employee’s household income.</p> <p>Employer avoids 4980H(b) penalty if it satisfies <i>Affordability Safe Harbors</i> using 9.61%</p>

ACA Affordability Safe Harbors

ACA Affordability Safe Harbor

Form W-2 Safe Harbor

The Basics

- Employee's required contribution does not exceed **9.61%** of that employee's Form W-2 wages from the ALE Group for the calendar year

“Strings” Attached

- Determined after the end of the calendar year and on an employee-by-employee basis, taking into account the Form W-2 wages and the required employee contribution for that year.
- Employee's required contribution must remain a consistent amount or percentage of all Form W-2 wages during the calendar year (or during the plan year for plans with non-calendar year plan years)
 - an applicable large employer member is not permitted to make discretionary adjustments to the required employee contribution for a pay period
- ACA Reporting rules allow full year contribution / 12
- Must Use Form W-2 Safe Harbor for all months of the calendar year

ACA Affordability Safe Harbors

ACA Affordability Safe Harbor

Rate of Pay Safe Harbor

The Basics

- Hourly employees: satisfied for a calendar month if the employee's required contribution for the calendar month does not exceed **9.61%** of an amount equal to **130 hours** multiplied by the lower of the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year) or the employee's lowest hourly rate of pay during the calendar month.
- Non-hourly employees: does not exceed **9.61%** of an amount equal to **130 hours** multiplied by the employee's monthly salary, as of the first day of the coverage period (instead of 130 multiplied by the hourly rate of pay).

“Strings” Attached

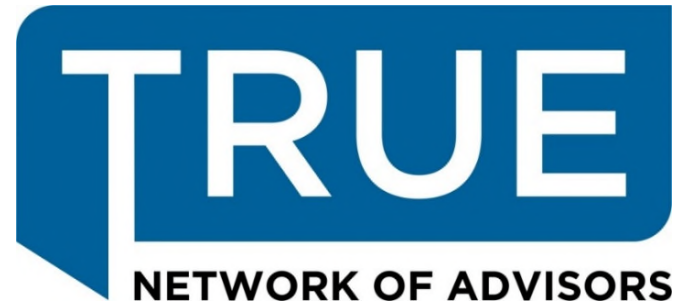
- Hourly employees: Must use lowest rate of pay (i.e., cannot count raises)
- Non-hourly employees: Unavailable if the monthly salary is reduced, including due to a reduction in work hours
- Generally does not work for tipped or commissioned employees
- May use for some or all months

ACA Affordability Safe Harbors

ACA Affordability Safe Harbor	FPL Safe Harbor
The Basics	<p>An applicable large employer member satisfies the federal poverty line safe harbor with respect to an employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.61% of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year, divided by 12.</p>
“Strings” Attached	<ul style="list-style-type: none">• Basically no strings attached• May use for some or all months• Allows use of the Qualified Offer Method for ACA reporting• Generally results in the lowest employee premium

Affordability Safe Harbor Take-Aways

- ▼ Affordability Threshold = 9.61% for plan years beginning in 2022
- ▼ Based on employee's required contribution for the employer's lowest cost self-only coverage that provides minimum value
 - ▼ May not be what employee actually pays (e.g., family coverage, wellness incentives, etc.)
- ▼ **BEWARE** of strings attached
- ▼ We find the most issues with Form W-2 Safe Harbor
 - ▼ Use a *buffer* affordability percentage to avoid the never-ending math problem”
- ▼ Rate of Pay Safe Harbor often works out best
- ▼ *May* be able to fix issues through ESRP process
- ▼ Work with your **TRUE Network** consultants! (before year-end)



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