



Toolkit for Protecting Access to Medical and Reproductive Health Care

I. EDUCATION

a. One effective strategy to ensure members have access to quality medical and reproductive health care is to educate them about existing benefits and the scope of coverage under their CBA, and to provide accurate information about their rights. A complete understanding of those benefits can be achieved through well-crafted information requests to employers.

b. Information Requests

i. Understanding Current Plan Benefits

1. Does unit employees' current Plan provide for abortion or abortion-related services (e.g., abortion counselling)? If so, please provide the SPD and/or plan document that describe these services.
2. Does unit employees' current Plan provide for telehealth appointments where prescriptions to aid medication abortion could be given, regardless of where the employee resides? If so, please provide the SPD or plan document that describes this benefit.
3. Does unit employees' current Plan cover mifepristone, misoprostal, or other medications used for medication abortion? If so, what such medications are covered, and what co-pay applies to these medications?
4. Is the plan self-funded by the Employer or fully insured? If fully-insured, when does the Employer renegotiate terms for the upcoming plan year?
5. In which states do plan participants currently reside?

ii. How does the benefit provided by the Employer work?

1. What is the policy's definition of "reproductive healthcare"?
2. Are dependents eligible for this benefit? Are there any restrictions on their eligibility?
3. What travel expenses does this policy cover?

4. Does the plan cover travel expenses of a person acting as a companion to an employee/covered dependent seeking reproductive healthcare?
5. Are there dollar limitations on what will be covered by this new travel policy?
6. What are the eligibility requirements for participation in this benefit? This question includes whether employees must exhaust a deductible before receiving this benefit.
7. How do eligible employees and covered dependents receive this benefit (e.g., reimbursement)?
8. Who receives and evaluates requests for this benefit?
9. Who determines whether or not “reproductive healthcare is available within 100 miles of [an employee’s] home?”
10. Do employees and covered dependents have to provide residential and treatment location documentation? If so, to whom?
11. Are employees required to use accrued PTO or sick leave if they need to take time off from work to access this benefit? If so, are they required to provide the Company with a reason for taking that PTO?

iii. How will the Employer ensure the privacy employees using this benefit?

1. Who keeps the records of employees and covered dependents requesting this benefit?
2. What retention policy, if any, governs these records?
3. How will the Company ensure that these records remain private?
4. Has the Company determined whether these records would be discoverable, if the Company and/or Plan is subjected to a subpoena?

c. Understanding Existing Benefits and the Affordable Care Act (“ACA”)

i. Contraceptive vs. Abortive

1. There may be some confusion over the difference between drugs for abortion (which would be used to end a pregnancy) and drugs used for contraceptive purposes (which would prevent pregnancy in the first place).

2. Currently under the ACA, non-grandfathered health insurance plans are required to cover a wide range of preventative services, including FDA-approved contraceptive methods.
 - a. This includes oral contraceptives, IUDs, implants, and tubal ligations, as well as emergency contraceptives, such as Plan B and Ella.
 - b. Religious Exception: If your health plan is sponsored by an exempt religious employer, that plan does not need to cover contraceptive methods and counseling. Such benefits may need to be paid for out-of-pocket.

ii. Medication Abortion

1. The FDA has approved the use of two drugs: mifepristone and misoprostol. In January 2023, the U.S. Food and Drug Administration modified its rules for mifepristone, allowing it to be offered with a prescription by certified retail pharmacies. Before this rule change, mifepristone could be dispensed only in person by providers at hospitals, clinics and medical offices, as well as by some mail-order pharmacies.

It is unclear whether or how the FDA's rule will affect state restrictions on abortion care. If medication abortion is not permitted in a specific state, retail pharmacies in that state may or may not be able to dispense mifepristone for abortion care. However, mifepristone could be dispensed from certified pharmacies for reasons unrelated to abortion care, such as miscarriage management. In light of the pharmacy certification process and opaque standing in some states, it may take some time before mifepristone is widely available in retail pharmacy settings.

2. Although termed "medication abortion," these drugs may also be medically necessary for the management of early pregnancy loss (e.g. miscarriage).
3. Whether these drugs are covered by private insurance carriers often depends on the state, and information requests to an employer may provide more clarity.

II. RIGHT TO ENGAGE IN PROTECTED CONCERTED ACTIVITY ("PCA")

a. What is PCA?

- i. The National Labor Relations Act gives employees the right to take collective action with their coworkers in an effort to improve working conditions. This generally includes the right to talk with coworkers about issues at work, and share collective concerns with the public.

1. *Speak Collectively*: One of the requirements for protected concerted activity is that the action must include some interaction with coworkers and cannot be a purely personal message. This can include, generally: (a) activities that are authorized by other employees; (b) activities where individual employees try to initiate or induce group action; (c) or activities where an employee brings a truly group complaint to the attention of management. In short, there must be some group element to the action.
 - a. If an employee is simply expressing their own partisan political beliefs or opinions on the Supreme Court, it may not have the collective element necessary for protection.
 2. *Connection to Working Conditions*: The activity must also be targeted at improving terms and conditions of employment, and concern issues within their employer's control.
 - a. This could include talking about an employer's position or response to a Supreme Court decision, or the employer's existing benefits or policies.
 - b. However, it might not include simply discussing the Supreme Court generally.
 3. *What Type of Activity is Protected*: Protected activity may include a variety of actions, including: talking with coworkers, wearing buttons, distributing flyers, and posting on social media. Employees should be sure to check their specific CBAs for any restrictions.
- b. Losing Protection: It is important to understand that even if an employee is engaged in protected concerted activity, their employer may seek to discipline them if they engage in uncivil conduct, or use excessive profanity or slurs, or disparage their employer. While it may be true that an employer is simply overreaching when disciplining employees for engaging in concerted activity, we also should consider whether uncivil or profane conduct aids our efforts.
- c. Overall Guidance: Ultimately, whether an employee is engaged in protected activity will depend on the specific facts of each case. As a result, if a member is discharged, disciplined, or otherwise retaliated against after possibly engaging in such activity, please contact the Legal Department for further guidance.

III. EXPANDED LEAVE BENEFITS

- a. In order for members to have meaningful access to quality medical care and services, including for reproductive health, they must have the opportunity to take necessary time off of work.

b. FMLA

- i. It is unclear—and even may be unlikely—that members seeking abortions would be legally entitled to unpaid leave under the Family Medical Leave Act (FMLA), because such leave requires a “serious medical condition” and an abortion without medical complications may not qualify. Therefore, union negotiators should not depend on FMLA unpaid leave as adequate to meet members’ needs.

c. Expanded Paid or Unpaid Leave Benefits

- i. Since negotiators cannot rely upon FMLA leave being available to cover abortions (or the travel necessary to access this care), bargaining enhanced personal or sick leave benefits may be more effective.
- ii. It would not be advisable to negotiate leave provisions specifically for abortion-related services or care, since this would raise significant privacy concerns.
- iii. Negotiators should also look to ensure that such leave benefits may be available on short notice.
- iv. Enhanced paid maternity/paternity leave can also help our members, particularly in states with restrictive laws concerning reproductive rights.

IV. PRIVACY PROTECTIONS

- a. Without reliable privacy protections, members may be discouraged from accessing the full spectrum of benefits that they are entitled to under their CBA and the law. Negotiators can consider strong contractual provisions that limit the employer’s collection of health information and prevent disclosure.

b. HIPAA

- i. HIPAA privacy regulations restrict how employer-sponsored plans can use, access, or disclose health information. Therefore, if negotiators are able to bargain for travel and lodging benefits, coverage options, or leave provisions that are offered through a health insurance plan, then the information provided to that program would be protected under HIPAA’s privacy rules.
- ii. Importantly, however, HIPAA privacy protections generally do not apply to the employer itself.

c. Other Confidentiality Provisions

- i. Since HIPAA’s privacy regulations generally do not extend to employers, negotiators should consider bargaining for robust confidentiality provisions within the CBA that would restrict the employer’s use and disclosure of health information.

ii. Sample Provision for the Privacy of Health Information

1. If proof of illness or medical treatment is required under the circumstances and in accordance with negotiated policies, the required documentation shall not include a diagnosis or type of treatment. Documentation shall only include the patient's name, provider's name, provider ID number, phone number, date of service, and any dates for which the provider recommends time off from work. Supervisors and other employer representatives may not ask the employee for a reason for the use of sick time or whether it was to care for the employee or an eligible dependent.

In addition to any requirements that may apply under HIPAA, employee health information received by the employer is strictly confidential and must be maintained in a confidential medical file that is maintained separate from the employee's personnel file. Such information shall not be disclosed or used for any purpose other than as necessary for the administration of benefits such as healthcare, sick time, FMLA.

The Employer shall not engage in surveillance of employee actions or communications in any medium or context, whether private or job related, concerning healthcare or other private medical matters.

If the Employer is served with a subpoena or any other legal process seeking access to employee health information, the Employer shall immediately notify the employee in writing.

V. NON-DISCRIMINATION AND PROHIBITION ON RETALIATION

- a. Privacy protections alone may not be sufficient to ensure that all members feel comfortable accessing their benefits or exercising their medical rights. Negotiators should consider bargaining for clear contractual provisions that prohibit employers from taking any adverse actions against members who seek reproductive care, whether in-state or out-of-state.
- b. Sample Language for Non-Discrimination and Non-Retaliation:
 - i. No employee shall be subject to discrimination, retaliation, discipline, or any other adverse employment action, including but not limited to changes in terms and conditions of employment due to disclosure of employee healthcare information or for seeking to access, receiving or contemplating abortion or other reproductive healthcare, or discussing or disclosing the above. The forgoing provision shall apply irrespective of the legal status of the health care contemplated, sought or received in any state. The forgoing provision shall not undermine or limit any other contractual right or benefit pursuant to this agreement and shall not undermine or limit the job security provisions of this agreement.

VI. INSURANCE COVERAGE

- a. Where possible, particularly when dealing with self-insured plans, negotiators can bargain for provisions that would allow members seeking reproductive health care services out-of-state to receive in-network coverage terms and benefits.
- b. Sample Language for Self-Insured Plans

i. Explainer

1. The following sample provision contains three parts. The first is designed to ensure insurance coverage for reproductive care. The second requires employers to provide a rider if there is a state law that restricts coverage for reproductive care. If a rider cannot be provided, the final section requires employers to maintain a fund (administered by a third-party) to cover the difference in cost between the co-pay and cost of services.
 - a. Members may experience difficulty accessing drugs that are used to treat autoimmune diseases (like rheumatoid arthritis, lupus, and cancer) because some of these drugs – like methotrexate - can cause miscarriages, be used for medical abortions, or be prescribed to treat patients after early pregnancy loss. As a result, some states with restrictive abortion laws are allowing pharmacists to refuse to fill prescriptions for these drugs. When bargaining, negotiators can discuss how the below provision – specifically the third section – can be used to ensure access to this important medical care.

ii. Three sections

1. All health plans offered to bargaining unit members shall cover comprehensive reproductive services, including contraceptives and abortion services (procedural and pharmaceutical). All plans shall include coverage of telehealth services, including treatment by out of state providers within the insurance plan network.
2. If any law prohibits core coverage for any of the required services in Section 1 under a healthcare plan offered to bargaining unit members, the Employer shall provide an insurance rider to cover the services at no additional cost to bargaining unit members.
3. If the Employer is prohibited by law from providing a rider or there are no providers offering the above services within the plan network, the Employer shall cover costs for insurance plan participants to receive care from out-of-network providers at in-network coverage rates. In addition to direct medical expenses, the Employer shall cover all travel expenses that are necessary to receive such out-of-network services. The Employer shall maintain a fund for such purposes that is administered by the

healthcare plan or another third party that will not share any identifying participant information with the Employer.

- c. Be aware, however, that many states have imposed strict bans that prevent insurance plans from covering abortions except in very narrow circumstances (e.g., necessary to save the life of the mother). These restrictions would therefore prevent the insurance plans from providing for out-of-state abortion coverage, as well. However, these restrictions would generally only apply to fully-insured plans, not self-insured plans.

VII. TRAVEL AND LODGING

- a. Given the potential need for members to travel significant distances, or even out of state, in order to access reproductive health care, negotiators can also consider negotiating for expanded travel and lodging reimbursement provisions. These do not need to be limited to reproductive healthcare, and can conceivably cover almost any medical care that is unavailable within a certain geographic distance. Additionally, these provisions can be incorporated through insurance plans or can conceivably be negotiated as a stand-alone reimbursement programs administered by the employer.

- b. Through Insurance Plan

- i. Travel and lodging benefits can be provided as a coverage options directly through a self-insured plan. Alternatively, Flexible Spending Accounts, Health Reimbursement Accounts, or Health Savings Accounts can be integrated with the employer's insurance plan, and can allow for reimbursement for travel necessary to obtain reproductive healthcare.

- ii. *Sample Language for Travel Benefit through Self-Insured Plan***

- 1. If the Employer is prohibited by law from providing a rider or there are no providers offering the above services within the plan network, the Employer shall cover costs for insurance plan participants to receive care from out-of-network providers at in-network coverage rates. In addition to direct medical expenses, the Employer shall cover all travel expenses that are necessary to receive such out-of-network services. The Employer shall maintain a fund for such purposes that is administered by the healthcare plan or another third party that will not share any identifying participant information with the Employer.

- iii. *Alternative Language for Travel Benefit through Self-Insured Plan***

- 1. In the event an in-network provider is not available within 50 miles of a participant's place of residence (subject to verification by the participant), for covered medical services such as abortion, fertility, gender affirmation or other covered services, the Program will cover travel, lodging, and related expenses for both the patient and a companion up to a maximum of \$10,000 per patient to a location where the services are available and legally permissible. For all services except abortion, members should

search for in-network providers on Highmark's online provider directory, or they can contact the customer service number on the back of their ID card. Reimbursement for lodging is limited to \$50 per night per patient, up to \$100 total per night including the patient's travel companion (such as a spouse or partner). Travel expenses are limited to coach airfare for air travel and \$0.18 per mile for land travel (subject to adjustment for years after 2022). Meals are not eligible for reimbursement. No prior authorization for the travel and lodging benefit is required. However, Participants must attest there is no network provider within 50 miles of their home address.

iv. Sample Language for Travel Benefit through FSA

1. The Employer shall contribute the maximum amount allowed by IRS regulations (\$500 effective June 2022) to a healthcare FSA on behalf of each bargaining unit employee. Employees may, but are not required to, contribute pre-tax dollars to the FSA. The Employer will further match employee contributions up to XXX. Unused funds at the end of the plan year shall rollover to the next plan year as allowed under federal regulations. If rollover of funds is no longer allowed by regulation, the Employer shall provide the maximum allowable grace period for spending of FSA funds.

VIII. SEVERABILITY LANGUAGE

- a. Finally, given the evolving state of the law surrounding reproductive healthcare, negotiators may consider bargaining severability language that would protect negotiated benefits should any aspects later be found to be unlawful.
- b. Sample Severability Language
 - i. If any provision of this Agreement shall be adjudicated illegal or in violation of any law, such adjudication shall not invalidate any other portion of this Agreement nor relieve either party from their obligations and liabilities under this Agreement and the remainder of the Agreement shall continue in full force and effect. In the event any provision of this Agreement is ruled illegal, the parties agree to promptly meet for the purposes of bargaining over lawful substitute provisions that effectuate the intent of the parties' original terms to the fullest extent possible while in compliance with applicable law. If the parties are unable to reach an agreement on substitute provisions within XX days, either party may submit the matter to expedited arbitration. Notwithstanding any other provision of this Agreement to the contrary, the arbitrator to whom a dispute under this Article is submitted shall have the authority to modify this Agreement to the extent necessary to effectuate the intent of the parties' original terms to the fullest extent possible while in compliance with applicable law.

IX. ADDITIONAL CONSIDERATIONS

- a. Contact the legal department for assistance with questions.
- b. Current state reproductive health laws will influence the proposals made on this issue. To prepare for bargaining, reviewing changes to reproductive health access or relevant state reproductive restrictions could be helpful. Contact legal for assistance.
- c. Changes to state laws being considered across the USA include but are not limited to:
 - i. “Trigger laws” restricting all abortion access post-Dobbs
 - ii. Lifting state reproductive health care restriction bans
 - iii. Restricting private insurance plan abortion coverage by limiting coverage only to when the patient’s life would be endangered by carrying the pregnancy to term.
 - iv. Restricting abortion coverage in health insurance plans for public employees
 - v. Restricting abortion access at the point of the “first detectable heartbeat”
 - vi. State constitutional amendment explicitly declaring that the constitution does not secure or protect the right to abortion or allow the use of public funds for abortion
 - vii. Online data privacy concerns related to GPS and menstrual cycle tracking
 - viii. Contact the legal department for assistance with this review.