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## Deducting Dobbs: The Tax Treatment of Abortion-Related Travel Benefits

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## Deducting *Dobbs*: The Tax Treatment of Abortion-Related Travel Benefits

Samantha J. Prince\*

*In 2022, Dobbs v. Jackson Women’s Health Organization overturned both Roe v. Wade and Planned Parenthood v. Casey thereby giving the states carte blanche to do as they wish regarding abortion access. The decision created upheaval in the United States. However, it also provided the impetus for the creation of a new employee benefit, abortion-related travel benefits.*

*Thirteen states had anti-abortion trigger bans that were unenforceable until Dobbs. Several other states have passed legislation that criminalizes, or significantly restricts, abortion access. Women residing in these states will now endure greater financial, health, and temporal challenges to travel out of state for abortion access. As a result, a profusion of private employers enhanced their employee benefit packages by providing abortion-related travel benefits. An assessment of the current and potential future tax treatment of such benefits is warranted.*

*This Article provides past examples of employee benefits that were created around pivotal United States Supreme Court cases. It then covers women’s need to travel, and the time and expense of such travel, including the disparate impact on women of color and those in lower socio-economic positions. Then this Article focuses on the creativity and swiftness with which companies responded*

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to *Dobbs* to assist women who will need to travel and the federal income tax treatment of these responses. The Article explores the potential deductibility issues that could arise due to state laws criminalizing abortion and enacting aiding and abetting laws. Lastly, the Article concludes with a discussion on how the government can best proceed equitably.

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## I. INTRODUCTION<sup>†</sup>

Travel for abortion care access is a problem that has plagued the United States. People in rural and less populated areas have had to travel significant distances to access abortion care even before *Dobbs v. Jackson*

*Women's Health Organization* was decided in June 2022.<sup>1</sup> Many were forced to travel to another state due to the restrictive laws in their home state or for access to a close facility.<sup>2</sup> Such restrictions often created abortion deserts.<sup>3</sup>

Now that *Dobbs* has deprived women of their rights,<sup>4</sup> we are seeing state legislative reactions on both sides of the controversial topic of abortion access.<sup>5</sup> Several states have passed laws that criminalize, significantly restrict, or make it more difficult for clinics to provide abortions and for women to access such care. Therefore, more women

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† I highly value inclusivity and recognize that gender is not binary. I acknowledge that not all women can become pregnant, and not all individuals that can become pregnant are women. In this Article, I use the term “women” to refer broadly to those that can become pregnant, as is precedent from the NIH Style Guide on Inclusive and Gender-Neutral Language.

1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2304 (2022). See Claire Stremple & Isabelle Ross, *Rural Alaskans Will Be Disproportionately Affected by Abortion Pill Lawsuit, Say Doctors and Advocates*, ALASKA PUB. MEDIA (Feb. 24, 2023), <https://alaskapublic.org/2023/02/24/rural-alaskans-will-be-disproportionately-affected-by-abortion-pill-lawsuit-say-doctors-and-advocates/> [<https://perma.cc/G5KK-N6TG>] (“Abortion is legal in Alaska, but . . . it is not equitable or accessible because of the state's geography and large rural population.”).

2. This Article will refer to interstate movement for the purposes of abortion care as “travel” given the statutory language of 26 U.S.C. § 213(d); however, some scholars have noted that “movement” may be a more appropriate descriptor. See Leslie Francis & John Francis, *Federalism and the Right to Travel: Medical Aid in Dying and Abortion*, 26 J. HEALTH CARE L. & POL'Y 49, 50 (2023) (“We use the language of ‘movement’ to encompass short-term visits, longer-term residency changes, and the movement of goods or services across state lines. We prefer ‘movement’ to ‘travel’ or ‘tourism,’ as this language risks trivializing the seriousness of what might be at stake. However, since ‘travel’ is the term used in many U.S. court decisions and other discussions concerning the right, we use that term as relevant to these.”). See generally Mikaela H. Smith, Zoe Muzyczka, Payal Chakraborty, Elaina Johns-Wolfe, Jenny Higgins, Danielle Bessett & Alison H. Norris, *Abortion Travel Within the United States: An Observational Study of Cross-State Movement to Obtain Abortion Care in 2017*, 10 LANCET REG'L HEALTH-AMERICAS 1 (2022) (finding that restrictive state-level abortion policies are positively correlated with the number of patients who leave the state for abortion care).

3. Smith et al., *supra* note 2, at 2.

4. *Dobbs*, 142 S. Ct. at 2318 (Breyer, Sotomayor & Kagan, JJ., dissenting). “[*Dobbs*] is also explicitly an anti-majoritarian ruling, both unpopular and willfully uninterested in the degree to which its vision of women as citizens within the constitutional order aligns with contemporary practices or enjoys popular support . . . *Dobbs* is a movement decision authored and supported by movement jurists.” Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 1, 4 (forthcoming 2024). “[T]he decision represents the endorsement of movement ideology, goals, methods, and rhetoric by Justice Alito, himself an interesting wrinkle on movement judges as a phenomenon.” *Id.* at 5.

5. “Abortion care has been denied with what seems from public evidence to be a poor understanding of the role abortion care plays in people's lives.” Katharine Silbaugh, *Family Needs, Family Leave in 2023*, 53 SETON HALL L. REV. 1609, 1632 (2023).

will be forced to travel outside of their home state to receive such care.<sup>6</sup> In response, numerous states and cities have enacted shield laws that protect women who travel to their jurisdiction for access.<sup>7</sup> Travel will be

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6. A 2023 research report's "data suggests that thousands of women have crossed lines to obtain an abortion, in the face of restrictions at home." Amy Schoenfeld Walker & Alison McCann, *Abortions Rose in Most States This Year, New Data Shows*, N.Y. TIMES (Sept. 7, 2023), <https://www.nytimes.com/interactive/2023/09/07/us/abortion-data-bans-laws.html>. For example, the legislature in Idaho has instituted strict abortion regulations while neighboring Washington has made moves to protect reproductive rights. As such, Washington has seen a rise in women from Idaho seeking care. Alison Saldanha, *Abortions Rise in WA as Idaho Travel Ban Challenged*, SEATTLE TIMES (July 14, 2023, 6:00 PM), <https://www.seattletimes.com/seattle-news/abortion-on-the-rise-in-wa-as-idaho-travel-ban-challenged/>.

7. Lola Fadulu, *New York City Welcomes Growing Number of Out-of-State Abortion Patients*, N.Y. TIMES (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/nyregion/abortions-out-of-state-nyc.html#:~:text=In%202019%2C%20New%20York%20passed,out%2Dof%2Dstate%20residents;Nina%20Shapiro,WA%20Preparing%20for%20Conflict%20with%20Anti-Abortion%20States>. California, Connecticut, Hawaii, Illinois, Maryland, Minnesota, New Jersey, New York, Oregon, Vermont, and Washington, have all expanded access to abortion. See *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/?state=CO> (last visited Oct. 30, 2023) [<https://perma.cc/G5KK-N6TG>]. Furthermore, the Governors of 14 states, including Maine, Michigan, Pennsylvania, Washington, and Arizona, signed executive orders that prohibit their state agencies from working with out-of-state agencies to enforce criminal and civil abortion laws. See Mollie Fairbanks, *How Governors Used Executive Orders to Protect Abortion Access in a Post-Roe United States*, GUTTMACHER INST. (July 20, 2023), <https://www.guttmacher.org/2023/07/governors-co-analysis-appendix-> [<https://perma.cc/TDH6-ASGW>]. See also Office of Governor Janet T. Mills, *Executive Order 4: An Order Protecting Access to Reproductive Healthcare Services in Maine* (July 6, 2022), [https://www.maine.gov/governor/mills/official\\_documents/executive-orders/2022-07-executive-order-4-order-protecting-access-reproductive](https://www.maine.gov/governor/mills/official_documents/executive-orders/2022-07-executive-order-4-order-protecting-access-reproductive) [<https://perma.cc/539L-ZRTK>] (also requiring state agencies to identify and remove barriers to reproductive healthcare); Office of Governor Gretchen Whitmer, *Executive Directive No. 2022-5* (May 25, 2022), [https://content.govdelivery.com/attachments/MIEOG/2022/05/25/file\\_attachments/2168036/ED%202022-05%20Reproductive%20Rights%20in%20Michigan%20%28with%20signature%29.pdf](https://content.govdelivery.com/attachments/MIEOG/2022/05/25/file_attachments/2168036/ED%202022-05%20Reproductive%20Rights%20in%20Michigan%20%28with%20signature%29.pdf) [<https://perma.cc/3XZC-UC5D>] (also requiring state agencies to generate reports on how they can protect reproductive rights); Office of Governor Josh Shapiro, *Executive Order 2022-01* (July 12, 2022), <https://www.governor.pa.gov/wp-content/uploads/2023/03/2022-07-12-EO-2022-01.pdf> [<https://perma.cc/S3MH-AECF>]; Office of Governor Jay Inslee, *Directive of the Governor 22-12* (June 30, 2022), <https://governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20assistance%20with%20interstate%20abortion%20investigations%20%28tmp%29.pdf> [<https://perma.cc/JS8D-4TTF>] (also requiring state law enforcement agencies to develop a process for screening out-of-state reproductive health investigation cooperation requests); Ray Stern, *Arizona Gov. Katie Hobbs Issues Executive Order to Limit Prosecutions Related to Abortion*, AZ CENT. (June 23, 2023, 4:41 PM), <https://www.azcentral.com/story/news/politics/arizona/2023/06/23/arizona-gov-hobbs-signs-executive-order-to-limit-abortion-prosecution/70348934007/> [<https://perma.cc/G33Q-V5XJ>]. Arizona Governor Katie Hobbs' executive order, however, is unique because the state already has a near total abortion ban, and she has ordered that there be no enforcement of the state's abortion laws. *Id.*

easier for some more than others. For instance, if an individual resides in a state in the Deep South, they likely need to travel much farther to find a state that is friendly to abortion care because neighboring states may also prohibit, or greatly limit, abortion care; simply crossing the nearest border will not work. Additionally, some municipalities are passing ordinances making it illegal to use certain roads to access abortion care.<sup>8</sup> These kinds of barriers increase time, costs, and health stressors for the individual. Other challenges such as taking time off of work and arranging transportation and care for elders, children, and pets only exacerbate these stressors.<sup>9</sup>

The negative impacts of travelling for abortion care are varied. Examples include delayed care, which can lead to a host of issues, such as a risk of health complications; rejection from facilities in neighboring states that are too busy to handle the demand; and anxiety and financial strain associated with planning, travel, missing work, and seeking medical assistance from someone other than their regular doctor.<sup>10</sup> “These burdens are particularly meaningful for those who have low incomes, are traveling further due to living in rural areas or abortion deserts, or experience other intersecting forms of structural oppression (for example related to race, gender, sexuality, or ability) that limit access to holistic reproductive healthcare.”<sup>11</sup>

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8. Caroline Kitchener, *Highways Are the Next Antiabortion Target. One Texas Town Is Resisting*, WASH. POST (Sept. 1, 2023), <https://www.washingtonpost.com/politics/2023/09/01/texas-abortion-highways/>. Such laws are purportedly designed to stop “abortion trafficking,” which is the “act of helping any pregnant woman cross state lines to end her pregnancy, lending her a ride, funding, or another form of support.” *Id.*

9. See Jonathan Marc Bearak & Rachel K. Jones, *Cross-State Travel for Abortion Care*, 10 LANCET REG’L HEALTH-AMERICAS 1, 1 (2022).

10. See Smith et al., *supra* note 2, at 9; see generally Alison Norris, Danielle Bessett, Julia R. Steinberg, Megan L. Kavanaugh, Silvia De Zordo & Davida Becker, *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN’S HEALTH ISSUES 49 (2011) (discussing abortion stigma, how it is managed, and the causes of it); Franz Hanschmidt, Katja Linde, Anja Hilbert, Steffi G. Riedel-Heller & Anette Kersting, *Abortion Stigma: A Systematic Review*, 48 PERSP. ON SEXUAL & REPROD. HEALTH 169 (2016) (presenting data regarding patient interviews about abortion stigma); Lawrence B. Finer, Lori F. Frohworth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 CONTRACEPTION 334 (2006) (finding that financial obstacles affect abortion access); see generally Suzanne Zane, Andreea A. Creanga, Cynthia J. Berg, Karen Pazol, Danielle B. Suchdev, Denise J. Jamieson & William M. Callaghan, *Abortion-Related Mortality in the United States 1998–2010*, 126 OBSTETRICS & GYNECOLOGY 258 (2015) (examining the causes of deaths in legally-induced abortions); LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE* (2017) (providing a guide to understanding women’s rights in the twenty-first century).

11. Smith et al., *supra* note 2, at 9. See discussion *infra* Part III. B.

Barriers to care have become more prevalent now that *Dobbs* has returned the power to regulate abortion to the states.<sup>12</sup> While Justice Kavanaugh noted in his concurrence that the majority opinion does not “bar a resident of that State from traveling to another State to obtain an abortion,”<sup>13</sup> the dissent pointed out that states enacting more and further restrictions will impact poor women the hardest, as they lack the resources to travel to states where abortion procedures may still be accessible.<sup>14</sup>

Although travel challenges have always existed due to geographical proximity to access, the recent *Dobbs* decision coupled with state stances on abortion has brought immediate awareness to the need and costs for women to travel to obtain such access. In response, private employers stepped up to help by providing abortion-related travel benefits.<sup>15</sup>

These developments seemingly began with a Supreme Court leak, or did they? On May 2, 2022, a draft of the *Dobbs* opinion was leaked, and the reactions were strong.<sup>16</sup> But prior to the leak, some state legislatures were getting their abortion ban legislation ready.<sup>17</sup> For example, Oklahoma’s Heartbeat Act (S.B. 1503) was first read in the

12. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

13. *Id.* at 2304 (Kavanaugh, J., concurring).

14. *Id.* at 2344-45 (Breyer, Sotomayor & Kagan, JJ., dissenting).

15. While this article focuses on private employers, there is also a trend for public employers to provide abortion-related travel benefits. For example, the United States Department of Defense has begun to offer abortion-related travel benefits for service members and their dependents. See *Military Advisory Panel Item 86-22(R), Paragraph 033013 “Travel for Non-Covered Reproductive Health Care Services,”* DEPT. DEF. (Feb. 16, 2023), <https://media.defense.gov/2023/Feb/16/2003163300/-1/-1/1/MEMORANDUM-TRAVEL-FOR-NON-COVERED-REPRODUCTIVE-HEALTH-CARE-SERVICES.PDF>. Specifically, the memorandum offers service members and their dependents an allowance for their travel expenses to seek such care. See *id.*; see also Sarah Lehr, *New Policy Will Reimburse Dane County Employees Who Travel for Abortions*, WPR.ORG (July 25, 2023), <https://www.wpr.org/new-policy-reimburse-dane-county-employees-travel-abortions>. However, some legislators are proposing bills to prohibit governmental funds from being used for abortion-related expenses. See Melissa Brown, *Tennessee Bill Would Ban Local Governments From Providing Abortion Funds*, TENNESSEAN (Jan. 11, 2023), <https://www.tennessean.com/story/news/politics/2023/01/11/tennessee-bill-to-ban-local-governments-from-giving-abortion-travel-aid/69797976007/> (detailing proposed Tennessee bill prohibiting local governments from providing abortion assistance through funding of health benefit plans or out-of-state travel).

16. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/L6VJ-KVS4>].

17. *Dobbs*, 142 S. Ct. at 2318 (Breyer, Sotomayor & Kagan, JJ., dissenting). The dissenting opinion in *Dobbs* acknowledged that states have already started passing laws that bar abortions from the moment of fertilization: “States have already passed such laws, in anticipation of today’s ruling.” *Id.* Note that Texas H.B. 1280, 87th Reg. Session 2021 (S.B. 8) was passed in September 2021 (prior to the leak) and became effective August 25, 2022.

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Oklahoma Senate on February 7, 2022.<sup>18</sup> On the next business day post-leak, this law passed and was approved by Governor Stitt.

Meanwhile, companies were watching these unfolding events. Citigroup reacted to Oklahoma's legislative movement early<sup>19</sup> and announced at its April 26, 2022, Annual Shareholders' Meeting: "In response to changes in reproductive healthcare laws in certain states in the U.S., beginning in 2022 we provide travel benefits to facilitate access to adequate resources."<sup>20</sup> Citigroup's offering was likely also a result of the restrictive Texas law passed in September 2021. Once State Representative Briscoe Cain of Texas heard about the travel benefits, he sent a cease-and-desist letter to Citigroup's CEO, Jane Fraser, demanding Citigroup rescind them.<sup>21</sup> Citigroup remained resolute.

Similarly, pre-existing anti-abortion trigger bans became enforceable.<sup>22</sup> In response to these laws, a profusion of concerned employers—over 600 companies—quickly enhanced their employee benefit packages by providing abortion-related travel benefits. The company announcements regarding employee benefits offerings in support of women's reproductive rights were prevalent. On April 29, 2022, Logan Green, CEO of Lyft, tweeted "[i]f you are a Lyft employee enrolled in a U.S. medical benefit plan, we'll cover travel costs if these

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18. The Oklahoma Supreme Court has since held that the Heartbeat Act is unconstitutional under the Oklahoma Constitution. *See Okla. Call for Reprod. Just. v. State*, 531 P.3d 117, 122-23 (Okla. 2023). However, under a 1910 law, abortions in Oklahoma are still mostly illegal except if the mother needs to terminate the pregnancy to preserve her life. *See Okla. Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1132 (Okla. 2023).

19. *See* Emilie Shumway, *Citigroup Caught in Political Crosshairs over Travel Benefit for Employees to Access Abortion*, HR DIVE (Apr. 7, 2022), <https://www.hrdiver.com/news/citigroup-caught-in-political-crosshairs-over-travel-benefit-for-employees/621750/> [<https://perma.cc/8XUJ-3KRG>].

20. *Citigroup Inc. 2022 Notice of Annual Meeting and Proxy Statement*, CITI 1, 20 (Apr. 26, 2022, 9:00 AM), <https://www.citigroup.com/citi/investor/quarterly/2022/ar22p.pdf?ieNocache=923> [<https://perma.cc/9RR4-ZQ8V>] (emphasis omitted).

21. Letter from Briscoe Cain, Texas State Rep., to Jane Fraser, Chief Exec. Officer, Citigroup (March 18, 2022). In Representative Cain's letter, he characterized Ms. Fraser's decision to pay for travel costs for abortion procedures as a "decision to divert corporate resources." *Id.* Among other threatening language, he reminded Ms. Fraser that "it is a crime to pay for another person's abortion in Texas" and that Citigroup "must immediately cease and desist all activities that aid or abet elective abortions performed in Texas. This includes paying for elective abortions performed in Texas, defraying or reimbursing the costs of such abortions, and providing any coverage of in-state elective abortions as part of an employee's benefits." *Id.*

22. Employers reacted as a result of *Dobbs* and trigger bans becoming enforceable. Some bans may not survive constitutional challenges. There is already evidence of this. Oklahoma's Heartbeat Act was found unconstitutional under the Oklahoma constitution. *Okla. Call for Reprod.*, 531 P.3d at 122-23.



cruel laws require you to travel 100+ miles to find an in-network abortion provider.”<sup>23</sup> Mr. Green’s tweet received a threatening response from the ever vigilant Texas Representative Briscoe Cain: “The state of Texas will take swift and decisive action if you do not immediately rescind your recently announced policy to pay the travel expenses of women who abort their unborn children.”<sup>24</sup> Like Citigroup, Lyft also remained resolute.

In a 2022 survey, sixty-four percent of participating employers stated they will limit their abortion-related travel expenses to those deductible for federal income tax purposes.<sup>25</sup> This makes tax deductibility a relatively important consideration regarding the extent that abortion-related travel benefits will be offered. The tax treatment, specifically the deductibility of these travel benefits, will be tested as we move forward. The Internal Revenue Code (I.R.C.) and the Treasury Regulations provide for deductions of “ordinary and necessary” business expenses, and this aligns with the premise that net income, not gross income, is taxed in the United States. Typically, expenses for providing employee benefits are deductible for the employer who pays for them. Numerous I.R.C. sections are applicable when considering the deductibility of employee benefit expenses.<sup>26</sup> There are exceptions that could apply, one of which disallows an employer’s deduction for business expenses related to engaging in

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23. Logan Green (@logangreen), TWITTER (Apr. 29, 2022, 8:21 PM), <https://twitter.com/logangreen/status/1520196525376241664?lang=en> [https://perma.cc/MPG6-WFN9]. The full tweet reads:

Women’s access to healthcare is under attack again, this time in Oklahoma. Lyft drivers are once again caught in the middle just for getting people where they need to go. We believe transportation shouldn’t be a barrier to accessing healthcare and it’s our duty to support both our rider and driver communities. Here’s what we’re going to do: 1) If you are a woman in Oklahoma or Texas seeking out-of-state abortion care, we’re working with health provider partners to create a safe state program to cover the cost of rides to help you get the care you need. 2) If you are a Lyft driver in Oklahoma or Texas, we’re extending our commitment to cover 100% of legal fees for drivers sued under SB1503 or SB8 while driving with Lyft. 3) If you are a Lyft employee enrolled in a U.S. medical benefit plan, we’ll cover travel costs if these cruel laws require you to travel 100+ miles to find an in-network abortion provider. *Id.* (emphasis omitted).

24. Letter from Briscoe Cain, Texas State Rep., to Logan Green, Chief Exec. Officer, Lyft (May 6, 2022).

25. Press Release, Willis Towers Watson, More U.S. Employers to Offer Travel Benefits for Abortion Services in Wake of Dobbs Decision, WTW Survey Finds (Aug. 11, 2022), <https://www.wtwco.com/en-us/news/2022/08/more-us-employers-to-offer-travel-benefits-for-abortion-services-in-wake-of-dobbs-decision-wtw> [hereinafter WTW Press Release].

26. I.R.C. §§ 162, 213.

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criminal activity.<sup>27</sup> This exception becomes important when considering aiding and abetting laws in tandem with abortion-related travel benefits.

When benefits, such as abortion-related travel benefits, are not covered by employers, individuals absorb the costs.<sup>28</sup> Therefore, those incurring such expenses would benefit from the ability to deduct them. Abortion-related travel deductibility is contingent upon abortion being considered a “qualified medical expense” as defined in section 213.<sup>29</sup> section 213 governs the personal deductibility of medical expenses including travel to obtain medical care. Currently, abortion and abortion-related travel is included in the definition of “qualified medical expense.” Notably, like in section 162 for employer deductibility, the adjoining regulation in section 213 contains a criminality deduction disallowance.<sup>30</sup>

Women’s reproductive rights, including the right to make their own bodily decisions, is a topic that elicits strong feelings.<sup>31</sup> This Article endeavors to compartmentalize those feelings and focus on the impact *Dobbs* has on women who are required to travel for abortion care, abortion-related travel provided by private companies, and the federal income tax ramifications of these benefits.

Part II of this Article provides examples of employee benefits that were created around pivotal Supreme Court cases. Part III then covers both women’s need to travel and the time and expense of such travel. Part IV contains a robust discussion regarding employers’ responses to *Dobbs* in creating abortion-related travel benefits for their employees and dependents. Part V reviews the tax considerations of providing abortion-related travel benefits and the tax considerations for recipients of those benefits. It also discusses potential issues that may result from anti-abortion and aiding and abetting laws. Lastly, the Article concludes with suggestions as to how the I.R.S. can best move forward equitably.

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27. I.R.C. § 162(c)(2).

28. This is true for employees of employers who do not offer the benefits as well as for those who are typically ineligible for fringe benefits, e.g., many part-time employees and independent contractors.

29. The definition of “qualified medical expenses” reaches beyond § 213 to other sections of the I.R.C. See I.R.C. § 223, 105.

30. Treas. Reg. § 1.213(e) (2014).

31. Bescheer Mohamed & Hannah Hartig, *America’s Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/religion/2022/05/06/social-and-moral-considerations-on-abortion/>.

## II. EMPLOYEE BENEFITS CREATED AROUND PIVOTAL SUPREME COURT DECISIONS

Numerous employee benefits—including some particularly controversial ones—have been created around pivotal Supreme Court decisions. This Part discusses two very different types of employee benefits that emanated from Supreme Court cases. One case was racist and contributed to systemic racism, and another case provided for equality between same-sex and heterosexual relationships.

The first example is linked to the rise of “segregation academies” in the 1950s when school desegregation was required following the *Brown v. Board of Education of Topeka* cases. In 1955, *Brown v. Board of Education of Topeka II (Brown II)* issued an enforcement decree conferring responsibility on local authorities to implement the *Brown I* decision. Chief Justice Warren notably urged the authorities to act swiftly to move toward full compliance “with all deliberate speed.”<sup>32</sup>

Not everyone was interested in desegregating their schools. As a matter of fact, “in many areas of the South, efforts to eliminate segregation in public education have been nullified by the massive withdrawal of white children from the public schools and the concomitant establishment of a ‘private’ school system.”<sup>33</sup> These private schools were referred to as “segregation academies.”<sup>34</sup> Southern resistance to integration was led by the Commonwealth of Virginia due to the creative strategies it implemented. One way was to provide direct governmental aid for private segregated schools through tuition grants.<sup>35</sup> Such tuition grants were not only funded by the government, but also by some employers and unions.<sup>36</sup>

Employers, together with at least one union, provided what could be called “tuition benefits” to white workers who wanted to keep their children segregated by sending them to private schools—“segregation academies.”<sup>37</sup> Some unions assisted with the establishment of schools for their members’ children.<sup>38</sup> But more important to this Article is that white workers pushed for certain tuition-type benefits, and employers

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32. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

33. *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1436 (1973).

34. *Id.* at 1441 n.38.

35. *Id.* at 1440 n.32.

36. *Id.* Federal courts held that such aid violated the affirmative duty to desegregate.

37. See BENJAMIN MUSE, VIRGINIA’S MASSIVE RESISTANCE 158 (1961); BENJAMIN MUSE, TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE SUPREME COURT’S 1954 DECISION, 148-49 (1964).

38. *Segregation Academies and State Action*, *supra* note 33, at 1447 n.67.

acquiesced. “[U]nionized workers have demanded and received bonuses from employers to pay private school tuition.”<sup>39</sup> This is a disturbing example of how a Supreme Court ruling fueled the creation of an employee benefit.

Sometimes businesses provide benefits—or in the following case, benefits *access*—ahead of Supreme Court rulings. An instructive example can be seen in employee benefits for partners and dependents in same-sex marriages or relationships where the law only provided benefits for heterosexual spouses.<sup>40</sup> In 2011, fifty-eight percent of companies on the Fortune 500 list provided equal benefits for the employees’ same-sex partners and spouses and their dependents, “[b]ut factoring in a broader mix of companies, the numbers decline.”<sup>41</sup>

Not only was lack of coverage, but when coverage *was* provided, the employee benefits extended to same-sex partners were not statutorily tax-free like they were for heterosexual partners, thereby increasing an LGBTQ+ employee’s tax liability. Companies stepped up to help equalize their employees’ tax burden<sup>42</sup> by offering a tax “gross-up”<sup>43</sup> to employees

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39. *Id.*

40. Patricia A. Cain, *Taxation of Domestic Partner Benefits: The Hidden Costs*, 45 U.S.F. L. REV. 481, 482 (2010); Michelle D. Laysner, *Tax Justice and Same-Sex Domestic Partner Health Benefits: An Analysis of the Tax Equity for Health Plan Beneficiaries Act*, 32 U. HAW. L. REV. 73, 76 (2009); see Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 47 (2014) (citing M. V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, WILLIAMS INST. 1, 1 (2007) (showing tax treatment disparity by providing the estimate that an employee with a domestic partner [paid] on average \$1,069 per year more in taxes for healthcare benefits than a married employee with a spouse receiving the same benefits)).

41. Eli Epstein, *Gay in Corporate America*, FORTUNE (July 10, 2011), <https://fortune.com/2011/07/10/gay-in-corporate-america-fortune-classics-1991/> (“[O]nly about 20% of small companies offered coverage in 2009, while 36% of bigger companies with more than 200 employees provided coverage.”); Tara Siegel Bernard, *Google to Add Pay to Cover a Tax for Same-Sex Benefits*, N.Y. TIMES (June 30, 2010), <https://www.nytimes.com/2010/07/01/your-money/01benefits.html>.

42. See Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee Benefit Plans to Same-Sex Couples*, 36 N.M. L. REV. 99, 108-09 (2006) (noting that private companies and various sub-national governments were providing same-sex couples with similar benefits provided to heterosexual married couples). Some businesses were well ahead of the curve in this respect. Dawn D. Bennett-Alexander, *Same-Gender Relationships and the Impact on Employment Benefits: Employers Rather than Legislators Leading the Way in a Case of the Tail Wagging the Dog*, ACAD. LEGAL STUDS. BUS. 1, 2 (2008) (stating that in 1982, the Village Voice, a newspaper in New York, was the first employer to offer domestic partners employee benefits).

43. A ‘gross-up’ is when an employer pays an employee cash compensation to cover the income tax that the employee would be required to pay. Note that the amount paid as a gross-up is taxable to the employee. JOSEPH S. ADAMS & TODD A. SOLOMON, DOMESTIC PARTNER BENEFITS: EMPLOYER’S GUIDE ch. 8 (7th ed. 2011). See *id.*

with same-sex partners. Such a gross-up helped to cover the differential in tax liability between same-sex couples and heterosexual couples.<sup>44</sup>

It was not until 2013 that the first step toward resolving the tax inconsistencies between same-sex and heterosexual relationships came from the Supreme Court. *United States v. Windsor* involved an estate tax issue that arose when the I.R.S. declined to recognize a same-sex couple's marriage in New York.<sup>45</sup> The Supreme Court held that section 3 of the Defense of Marriage Act was unconstitutional and that the federal government was required to recognize same-sex marriages legally conducted by states.<sup>46</sup> In response, the I.R.S. issued Revenue Ruling 2013-17, affirming that all legally married same-sex couples must file their returns as married filing jointly or married filing separately.<sup>47</sup> This also meant that going forward federal taxation of benefits would be the same for all legal marriages. Two years later, the Court extended this holding in *Obergefell v. Hodges*, concluding that the fundamental right to marry is guaranteed to same-sex couples in *all fifty* states.<sup>48</sup> Thus, between *Windsor* and *Obergefell*, same-sex couples from all fifty states were finally entitled to the same federal tax benefits of marriage, which included making those employee benefits that employers provided tax-free.

While it is unlikely that the cost of covering same-sex partners in the gross-up was large enough to significantly impact employers' bottom lines, this pre-*Windsor* corporate activism is notable. These policies were more about doing the right thing by "picking up the slack" where federal law did not recognize the needs of the diverse workforce of the time.<sup>49</sup>

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44. Tara Siegel Bernard, *For Gay Employees, an Equalizer*, N.Y. TIMES (May 20, 2011), <https://www.nytimes.com/2011/05/21/your-money/health-insurance/21money.html>.

45. *United States v. Windsor*, 570 U.S. 744, 750-51 (2013).

46. *Id.* at 775.

47. Rev. Rul. 2013-17, 2013-38 I.R.B. 201; Patricia A. Cain, *Taxation of Same-Sex Couples After United States v. Windsor: Did the IRS Get It Right in Revenue Ruling 2013-17?*, 6 ELON L. REV. 269, 272-73 (2014). Revenue Ruling 2013-17 affirmed that the I.R.C. terms "husband and wife" and other gendered partner terms would be applied in a gender-neutral fashion moving forward. *See also* I.R.S. Notice 2014-19 which provided guidance on the application of *Windsor* and Rev. Rul. 2013-17 to retirement plans.

48. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

49. Adam N. Eckart, *In Business We Trust*, 23 WAKE FOREST J. BUS. & INTELL. PROP. L. 227, 237 (2023); Bernard, *supra* note 41; Todd A. Solomon, Brian J. Tiemann & Jaco M. Mattinson, *Employee Benefits Implications of Supreme Court Decision on Same-Sex Marriage*, MCDERMOTT WILL & EMERY (June 30, 2015), <https://www.mwe.com/insights/employee-benefits-implications-of-supreme-court/> [<https://perma.cc/PWC4-5C3T>]; Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 486-87 (2019).

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This pattern is repeating with respect to abortion-related travel benefits—companies seeking to do the “right thing” creatively and equitably.

## III. ABORTION-RELATED TRAVEL

Today’s decision, the majority says, permits “each State” to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today’s decision.<sup>50</sup>

Justice Kagan hit the nail on the head with the above statement referencing the majority opinion in *Dobbs*. As states change their laws on abortion access to be more restrictive—and even prohibitive—women will be forced to travel to another state where they can get the care they seek.<sup>51</sup> While women who have been residing in access-restrictive states,<sup>52</sup> rural communities, or abortion deserts have already had to travel for access,<sup>53</sup> an even greater number of women will need to travel now that the *Dobbs* decision allows states to impose greater restrictions or prohibitions on abortion.<sup>54</sup> This Part discusses the need to travel for abortion access and the negative impact on women who must travel.

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50. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (citation omitted).

51. Even if these laws are ultimately deemed unconstitutional, women will be negatively impacted while they are in effect.

52. In 2020, 81,120 women traveled out of their state of residence to obtain an abortion. This number represents nine percent of all travel for abortion care. In the twenty-nine states that are categorized as “hostile to abortion rights,” the proportion of residents obtaining abortions who traveled to another state increased from nine percent in 2011 to fifteen percent in 2020. It is important to note, however, that sometimes travel outside of one’s state of residence is simply due to geographical convenience. For instance, even though Delaware has relatively few restrictions on abortion, in 2019 and 2020, forty-three to forty-four percent of women who are Delaware residents traveled to nearby Pennsylvania, New Jersey, or Maryland for care. Isaac Maddow-Zimet & Kathryn Kost, *Even Before Roe Was Overturned, Nearly One in 10 People Obtaining an Abortion Traveled Across State Lines for Care*, GUTTMACHER INST. (Jan. 1, 2022), <https://www.guttmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across>; see Bearak & Jones, *supra* note 9.

53. See generally Katrina Kimport & Maryani Palupy Rasidjan, *Exploring the Emotional Costs of Abortion Travel in the United States Due to Legal Restriction*, 120 CONTRACEPTION 1, 1 (2022) [hereinafter, Kimport *Exploring*] (“Pregnant people have traveled across state and national borders for the purpose of abortion since at least the 1960s.”).

54. Currently, more than 25 million women of childbearing age live in states that have restricted abortion access since *Dobbs*, and another 5.5 million live in states where litigation about abortion bans or restrictions are in progress. See Geoff Mulvihill, Kimberlee Kruesi & Claire Savage, *A Year After Fall of Roe, 25 Million Women Live in States with Abortion Bans or Tighter*

### A. *The Need to Travel*

Women have been traveling to obtain abortion access for years, but company awareness of this issue is directly tied to the June 24, 2022, *Dobbs* decision. As a result of the decision (both the leaked and the final version), many individuals and entities, including numerous celebrities, organizations, companies, government officials, and media reacted.<sup>55</sup> Attorney General Merrick Garland announced:

This decision deals a devastating blow to reproductive freedom in the United States. It will have an immediate and irreversible impact on the lives of people across the country. And it will be greatly disproportionate in its effect—with the greatest burdens felt by people of color and those of limited financial means.<sup>56</sup>

State statutes containing trigger bans that were previously unconstitutional under *Roe* became potentially enforceable as a result of *Dobbs*.<sup>57</sup> Even aside from those statutes, numerous state legislatures are

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*Restrictions*, A.P. NEWS (June 21, 2023, 11:01 PM), <https://apnews.com/article/abortion-dobbs-anniversary-state-laws-51c2a83899f133556e715342abfcface> [<https://perma.cc/Q9F4-RFZ8>].

55. Immediately, celebrities launched into action, sharing their thoughts and emotions about *Dobbs*. Michelle Obama stated that she was “heartbroken” over the “horrifying decision” but encouraged people to take action. Michelle Obama (@MichelleObama), TWITTER (Jun. 24, 2022, 9:46 AM), [https://twitter.com/MichelleObama/status/1540345715616006148?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1540345715616006148%7Ctwgr%5E7e3230d363981d6edd7beecd7b5b77a82b0cfccc%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fpeople.com%2Fembed%3Furl%3Dhttps3A2F2Ftwitter.com2Ftwitter2Fstatus2F1540345715616006148id%3Dmntl-sc-block\\_1-0-32-iframeoptions%3De303DdocId%3D5940018](https://twitter.com/MichelleObama/status/1540345715616006148?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1540345715616006148%7Ctwgr%5E7e3230d363981d6edd7beecd7b5b77a82b0cfccc%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fpeople.com%2Fembed%3Furl%3Dhttps3A2F2Ftwitter.com2Ftwitter2Fstatus2F1540345715616006148id%3Dmntl-sc-block_1-0-32-iframeoptions%3De303DdocId%3D5940018) [<https://perma.cc/KT84-HMX2>]. President Barack Obama asserted that the Supreme Court “neglected” people’s “intensely personal decision” by “attacking the essential freedoms of . . . Americans.” Barack Obama (@BarackObama), TWITTER (June 24, 2022, 9:26 AM), <https://twitter.com/BarackObama/status/1540340642848690176> [<https://perma.cc/JXL6-HGWM>]. Alyssa Milano joined the conversation and cited the “deadly consequences” of *Dobbs* that will “disproportionately impact people of color, LGBTQ+ communities, people struggling to make ends meet, young people, and those living in rural areas.” See Alyssa Milano (@Alyssa\_Milano), TWITTER (June 24, 2022, 10:01 AM), [https://twitter.com/Alyssa\\_Milano/status/1540349280694571008](https://twitter.com/Alyssa_Milano/status/1540349280694571008). And the advocacy continued in 2023. Two days before the one-year anniversary of *Dobbs*, Demi Lovato released a surprise song “SWINE.” DEMI LOVATO, SWINE (Island Records 2023). Lovato explained that she “created ‘SWINE’ to amplify the voices of those who advocate for choice and bodily autonomy.” Demi Lovato (@ddlovato), TWITTER (June 22, 2023, 9:05 AM) <https://twitter.com/ddlovato/status/1671882115150143491> [<https://perma.cc/WVX8-9EQM>].

56. Press Release, Dep’t of Just., Att’y Gen. Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization*. (June 24, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>.

57. Several governors in states with such pre-*Dobbs* bans will not seek to enforce their state laws. And some governors have been more proactive in advocating to repeal such laws. For

considering, or have recently passed, laws prohibiting or limiting abortion access.<sup>58</sup> And several states will have November 2023 and 2024 ballot measures pertaining to women’s reproductive rights.<sup>59</sup> As of this writing, at least twenty-four states have laws that criminalize abortion, some with historic bans that were not enforced due to *Roe*. Some legislatures have recently enacted laws that state that employer coverage of abortion-related services will be considered aiding and abetting illegal abortions. As such, companies that offer these benefits can conceivably be in violation of such aiding and abetting laws. In addition, some municipalities are seeking to pass ordinances that would punish those engaged in “abortion trafficking”—the act of helping women cross state lines to end a pregnancy either by lending a ride or with funding.<sup>60</sup>

Because of significant restrictions (or bans) on access to abortion, more women will need to travel across state lines to avail themselves of

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example, Michigan Governor Gretchen Whitmer has been active in protecting women’s reproductive rights and in particular was successful in winning a suit that held Michigan’s 1931 law banning abortion with no exceptions as unconstitutional. Press Release, Governor Gretchen Whitmer, Whitmer Statement on Winning a Preliminary Injunction Against Extreme 1931 Law Banning Abortion (Aug. 19, 2022) (on file with author).

58. See *State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST. (Aug. 18, 2023), <https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker> [<https://perma.cc/L7RQ-2A79>]; *Abortion Policy Tracker*, KFF, (June 6, 2023) <https://www.kff.org/other/state-indicator/abortion-policy-tracker/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/VXV2-5SM9>]; *State Legislation Tracker*, GUTTMACHER INST., <https://www.guttmacher.org/state-legislation-tracker> (last visited Aug. 24, 2023) [<https://perma.cc/8YAE-ALY5>].

59. Ohio’s November 2023 ballot will include a measure to amend the state constitution to ensure the right to “make and carry out one’s own reproductive decisions.” Ohio Ballot Board, *Issue 1: A Self-Executing Amendment Relating to Abortion and Other Reproductive Decisions* (Sept. 21, 2023), <https://www.ohiosos.gov/globalassets/ballotboard/2023/certified-language-9-21-ballot-board.pdf> [<https://perma.cc/4Y3Q-3XUQ>]. Both Maryland and New York have measures on the 2024 ballot that would amend their respective state constitutions by defining abortion as a right. See S.B. 798, 2023 Reg. Sess. (Md. 2023); see also S. Con. Res. 1283, 2023 Reg. Sess. (N.Y. 2023) (amending the New York State Constitution to include protection from discrimination on the basis of reproductive healthcare decisions). Numerous other states could have abortion-related ballot measures in 2024 if they receive the necessary signatures and final legislative votes. See *2023 and 2024 Abortion-Related Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/2023\\_and\\_2024\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures) (last visited Oct. 16, 2023) [<https://perma.cc/E9FF-9J9F>] (discussing 2023 and 2024 abortion-related ballot measures).

60. Kitchener, *supra* note 8. Employers are also “faced with an additional risk that the legal advice they seek related to providing abortion-related benefits [may] not be protected by attorney-client privilege.” Jennifer B. Rubin & Greer A. Clem, *Will ‘Dobbs’ Advice Erode the Attorney-Client Privilege?*, MINTZ (Aug. 31, 2022), <https://www.mintz.com/insights-center/view-points/2226/2022-09-01-will-dobbs-advice-erode-attorney-client-privilege>.



abortion access.<sup>61</sup> As a result, abortion-related travel benefits were born. In 2022, over 600 employers, large and small, expanded employee benefits to include abortion-related travel benefits.<sup>62</sup> It is anticipated that more employers will add such benefits to their packages in 2023 and 2024.

Certainly, state legislatures that criminalize abortion would like to prohibit companies from providing abortion-related travel benefits,<sup>63</sup> and state laws will try to impact the offering of these benefits. Including aiding and abetting language in their statutes is one way that states will try to deter companies from offering these benefits.<sup>64</sup> Depending on the way that the benefits are structured, state statutes may have no ability to penalize companies or have an impact on whether companies offer these benefits.<sup>65</sup>

States that ban, or greatly limit, access to abortions within their borders would also like to prohibit their residents from going outside of their state borders to seek abortion or reproductive healthcare.<sup>66</sup> An Idaho law enacted in 2023 does just this.<sup>67</sup> Such an attempt by states will most assuredly bring about a constitutional challenge because the right to travel is protected.<sup>68</sup>

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61. CHOICES, an abortion clinic formerly located in Memphis, was forced to relocate to Illinois after *Dobbs*. CHOICES estimates that over eighty percent of their patients come from communities they traditionally served, even though their new location is a three hour drive north. See Garnet Henderson, *'We Were Forced': Abortion Clinics Move Across State Lines to Stay Open*, REWIRE NEWS GRP. (Aug. 1, 2022, 9:00 AM), <https://rewirenewsgroup.com/2022/08/01/we-were-forced-abortion-clinics-move-across-state-lines-to-stay-open/> [<https://perma.cc/9P7X-5RJ8>].

62. WTW Press Release, *supra* note 25.

63. See, e.g., Shumway, *supra* note 19 (discussing Texas' response to Citigroup's policies); see also Kitchener, *supra* note 8 (noting abortion trafficking ordinances can be enforced by private citizens).

64. Municipal ordinances also seek to do the same. See Matt Stringer, *Odessa City Council Fires Manager and Attorney, Passes Sanctuary City for the Unborn Ordinance*, THE TEXAN (Dec. 15, 2022), [https://thetexan.news/issues/social-issues-life-family/odessa-city-council-fires-manager-and-attorney-passes-sanctuary-city-for-the-unborn-ordinance/article\\_465b2138-f52f-5fae-92b1-34aa78b4a69d.html](https://thetexan.news/issues/social-issues-life-family/odessa-city-council-fires-manager-and-attorney-passes-sanctuary-city-for-the-unborn-ordinance/article_465b2138-f52f-5fae-92b1-34aa78b4a69d.html).

65. See discussion *infra* Part V.

66. See, e.g., H.B. 242, 67th Leg. (Idaho 2023) (prohibiting women from obtaining abortions outside of the state).

67. See *id.*

68. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (noting that a state cannot bar its residents' interstate travel to obtain abortions because of the "constitutional right to interstate travel"); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (finding that Virginia could not "prevent its residents from traveling to New York to obtain" an abortion); see also Brendan S. Maher, *Pro-Choice Plans*, 91 GEO. WASH. L. REV. 446, 473 (2023) (suggesting that travel to obtain an abortion falls under the constitutional right to travel); Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and*

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Attorney General Merrick Garland has said, “[w]e recognize that traveling to obtain reproductive care may not be feasible in many circumstances. But under bedrock constitutional principles, women who reside in states that have banned access to comprehensive reproductive care must remain free to seek that care in states where it is legal.”<sup>69</sup> Additionally, President Joe Biden referred to those states that are trying to “interfere with women exercising this basic right [to travel between states],” as perpetuating a “deeply un-American attack.”<sup>70</sup>

*B. The Impact of Travel*

The direct impacts of having to travel for access are varied and will depend on the individual and their circumstances.

Some women, especially women of means, will find ways around the State’s assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost.<sup>71</sup>

As Justices Breyer, Sotomayor, and Kagan elucidated, those with fewer financial resources will be most impacted in states where abortion is banned or significantly limited. A 2014 study estimated that “half of individuals who needed abortion care were living below the federal poverty level, and an additional one quarter of those who sought abortion care were defined as low-income, falling between the federal poverty level and up to two times the federal poverty level.”<sup>72</sup> And in the United States, due to systemic racism, people of color make up a larger

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*Extraterritorial Abortions*, 91 MICH. L. REV. 907, 913 (1993) (discussing federal courts’ limitations on states’ authority); see generally Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (discussing abortion, federalism, and the constitutional right to travel).

69. Press Release, Dep’t of Just., *supra* note 56.

70. *FACT SHEET: President Biden Announces Actions in Light of Today’s Supreme Court Decision on Dobbs v. Jackson Women’s Health Organization*, THE WHITE HOUSE (June 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/24/fact-sheet-president-biden-announces-actions-in-light-of-todays-supreme-court-decision-on-dobbs-v-jackson-womens-health-organization/> [<https://perma.cc/48BJ-BP3B>].

71. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2318-19 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

72. Silbaugh, *supra* note 5, at 1611 n.7 (citing Jenna Jerman, Rachel K. Jones & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>).

percentage of those with limited financial resources.<sup>73</sup> For instance, nearly 6.7 million Latinas live in states with abortion bans.<sup>74</sup> “Latinas represent the largest group of women of color impacted by current or likely state abortion bans” and “more than 3 million Latinas living in states with abortion bans are economically insecure.”<sup>75</sup> Women of color also have a higher need for abortion access due to a lack of access to and effective use of contraceptives.<sup>76</sup> “In 2019, the abortion rate for Black women was 23.8 per 1,000 women. For Hispanic women, it was 11.7 per 1,000. And for White women, it was 6.6 per 1,000.”<sup>77</sup> Many women of color may also face abortion-related care challenges due to a language barrier particularly in states like Texas where a disproportionate number of Latinas with limited English-speaking ability reside.<sup>78</sup>

The number of facilities in Texas dropped after the passing of Texas S.B. 8 (SB8) on September 21, 2021, and travel time increased after the *Dobbs* decision.<sup>79</sup> This drop in access due to stricter laws has created

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73. Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER POL’Y REV. (Aug. 6, 2008), <https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture> [<https://perma.cc/AFG3-CPB4>].

74. “Nearly 6.7 million Latinas – 43 percent of all Latinas ages 15-49 – live in the 26 states that have banned or are likely to ban abortion.” Katherine Gallagher Robbins, Candace Gibson, & Shaina Goodman, *State Abortion Bans Threaten 6.7 Million Latinas*, NAT’L P’NSHIP FOR WOMEN & FAMILIES (Oct. 2023), [https://nationalpartnership.org/report/state-abortion-bans-threaten-latinas/?utm\\_source=nbc&utm\\_medium=referral&utm\\_campaign=hj\\_dobbs](https://nationalpartnership.org/report/state-abortion-bans-threaten-latinas/?utm_source=nbc&utm_medium=referral&utm_campaign=hj_dobbs) [<https://perma.cc/KM5N-P6HK>].

75. *Id.* Authors of the issue brief chose to analyze woman aged fifteen to forty-nine to align with Guttmacher Institute, World Health Organization, and others. *Id.* Note also, that “women with low incomes are especially impacted by state bans as they are more likely to lack access to necessary funds to travel to another state for abortion care...women who are denied abortion care are significantly more likely to be pushed deeper into poverty as a result.” *Id.* The issue brief defines “economically insecure” as a family living below 200% of the federal poverty line. *Id.*

76. Cohen, *supra* note 73.

77. These numbers are from the CDC data where twenty-nine states and the District of Columbia reported racial and ethnic data. Anne Branigin & Samantha Chery, *Women of Color Will Be Most Impacted by the End of Roe, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), <https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe/>.

78. “More than one million Latinas who live in states that have or are likely to ban abortions report not speaking English at all or speaking it well. Among respondents who report not speaking English or not speaking it well, the vast majority (more than 99 percent) speak either Portuguese or a Native Language. This language barrier creates substantial challenges to accessing and receiving culturally competent abortion care.” Robbins et al., *supra* note 74.

79. See Kari White, Asha Dane’el, Elsa Vizcarra, Laura Dixon, Klaira Lerma, Anitra Beasley, Joseph E. Potter & Tony Ogburn, *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8*, TEX. POL’Y EVALUATION PROJECT, U. TEX. AUSTIN (Mar. 2022), <https://sites.utexas.edu/txpep/files/2022/03/TxPEP-out-of-state-SB8.pdf> [<https://perma.cc>].

greater burdens on women, particularly women of color, in numerous ways, one of which is from a travel-time standpoint.<sup>80</sup> Studies predict that “39% of the national population of women aged 15–44 would experience increases in travel distances ranging from less than 1 mile to 791 miles . . . Aggregating across all affected regions, the average resident is expected to experience a 249 mile increase in travel distance . . . in the year following a Roe [sic] reversal.”<sup>81</sup> Women residing in Texas and Louisiana will have to travel much farther—over seven hours on average.<sup>82</sup> Such lengthy travel is time-consuming and would require someone (and perhaps a support individual) to take off of work for two days at a minimum, that is if they are *able* to take time off from work.

Travel is also expensive. Does one drive if they have a reliable car and possess a driver’s license? According to the National Equity Atlas, in 2019, eighteen percent of Black households did not own a car, as compared to six percent of White households.<sup>83</sup> And immigrant households for all racial and ethnic groups, except Black households, “are less likely to have access to a vehicle compared to their US-born counterparts.”<sup>84</sup> Does one take a bus? Not everyone lives where public transportation is accessible. Does one fly? Flying is expensive. And more money may have to be expended for lodging and meals as well.

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cc/546G-N5F2]; H.B. 1280, 87th Reg. Sess. (Tex. 2021); *see also* Mulvihill et al., *supra* note 54 (discussing changes to abortion access post-*Dobbs*).

80. *See* Maddow-Zimet & Kost, *supra* note 52. “Texas is home to 2.9 million Latinas of reproductive age . . . 19 percent of all Latinas of reproductive age in the country . . . [o]f those Latinas . . . 1.3 million are economically insecure.” Robbins et al., *supra* note 74 (discussing the significant impact of restrictive abortion laws on women of color and women of low-income status).

81. Caitlin Myers, Rachel Jones & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 *CONTRACEPTION* 367, 367 (2019).

82. Caitlin Myers, Lauren Bennett, Flora Vale & Alberto Nieto, *Abortion Access Dashboard* (May 1, 2023), <https://experience.arcgis.com/experience/6e360741bfd84db79d5db774a1147815/page/Page/?views=Dashboard—October-10> [<https://perma.cc/XYD7-Q9PP>]; Mathieu Benhamou, Kelsey Butler & Chloe Whiteaker, *Americans in 26 States Will Have to Travel 552 Miles for Abortions*, *BLOOMBERG* (June 24, 2022, 8:15 PM), <https://www.bloomberg.com/graphics/2022-supreme-court-abortion-travel/?leadSource=verify%20wall>; Diedre McPhillips, *Travel Time to Abortion Facilities Grew Significantly After Supreme Court Overturned Roe v. Wade*, *CNN* (Nov. 1, 2022, 11:08 AM), <https://www.cnn.com/2022/11/01/health/abortion-access-travel-time/index.html> [<https://perma.cc/V3N8-LSH3>].

83. *Car Access: Everyone Needs Reliable Transportation Access and in Most American Communities That Means a Car*, *NAT’L EQUITY ATLAS*, [https://nationalequityatlas.org/indicators/Car\\_access#/](https://nationalequityatlas.org/indicators/Car_access#/) (last visited Aug. 25, 2023) [<https://perma.cc/ZH6J-EWVM>].

84. *Id.* In Alaska, “[a]t 48 percentage points, Native Americans households headed by those with Other Alaskan ancestry are the most likely to lack access to a vehicle out of all ancestry groups for all nativity breakdowns.” *Id.*

Many Americans do not have money saved to spend on emergencies such as a last-minute flight. In fact, one-in-four Americans say that they would have to use a credit card to cover a \$1,000 emergency expense.<sup>85</sup> Further, women are less likely to pay for an unanticipated \$1,000 expense with their savings.<sup>86</sup> Using credit cards to pay for such travel can create a financial quicksand that is often impossible to get out from under, which can lead to damage to one's credit score. This is one very good reason why it is important that employers provide abortion-related travel benefits.

In addition to the challenging economic considerations, there are other impacts of having to travel, especially long distances. The health risks—physical and mental—should not be discounted. Accessing abortion care is time-sensitive and delays in getting such care can be detrimental.<sup>87</sup> When care is delayed, patients face increased risk of complications from an abortion.<sup>88</sup> These delays can emanate from the travel itself or the inability to get an appointment in another state where facilities may be congested.<sup>89</sup> Women who endure riskier abortions could need additional time to recuperate.<sup>90</sup> In addition, travel can be exhausting and stressful. Elizabeth B. Harned and Liza Fuentes interviewed Dr. Serina Floyd about abortion travel:

We recently had a patient fly to D.C. from Texas in the morning, have an abortion, and fly home that night. No one should have to do that. Yet, that patient's ability to have an abortion is phenomenally different from

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85. Lane Gillespie, *Bankrate's 2023 Annual Emergency Savings Report*, BANKRATE (June 22, 2023), <https://www.bankrate.com/banking/savings/emergency-savings-report/#over-1-in-3> [<https://perma.cc/B92X-WGJH>].

86. *Id.*

87. Restrictions on abortion care access can also be detrimental to women's existing children. See Robbins et al., *supra* note 74. "Research shows that when mothers cannot access abortion care, the economic security and development of their existing children are negatively impacted." *Id.*

88. Usha Ranji, Karen Diep & Alina Salganicoff, *Key Facts on Abortion in the United States*, KFF (Aug. 29, 2023), <https://www.kff.org/womens-health-policy/report/key-facts-on-abortion-in-the-united-states/> [<https://perma.cc/9K6B-YLBE>].

89. See Jason M. Lindo, Caitlin Knowles Myers, Andrea Schlosser & Scott Cunningham, *How Far Is Too Far? New Evidence on Abortion Clinic Closures, Access, and Abortions*, 55 J. HUM. RES. 1137, 1152 (2020).

90. Elizabeth B. Harned & Liza Fuentes, *Abortion out of Reach: The Exacerbation of Wealth Disparities After Dobbs v. Jackson Women's Health Organization*, HUM. RTS. MAG. (Jan. 6, 2023), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/wealth-disparities-in-civil-rights/abortion-out-of-reach/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/abortion-out-of-reach/).

thousands of others who do not have the resources or ability to travel in the same way.<sup>91</sup>

Traveling to receive abortion care can also be anxiety-inducing and stressful. The stress of being unfamiliar with medical caregivers and geographical location during a time when a woman is already stressed about a procedure can take a toll.<sup>92</sup> “Abortion care is highly stigmatized, and that stigma is reinforced when services are limited or unavailable such that a person travels away from their home state to access the care.”<sup>93</sup>

Added stress also emanates from uncertainty and the potential for arrest.<sup>94</sup> For women who leave a state where abortion is a criminal act, fear of returning home and being arrested is real.<sup>95</sup> Women may also fear that individuals who help them may be penalized, adding to their stress.<sup>96</sup> Also, if a woman uses her abortion-related travel benefits, her employer will have a record of the abortion and that essentially starts a “paper trail[] for law enforcement officials in states criminalizing abortion,” potentially

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91. *Id.*

92. See Kimport *Exploring*, *supra* note 53, at 3; Katrina Kimport, *What to Know About the Costs of Traveling for Abortion Care in the US – Here’s What I Learned from Talking to Hundreds of Women Who’ve Sought Abortions*, THE CONVERSATION (Aug. 30, 2022, 8:19 AM), <https://theconversation.com/what-to-know-about-the-costs-of-traveling-for-abortion-care-in-the-us-heres-what-i-learned-from-talking-to-hundreds-of-women-whove-sought-abortions-187266> [<https://perma.cc/G47L-ZJ9W>] [hereinafter, Kimport *Costs*].

93. Smith et al., *supra* note 2, at 9; see Norris et al., *supra* note 10, at 7; Hanschmidt et al., *supra* note 10, at 169; see generally Tamika Odum, Orlaith Heymann, Abigail Norris Turner, Katherine Rivlin & Danielle Bessett, *Assessing Psychosocial Costs: Ohio Patients’ Experiences Seeking Abortion Care*, 117 *CONTRACEPTION* 45 (2022) (finding that financial, geographic, and timing constraints lead to social costs for those seeking abortions).

94. Harned & Fuentes, *supra* note 90. Also note that this stress is heightened for women of color. See Robbins et al., *supra* note 74. “Anti-immigrant laws and policing of immigrant and Latinx people are especially prevalent in many of the same 26 states that have banned or are likely to ban abortion. These policies, coupled with heightened surveillance of people attempting to access abortion care, can make traveling out of state especially precarious or even impossible for Latinas, especially those at risk of deportation, detention, and family separation. Even for Latinas who are U.S. citizens or have documentation, the climate of fear can impose significant barriers to care.” *Id.*

95. Despite safe havens created by state shield laws, “[m]edical care procured outside a patient’s home state increasingly leaves a digital trail that will easily make its way back to the patient’s domicile.” Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 *YALE L.J.* 197, 197 (2022). See Harned & Fuentes, *supra* note 90.

96. *Id.*; see Kitchener, *supra* note 8. Some states such as Texas, have laws making “abortion trafficking” a felony. This is an added stressor putting those who drive someone to get an abortion in fear of criminal prosecution as well. Moira Donegan, *Anti-choice States Aren’t Satisfied. Now They Want to Punish Traveling for Abortions*, *GUARDIAN* (Sept. 12, 2023), <https://www.theguardian.com/commentisfree/2023/sep/12/anti-choice-states-arent-satisfied-now-they-want-to-punish-traveling-for-abortions>.

becoming the subject of a subpoena.<sup>97</sup> And it is not only an employer who will have information potentially subject to subpoena, but the hotel one stayed in will have information as well.<sup>98</sup> This risk also extends to certain phone and social media apps.<sup>99</sup>

The accompanying costs and stressors can accumulate. A woman may have to plan for the care of children, relatives, and pets.<sup>100</sup> Perhaps she will need a rental car.<sup>101</sup> If the woman is an hourly worker, she may not recoup her lost wages.<sup>102</sup> Additionally, one study highlighted how traveling out of state altered the timing of women's disclosure of their abortions to family and friends.<sup>103</sup> One example discussed the anxiety and stress a woman felt because her family used a tracking app.<sup>104</sup> Leaving the comfort of one's geographic area and support system adds to anxiety and

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97. Darius Tahir, *Big Employers Are Offering Abortion Benefits. Will the Information Stay Safe?*, KFF HEALTH NEWS (July 1, 2022), <https://khn.org/news/article/employer-abortion-benefits-privacy-confidentiality/> [<https://perma.cc/4E6M-YAJQ>]. It is possible that companies could be subpoenaed for such records. *Id.*

98. Joyce Hanson, *Hotels Face New Risks As Women Travel for Abortions*, LAW360 (Nov. 16, 2022), <https://www.law360.com/articles/1546210/hotels-face-new-risks-as-women-travel-for-abortions>. “If states want to target their neighboring states or companies for facilitating that travel and that care — aiding and abetting what is in that state a crime — hotels really have to be mindful that they might receive requests for evidence that people are using their hotels as part of a scheme to go across state lines to get an abortion.” *Id.*

99. Several states have enacted health information privacy laws that “limit the collection, use, or disclosure of private health information, especially data related to reproductive care.” Andrea Vittorio & Skye Witley, *Abortion-Rights States Begin Shielding Digital Data Near Clinics*, BLOOMBERG LAW (July 24, 2023, 5:05 AM), [https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/X2LNUS4000000?bna\\_news\\_filter=privacy-and-data-security](https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/X2LNUS4000000?bna_news_filter=privacy-and-data-security). These types of laws were created to protect women's data collected by any means, including phone and social media apps. For example, “Washington's new privacy law seeks to protect consumer location data, and restrict the gathering and sharing of health data for advertisements or other purposes without proper permission from consumers. It also gives consumers privacy rights over personal health data that companies collect about them, including the ability to ask for its erasure.” Andrea Vittorio, *Washington Shields Abortion Data in First-in-Nation Privacy Law*, BLOOMBERG LAW (Apr. 27, 2023, 1:07 PM), <https://news.bloomberglaw.com/privacy-and-data-security/washington-shields-abortion-data-in-first-in-nation-privacy-law>.

100. See Kimport *Costs*, *supra* note 92.

101. *Id.*

102. *Id.* Note that hourly worker concerns may be even more significant for women of color. “Latinas are over-represented in low-wage service occupations, such as servers and cleaners. . . . [M]ore than 1.4 million Latinas in the 26 states [that have banned or likely will ban abortion] surveyed work in service occupations. . . . These same jobs are less likely to provide access to supports that are necessary both to access abortion care and to achieve economic security, including paid sick days and flexible scheduling.” Robbins et al., *supra* note 74.

103. Kimport *Exploring*, *supra* note 53, at 2.

104. *Id.*

stress as well.<sup>105</sup> Driving through towns that have passed ordinances against using their roads to travel to get abortion access could bring on even more anxiety.<sup>106</sup>

These are more reasons why it is imperative that companies offer abortion-related travel benefits to their employees. Some even extend their abortion-related travel benefits to include a companion or childcare coverage.<sup>107</sup>

#### IV. COMPANIES RESPOND WITH BENEFITS

Some companies are being more proactive in protecting individual rights.<sup>108</sup> In 2022, we saw several examples of such corporate activism. One example is Disney supporting LGBTQ+ rights and speaking out against a law restricting discussion of LGBTQ+ issues<sup>109</sup> despite threats from Florida Governor Ron DeSantis to strip it of its tax-favored status.<sup>110</sup> Disney CEO Bob Chapek did not condemn the law initially but after facing criticism from stakeholders, he stepped up.<sup>111</sup> Another example is the baseball game between the New York Yankees and Tampa Bay Rays where instead of tweeting about the game, the teams tweeted about gun safety—which also purportedly led to financial retaliation from Governor DeSantis.<sup>112</sup>

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105. *Id.* at 3.

106. *See* Kitchener, *supra* note 8.

107. *See infra* Part IV.B.

108. *See generally* Eckart, *supra* note 49, at 247-48 (discussing business's increasing role in social activism).

109. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

110. Jamiel Lynch, Chris Boyette & Eric Levenson, *Disney's Self-Governing District Says Florida Cannot Dissolve It Without Paying Off Its Debts*, CNN (Apr. 28, 2022, 8:54 AM), <https://www.cnn.com/2022/04/27/us/reedy-creek-disney-florida/index.html> [<https://perma.cc/N5H8-LU9D>]. Florida has not restricted its attacks to Disney's tax status. *See* Alison Durkee, *Florida Lawmakers Pass More Bills Targeting Disney Amid Legal Fight*, FORBES (May 4, 2023, 6:38 AM), <https://www.forbes.com/sites/alisondurkee/2023/05/04/florida-lawmakers-pass-more-bills-targeting-disney-amid-legal-fight/?sh=70fa96ea7ac5> [<https://perma.cc/34VU-E8LC>]. In May 2023, the Florida House of Representatives passed two bills targeting Disney's monorail and a development agreement. *Id.* The monorail bill, H.B. 1305, targets Disney by requiring the state to create and implement "safety rules and perform safety inspections for 'privately owned and or operated fixed-guideway transportation systems' located in special districts." *Id.* Currently, Disney controls the entire inspection process. *Id.* Additionally, H.B. 1305 would nullify Disney's development agreement that gave it broad authority to develop its property in the special district. *Id.*

111. Lynch et al., *supra* note 110.

112. Both teams used their social media channels to share gun violence statistics after the Uvalde shootings. Following this media push, Gov. DeSantis vetoed funding a new sports training and youth tournament complex in the Tampa Bay area. The governor stated that he does not believe



Corporate activism stances have also shaped the world of employee benefits, of particular note are abortion-related travel benefits. Many companies quickly reacted to *Dobbs* and state action on restricting/banning abortion access by adding abortion-related benefits to their employee benefit packages. Thirty-five percent of employers “now offer travel and lodging benefits for . . . abortions. Another 16% of employers plan to offer abortion travel benefits in 2023, while 21% are considering it.”<sup>113</sup> Employers likely have some confidence in offering travel benefits because Justice Kavanaugh said in his concurring opinion that “[t]o the extent paying for an abortion is protected . . . one can assume that other things plans do that are entwined with paying for abortion—such as paying for travel to an abortion-permitting state . . . would likewise be protected.”<sup>114</sup>

#### A. Motivation

The motivation for enhancing benefits packages with abortion-related travel are varied, but overall, the message these companies are sending is that they support a woman’s right to choose. Nike issued the following statement hours after the *Dobbs* decision:

No matter where our teammates are on their family planning journey—from contraception and abortion coverage, to pregnancy and family-building support through fertility, surrogacy and adoption benefits—we are here to support their decisions. We cover travel and lodging expenses in situations where services are not available close to home and regularly make adjustments to our benefits to ensure employees have access to the quality healthcare they need.<sup>115</sup>

Beyond Yoga issued a statement:

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taxpayer money should fund sports stadiums and that it is also “inappropriate to subsidize political activism of a private corporation.” CNN reported that the governor did not make his decision to veto the funding until after the social media push. Steve Contorno, *DeSantis Blocks State Money for Tampa Bay Rays Training Facility After Team Tweets Against Gun Violence*, CNN (June 3, 2022, 12:55 PM), <https://www.cnn.com/2022/06/03/politics/ron-desantis-tampa-bay-rays-gun-violence/index.html> [<https://perma.cc/99FN-P3DK>].

113. WTW Press Release, *supra* note 25.

114. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

115. Katie Abel, *Nike Will Cover Travel and Lodging for Employees Who Don’t Have Abortion Access*, FOOTWEAR NEWS (June 24, 2022, 3:56 PM), <https://footwearnews.com/2022/business/legal-news/nike-abortion-roe-wade-employee-protection-1203304702/> [<https://perma.cc/FVU8-LTH8>].

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Supporting and empowering the health and well-being of women has always been a part of our brand's mission. Protection of reproductive rights, including abortion access, is critical. Beyond Yoga will continue to ensure our employees can get the care they need regardless of where they live.<sup>116</sup>

Patagonia issued a statement entitled, *Patagonia Supports Choice*, which included significant benefits for full-time and part-time employees whether they are choosing to have children or choosing abortion:

Caring for employees is the responsibility of business. Caring for employees extends beyond basic health insurance, so we take a more holistic approach to coverage and support overall wellness to which every human has a right. That means offering employees the dignity of access to reproductive health care. It means supporting employees' choices around if or when they have a child. It means giving parents the resources they need to work and raise children.<sup>117</sup>

Regarding abortion-related travel benefits, Patagonia covers travel, lodging, and food where restrictions to abortion exist, together with 100% of co-pay costs for mental health visits.<sup>118</sup>

Airbnb's statement of support from 2021:

[E]ven with the economic and employment gains achieved by women over the past several decades, equality cannot be achieved without access to comprehensive reproductive care that empowers women to not only make their own health care choices, but also to fully thrive. Recognizing the importance of a woman's right to make choices about their reproductive care, Airbnb's health care provides women the coverage they need to be able to make such decisions.<sup>119</sup>

The list of supporting statements could go on for pages and pages. However, the emergence of abortion-related benefits has proven to be a divisive issue.<sup>120</sup> When Chemours Co. announced that it was going to

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116. *Does Your Favorite Beauty Brand Support Abortion Rights?*, ALLURE (Oct. 25, 2022), <https://www.allure.com/story/which-beauty-brands-support-abortion-rights#p-beauty-brands> [<https://perma.cc/W8BE-BEWT>].

117. *Patagonia Supports Choice*, LINKEDIN (June 24, 2022), <https://www.linkedin.com/pulse/patagonia-supports-choice-patagonia-2/> [<https://perma.cc/74F6-GYYV>].

118. *Id.*

119. *Airbnb Supports the Reproductive Rights of Women*, AIRBNB NEWS (Sept. 27, 2021), <https://news.airbnb.com/airbnb-supports-the-reproductive-rights-o...20even%20with%20the%20economic,but%20also%20to%20fully%20thrive> [<https://perma.cc/3VPX-AN5>].

120. *See Lydia Saad, Broader Support for Abortion Rights Continues Post-Dobbs*, GALLUP (June 14, 2023), <https://news.gallup.com/poll/506759/broader-support-abortion-rights-continues->

offer abortion-related benefits, one of its board members resigned.<sup>121</sup> And of course some companies do not provide abortion-related travel (or other abortion-related) benefits, e.g., Chick-fil-A, Hobby Lobby, Waffle House, Safeway/Albertsons, Jockey, Wrangler, Sheetz, and Academy Sports.<sup>122</sup> Additionally, companies offering abortion-related travel benefits have been specifically targeted by PublicSq, an online marketplace offering conservative alternatives to major brand names.<sup>123</sup>

Despite the dissonances, evidence suggests companies' decisions to offer abortion-related travel benefits may not just be generically tied to supporting women's rights but may also be driven by a desire to communicate political standing and establish company culture.<sup>124</sup> Providing abortion-related benefits appears to be a mechanism for successful employee recruitment and retention.<sup>125</sup> Statistically, employees generally appreciate the extension of benefits *in support of access*.<sup>126</sup> Eighty-one percent of women under age forty say that companies that support access to reproductive healthcare, including abortion, demonstrate a commitment to supporting and advancing women.<sup>127</sup> Seventy-six percent are more likely to want to work for a company that

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post-dobbs.aspx (finding the net result of changes among Republican and Democrat support for legal abortion indicated that partisans are more polarized on abortion than ever before).

121. In 2022, Chemours Co. board of directors member Bradley Bell resigned after the company decided to provide abortion-related travel benefits, asserting he could not "reconcile [his] participation on the Chemours Board with [his] beliefs and commitments to other organizations promoting the opposing viewpoint." See Levi Sumagaysay, *Citing 'Woke Culture,' Chemours Director Resigns Over Abortion Benefits For Employees*, MARKETWATCH (Dec. 27, 2022, 7:21 AM), <https://www.marketwatch.com/story/citing-woke-culture-chemours-director-resigns-over-abortion-benefits-for-employees-11672182733>.

122. *Alternative Options to Woke Companies Funding Abortion Travel for Employees*, CONCERNED WOMEN FOR AM. LEGIS. ACTION COMM., <https://concernedwomen.org/alternative-options-to-woke-companies-funding-abortion-travel-for-employees/> (last visited Aug. 25, 2023) [<https://perma.cc/PT7T-4H49>].

123. PublicSq. (@officialpublicsq), INSTAGRAM (Apr. 13, 2023), <https://www.instagram.com/p/Cq-2-dKOcVg/>.

124. Pawel Adrjan, Svenja Gudell, Emily Nix, Allison Shrivastava, Jason Sockin & Evan Starr, *We've Got You Covered: Employer and Employee Responses to Dobbs v. Jackson*, IZA INST. LAB. ECON. DISCUSSION PAPER SERIES, no. 16360, Aug. 2023, at 1, 20. <https://www.iza.org/publications/dp/16360/weve-got-you-covered-employer-and-employee-responses-to-dobbs-v-jackson> [<https://perma.cc/8F9P-7ZKJ>].

125. *Id.*; see also Sumagaysay, *supra* note 121 (highlighting abortion-related benefits were something current employees indicated as important to them).

126. *Id.*

127. *Abortion Rights Are a Critical Workplace Issue*, LEAN IN, <https://leanin.org/research/abortion-access-workplace-issue#!> (last visited Aug. 25, 2023) [<https://perma.cc/52MM-DDNW>].

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supports abortion access.<sup>128</sup> Men care, too. Seventy-four percent of men under age forty are more likely to choose a company to work for that supports abortion access; seventy-three percent think their employer should take action to protect abortion access.<sup>129</sup> And, notably, for survey respondents under age forty, sixty-three percent of Republicans, eighty-four percent of Democrats, and seventy-seven percent of Independents said they are more likely to work for a company that supports abortion access.<sup>130</sup>

### B. Benefits

Now that we see why some companies are providing access, we will examine these company policies. Appendix A contains a list of several companies together with their benefits/policies as publicly stated.<sup>131</sup> Some companies like Apple reiterated that their existing policies covered travel for medical procedures, including abortion access.<sup>132</sup> Others swiftly announced enhancements to their benefits packages when the *Dobbs* opinion was in the offing.<sup>133</sup> Citigroup is one of these companies.<sup>134</sup> In its March 15, 2022 proxy statement, the company announced in its proxy

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128. *Id.* In 2023, another survey indicated that eighty-nine percent of people, not just women, say “it is important that their [employer] offers reproductive benefits.” Jocelyne Gafner, *Report: Nearly Half of Job Seekers Would Not Work at a Company That Does Not Offer Abortion Care Assistance*, INDEED (updated Feb. 27, 2023) <https://www.indeed.com/career-advice/career-development/abortion-care-assistance>.

129. *Id.*

130. *Id.*

131. In addition, Rhia Ventures has compiled a database, “a roundup of the corporations who are leading the way in bringing more transparency to abortion care coverage in the private sector.” #*WhatAreYourReproBenefits*, RHIA VENTURES, <https://rhiaventures.org/corporate-engagement/whatareyourreprobenefits/> [<https://perma.cc/B7P5-9RYS>] (last visited Oct. 30, 2023).

132. Apple’s reassurances to employees came on the heels of the passing of a restrictive Texas abortion law before the *Dobbs* decision. See Matthew Panzarino, *In Internal Memo, Apple Says It Is Monitoring Legal Challenges to Texas Abortion Law*, TECHCRUNCH (Sept. 16, 2021, 8:23 PM), <https://techcrunch.com/2021/09/16/in-internal-memo-apple-says-it-is-monitoring-legal-challenges-to-texas-abortion-law/> [<https://perma.cc/F83F-SN4C>].

133. While there are a significant number of companies that offer such benefits, most companies in the United States do not offer abortion-related travel benefits for their employees yet. See Jeff Green, *Women Are at Risk of Being Taxed on US Abortion Travel Benefits*, BLOOMBERG L. NEWS (July 29, 2022), <https://www.bloomberg.com/news/articles/2022-07-29/the-tax-man-cometh-for-americans-seeking-abortion-travel-benefits#:~:text=Women%20Are%20at%20Risk%20of,Saturday%2C%20July%209%2C%202022>. Green notes that the more uncertainty that exists about the laws and deductibility, the less likely the employer is to offer the benefit. See *id.*

134. See discussion *supra* Part I.

statement on March 15, 2022, that it was going to provide travel benefits when traveling for abortion access—this included plane tickets and lodging.<sup>135</sup>

Although numerous companies provide abortion-related transportation and lodging benefits, it is interesting to see how the benefit coverage differs. Some companies are extending their benefits to help alleviate some of the stressors and other impediments/impacts related to abortion access.<sup>136</sup>

On June 24, 2022, team collaboration tools company Atlassian tweeted:

[W]e are dismayed at this decision and stand firmly against the restriction and removal of rights that have been entrusted in people for decades. Starting today, US employees living in states that have restricted or banned abortions will be offered reimbursement for travel and accommodations for themselves *and a companion* should they seek care outside of their state.<sup>137</sup>

Including a companion is an important feature for providing a support system and reducing anxiety and stress. Other companies that have added a companion include Compass, Inc.,<sup>138</sup> and Dick's Sporting Goods, Inc.<sup>139</sup>

Lindsay Kaplan, co-founder of Chief, a private membership network that focuses on connecting and supporting women leaders, tweeted on June 24, 2022, “[w]e will reimburse up to \$1,000 in out-of-pocket travel expenses, including costs of necessary childcare, for employees and their family members who need to go out of state . . .”<sup>140</sup> Note the addition of “childcare,” which will help alleviate the stress of paying for what could be overnight, or several nights, of childcare. Some other companies that

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135. *Citigroup Inc. 2022 Notice of Annual Meeting and Proxy Statement*, *supra* note 20.

136. *See* discussion *supra* Part III.B.

137. Atlassian (@atlassian), TWITTER (June 24, 2022, 5:34 PM), <https://twitter.com/Atlassian/status/1540448315321597956?s=20> [<https://perma.cc/B64Y-W7MR>] (emphasis added).

138. Harrison Connery & Sasha Jones, *Brokerage Execs Condemn SCOTUS Ruling, Pledge to Cover Abortion Costs*, REAL DEAL (June 29, 2022, 10:45 AM), <https://therealdeal.com/new-york/2022/06/29/brokerage-execs-condemn-scotus-pledge-cover-abortion-costs/> [<https://perma.cc/LA99-PYLC>].

139. Lauren Hobart, President and CEO of Dick's Sporting Goods, LINKEDIN (June 24, 2022), [https://www.linkedin.com/posts/lauren-hobart-0656893\\_at-dicks-our-teammates-are-the-heart-of-activity-6946126055220936705-HPGn?utm\\_source=linkedin\\_share&utm\\_medium=member\\_desktop\\_web](https://www.linkedin.com/posts/lauren-hobart-0656893_at-dicks-our-teammates-are-the-heart-of-activity-6946126055220936705-HPGn?utm_source=linkedin_share&utm_medium=member_desktop_web) [<https://perma.cc/QW54-FNKG>].

140. Lindsay Kaplan (@lindsaykap), TWITTER (June 24, 2022, 10:42 AM), <https://twitter.com/lindsaykap/status/1540359616931979264> [<https://perma.cc/B7GP-P4R2>].

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also include childcare coverage are: Allbirds, Inc.,<sup>141</sup> Amalgamated Bank,<sup>142</sup> Chobani, LLC,<sup>143</sup> and Impossible Foods, Inc.<sup>144</sup>

### C. Limitations

Companies are extending abortion-related travel benefits with different limitations in place: eligibility, maximum allowed number of times an individual can use the benefit, and maximum allowable dollar amounts.

#### 1. Eligibility

The language that companies use determines eligibility for travel benefits. Eligibility is exemplified in several ways. The most obvious eligibility question is whether a particular classification of worker (and their covered dependents) is eligible for the benefit. Employees are entitled to fringe benefits; independent contractors are typically not.<sup>145</sup> At Patagonia, covered employees include part-time employees but that is not the case at most other companies that reserve eligibility to full-time employees. For example, part-time Amazon warehouse workers are not eligible for fringe benefits.<sup>146</sup> Also keep in mind that independent contractors such as platform-based workers, e.g., drivers for DoorDash, Lyft, Uber, and Amazon, are ineligible.<sup>147</sup>

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141. Joseph Zwillinger, Co-Founder and Co-CEO of AllBirds, LINKEDIN (June 24, 2022), <https://www.linkedin.com/feed/update/urn:li:activity:6946219891708375040/> [<https://perma.cc/E9BW-UJ95>].

142. *Amalgamated Bank Funds Full Reproductive Health Care Access for Employees and Communities*, AMALGAMATED BANK (May 3, 2022), <https://amalgamatedbank.com/news/amalgamated-bank-funds-full-reproductive-health-care-access-employees-and-communities> [<https://perma.cc/JM3A-JMYS>].

143. Hamdi Ulukaya (@hamdiulukaya), TWITTER (May 12, 2022, 9:04 AM), <https://twitter.com/hamdiulukaya/status/1524752418625490945> [<https://perma.cc/2G4M-LMQG>].

144. Peter McGuinness, CEO of Impossible Foods, LINKEDIN (May 2022), [https://www.linkedin.com/posts/peterjmcguinness\\_impossible-foods-has-always-held-the-belief-activity-6930605853519540224-4aTM/](https://www.linkedin.com/posts/peterjmcguinness_impossible-foods-has-always-held-the-belief-activity-6930605853519540224-4aTM/) [<https://perma.cc/3P4N-SNBN>].

145. See generally Samantha J. Prince, *The AB5 Experiment—Should States Adopt California’s Worker Classification Law?*, 11 AM. UNIV. BUS. L. REV. 43, 50 (2022) (presenting differences in protections and benefits for employees and independent contractors and the importance of same in connection with California’s AB5).

146. Lauren Kaori Gurley, *Amazon’s Abortion Travel Benefit Doesn’t Include Its Most Vulnerable Workers*, VICE (May 3, 2022, 1:03 PM), <https://www.vice.com/en/article/7kbnpd/amazons-abortion-travel-benefit-doesnt-include-its-most-vulnerable-workers> [<https://perma.cc/9QS7-K3JA>].

147. Caitlin Harrington, *Tech Companies Will Cover Abortion Travel—But Not for All Workers*, WIRED (July 7, 2022, 7:00 AM), <https://www.wired.com/story/tech-companies-abortion->

Most companies limit the use of abortion-related travel benefits to whether the health plan covers the abortion. Some policies contain broad language allowing for women to make their choice—no questions asked and no limits. But not all companies that support choice support it as broadly as others. For instance, Walmart’s healthcare plans only cover abortion “when there is a health risk to the mother, rape or incest, ectopic pregnancy, miscarriage or lack of fetal viability,” and its travel benefit would correspondingly be limited as well.<sup>148</sup>

Eligibility to use the abortion-related travel benefit by one who is otherwise entitled to the company’s host of benefits can be contingent upon whether the person has to travel *out-of-state* to receive the benefit. Take Allbirds, the natural-material apparel company: “[s]hould you have to incur travel to reach a state that legally allows an abortion and you would like to exercise your right to do so, we will cover your travel cost to ensure that you can make the decision that is right for you.”<sup>149</sup> Other companies with policies containing similar language include Adidas, Bank of America, Bloomberg, CVS, Levi Strauss, Meta, and Tesla.<sup>150</sup> Structuring the benefit with a state border limit may be helpful for some women, but it does not help those living in remote rural areas or abortion deserts in states without oppressive restrictions. These companies’ benefits would be more inclusive if they were not only focused on the need to escape state anti-abortion laws because of *Dobbs* but on abortion access generally.

A seemingly more inclusive benefits option would specify a geographical distance rather than require crossing a state border. For instance, JP Morgan Chase, the largest bank in the United States, covers travel greater than 50 miles.<sup>151</sup> Numerous other companies cover travel

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travel/ [https://perma.cc/3C2E-F62S]. See generally Samantha J. Prince, *The Shoe Is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World*, 52 U. MEM. L. REV. 627 (2022) (discussing that independent contractors are not typically entitled to employee fringe benefits and this presents unique problems for platform-based workers).

148. Walmart’s geographic requirement is beyond 100 miles. See Melissa Repko, *Walmart Expands Abortion Coverage for Its Employees in the Wake of Roe v Wade Decision*, CNBC (Oct. 4, 2022, 9:44 PM), <https://www.cnbc.com/2022/08/19/walmart-expands-abortion-coverage-for-employees-after-roe-v-wade.html> [https://perma.cc/76E6-8HT3].

149. Zwilling, *supra* note 141.

150. #WhatAreYourReproBenefits, *supra* note 131.

151. Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html>.

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greater than 100 miles.<sup>152</sup> Microsoft has a broader, more generous policy that extends its travel benefit “where access to care is limited in availability in an employee’s home geographic region.”<sup>153</sup> Microsoft’s policy not only covers limitless travel mileage, it also importantly addresses the issue set forth above by including benefits for all women who need to travel, not just those who have to escape their state’s laws.

## 2. Dollar and Usage Caps

Some companies crafted their policies to limit the number of times an individual can use abortion-related travel benefits in a year. Some have chosen to incorporate a maximum dollar amount.<sup>154</sup> Among companies that offer or plan to offer travel benefits for abortions, twenty-eight percent have a lifetime limit and twenty percent have a limit per occurrence.<sup>155</sup>

Comcast covers up to \$4,000 per trip up to *three times per year* and places an annual cap of \$10,000.<sup>156</sup> The benefit funds travel for general medical treatment or care, which includes abortion care. The cap serves as an anti-abuse provision but also is likely helpful from a corporate-budgeting standpoint.

Across the board, there is great variety in the dollar amounts that companies will cover for abortion-related travel. “Among companies that offer or plan to offer travel benefits for abortion services, 43% have an annual limit and 22% expect to place a limit in the future.”<sup>157</sup>

Some employers are offering \$1,000 in transportation benefits, while others like Coty (the parent company of numerous beauty brands—Cover Girl, Kylie Cosmetics, Rimmel London, and Sally Hansen) provide up to \$10,000 including accommodations.<sup>158</sup> It is unclear if the \$10,000 from Coty is per trip or a total for the year.

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152. This list includes Amazon, AT&T, Deutsche Bank AG, the *New York Times*, and Starbucks.

153. Herb Scribner, *These Companies Are Helping Employees Access Abortions*, AXIOS (Aug. 19, 2022), <https://www.axios.com/2022/05/05/abortion-travel-benefit-uber-apple-amazon-lyft>.

154. Using public statements or comprehensive summaries for policies communicated by employers after the Dobbs decision, 76 employers were identified as announcing a maximum dollar amount for how much they would cover each year incurred from abortion-related travel. Adjran, *supra* note 124.

155. WTW Press Release, *supra* note 25.

156. Scribner, *supra* note 153.

157. WTW Press Release, *supra* note 25.

158. See *#WhatAreYourReproBenefits*, *supra* note 131.



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As shown, there are numerous different ways that abortion-related travel benefits are structured with a variety of eligibility criteria and limits. Some companies include abortion-related travel benefits as an addition to other medical-related travel benefits, and this could be important for anti-discrimination and fairness purposes.<sup>159</sup> Notably, Trump-appointed EEOC Commissioner Andrea Lucas charged three employers with allegations that they favored workers seeking abortion care while discriminating against pregnant and disabled employees that were not eligible for a comparable benefit.<sup>160</sup> Such independent action by a commissioner is rare, considering that only three commissioner charges were filed during 2021 and 2022.<sup>161</sup> Additionally, Sharon Gustafson, the *former* general counsel of the EEOC, wrote an intimidating letter to dozens of large employers asserting that offering abortion-related travel benefits may violate Title VII of the Civil Rights Act.<sup>162</sup> The letter strongly suggested that employers may be charged by the EEOC for discriminatory practices.<sup>163</sup> Despite leaving the Commission in 2021 and acting in a private capacity, many watchdog groups argued that the Gustafson letter appeared to threaten employers with regulatory action for supporting abortion access.<sup>164</sup>

The tax treatment of abortion-related travel benefits is an important consideration when determining whether and how to offer such benefits. In a recent survey, sixty-four percent of employers stated they will limit their abortion-related travel expenses to those deductible for federal income tax purposes.<sup>165</sup> This large percentage of employers is somewhat

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159. A discussion of Title VII and other anti-discrimination laws is beyond the purview of this article.

160. See J. Edward Moreno, *EEOC Official Quietly Targets Companies over Abortion Travel*, BLOOMBERG L. (Nov. 14, 2022, 4:15 AM), <https://news.bloomberglaw.com/daily-labor-report/eeoc-official-quietly-targets-companies-over-abortion-travel-20>.

161. See *id.* The Equal Employment Opportunity Commission (EEOC) consists of five appointed Commissioners. A single Commissioner can file charges; however, this is unusual, and Commissioners typically act in larger groups.

162. See, e.g., Letter from Michael J. Lotito, Co-Chair of Littler Workplace Pol’y Inst. to Carol Miaskoff, Legal Couns. to the EEOC, (Oct. 11, 2022).

163. *Id.* (condemning the action of former EEOC Commissioner Gustafson in asserting that the Commission may bring charges for employers who offer abortion-related travel benefits).

164. Debra C. Weiss, *Ex-EEOC Lawyer Is Making ‘Highly Questionable’ Assertion About Abortion Travel Benefits*, *Littler Mendelson Says*, A.B.A. J. (Oct. 25, 2022, 3:12 PM), <https://www.abajournal.com/news/article/ex-eeoc-lawyer-is-making-highly-questionable-assertion-about-abortion-travel-benefits-littler-says>.

165. WTW Press Release, *supra* note 25. Such limitations pose a further financial challenge to employees: how to pay for the difference.

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surprising because the costs may not be high enough to warrant concern about tax deductibility. Additionally, the main reasons for including such benefits appear to be supporting a woman's right to choose, creating a company culture, and indicating political standing. However, the economics and bottom line are important as well, particularly as one considers fiduciary duties to various other stakeholders.

An assessment of how abortion-related travel benefits will be federally income taxed and/or deducted is warranted.

## V. TAX CONSIDERATIONS

Because tax-deductibility matters both to employers and employees, it is important to consider how abortion-related travel benefits will be treated for federal income tax purposes. The benefits' structure impacts deductibility. Abortion-related travel benefits have been set up in a variety of different ways across companies that offer them: stipends or direct reimbursement benefits, health spending accounts (HSA/FSA), health reimbursement arrangements (HRA), etc. The tax ramifications of each of these methods can vary. One consideration is whether the employee who receives the benefit will be taxed on the value of the benefit. Additionally, it is important to assess whether the travel benefits offered by employers are allowed as an employer tax deduction. Another consideration is if the employee can use pre-tax money that they contributed to their health spending account.<sup>166</sup>

Abortion-related travel benefits can trigger potential deductions for both employees and employers depending on the circumstances. A majority of employers who provide abortion-related travel benefits would limit them to amounts that receive favorable tax treatment, i.e., are deductible for the company.<sup>167</sup> This Part covers the current status of deductibility of abortion-related travel to employers and employees, as applicable.

### A. *The Basics*

Employer-provided benefits are considered taxable compensation (I.R.C. section 61 gross income) to employees unless there is an exemption or deferral from immediate taxation. The employer can deduct

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166. The term "pre-tax" refers to pre-federal income tax and does not include state taxation as states have different approaches to whether to allow such contributions to be pre-state income tax. See discussion *infra* Part V.A.

167. See discussion *supra* Part IV.

the payments associated with providing these benefits as ordinary and necessary business expenses when the benefits are included in an employee's gross income.<sup>168</sup> There are distinct rules that apply to payments made for medical benefits, and these rules impact employees differently depending on how the medical benefits are structured.<sup>169</sup>

Some employers offer their employees the ability to have either a health flexible spending account (FSA) or health savings account (HSA). Employees can save pre-tax dollars into one of these accounts and use the money for medical care.<sup>170</sup> Generally, if an employee uses FSA/HSA money for "qualified medical expenses," such money will not be included in gross income,<sup>171</sup> whereas if an employee uses FSA/HSA money for expenses other than "qualified medical expenses," then the money *will* be included in gross income.<sup>172</sup> Section 213's definition of "medical care" is used by the I.R.C. sections that govern HSAs, FSAs, and other types of tax-preferred health accounts.<sup>173</sup>

Including abortion within the term "medical care" allows for the use of pre-tax money through FSAs/HSAs to cover such care. It follows therefrom that travel associated with abortion/medical care will be able to be paid for via these tax-preferred vehicles.<sup>174</sup> This creates an automatic

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168. I.R.C. § 162.

169. I.R.C. §§ 105, 125, 223.

170. *The ABCs of HSAs and FSAs*, FINRA, <https://www.finra.org/investors/insights/abcs-hsas-and-fsas> (last visited Nov. 27, 2023) [<https://perma.cc/Q62X-SS7U>].

171. I.R.C. § 223(f)(1).

172. I.R.C. § 223(f)(2) (explaining that for purposes of determining the amount of the deduction under § 213, "[a]ny amount paid or distributed out of a health savings account which is not used exclusively to pay the qualified medical expenses . . . shall be included in the gross income of such beneficiary.").

173. I.R.C. §§ 213(d), 223, 125(i), 105(b); Rev. Rul. 2003-43, 2003-1 C.B. 935. Additionally, a key distinction between HSAs and FSAs are the forfeitability provisions. When an employee or an employer contributes to an HSA, the contributions are non-forfeitable to the employee, meaning they can roll-over an unlimited amount and accumulate money which can eventually be used for larger expenses. I.R.C. § 223(d)(1)(E). Conversely, employees must use the money in their FSA each year or lose it; however, employees can carry-over \$500 to the following year, which does not count against their maximum contribution. I.R.C. § 125(d)(5)(B); see I.R.S. Notice 2013-71, 2013-20 I.R.B. 1082 (Oct. 31, 2013) (modifying the use-or-lose rule to allow for \$500 carry-over); see also IRS Notice 2020-33 (indexing the 2013 carry-over rule to inflation); Rev. Proc. 2022-38, 2022-45 I.R.B. 445 (increasing the carry-over limit for 2023). If someone needs to cover the costs of an abortion and the related travel, it is more likely they can do so with an HSA than an FSA due to the lack of limit on carrying over funds.

174. See Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1138 (2004); Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 706 (2002).

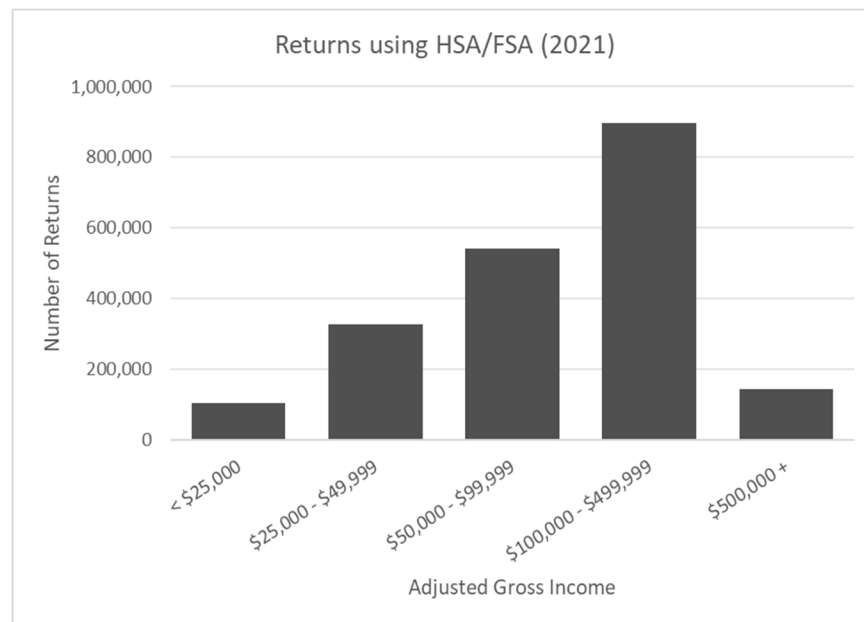
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tax savings for those who would otherwise owe federal income tax.<sup>175</sup> In 2021, 2,008,708 returns were filed for tax year 2020, indicating there was money contributed to health savings accounts.<sup>176</sup> While this is an excellent benefit to offer for various reasons, it is attenuated for those who are in the lower Adjusted Gross Income (AGI) strata. Such individuals do not all have the ability to set aside money in an HSA or FSA despite the lure of the pre-tax feature. And if they do, it may not be enough to cover the expenses. Figure 1 demonstrates the number of returns filed in 2021 for tax year 2020 using a health savings account by AGI.

**Figure 1**<sup>177</sup>



Another way employers confer these benefits is through stipends or stand-alone direct reimbursements. Employers often accomplish this through health reimbursement arrangements (HRAs). Section 105 permits an employer to directly reimburse an employee for qualified medical expenses.<sup>178</sup> Whether accomplished through an HRA or a stand-alone stipend, an employer can deduct the expenses associated with the reimbursement. Still, employees could recognize taxable income if the

175. Pratt, *supra* note 174, at 1138.

176. Individual Income Tax Returns 2020, IRS Publication 1304, Rev. 11-2022, <https://www.irs.gov/pub/irs-pdf/p1304.pdf> [<https://perma.cc/G7QX-LXSD>].

177. *Id.*

178. I.R.C. § 105(b).

program is not administered properly. If the stipend does not verify the medical expenses, pays a flat amount, or exceeds the qualified medical expenses actually incurred, the amount would be taxable to the employee as gross income and included on their W-2.<sup>179</sup> In addition to the potential taxability, this arrangement is also problematic because third party administrators and payroll providers need access to private medical information to determine eligibility.<sup>180</sup> Such personal information could become the target of subpoenas as criminal statutes are enacted or rekindled.<sup>181</sup> Additionally, abortion is stigmatized, and women may not feel comfortable with certain individuals knowing their medical information.<sup>182</sup>

Employers must also consider the *state* tax implications of administering certain benefits. Health benefits receive disparate treatment across different jurisdictions. For example, California and New Jersey treat employee contributions to health spending accounts as post-tax contributions; in other words, such contributions are made from taxable income rather than on a pre-tax basis.<sup>183</sup> Other states could amend their tax codes in the future to require employers to impute income for abortion-related expenses. Finally, state tax laws raise important privacy questions. Administrators must track the residency of beneficiaries and determine the proper jurisdiction for tax attribution. Again, this private information could attract the attention of law enforcement in certain jurisdictions.

While outside of the purview of this Article, one cannot ignore the Employee Retirement Income Security Act of 1974 (ERISA) because ERISA interplays with the I.R.C. in the governance of qualified retirement, health, and employee benefit plans.<sup>184</sup> Notably, ERISA section 514 preempts state laws that relate to employee benefit plans, with some

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179. I.R.C. § 105(a).

180. While the privacy aspects are beyond the scope of this article, they are certainly of great importance and perhaps the requirements here should be reconsidered.

181. Regardless of the nature of the statute, seventy-two percent of employees with any abortion benefit are concerned about the legal implications of using their employer's policy. Jocelyne Gafner, *Report: Nearly Half of Job Seekers Would Not Work at a Company That Does Not Offer Abortion Care Assistance*, INDEED, <https://www.indeed.com/career-advice/career-development/abortion-care-assistance> (last updated Feb. 27, 2023).

182. See discussion *supra* Part III.B.

183. CAL. REV. & TAX. CODE § 17131.5 (West 2005); N.J. STAT. ANN. § 54:6-24 (West 2019).

184. For comprehensive coverage of ERISA and abortion-related plans and benefits, see Maher, *supra* note 68.

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exceptions.<sup>185</sup> For example, state statutes criminalizing abortion services would not be preempted, as the statute does not directly relate to an employee benefit plan.<sup>186</sup> State statutes that bar insurance coverage of abortion services in fully insured health plans would also not be preempted as this falls squarely within the states' long recognized power to regulate insurance.<sup>187</sup>

What is murky is whether various reporting and aiding and abetting statutes would be preempted by section 514. ERISA likely preempts legislation prohibiting employers from paying abortion expenses because such legislation impermissibly interferes with the administration of a benefit plan.<sup>188</sup> That being said, it is ambiguous whether ERISA would preempt a law prohibiting an individual from furnishing the means to obtaining an abortion. Parties may be able to successfully argue that such laws “‘conflict[] with the provisions of ERISA’ or ‘operate[] to frustrate its objects.’”<sup>189</sup> Until case law develops, these questions will likely remain in flux.<sup>190</sup>

## B. Deductibility

### 1. Deducting Travel Expenses under Section 213

When individuals are not covered by an employer benefit plan or they pay for their own abortion-related travel (unreimbursed and outside of a health spending account), they will have to entirely subsume the cost

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185. 29 U.S.C. § 1144(a) (2018).

186. Maher, *supra* note 68, at 455.

187. Still, large employers can mostly escape state insurance regulation by self-insuring their health plan. Self-insured plans are given far greater latitude, as employers can choose what procedures to cover or exclude. This could also apply to partially self-insured plans where employers use an in-state insurer for all non-abortion coverage and then self-funds for the out-of-state abortion coverage including travel. *Id.* at 466-67.

188. See 29 U.S.C. 1144(b)(4)(2018); see also Jason Lacey, *Considering ERISA Preemption of State Laws Following Dobbs v. Jackson Women's Health Organization*, A.B.A. (Nov. 9, 2022), [https://www.americanbar.org/groups/health\\_law/publications/aba\\_health\\_resource/2022-2023/dobbs/considering-erisa-preemption-of-state-laws-following-dobbs-v-jackson-womens-health-organization/](https://www.americanbar.org/groups/health_law/publications/aba_health_resource/2022-2023/dobbs/considering-erisa-preemption-of-state-laws-following-dobbs-v-jackson-womens-health-organization/) (considering the effects of ERISA on pre-emption of state law regulating benefits). See generally, Greer A. Clem & Jennifer B. Rubin, *Managing State Law Risks of Employer-Sponsored Abortion-Related Travel Benefits Post-Dobbs*, MINTZ (Aug. 8, 2022), <https://www.mintz.com/insights-center/viewpoints/2226/2022-08-08-managing-state-law-risks-employer-sponsored-abortion>.

189. See Lacey, *supra* note 188.

190. See *id.*; Jennifer B. Rubin, Michelle Capezza, Corbin Carter & Michael S. Arnold, *Group Health Plans in the Crossfire: Facilitating Reproductive Choice in the Wake of Dobbs v. Jackson Women's Health*, MINTZ (June 26, 2022), <https://www.mintz.com/insights-center/viewpoints/2226/2022-06-26-group-health-plans-crossfire-facilitating-reproductive>.

unless they can find a way to deduct the payment. This concept stems from the I.R.C.'s deduction disallowance for personal, living, and family expenses in I.R.C. section 262.<sup>191</sup> The primary deduction allowance for abortion-related travel is in I.R.C. section 213, which permits individuals to deduct medical expenses that exceed 7.5% of their AGI, including for “transportation primarily for and essential to medical care.”<sup>192</sup>

There are transportation deductibility limits and exclusions within section 213.<sup>193</sup> In 2023, mileage was limited to 22 cents per mile.<sup>194</sup> Lodging, when permissible, is limited to fifty dollars per night.<sup>195</sup> Lodging may not be “extravagant” or “lavish” and is deductible up to the \$50 per night cap when the medical care “is provided by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital), and . . . there is no significant element of personal pleasure, recreation, or vacation in the travel away from home.”<sup>196</sup> There is no deductibility of any meals while away from home receiving medical treatment.<sup>197</sup>

What qualifies as a qualified medical expense is critical as a first step to determining deductibility. The term “‘qualified medical expense[]’ means . . . amounts paid . . . for *medical care* (as defined in section 213(d)) . . . but only to the extent such amounts are not compensated for by insurance or otherwise.”<sup>198</sup> And the pertinent part of the definition of the term “medical care” is: “amounts paid—(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of

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191. I.R.C. § 262.

192. I.R.C. § 213(a). The primary rationale behind the allowance of this deduction is that “taxpayers who incur significant medical expenses are less able to pay taxes.” Katherine Pratt, *The Tax Definition of “Medical Care:” A Critique of the Startling IRS Arguments in O’Donnabhain v. Commissioner*, 23 MICH. J. GENDER & L. 313, 319 (2016); see also James W. Colliton, *The Medical Expense Deduction*, 34 WAYNE L. REV. 1307, 1333 (1988) (assessing the cause and effect of congressional changes to I.R.C. § 213).

193. See J. Timothy Philipps & Kenneth B. Tillou, *Medically Necessitated Meal and Lodging Costs: Should They Be Deductible Under Internal Revenue Code Section 213?*, 41 WASH. & LEE L. REV. 453, 462 (1984).

194. No, this is not a typo. It is truly a paltry twenty-two cents per mile for medical expense travel. Compare this to business-related travel, which is 65.5 cents per mile. I.R.S. Notice 2023-03, 2023-1 C.B. 388.

195. I.R.C. § 213(d)(2). The amount is \$100 if a person accompanies the person who is traveling for medical care. Medical and Dental Expenses, Publication 502, Cat. No. 15002Q (Feb. 6, 2023).

196. I.R.C. § 213(d)(2).

197. Treas. Reg. § 1.213(e)(1)(iv) (2014).

198. I.R.C. § 223(d)(2)(A) (emphasis added); see Medical and Dental Expenses, *supra* note 195.

affecting any structure or function of the body, (B) for transportation primarily for and essential to medical care referred to in subparagraph (A).”<sup>199</sup>

Pivotal to the discussion on abortion-related travel benefits is whether abortion is considered as “medical care.” Before *Roe*, a 1973 Revenue Ruling answered that question by holding that abortion is considered “medical care” under section 213(d)(1)(A) so long as it is not illegal under state law.<sup>200</sup> But classifying abortions as medical care is controversial. Not everyone agrees that women should be able to deduct abortion-related expenses, including travel. In 2020, well before *Dobbs*, Senator Marco Rubio wrote a letter to Secretary Steven Mnuchin advocating for abortions to no longer be considered “medical care” under the I.R.C.<sup>201</sup> Seeing such classification as a “tax break,” Rubio urged Mnuchin to end “tax breaks for abortion under the guise of medical care . . . except when the mother’s life is physically endangered.”<sup>202</sup> In addition, Senator Mike Lee and eighteen other GOP colleagues co-sponsored the Abortion is Not Healthcare Act.<sup>203</sup> This bill sought Congressional action to end preferential treatment of abortion by amending section 213 to remove abortion costs from being considered “medical expenses.”<sup>204</sup>

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199. I.R.C. § 213(d)(1).

200. Rev. Rul. 73-201, 1973-1, C.B. 140. The regulations consider abortion to satisfy the statutory language for the purpose of affecting any structure or function of the body, and therefore, the expenses associated with an abortion are paid for medical care. See Tessa Davis, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality & Marriage*, 19 CARDOZO J.L. & GENDER 1, 37-38 (2012) (“Previous analysis of IRS pronouncements regarding the deductibility of reproductive care and fertility treatments under section 213 made clear that the IRS never required the presence of an underlying disease for medical care such as a vasectomy or an abortion to be deductible. Treasury Regulation 1.213-1(e)(1)(ii) itself expressly states that ‘obstetrical expenses . . . are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care[.]’” (emphasis omitted)); Frederick R. Parker, *Federal Income Tax Policy and Abortion in the United States*, 13 MICH. ST. U. J. MED. & L. 335, 342-43 (2009) (emphasis omitted).

201. Letter from Marco Rubio, U.S. Sen. for Florida, to Steven T. Mnuchin, Sec’y of the Treasury, U.S. Dep’t of the Treasury (Aug. 12, 2020) (arguing that the IRS should not consider abortions medical care and that “the IRS should not treat premiums for health insurance that covers such abortions as medical care, unless in compliance with the law’s separate accounting requirements for coverage of non-medical care”).

202. See *id.*

203. S. 124, 117th Cong. § 2 (2021).

204. *Id.* A few scholars believe that the I.R.S.’s position on deducting abortion expenses as “medical care” is overreaching. See Parker, *supra* note 200, at 353-54. In 2009, Professor Frederick Parker set forth numerous “problematic aspects” of tax law as it pertains to abortion expense deductibility under § 213. *Id.* at 348. “A medical expense deduction . . . does not provide



Fortunately, as it currently stands, abortion is classified by the I.R.S. as medical care. As long as there is no state law banning or greatly limiting abortion, abortion-related travel benefits can be counted toward the 7.5% threshold and could ultimately be deductible under section 213(d)(1)(B). This is important because the U.S. Bureau of Labor Statistics stated that in 2018, “U.S. households allocated an average of 8.1% of spending to healthcare.”<sup>205</sup>

To quantify, 3.924 million individual returns successfully used the medical expenses deduction under section 213 for a total amount of \$77.428 billion (after subtracting the 7.5% AGI threshold.)<sup>206</sup> For the bottom fifty percent of returns based on income, 1.089 million returns used the section 213 deduction totaling \$19.995 billion.<sup>207</sup> Meeting the 7.5% threshold happens fairly frequently even for those with an AGI below \$25,000, although less frequently at that level.<sup>208</sup>

**Table 1**<sup>209</sup>

2020 I.R.C. § 213 Usage By Income					
Adjusted Gross Income (AGI)	# of Returns Claiming I.R.C. § 213	Total Expenses Claimed	Deductions after AGI Limitation	Average Deduction Per Return	% Disallowed by AGI Limitation
<\$25,000	550,682	\$12,148,499,000	\$11,539,954,000	\$20,956	5.01%
\$25,000-50,000	827,865	\$15,618,615,000	\$13,237,898,000	\$15,990	15.24%
\$50,000-\$100,000	1,417,342	\$34,225,683,000	\$26,530,666,000	\$18,719	22.48%
\$100,000-\$500,000	1,130,871	\$37,845,117,000	\$24,489,563,000	\$21,655	35.29%
1% (\$500,000+)	15,053	\$2,331,095,000	\$1,450,330,000	\$96,348	37.78%
<b>TOTAL</b>	<b>3,941,813</b>	<b>\$102,169,009,000</b>	<b>\$77,248,411,000</b>	<b>\$19,597</b>	<b>24.39%</b>

the same value to an economically-disadvantaged person who has an abortion as it does for someone who is more affluent. Rather, it would be entirely meaningless for an indigent woman who has no tax liability.” *Id.* at 363.

205. Lekhnath Chalise, *How Have Healthcare Expenditures Changed? Evidence from the Consumer Expenditure Surveys*, U.S. BUREAU OF LAB. STAT. (Nov. 2020), <https://www.bls.gov/opub/btn/volume-9/how-have-healthcare-expenditures-changed-evidence-from-the-consumer-expenditure-surveys.htm>.

206. *Id.*

207. *Id.* Slight variance exists due to rounding when putting taxpayers in groups.

208. In order to take advantage of the § 213 deduction, individuals must itemize deductions. Data is unavailable to ascertain the ages of the individuals using § 213. It would be beneficial to know the number of women of child-bearing age that use the deduction.

209. *SOI Tax Stats – Individual Statistical Tables by Size of Adjusted Gross Income*, I.R.S., <https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income> [<https://perma.cc/ANC5-SBC6>] (last visited Oct. 31, 2023). At the time of writing, 2020 represents the most recent data. Although 2020 was marked by the COVID-19 pandemic, it remains representative of § 213 usage following the Tax Cuts and Jobs Act. In 2018 and 2019, taxpayers claimed a total of \$107 and \$108 billion in medical expenses respectively.

Planned Parenthood estimates that most abortion procedures cost between \$600 and \$2,000.<sup>210</sup> Because an abortion is unlikely to cost 7.5% of an average women's AGI, most women seeking abortion care will not reach the section 213 limitation solely because of the procedure. And even adding the related travel will likely not help much because the I.R.S. only permits paltry lodging and mileage allowances.<sup>211</sup> To quantify, the median weekly wages for a woman employed full-time in 2021 was \$912 (or \$47,424 annually assuming fifty-two weeks of work). Based on that figure, the average American woman could only deduct medical expenses that exceed \$3,350.<sup>212</sup> This amount drops in states that are most affected by post-*Dobbs* restrictions like Mississippi. Women working full-time in Mississippi earn a median weekly wage of \$675 (or \$35,100 annually assuming fifty-two weeks of work), and Black women only earn a weekly wage of \$565 or \$29,362 annually on average.<sup>213</sup> These taxpayers would

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210. Attia, *How Much Does an Abortion Cost?*, PLANNED PARENTHOOD (Nov. 2022), <https://www.plannedparenthood.org/learn/ask-experts/how-much-does-an-abortion-cost> [https://perma.cc/J7BA-CACY].

211. See discussion *supra* Parts V.B.1 and VI.C. And more importantly, women would need sufficient itemized deductions to exceed the 2022 standard deduction of \$12,950 for taxpayers filing single. On another note regarding costs, although this article focuses on abortion-related benefits provided by employers, it is worth noting Medicaid's relationship with abortion care. Although nearly 92 million Americans rely on Medicaid for health insurance, most do not receive coverage for typical abortion services. The Hyde Amendment, first enacted in 1976, restricts federal funding for abortion procedures to situations involving rape, incest, and life endangerment. Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, *The Hyde Amendment and Coverage for Abortion Services*, KFF (Mar. 5, 2021), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/> [https://perma.cc/WL6N-8ZL6]. States may provide additional coverage; however, they are not required to do so, and must do so at their own cost. Today, thirty-two states and the District of Columbia follow the federal standard and do not supplement coverage. *State Funding of Abortion Under Medicaid*, THE GUTTMACHER INST. (July 1, 2023), <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicare> [https://perma.cc/H8QV-5X4K]. Other states extend coverage only under a court order, which is subject to momentary repeal. This tumultuous landscape leaves tens of millions of low- and moderate-income women without coverage for expensive abortion procedures.

212. *Median Earnings for Women in 2021 Were 83.1 Percent of the Median for Men*, BUREAU OF LAB. STAT. (Jan. 24, 2022), <https://www.bls.gov/opub/ted/2022/median-earnings-for-women-in-2021-were-83-1-percent-of-the-median-for-men.htm#:~:text=In%202021%2C%20median%20weekly%20earnings,83.1%20percent%20of%20men's%20earnings.>

213. *Women's Earnings in Mississippi—2020*, BUREAU OF LAB. STAT. (Oct. 7, 2021), [https://www.bls.gov/regions/southeast/news-release/womensearnings\\_mississippi.htm](https://www.bls.gov/regions/southeast/news-release/womensearnings_mississippi.htm); *Black Women and the Wage Gap*, NAT'L P'SHIP FOR WOMEN & FAMS. (Oct. 2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/african-american-women-wage-gap.pdf> [https://perma.cc/R6K4-58G7].

reach the section 213 limitation after only \$2,632 and \$2,198 in medical expenses respectively.<sup>214</sup>

While women with lower AGI are able to take the section 213 deduction if they meet the 7.5% threshold and, as shown, some do, an even better way to help them is to have these expenses appear above the line and either not subject to a 7.5% threshold or lower the threshold for certain taxpayers.<sup>215</sup> Even better is to save them from paying for the travel to begin with—particularly as many likely would charge it to their credit cards because they may not have emergency savings. If they are employees for companies that do not yet offer abortion-related (and other medical-related) travel benefits, then perhaps we should incentivize the employer to expand its coverage to include travel for medical care, including abortion-related travel. A nudge from the government in the form of certainty could help and bring equity to a situation where it is lacking.

Benefits plans that allow abortion-related travel are much more beneficial to the employee. The best case scenario is when employers cover the costs. But some employers offer other vehicles where an employee contributes to a fund on a tax-advantaged basis. If the employee has a health spending account (HSA or FSA), the employee contributes pre-tax funds into that account, and that money can be used to pay for abortion-related travel such as lodging and transportation, so long as the money is used on “qualified medical expenses.”<sup>216</sup> While companies that provide for these accounts should be lauded, employee account balances are not always robust enough to cover abortion-related costs. Consider the average woman in Mississippi who makes \$675 per week. She is likely unable to contribute much to an HSA or FSA. When there is a shortfall in these types of accounts, women must cover the remainder of out-of-pocket expenses with post-tax dollars and therefore find themselves in a

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214. This limitation becomes a lot more achievable given the fact that the average employer-sponsored health plan deductible now exceeds \$2,000 for single individuals. In fact, average employee premium contributions and deductibles represent 19.0% of median wages in Mississippi, the highest in the nation. These expenses only increase with small employer plans, which often provide less comprehensive benefits and exclude procedures like abortions. With other common itemized deductions, many women could exceed the standard deduction. *Id.*

215. See discussion *infra* Part VI.C.2.

216. See discussion *supra* Part V.B.1. It should be noted that if an employee uses pre-tax contributions made to an employer-offered HSA or FSA for abortion-related travel, the employee may not also deduct the medical expense using I.R.C. § 213. “For purposes of determining the amount of the deduction under section 213, any payment or distribution out of a health savings account for qualified medical expense shall not be treated as an expense paid for medical care.” I.R.C. § 223(f)(6).

position to potentially use the section 213 deduction for those out-of-pocket expenditures. Arguably, this is the case for all medical care expenses, but not all medical care is under siege by state laws requiring women to go out of state in order to receive it.

All that being said, there is one crucial sentence in section 213 about illegality that the Treasury Regulations flesh out. This sentence can nullify the ability to deduct any of these expenses under section 213 even if all of the other requirements are met: “Amounts expended for illegal operations or treatments are not deductible.”<sup>217</sup> The same language is replicated in the I.R.S. Preparing 2022 Tax Returns Publication.<sup>218</sup> Now that a woman’s right to abortion access is left up to the states, states’ criminalization of abortion could impact a woman’s ability to federally deduct abortion-related expenses, including travel benefits. The fact that a deduction can be disallowed for an expense that is illegal under state law also arises within the employer deduction context.<sup>219</sup>

## 2. Employers and Section 162

I.R.C. section 162(a) states that “ordinary and necessary” business expenses are deductible.<sup>220</sup> Many employer-provided employee benefits

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217. Treas. Reg. § 1.213-1(e)(1)(ii) (2014). The focus will likely be on whether the abortion was legal within the state in which it was performed; however, some states are trying to reach and criminalize leaving their states in order to receive an out-of-state abortion. Additionally, there are individuals applying for religious exemption to abortion laws, which, while beyond the scope of this article, shows there are numerous nuances to these laws. Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. TIMES (July 5, 2023), [https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html?campaign\\_id=9&emc=edit\\_nn\\_20230703&instance\\_id=96608&nl=the-morning&regi\\_id=96902683&segment\\_id=138251&te=1&user\\_id=f03e3e8c4ba4931f55658d5d433729a0](https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html?campaign_id=9&emc=edit_nn_20230703&instance_id=96608&nl=the-morning&regi_id=96902683&segment_id=138251&te=1&user_id=f03e3e8c4ba4931f55658d5d433729a0). How the IRS will deal with all of this is unknown. Notably, abortion-related issues are not the only ones of recent concern with regard to the illegality provision. “[N]ew state laws will create an acute problem for taxpayers seeking to deduct gender-affirming care expenses” as well. Diane Kemker, *When Gender-Affirming Healthcare Becomes Illegal, Will It (Still) Be Tax-Deductible?*, AM. U. J. GENDER, SOC. POL’Y & L. (forthcoming 2023) (manuscript at 3) (on file with author). See also Douglas A. Kahn & Howard Bromberg, *Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should Be Repealed*, 18 FLA. TAX REV. 213, 214 (2016) (explaining the instances in which federal incomes tax rules deny deductions for illegal expenses).

218. See discussion *supra* Part V.B.1; Medical and Dental Expenses, *supra* note 195 (explaining that taxpayers “can include in medical expenses the amount [they] pay for a legal abortion” and further that taxpayers cannot include in medical expenses amounts paid for “illegal operations”).

219. See discussion *infra* Part V.C.

220. I.R.C. § 162(a).

are tax deductible to the employer under section 162.<sup>221</sup> Tax deductions can incentivize an employer to offer an employee benefit because while the benefit costs the employer money, the deduction helps to reduce tax liability—thereby easing the economic pain of providing the benefit.

Tax deductions provide tax preferential treatment for the specific cost of providing these benefits. This can make allowing certain tax deductions controversial depending on the nature of the expense. Deductions are sometimes put in place to incentivize taxpayers to alter their behavior.<sup>222</sup> For example, by allowing tax deductions to employers for 401(k) retirement plan contributions, the hope is that employers will be incentivized to offer and contribute to 401(k) plans. Conversely, disallowing or limiting a deduction can serve to disincentivize an employer. For instance, deductions for golden parachute payments are limited under I.R.C. section 280G to dissuade large windfalls to executives through severance packages.<sup>223</sup>

Even though some deductions are not a hotbed for political controversy, some like abortion-related benefits are. Will Congress and the Department of Treasury permit continued or additional incentives to offer tax advantages to employers who provide abortion-related benefits?

Currently, section 162 permits the deduction of abortion-related travel benefits as employee compensation or as part of an employee benefits plan. As mentioned above, travel for an abortion has been historically considered by the I.R.S. as a medical care expense and therefore receives the same tax-preferred status as other medical care.<sup>224</sup> However, given the highly politically charged topic that this is, it is unsurprising that some senators are sponsoring bills that seek to disallow this deduction. For example, Senator Rubio has sponsored a bill called the No Tax Breaks for Radical Corporate Activism Act of 2023.<sup>225</sup> This bill takes direct aim at disallowing the section 162 deduction for abortion-related travel benefits.<sup>226</sup> “IN GENERAL.—No deduction shall be

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221. Treas. Reg. § 1.162(10) (2014) (specifying that amounts paid for employee benefits such as medical expenses are deductible under § 162(a)).

222. See Victoria J. Haneman, *Dynasty 529 Plans and Structural Inequality*, 61 WASHBURN L.J. 497, 497 (2022).

223. See I.R.C. § 280(G); Michael Doran, *Executive Compensation and Corporate Governance* 9 (Aug. 25, 2022) (unpublished manuscript) (on file with journal).

224. Rev. Rul. 73-201, 1973-1 C.B. 140.

225. S. 187, 118th Cong. § 1 (2023).

226. See S. 187, 118th Cong. § 2 (2023). This bill’s main thrust is actually on eliminating deductions for minors to get gender transition procedures, but it adds abortion-related travel benefits in its first section.

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allowed under this chapter to an employer for any amount paid or incurred to reimburse an employee for, or to otherwise pay, expenses in connection with—“(A) travel for the purpose of obtaining an abortion.”<sup>227</sup> As of this writing, this bill has not gained overwhelming support.

As currently written, section 162(c)(2) disallows a deduction as an ordinary and necessary business expense in two circumstances pertinent to this Article:

No deduction shall be allowed . . . for any payment . . . under any law of the United States, or *under any law of a State* (but only if such State law is generally enforced), which *subjects the payor to a criminal penalty* or the *loss of license or privilege to engage in a trade or business*.<sup>228</sup>

The Treasury Regulations add a noteworthy parenthetical: “(whether or not such penalty or loss is actually imposed upon the taxpayer).”<sup>229</sup> Therefore, the statute and regulations require only that the taxpayer seeking the deduction is *subject* to a criminal penalty or loss of license, not that they actually have been penalized.

Section 162(c)(2) can be broken down into two main parts: illegality (criminal) and loss of privilege to engage in a trade or business. If either of these parts is present, the deduction will be disallowed.

a. Illegality

Some states have anti-abortion legislation in place that would render obtaining an abortion a crime. Those states also consider one who assists a person obtaining abortion-related care as someone who has aided and abetted. “Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.”<sup>230</sup> If an employer offers abortion-related travel benefits, it is possible that it will be considered as criminally aiding and abetting under a state law.<sup>231</sup>

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227. *Id.*

228. I.R.C. § 162(c)(2) (emphasis added). “[U]nder any law of a State” includes Washington D.C. Treas. Reg. § 1.162-18(b)(2) (2022).

229. Treas. Reg. § 1.162-18(b)(1) (2022).

230. Ken Paxton, Tex. Att’y Gen. Op., Advisory on Texas Law Upon Reversal of *Roe v. Wade*, at 2 n.7 (June 24, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf> [<https://perma.cc/GVC7-Z337>] (citing TEX. PENAL CODE art. 1192 (West 1925)).

231. Employers can protect themselves from the potential of being found as “aiding and abetting” by structuring the travel benefits to cover more than abortion, in other words, by providing travel benefits for *any* type of medical service or procedure. See Kellie Mejdrieh, *Legal Risks Loom for Employers Protecting Abortion Access*, LAW360 (Oct. 14, 2022, 6:22 PM),

Some statutes are civil in nature instead. For instance, Texas's SB8 created private *civil* causes of action for aiding and abetting.<sup>232</sup> This particular law does not directly set forth criminal culpability, but it does say that that Texas's preexisting statute that criminalizes abortion was never repealed. Texas Attorney General Ken Paxton confirmed in an advisory opinion that the 1925 never-repealed criminal statute is still law, thereby making obtaining an abortion a crime.<sup>233</sup> Paxton has vowed to "strictly enforce this law."<sup>234</sup> He also stated in the context of abortion providers:

[S]ome prosecutors may choose to immediately pursue criminal prosecutions based on violations of Texas abortion prohibitions predating *Roe* that were never repealed by the Texas Legislature. Although these statutes were unenforceable while *Roe* was on the books, they are still Texas law. Under these pre-*Roe* statutes, abortion providers could be criminally liable for providing abortions starting today.<sup>235</sup>

As such, Texas has both a criminal and civil statute designed to restrict abortion.

One part of the deduction disallowance here is that the employer be subject to a criminal penalty (whether or not it is actually imposed), and the other part is that the law is being *enforced*. The Treasury Regulations elaborate on what it means for I.R.S. purposes to "generally enforce" a state law:

[A] State law shall be considered to be generally enforced unless it is never enforced or the only persons normally charged with violations thereof in the State (or the District of Columbia) enacting the law are infamous or those whose violations are extraordinarily flagrant. For example, a criminal statute of a State shall be considered to be generally enforced unless violations of the statute which are brought to the attention of appropriate

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<https://www.law360.com/articles/1539565/legal-risks-loom-for-employers-protecting-abortion-access?copied=1> [<https://perma.cc/F8SV-X5BC>].

232. S.B. 8, 87th Reg. Sess. (Tex. 2021). *See* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[A] State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.").

233. Paxton, *supra* note 230, at 2 n.7. (discussing that the 1925 criminal statute is still alive and well).

234. *Id.* at 2.

235. *Id.*

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enforcement authorities do not result in any enforcement action in the absence of unusual circumstances.<sup>236</sup>

A literal reading of this regulation seems to set a low bar for enforcement. The law is deemed as generally enforced unless it is “never enforced.” But what does this mean going forward? Time will tell. Florida Governor DeSantis permanently suspended State Attorney Andrew Warren, an elected local prosecutor, for pledging not to prosecute abortion-related cases.<sup>237</sup> Meanwhile, Arizona Governor Hobbs signed an executive order divesting all local prosecutors of the authority to prosecute abortion cases and ordering the Attorney General to cease all abortion-related prosecutions despite Arizona having a strict abortion law.<sup>238</sup> In other words, there is to be no legal enforcement of the Arizona anti-abortion laws.

Nearly one hundred prosecutors in myriad states, including deep southern states, have pledged not to enforce anti-abortion laws.<sup>239</sup>

We are a group of elected prosecutors representing communities across every region of the country. Over the past few years, we have watched with increasing concern as the constitutional right to abortion has been threatened and eroded. Now, the Supreme Court’s decision to end the federally protected constitutional right to abortion first established five decades ago in *Roe v. Wade* — a right that three generations of Americans have come of age relying upon — means that abortions will immediately or soon be banned, and potentially criminalized, in at least half of our nation’s states. As elected prosecutors, ministers of justice, and leaders in our communities, we cannot stand by and allow members of our community to live in fear of the ramifications of this deeply troubling decision.<sup>240</sup>

The pledge outlines reasons why prosecutors will not enforce the laws. It states that prosecutors are “entrusted with immense discretion”

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236. Treas. Reg. § 1.162-18(b)(3) (2022). Generally, this section has to do with illegal bribes and kickbacks; however, it does include a catchall “or other illegal payment.” Treas. Reg. § 1.162-18(b)(1).

237. Lawrence Mower & Emily L. Mahoney, *DeSantis Removes Hillsborough County State Attorney Andrew Warren*, TAMPA BAY TIMES (Aug. 4, 2022), <https://www.tampabay.com/news/florida-politics/2022/08/04/desantis-suspends-hillsborough-county-state-attorney-andrew-warren/>.

238. Governor Katie Hobbs, *State of Arizona Executive Order 2023-11* (June 22, 2023), [https://mcusercontent.com/44a5186aac69c13c570fca36a/files/3a24dd39-a445-622d-efdd-c375f66a21df/Executive\\_Order\\_2023\\_11.pdf](https://mcusercontent.com/44a5186aac69c13c570fca36a/files/3a24dd39-a445-622d-efdd-c375f66a21df/Executive_Order_2023_11.pdf) [<https://perma.cc/9E5Y-FU9G>].

239. *Joint Statement from Elected Prosecutors*, FAIR AND JUST PROSECUTION (May 9, 2023) (on file with author).

240. *Id.*



and an obligation to seek justice through the “furtherance of policies and practices that protect the well-being and safety of all.”<sup>241</sup> Further, the pledge reminds readers that our legal system is overburdened, that prosecutors have limited resources, and therefore, they must use discretion to decide which cases to prosecute.<sup>242</sup> Essentially this means that some women within abortion-ban states would be prosecuted and some not depending on the prosecutor. And it follows that some businesses within those states could deduct while others could be deemed aiding and abetting, and therefore disallowed a deduction.<sup>243</sup>

There are several prosecutors in Texas who have signed the pledge. In Representative Cain’s cease-and-desist letter to the CEO of Lyft, Logan Green, he stated he will be introducing legislation that will “empower district attorneys from throughout the state to prosecute abortion-related crimes . . . when the local district attorney fails or refuses to do so.”<sup>244</sup> If something like that law passes, it would likely satisfy the Treasury Regulations definition of “enforced.” Alternatively, Governor Hobbs’s Executive Order prohibiting enforcement of Arizona abortion laws does not appear to meet the enforcement requirement if the laws are truly not enforced.

State law aiding and abetting provisions that penalize paying for abortions even outside of a state’s borders could trigger section 162(c)(2) and cause a disallowance of the deduction for abortion-related expenses including travel. If there is “general” enforcement of the law, section 162(c)(2) would seem to disallow the deduction for the abortion-related travel benefits whether or not the company has been actually penalized.

Given the inconsistency of prosecution or enforcement even within a particular state, the wording in Treasury Regulation section 1.162-18(b)(3) stating that a law is “generally enforced” “unless it is never enforced” should be replaced with “unless it is inconsistently enforced.” This wording would better serve the goals of the regulation and adjoining statute, which have to do with bribes, kickbacks, and other types of illegal payments. Employee benefits likely were not considered during the drafting of this language.

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241. *Id.* (emphasis omitted).

242. *Id.*

243. See generally Jeessoo Nam, *Just Taxation of Crime: Should the Commission of Crime Change One’s Tax Liability?*, 54 ARIZ. STATE L.J. 1213 (2022) (discussing public policy doctrine and the prohibition of deductions arising from criminal activity).

244. Letter from Briscoe Cain, *supra* note 24, at 3.

Such laws would also have to survive constitutional challenges. Additionally, who at the short-staffed I.R.S. is going to scrutinize this even in an audit? It would be too time consuming to keep up on the nuances of every state's abortion laws and even more so, which in-state jurisdictions are actually enforcing their state laws. It would also be difficult to track down how every dollar of employee compensation is allocated during an employer audit.

If we could get past the enforcement issues, it would still be inherently messy (and inequitable) for employers to have deductions for some of their employees' abortion-related travel benefits but not for others. Employers could technically be denied a deduction even if they have not been sued or prosecuted for aiding and abetting. It will also make it challenging for the I.R.S. to handle.

b. Loss of Privilege to do Business

Section 162(c)(2) states that “[n]o deduction shall be allowed . . . for any payment . . . under any law of a State . . . which subjects the payor to . . . loss of license or privilege to engage in a trade or business.”<sup>245</sup> Even if there is no criminal penalty, a state could conceivably revoke a license or disallow a business from operating within its borders, which could invoke a federal tax deduction disallowance. However, when looking at the parenthetical from the Treasury Regulations that states “whether or not such penalty or loss is actually imposed upon the taxpayer,” it is evident that even if a company is not *actually* prohibited from doing business in the state, the requirement might still be met to disallow the deduction.<sup>246</sup> The result here is ludicrous. How can the I.R.S. or any company manage this? Are threats from a state legislator enough? Of course not.

As previously discussed, Lyft CEO Logan Green drew the ire of Texas State Representative Briscoe Cain when he tweeted that Lyft would cover travel costs for abortions.<sup>247</sup> Representative Cain sent a cease-and-desist letter to Green in which he stated that he will “introduce legislation . . . that bars corporations from doing business in the state of Texas if they . . . reimburse abortion-related expenses—regardless of where the abortion occurs.”<sup>248</sup> While it is unlikely that Texas will prohibit

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245. I.R.C. § 162(c)(2).

246. Treas. Reg. § 1.162-18(b) (2022).

247. See discussion *supra* Part I.

248. Letter from Briscoe Cain, *supra* note 24.

Lyft or any company from operating within its borders, especially as Governor Greg Abbott is trying to lure companies from California to Texas, the threat is an interesting one. Does such a threat put Lyft on notice that if it pays for abortion-related travel benefits, that it could be banned from doing business? If so, then the I.R.S. may conceivably disallow the deduction. As stated repeatedly before, how is the I.R.S. going to enforce this? It is impossible and a waste of valuable resources to try. Perhaps this ambiguous and overreaching language should be removed from the regulations.

C. *Disallowing Deductions under Section 213 and Section 162*

Numerous scholars have pointed out issues with illegality being part of the federal tax deductibility framework.<sup>249</sup> One thought is that the state has decided the appropriate penalty for the illegal act, and therefore, the federal government should not be adding another penalty through disallowing a deduction that would otherwise be permitted.<sup>250</sup> Doing so is constructively imposing a federal penalty on top of a state penalty—and that is excessive and out of place, particularly if the federal government does not also have a law outlawing the practice being penalized.

Consider also that the punishment for the offense should bear a rational relationship to the seriousness of the offense.<sup>251</sup> Yet, there is an arbitrary punishment that is evidenced by denying a deduction for an illegal action—the amount of this penalty or punishment is tagged to the dollar figure represented by the expense applied to the tax bracket of the company. This creates inconsistent results across companies and within the same company if it has employees in different states. “The size of the penalty imposed by denying a deduction is based on conditions no more relevant to determining the seriousness of the crime than is the condition of the weather on sentencing day or the size of the taxpayer’s foot.”<sup>252</sup> In some cases, a state penalty may be insignificant because the state considers the particular crime as minor, yet the loss of a deduction for federal tax purposes could yield a very high, disproportionate number.

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249. See Kahn & Bromberg, *supra* note 217, at 207-20; Parker, *supra* note 200; Nam, *supra* note 243.

250. See Kahn & Bromberg, *supra* note 217, at 215.

251. See *id.* at 218; see also Nam, *supra* note 243, at 1232 (arguing against the retributivist justification for disallowing deductions arising from criminal activity). “An important part of retributivism is proportionality—the proposition that there is a right level of punishment a wrongdoer deserves depending on factors such as the severity of his wrongdoing and his degree of culpability.” *Id.*

252. See *id.* at 219.

Another observation is that the allowance of the deduction would help offset the penalty paid to the state, which is something the federal government can do if it wants to essentially stick it to the state because it disagrees with what the state deems illegal. Perhaps codifying abortion-related travel benefits as being deductible medical expenses with no applicability of section 162(c)(2) disallowances would be the best way to ensure companies continue to provide for women's needs. Such an amendment, however, would not be an easy sell to groups who are not pro-choice.

Some argue that if a state law deems something illegal, then the federal government should not reward or support the illegal behavior.<sup>253</sup> The argument is made both from an economic and policy frustration standpoint. In *Tank Truck Rentals, Inc. v. Commissioner*, the Supreme Court stated that when an expense is illegal under state law, “the frustration of state policy is most complete and direct.”<sup>254</sup> But this brings us to our method of taxing companies: we tax net income.

If a business expense is an ordinary and necessary business expense under section 162, then it should be deductible. We endeavor to tax *net* income, not *gross* income in the United States. Therefore, deducting expenses from gross income is appropriate. When deductions are disallowed for an expense incurred in the production of income that is deemed illegal, then essentially the company is being taxed on its gross income rather than its net income. Perhaps disallowances are appropriate in bribe and kickback situations but not so where employers are assisting employees with benefits. As a society, we want to encourage employers to provide benefits for employees, not make it harder for them to do so.

The existence of the illegality provision in section 162 skews the appropriate base income for tax liability purposes. There should be horizontal equity between businesses. In other words, businesses that offer similar abortion-related travel benefits should be treated similarly from the deduction standpoint.

Currently, abortion-related travel benefits are considered “medical care” under section 213 and other provisions, so it should follow—without interference—that these expenses should be deductible for the employers who provide them.

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253. *But see id.* at 223 (“The deduction for business expenses is not a governmental subsidy. It is an essential element of the measurement of the profits earned by a business . . . whether the expense itself is legal or not.”). *See also* Nam, *supra* note 243, at 1233 (arguing the risk of subverting state legislatures’ intent is not a proper reason for prohibiting deductions).

254. 356 U.S. 30, 35 (1958).

## VI. MOVING FORWARD

Regardless of whether or not one agrees with abortion, or what state laws are enacted impacting access, women will continue to get them, and now the need to travel is even greater than it was before.<sup>255</sup> Companies are offering abortion-related travel benefits, and the deductibility of these benefits is already hotly contested.

The question is how much of a burden we as a country want to allow to be placed on women as *Dobbs* has already created one burden—the uncertainty of managing laws across states. There is no need to compound the burdens that states put on women by removing the ability to take a medical care deduction or use HSA/FSA money, or by disallowing business deductions for employers who offer these benefits.

We need to drill down on the disparate impact on women of color and those in lower socio-economic positions in our society. Better data is needed. It is also imperative to clarify the deductibility of these benefits as soon as possible for many reasons: (1) too much uncertainty for women and for the profusion of companies offering these benefits; and (2) in order to help women of all income levels, we should be nudging companies to offer benefits, not dissuading them by disallowing compensation deductions.

A. *Disparate Impact*

Statistics show that women of color and those in lower socio-economic positions are more greatly impacted by having to travel for abortion access.<sup>256</sup> They have more difficulty affording the costs. As such, we should do what we can to incentivize employers to provide abortion-related benefits including travel benefits to their employees.<sup>257</sup> Removing

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255. Rachel Jones, Marielle Kirstein & Jesse Philbin, *Abortion incidence and service availability in the United States, 2020*, PERSPECTIVES ON SEXUAL & REPROD. HEALTH, 2022: 54:128, 129, 131, <https://www.guttmacher.org/article/2022/11/abortion-incidence-and-service-availability-united-states-2020> (stating that despite 168 restrictive abortion laws passed in states between 2017–2020, abortions saw an eight percent increase during that same period). See Susan Randall, *Health Care Reform and Abortion*, 9 BERKLEY WOMEN'S L.J. 58, 67 (1994).

256. See generally Christine Dehlendorf, Lisa H. Harris & Tracy A. Weitz, *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH 1772 (2013) (discussing causes of abortion disparities and public health approaches to address them). See also Robbins et al., *supra* note 74 (noting the significant impact of state abortion bans on women of color and women of low income).

257. Such benefits should be more inclusive and not require traveling to a different state because some women must travel far distances within their states due to being in rural areas or abortion deserts.

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deductibility of such benefits could disincentivize a majority of employers from offering abortion-related travel benefits.

Additionally, removing abortion-related travel benefits from being deductible or paid for with pre-tax funds from HSAs/FSAs would greatly burden women who struggle to pay for these and other medical-related costs.<sup>258</sup> The effect creates a disparate impact. In order to determine how disparate the impact is, more precise data is needed. More data on who (demographically) uses the section 213 deduction or their HSAs/FSAs would align with President Biden's directive to federal agencies to "identify[] inadequacies in existing Federal data collection programs, policies, and infrastructure across agencies, and strategies for addressing any deficiencies identified."<sup>259</sup> The President noted that:

Many Federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables. This lack of data has cascading effects and impedes efforts to measure and advance equity. A first step to promoting equity in Government action is to gather the data necessary to inform that effort.<sup>260</sup>

Information is power, and the more we have, the better equipped we can be as a society to tackle the issue. We can do better if we can get a more complete understanding as to who uses the deductions and who is unable to benefit from the deductions.

*B. Too Much Uncertainty*

The *Dobbs* decision has created uncertainty in so many ways. Women's rights changed significantly with this decision. States have their own laws with respect to abortion rights, and women across the country will have different experiences. On top of that, women deserve to know how the tax code will treat them with respect to abortion-related benefits, including travel. Section 213's definition of "medical care" requires some

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258. Medical credit cards are another option used by consumers to bridge the cost gap for care. Medical credit cards are loans designed to help patients pay their medical bills. See Press Release, Consumer Financial Protection Bureau, CFPB Report Highlights Costly Credit Cards and Loans Pushed on Patients (May 4, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-highlights-costly-credit-cards-and-loans-pushed-on-patients/> [<https://perma.cc/68BP-CWGZ>]. However, the Consumer Financial Protection Bureau has found that these loans have interest rates as high as 26.99%, far higher than some traditional credit cards. *Id.* Patients that used these cards paid \$1 billion in deferred interest on almost \$23 billion of healthcare expenses. *Id.* Further, healthcare providers may not fully explain the risks to patients before offering a medical credit card because promise of speedy payments disincentivizes disclosure. See *id.*

259. Exec. Order No. 13985, 86 Fed. Reg. 14, 7009 (Jan. 20, 2021).

260. *Id.* at 7011.

current clarity. Notably, the I.R.S. provided guidance for the 2022 taxable year stating that taxpayers may include expenses for a legal abortion in calculating the taxpayer's section 213 deduction.<sup>261</sup> Thus, it would appear that for many women across the country, abortion-related expenses (travel and otherwise) are covered in the medical care definition for now. Unfortunately, we do not have this level of certainty for all women due to the lingering illegality provision.

If nothing changes, the deduction could be disallowed for women who live in states where abortion is criminalized or subject to penalty regardless of where it is obtained due to the illegality provision in section 213. These are the very women that employers are trying to help with abortion-related travel benefits. Inconsistent federal tax treatment for U.S. citizens who receive similar medical procedures is inequitable. It is also economically inequitable to treat women from one state differently from another simply because they reside in a state where abortion is unavailable to them. The negative financial impact of losing a deduction is a stressor that women do not need.

Companies desiring to help women with abortion-related travel benefits should have clarity as to whether these benefits will be tax deductible under section 162—particularly as so many may choose to not offer benefits due to the uncertainty.<sup>262</sup> The illegality provision puts companies unnecessarily in flux due in part to aiding and abetting provisions. Another insertion of uncertainty is that parenthetical language in Treasury Regulation section 1.162-18(b) regarding loss of privilege to do business: “whether or not such penalty or loss is actually imposed upon the taxpayer.” This over-inclusive language is ridiculous.<sup>263</sup> It should be eliminated if not for all purposes, at least for these purposes. Additionally, amending the language in the Treasury Regulations, as mentioned *supra*, to eliminate the use of the words “never enforced” when defining enforcement, would solve a tension created in applying that language to states that have inconsistent enforcement within their borders. “The longer the uncertainty lingers, the more likely that companies stay on the sidelines.”<sup>264</sup>

Removing the illegality provision from section 213 and section 162 is an option (or at least removing abortion-related situations from its applicability). That would reduce the uncertainty but would likely be a

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261. Medical and Dental Expenses, *supra* note 195.

262. See Green, *supra* note 133.

263. See discussion *supra* Part V.B.2.b.

264. See Green, *supra* note 133.

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tough sell to religious organizations and legislators from states that have laws criminalizing abortion. From looking at Senator Rubio's bill No Tax Breaks for Radical Corporate Activism Act of 2023, we see that he is on the other side of this.<sup>265</sup> He would like to see clarity in abortion-related travel benefits' deductibility under section 162 by a codified disallowance.

Both sides of this topic see the need for certainty, but of course, both sides seek opposite outcomes.

*C. Potential Tax Changes*

## 1. Deductions

Generally, deductions are not as beneficial to lower income individuals as they are to higher income individuals. The value of a deduction increases as we move up the "income ladder."<sup>266</sup> If we consider how high the standard deduction is currently, fewer people are itemizing deductions, and therefore, fewer people are going to utilize the section 213 deduction assuming they meet the 7.5% threshold (although, they could itemize in years in which they meet the threshold).

Consider also that the housing market flourished during the pandemic and home mortgage interest rates significantly increased.<sup>267</sup> As a result, we may see a pattern of people starting to itemize deductions again—since home buyers can itemize their home mortgage interest. It is unlikely that these are the lower income individuals who do not benefit as much from deductions. Still, it opens the door to more individuals who may have the opportunity to use the section 213 deduction.

Here is where employer-provided medical-care travel benefits, including abortion-related travel benefits, can be most helpful to employees. So long as the benefits are structured so that they are tax-free to the recipient employee, the individual does not recognize income, and the section 213 deduction becomes irrelevant. Clearly, employers providing these benefits help more lower income people than the section 213 deduction does because there is no out-of-pocket cost to the individual and deductions do not help the lower-income echelon generally. As such, perhaps this *is* a place where the I.R.S. should nudge

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265. S. 187, 118th Cong. § 2 (Fla. 2023).

266. Parker, *supra* note 200, at 363.

267. See Rae Beck & Michele Petry, *How Did COVID Affect the Housing Market?*, BANKRATE (Aug. 23, 2023), <https://www.bankrate.com/real-estate/covid-impact-on-the-housing-market/>.



employers to provide a specific benefit. The disparate treatment of women based on income is especially noticeable when it comes to tax deductible abortion-related expenses.

And as Garland noted, “[*Dobbs*] will be greatly disproportionate in its effect—with the greatest burdens felt by people of color and those of limited financial means.”<sup>268</sup>

If Congress and the Department of Treasury codify section 162 deductibility for abortion-related travel benefits thereby eliminating uncertainty, companies may be incentivized to provide this assistance for their employees. When companies pay, employees do not, and that is even better than employees paying and getting a deduction.

As previously noted, traveling to get medical care such as an abortion is costly and stress inducing. The least we can do as a country is lessen that financial blow by ensuring that deductions are available to those who can benefit from the deduction and to employers who generously provide abortion-related travel benefits.

## 2. Carving out Travel

As a country, we should seek to assist those traveling to access medical care, abortion-related and otherwise. Costs associated with travel for medical care are included in computing the 7.5% medical expense deduction threshold under section 213.<sup>269</sup> If the threshold is already met by other medical expenses, then these are deductible. As already mentioned, lower income individuals do not benefit from deductions as most take the standard deduction.<sup>270</sup>

To help more lower-income individuals, we could carve a certain amount of travel-related medical care costs out of the 7.5% computation and allow the deduction of this carve out above the line. For example, travel-related expenses capped at a reasonable dollar amount could be deductible above the line and any excess could go into the 7.5% computation.

There is precedent for such an arrangement in the current I.R.S. section 62, which separates educator expenses from traditional trade or business expenses, allowing teachers to deduct up to \$250 of necessary

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268. Press Release, Dep’t of Just., *supra* note 56.

269. *See* discussion *supra* Part V.B.1.

270. *See* discussion *supra* Part VI.C.1.

classroom expenditures above the line.<sup>271</sup> Certain above-the-line deductions can also “pour over” into other deductions and credits. For example, teachers can use the educator expenses deduction for professional training courses; however, they may be able to use the Lifetime Learning credit for amounts in excess of the \$300 cap.<sup>272</sup>

Health savings account contributions work in an analogous manner. Such contributions lower a taxpayer’s pre-tax income, yet these amounts are removed from the section 213 pool when healthcare is eventually incurred. Still, such contributions do not actually hinder the usage of section 213 and may in fact make the 7.5% floor more accessible as it lowers AGI for the purposes of calculating the limitation.

### 3. Harmonizing Deductible Travel Costs

The I.R.S. could harmonize the medical-related travel costs with business travel costs. This means allowing meal expenditures—at least at the fifty percent rate. It also means increasing or eliminating the lodging cap to align better with allowed lodging deductions for businesses. The fifty dollar per night cap on lodging is embarrassingly low and out-of-touch with reality.<sup>273</sup>

Perhaps even more important is harmonizing the medical-related travel mileage amount—twenty-two cents per mile—with the business mileage rate of 65.5 cents per mile. The rationale behind the difference in treatment is embodied in the way the I.R.C. classifies the vehicle’s use. When a vehicle is used for business purposes, the mileage rate strives to estimate both the costs of owning and operating the vehicle.<sup>274</sup> Whereas for other permissible deductions for vehicular use, such as moving, the

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271. I.R.C. § 62(a)(2)(D). A similar dynamic exists with performing artists who are allowed to deduct expenses paid or incurred in connection with their performances. See I.R.C. § 62(a)(2)(B).

272. See *Lifetime Learning Credit*, I.R.S., <https://www.irs.gov/credits-deductions/individuals/lle> (last visited Oct. 31, 2023) [<https://perma.cc/N89E-G8KK>].

273. Clearly these numbers are not designed to make someone whole because where do you stay for \$50 per night? This allowance has plenty of room to move higher and still be well away from being lavish or extravagant. *But see* Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 866–68 (1979) (noting that taxpayers may have mixed motives when travelling for medical care, and that wealthier taxpayers buy more amenities, e.g., luxurious, private hospital rooms, when receiving medical care).

274. Letter from George J. Blaine, Assoc. Chief Couns., I.R.S., to Hon. Bill Nelson, U.S. Sen. from Florida (May 3, 2011) (explaining that the costs to own and operate would typically be deductible on their own). Examples of costs to own would be “purchase price, lease payments, and depreciation.” *Id.* Costs to operate would be “fuel and repairs.” *Id.*

I.R.C. only seeks to estimate the operating expenses, not the ownership expenses.<sup>275</sup>

This stance appears to have no reasoning or precedent. An individual traveling for medical treatment incurs the same ownership and operation expenses as a business owner. And, medical travel is limited in scope, less prone to abuse, and already restricted by the current 7.5% AGI limitation.

Furthermore, this estimate of operating a motor vehicle is inconsistent with the realities of modern times. At the time of the release of the *Dobbs* opinion, the driver of an average new vehicle was spending twenty cents per mile on gasoline alone.<sup>276</sup> Operators of older and less efficient vehicles likely exceeded the twenty-two cent allowance before even considering maintenance, repairs, insurance, inspections, tolls, and parking.<sup>277</sup> In 2022, the American Automobile Association (AAA) estimated the average cost of only operating a vehicle at approximately seventy to seventy-six cents per mile.<sup>278</sup> In short, the current rate is not even accomplishing the already limited scope proposed by the I.R.S.

Regardless of the “owning versus operating” expense distinction, the estimates could be harmonized at least in part. Twenty-two cents per mile is paltry and is not a good estimate of the actual cost of operating a vehicle.

The current business mileage rate of 65.5 cents a mile is not particularly generous either. The same AAA study estimated the average cost of ownership and operation at seventy-two cents per mile.<sup>279</sup> Allowing this 65.5 cent mileage rate for medical patients undergoing significant procedures is a reasonable measure that would likely enjoy bipartisan support so long as it was for *all* medical travel (not exclusively abortion-related travel).

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275. *Id.*

276. *U.S. All Grades All Formulations Retail Gasoline Prices*, U.S. ENERGY INFO. ADMIN. (Aug. 21, 2023), [https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EMM\\_EPM0\\_PTE\\_NUS\\_DPG&f=M](https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EMM_EPM0_PTE_NUS_DPG&f=M) [<https://perma.cc/PW59-ED3G>]; *The 2022 EPA Automotive Trends Report*, U.S. ENV'T PROT. AGENCY (Dec. 2022), <https://www.epa.gov/automotive-trends/highlights-automotive-trends-report> [<https://perma.cc/Z3GC-H88P>].

277. *Local Standards: Transportation*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/local-standards-transportation> (last visited Aug. 25, 2023) [<https://perma.cc/XR4A-AW3T>].

278. *Your Driving Costs*, AMERICAN AUTO. ASS'N (2022), <https://newsroom.aaa.com/wp-content/uploads/2022/08/2022-YourDrivingCosts-FactSheet-7-1.pdf> [<https://perma.cc/L9UR-YU8M>].

279. *Id.* (assuming 15,000 miles driven in the year).

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## VII. CONCLUSION

It is a historic time in employee benefits. Supreme Court decisions and legislation have led to companies creating employee benefits in the past, but not like the outpouring of companies that decided to offer abortion-related travel benefits. The *Dobbs* decision created an upheaval in this country. But it also brought awareness to the plight of women who must travel for abortion access.

As states and municipalities enact significantly restrictive, anti-abortion legislation, women will be forced to travel more to obtain abortion access. Some will have to travel great distances. Women of color and those with lower incomes will be impacted the most.

Employers want to offer abortion-related travel benefits, and many are! This verve should be commended and rewarded. As such, we need to provide employers and their employees with certainty that these benefits will continue to be protected and deductible for federal tax purposes.

APPENDIX A<sup>280</sup>

The following table contains a selection of companies that offer a variety of abortion-related travel benefits.

<i>Company</i>	<i>Policy</i>	<i># of Employees</i>
Alloy, Inc.	Alloy committed to covering fifty percent of legal expenses up to \$5,000 for legal issues, up to \$1,500 toward out of state travel, and up to \$1,500 for out-of-pocket medical expenses related to anti-abortion policies.	250+
Amazon, Inc.	Amazon announced that it would cover travel expenses for abortion-related travel for employees and dependents eligible for health care insurance, up to \$4,000 annually. The care must not be available within 100 miles of the employee's home. Amazon offers up to \$10,000 annually for travel reimbursements for life-	1,541,000

280. This table is based on the author's review of company abortion benefits and employment information found online, on file with the journal.

	threatening conditions. Notably, the coverage does not include contractors and part-time/temporary employees.	
Coty (parent company of brands including CoverGirl, Kylie Cosmetics, Rimmel London, and Sally Hansen)	Coty announced that its U.S.-based employees in states with restrictions or bans can be reimbursed up to \$10,000 for transportation and accommodation, along with additional time off.	11,350
Chobani	Chobani covers costs for travel out of state or more than 100 miles to receive an abortion for employee or their dependents. These costs include lodging, transportation, and childcare. Chobani will also cover costs for one caregiver.	2,200
Comcast, Inc.	Comcast announced that it will cover \$4,000 per trip in healthcare travel including abortion services, up to three times a year. This benefit has an annual cap of \$10,000.	186,000
Dick's Sporting Goods, Inc.	Dick's announced that it would reimburse up to \$4,000 in travel expenses for employees, their spouse, or their dependents enrolled in their company's health plan who live in states where abortion access is restricted. The benefit will also cover one support person's travel expenses.	52,800

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DoorDash, Inc.	DoorDash announced that it will cover out-of-state travel costs for employees and dependents enrolled in its health plans for abortion-related care. Employees can backdate their travel costs as the company rolls out the benefit. This benefit excludes independent contractors, which includes its delivery drivers.	16,800
Favor, Inc.	Favor (formerly The Pill Club) updated its pregnancy loss leave policy to explicitly include leave for abortion care, giving all abortion patients a minimum of ten days to also account for travel (more based on gestational age), as well as \$3,000 for travel expenses. The policy includes eight to sixteen weeks of paid leave for the loss of a pregnancy.	310
Google LLC (subsidiary of Alphabet Inc.)	Google announced that its U.S. benefits plan covers “out-of-state medical procedures that are not available where an employee lives and works.” In addition, Google workers can “apply for relocation without justification, and those overseeing this process will be aware of the situation.” Google also will “keep working to make information on reproductive healthcare accessible across [its] products and continue [its] work to protect user privacy.”	190,234
J.P. Morgan Chase & Co.	J.P. Morgan Chase will cover travel costs for U.S.-based employees that need to travel more than fifty miles for abortion care.	293,723
Levi Strauss & Co.	Levi Strauss issued a statement offering employees who participate in the company’s health plans a travel benefit to access abortion care out of state; part-time employees can be reimbursed.	~18,000

Lyft, Inc.	Lyft, which previously said it would cover travel expenses for abortions, created a Legal Defense Fund to cover 100% of legal fees for drivers sued under Texas's unconstitutional ban.	4,419
Match Group, Inc.	In 2021, Match Group CEO Shar Dubey said she is setting up a fund to help any of the company's Texas workers who may need to travel out of state for the procedure.	2,720
Meta Platforms, Inc.	Meta shared its intention to reimburse employees who have to travel for reproductive health services. The company added the caveat that it will offer this benefit, "to the extent permitted by the law" and that they are assessing how best to provide the benefit given the legal complexities.	86,482
Netflix	Netflix announced it will cover up to \$10,000 for travel and medical care for abortions, but also cancer treatments, organ transplants, and gender affirming care if the employee is enrolled in its healthcare plan.	12,800
Revlon, Inc.	Revlon announced that their health plan covers abortions, and that they intended to create a new benefit "to include up to \$2,000 for travel and lodging costs to support those covered who live in states that will not provide access to certain services."	5,700
Uber Technologies, Inc.	Uber announced that its health plan covered abortion care and associated travel expenses for employees. It previously announced it would cover legal fees for its drivers who are sued under Oklahoma's restrictive abortion law. Like Lyft, Uber largely does not extend the health benefit to their gig workers, who are typically classified as	32,800

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	independent contractors.	
Ulta Beauty, Inc.	Ulta announced that it would immediately extend their existing health plan to include “travel expense assistance for eligible reproductive health services where access to care is restricted” for all employees, including retail associates.	40,000+
Vox Media	Vox announced that it will reimburse employees for abortion travel expenses up to \$1,500 if the care is unavailable within 100 miles of the employee’s residence. Vox also extended its pregnancy loss leave as a benefit for its employees. This benefit covers employees that had an abortion.	~1,900
The Walt Disney Company	Disney announced it “remain[s] committed to removing barriers and providing comprehensive access to quality and affordable care ... no matter where they live.” It announced a benefit including “affordable coverage for receiving similar levels of care in another location.”	223,000