Compliance Update for July 2022

July 13, 2022

Presented by:
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Agenda

- Transparency in Coverage – What is a MRF and What Do You Do With It?
- Mental Health Hotline – New for 2022
- 5500 Deadline
- Medicare – New Recording Requirements
- Dobbs v. Jackson
- Questions

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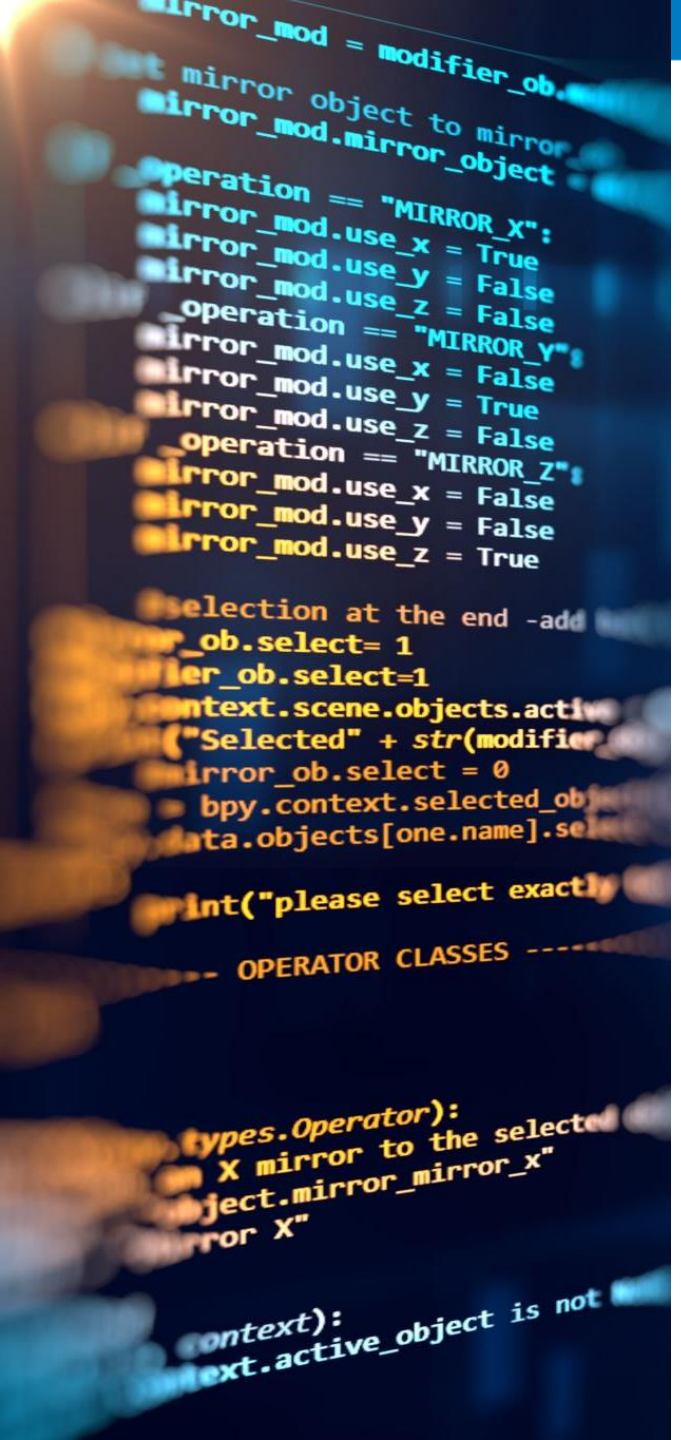

Transparency In Coverage

What Is A Machine-Readable File?

The machine-readable files are formatted to allow researchers, regulators, and application developers to access and analyze data more easily.

A machine-readable file as defined at 45 CFR 180.20 means a digital representation of data or information in a file that can be imported or read into a computer system for further processing.

Examples of machine-readable formats include, but are not limited to, .XML, .JSON and .CSV formats.

To ensure data integrity, all files must conform to a non-proprietary, open standard format, like JSON, XML, or YAML, and be made available via HTTPS. Dates, file names, and file type names need to follow set standards to meet mandate requirements. The Centers for Medicare & Medicaid Services has a technical implementation guide which can be found here: https://github.com/CMSgov/price-transparency-guide.

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This Is A Machine-Readable File

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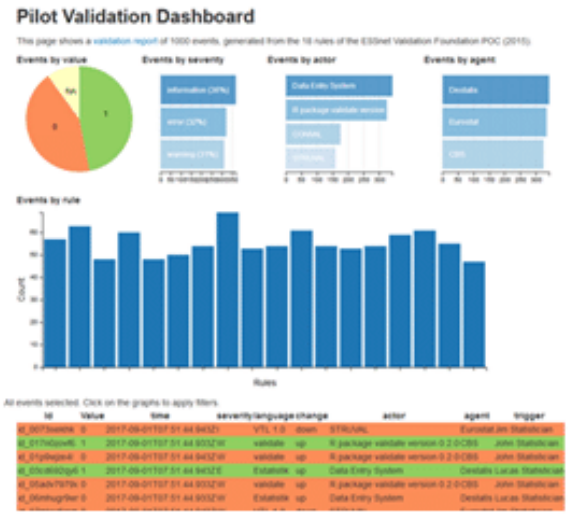
What Does a Machine-Readable File Look Like?

Machine readable


```
[
  {
    "rule": {
      "expression": "check(DS.hours_worked between 1 and 80)",
      "severity": "warning"
    },
    "event": {
      "time": "2017-09-01T07:51:44.933Z",
      "actor": "Eurostat"
    },
    "data": {},
    "value": "0" // failed
  },
  {
    "rule": {
      "expression": "cost + profit == turnover",
      "severity": "error"
    },
    "event": {
      "time": "2017-09-01T07:51:46.933Z",
      "actor": "Eurostat"
    },
    "data": {},
    "value": "1" // passed
  },
  ...
  ...
  ...
]
```


Human readable



markdown

html pdf word

Who is Responsible for MRFs?

- A carrier will be responsible for any MRF failure as long as it is required in writing to ensure a plan's compliance.
- Self-funded plans also can contract to have a third party provide and update MRF, but the TiC rules do not shift liability to a third party for self-insured plan failures.
  - Self funded plans should carefully review indemnification provisions in all relevant vendor service agreements. Most carriers and TPAs have already contacted employer plan sponsors offering to assist with preparing, updating, and hosting the MRF.
  - Employers should be carefully reviewing their service agreements and related contracts to make certain they include specific provisions dealing with all aspects of the required disclosures.

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What Needs to be Included in the Machine-Readable Files?

- The first MRF must disclose a plan's negotiated rates for covered items and services for all in network providers.
- The second MRF must show the historical payments and billed charges from out-of-network providers. This file should include at least 20 historical entries to help protect individual participant privacy.
- The MRF must include:
  - For each group medical plan option, either the insurer Health Insurance Oversight (HIOS) identifier or, if none, the employer identification number (EIN).
  - A billing code (e.g., Current Procedural Terminology (CPT) code, Healthcare Common Procedure Coding System (HCPCS) code, Diagnosis-related Group (DRG) code, National Drug Code (NDC), or any other common payer identifier, as well as a plain language description for each billing code.

Plan Sponsor Responsibilities

Fully Insured Plan Designs – Employers sponsoring fully insured medical plan options can rely on the insurance carrier to satisfy this requirement. The rules specifically say that if the employer ***has something in writing from the carrier*** indicating that the carrier is posting the information, then the employer does not need to take further action.

Self-Insured Plan Designs – Employers sponsoring self-insured medical plans should be prepared to post a link on their own company public-facing website to ensure the file is publicly available, rather than on an internal site or benefits portal where it is available solely to the employees or plan participants. Currently, there is no formal guidance on how or where exactly the link should be displayed. The link does not need to be front and center, but it should not be intentionally hard to find. Along with the link, some carriers are recommending overview verbiage, for example:
This link leads to the machine-readable files that are made available in response to the federal Transparency in Coverage Rule and includes negotiated service rates and out-of-network allowed amounts between health plans and healthcare providers. The machine-readable files are formatted to allow researchers, regulators, and application developers to access and analyze data more easily.

Plan Sponsor Responsibilities (cont'd)

Fully insured plans: A fully insured group health plan will satisfy the MRF requirements if the issuer offering the coverage is required to provide the information pursuant to a written agreement between the plan and issuer. Accordingly, if a plan sponsor and an issuer enter into a written agreement under which the issuer agrees to provide the information required and the issuer fails to provide full or timely information, then the issuer, not the plan, has violated the TiC Final Rules' disclosure requirements.

Self-insured plans: A self-insured group health may satisfy the MRF requirements by entering into a written agreement under which another party (such as a TPA or health care claims clearinghouse) will make public the required information. The plan must monitor the other party to ensure the entity is providing the required disclosures. It is ultimately the responsibility of the plan to ensure that the third party provides the required information. Unfortunately, while the TiC Final Rules suggest that plan sponsors using the nonduplication rule may be required to provide a link on their websites to the location where the MRFs are publicly available, this is unclear, and we await further guidance.

For level-funded plans: Unless the issuer specifically agrees to satisfying the requirements, the employer will have the responsibility and will need to post the link on their website.

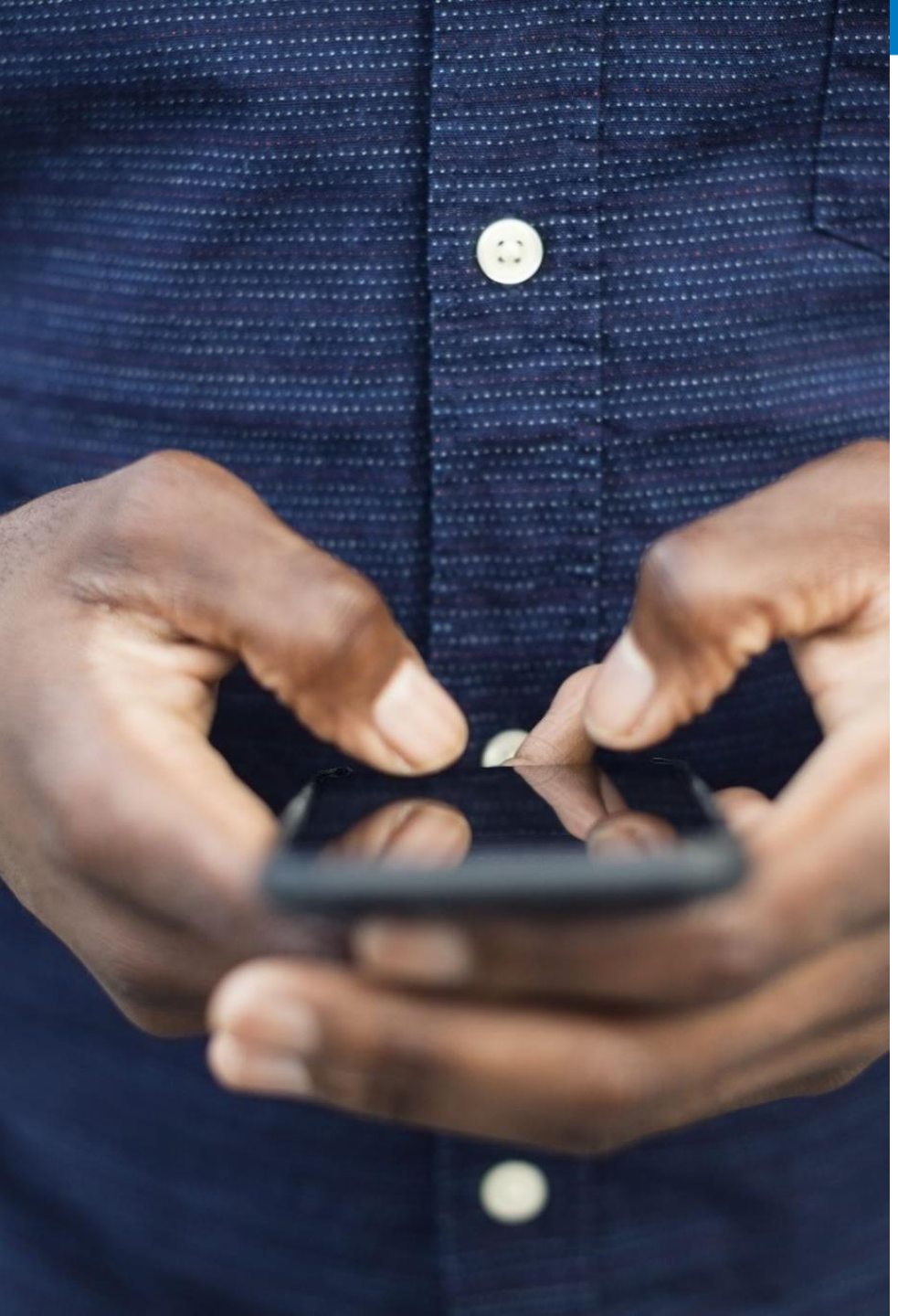
Maintenance and Availability Requirements for Machine-Readable Files

Creating, hosting, and linking to the machine-readable files is just one part of the overall requirements.

- The machine-readable files must be updated monthly and clearly indicate the date the file was last updated.
- Must be available in a form and manner specified in any guidance issued by the IRS, DOL, or CMS.

Next Steps

Employers should work with their brokers and consultants to confirm with their carriers and TPAs that they are able to meet the requirements and to understand the approach their carriers and TPAs are taking.



New! Mental Health Hotline

- Federally mandated crisis number “988” will be available to all landline and cell phone users beginning July 16.
- Callers who are suicidal or experiencing a mental health crisis will be routed to the National Suicide Prevention Lifeline and connected to a crisis counselor.
- Fact Sheet

5500 Deadline

- File Form 5500 to report information on the qualification of the plan, its financial condition, investments and the operations of the plan. Must file electronically through EFAST2.
- Due date: **the last day of the seventh month after the plan year ends** (July 31 for a calendar year plan).
- July 31 is the deadline for sponsors of calendar-year benefit plans to file Form 5500, Annual Return/Report of Employee Benefit Plan, with the IRS. Plan sponsors can request an extension to October 15 by filing Form 5558, Application for Extension of Time to File Certain Employee Plan Returns.
- Form 5500 and related instructions or, for smaller filers generally with fewer than 100 participants, Form 5500-SF (short form) and instructions, are used to report the financial conditions, investments and operations of benefit plans. Annual forms are filed for:
  - **Retirement and savings plans**, such as defined benefit pension plans and 401(k)s or similar defined contribution, profit-sharing and stock bonus plans.
  - **Health and welfare plans**, such as medical, dental, life insurance and disability benefits plans.
  - Typically, the form is due on the last day of the seventh month after the plan year ends—July 31 for calendar-year plans—with an optional two-and-a-half-month extension.

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5500 Penalties

- Overlapping penalties for failing to timely file Form 5500 by July 31 (or, with a Form 5558 extension, by Oct. 15) are imposed by the Department of Labor (DOL) and the IRS, the agencies that use the information related to the annual reports.
- For penalties assessed after January 15, 2021:
    - **The DOL per day penalty** for failure to properly file Form 5500 has increased to $2,259 from $2,233, with no maximum.
    - **The IRS can also assess a penalty** for late filers up to $250 a day, up to a maximum penalty of $150,000 per plan year.
- "Plan sponsors with late 5500s should file through the DOL's Delinquent Filer Voluntary Compliance Program (DFVCP)," advised Ary Rosenbaum of the Rosenbaum Law Firm in Garden City, N.Y.
- "The DOL penalties under DFVCP are reduced from $2,259 per day to $10 per day," he noted. In addition:
    - **Penalties for small plans** (generally under 100 participants) are capped at $750 for a single late Form 5500 and $1,500 for multiple years per plan.
    - **Penalties for large plans** (generally 100 employees and over) are capped at $2,000 for a single late Form 5500 and $4,000 for multiple years per plan.

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Medicare New Recording Requirements

- Agents and brokers will need to record all sales calls with beneficiaries in their entirety, including the enrollment process.
- **The recordings must be retained in a HIPAA compliant manner for 10 years**.
- This will apply to new and existing clients.
- Starting October 1, TPMOs will have to record all marketing calls with clients and prospects.

Medicare New Recording Requirements (cont'd)

- CMS published a final ruling on 5/9/2022 announcing policy and regulatory revisions for Contract Year 2023. In this publication, **ONE VERY IMPORTANT CHANGE** states that field agents must record all calls with beneficiaries in their entirety, including the enrollment process. Many believe that this is in response to the barrage of deceiving TV commercials that have been airing recently. The full article from the Federal Register can be found here.
- The following is a summary of the changes published:
  - All field agents must begin recording all phone calls with beneficiaries
  - The disclaimer "I/We do not offer every plan available in your area. Please contact medicare.gov or 1-800-MEDICARE to get information on all your options" must be conveyed as follows:
    1. Verbally conveyed within the first minute of a sales phone call
    2. Electronically conveyed when communicating with a beneficiary through email, online chat, or other electronic means of communication
    3. Prominently displayed on third-party marketing organization websites
    4. Included in any third-party marketing organization marketing materials, including print materials and television advertisements

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Dobbs v. Jackson–Facts

- Given Roe v. Wade being overturned, and power given to the states, plan sponsors should review their plan documents to assess current coverage and discuss potential coverage options with ERISA counsel and with vendors (including insurers, stop-loss carriers and administrators, as applicable), and should monitor future developments.
- Plan sponsors and administrators should consult ERISA counsel to familiarize themselves with the applicability of relevant state laws, tax law implications of travel benefits, and the unique risks and opportunities that their plans may face.

Each plan's situation will depend on its particular facts and circumstances, including the state law at hand.

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Dobbs v. Jackson–Facts, (cont'd)

- **Fully Insured Plans** — Coverage of reproductive services, such as abortion, under a fully insured plan largely depends on state law (generally based on the issued policy's governing state law), which varies by state, with some now prohibiting or restricting plans from covering abortion services (to different degrees and with different consequences) and others requiring group health plans to maintain coverage for these services.
  - Careful inventory and analysis of state law is vital to understanding which medical services a fully insured plan may or may not cover, and whether and when such coverage might lapse.
- **Self-Insured Plans** — Self-insured plans are not subject to state insurance mandates because they are entitled to ERISA preemption. Therefore, unlike fully insured plans, self-insured plans have more autonomy regarding design (including control over coverage); and, because there is no federal prohibition on plan coverage of abortion, self-insured plans can generally choose to offer (or not offer) coverage for abortion services or to limit the coverage to specific circumstances.
  - ERISA preemption has generally been interpreted to apply only to civil actions, and not as a shield against criminal liability under state laws.
  - State laws that potentially impose criminal liability relating to abortion must still be considered and discussed specifically with legal counsel, as self-funded plans and the employers that sponsor them may remain exposed to state laws in certain instances (particularly as enforcement and penalties under new state laws criminalizing abortion remain uncertain).

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Dobbs v. Jackson – Medical Travel Reimbursements

- Avenues for offering travel reimbursements to enable employees to seek medical care for abortion services in states where it would still be accessible and legal.
- The group health plan's coverage of abortion may remain the same, but because access might be limited by where a participant resides, a travel benefit would allow all plan participants to access the same plan coverage.
    - By offering this travel benefit through the plan itself, a participant might be able to receive the reimbursement on a tax-free basis, at least on a federal level, up to certain limits.
- **Self-insured plans** could provide for medical transportation if certain services are not available where a participant lives and these plans have a great deal of flexibility in crafting such a policy, subject to tax considerations.

Dobbs v. Jackson – Medical Travel Reimbursements (cont'd)

- **Fully insured plans** have been initiating similar discussions with their vendors and counsel to discuss expanding travel coverage.
  - Fully insured benefits are less flexible because they are set by state-level requirements and, even if desired by the plan sponsor, an insurance carrier may be unwilling to administer any such travel benefit in light of *Dobbs*.
  - Employers that utilize professional employer organizations (PEOs) may find themselves with less flexibility than if they would sponsor a plan on their own.
  - If a travel benefit were offered, it would not change the medical coverage available under the plan.
  - To the extent not provided under or in connection with a group health plan, an employer may opt to provide a medical travel reimbursement program or stipend entirely outside, and independent from, the plan (or by vendors separate from the plan, limited to plan participants); however, this may raise a number of administrative issues.
  - Offering a travel reimbursement program "outside of the plan" (for example, through a health reimbursement arrangement (HRA) available even to those employees not eligible for the employer's medical plan) could create an "employer payment plan," which is subject to certain Affordable Care Act concerns and may result in significant financial penalties to the employer if it is not "integrated with" a compliant group health plan.

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Dobbs v. Jackson – Medical Travel Reimbursements (cont'd)

If an employer were to provide medical travel reimbursements, it should consider the implications noted above and a number of other considerations, including the following:

- **Long-Arm State Statutes —** Certain states (e.g., Texas, Oklahoma) have enacted laws barring the aiding and abetting of the performance or inducement of an abortion, which will become effective now that *Roe* is overturned.
  - If interpreted broadly, these statutes could expose plan sponsors and insurers to criminal liability, in some instances, as a result of paying for or reimbursing the costs of abortion services through insurance or otherwise, including, potentially, by offering a travel stipend.
  - The potential extraterritorial application of such state laws with long-arm abortion statutes is yet to be decided. Do you want your client to the first in Court?
- **Mental Health Parity Considerations —** Under the Mental Health Parity and Addiction Equity Act (MHPAEA), federal law generally prohibits group health plans that provide mental health and substance use disorder benefits from imposing less favorable benefit limitations on those benefits than on medical/surgical coverage.
  - As a result, any plan changes, including any expanded coverage and/or travel reimbursement offerings, should be designed to not run afoul of MHPAEA requirements (which may occur if, for instance, medical travel reimbursements through a plan are limited to abortion services).
  - The Department of Labor has actively been auditing plans for MHPAEA compliance, so plans should proceed cautiously in this respect.

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Dobbs v. Jackson – Medical Travel Reimbursements (cont'd)

- If medical travel reimbursements are provided for, it would likely be best practice for the policy, program or offering to:
  1. Be facially neutral as to eligible participants and/or medical services, and
  2. Establish a fixed geographic limit outside of which otherwise inaccessible services may be eligible for transportation reimbursement.

  For instance, the policy could be available to employees otherwise eligible for health benefits, could cover transportation for medical services and procedures otherwise covered by the health plan, and could apply if the service is not otherwise accessible within a certain distance (e.g., 100 miles) of the employee's residence. However, any such policy, program or offering is not without risk, and employers should consult with their brokers, administrators, carriers and ERISA counsel to weigh such risks and to discuss the best path forward given the particular facts and circumstances.

Dobbs v. Jackson – HIPAA Concerns

- The U.S. Supreme Court's ruling overturning *Roe v. Wade* has led to new questions about privacy protections for health information about an individual's use of reproductive services such as abortion.
- Employer plans that cover these services, and that are now adding a travel benefit for employees to access this care, might create a paper trail of claims information or reimbursement records.
- Some states with laws to ban or criminalize abortion may seek this information to bring actions against any entity involved in assisting to obtain an abortion, which could include employers as well as providers.
- Federal privacy protections have long restricted the use and disclosure of personal health information to and by employer-sponsored plans, but these protections are not fool proof and will likely be tested going forward by states looking to implement abortion bans and related restrictions.

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Dobbs v. Jackson – HIPAA Concerns (cont'd)

- HIPAA privacy regulations, effective since 2003, place restrictions on the ability of employer-sponsored plans to access, use and disclose health information without specific written authorization from the individual who is the subject of the information.
- HIPAA – which stands for the Health Insurance Portability and Accountability Act of 1996 — applies to employer-sponsored health plans as well as most health care providers, and health care clearinghouses.
- An employer's major medical plan, a health reimbursement arrangement (HRA), and a flexible spending account (FSA) are all considered group health plans that must meet HIPAA's privacy protections.

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Dobbs v. Jackson – HIPAA Concerns (cont'd)

- Recent guidance from the Office for Civil Rights at the U.S. Department of Health and Human Services (HHS), while stating the protections under the HIPAA privacy law for reproductive healthcare service, puts a spotlight on HIPAA's limits.
- In explaining how HIPAA protects the privacy of reproductive health information, HHS acknowledges that current regulations do allow plans to disclose this information in certain instances, such as when disclosure is required by another law or in response to a law enforcement request accompanied by a court ordered warrant or subpoena.
- Some states might use these tools to try to compel employers, plans and providers to disclose information about an individual's abortion.
- The clinicians that provided the service could be targeted or criminalized depending on where they practice.
- States friendlier to abortion access may look to enact stronger privacy protections, since the federal HIPAA standards represent a floor rather than a ceiling.
- This new environment will put these employers and health plans on the front line of protecting access to sensitive health information in ways they may have never anticipated. Litigation battles are expected.

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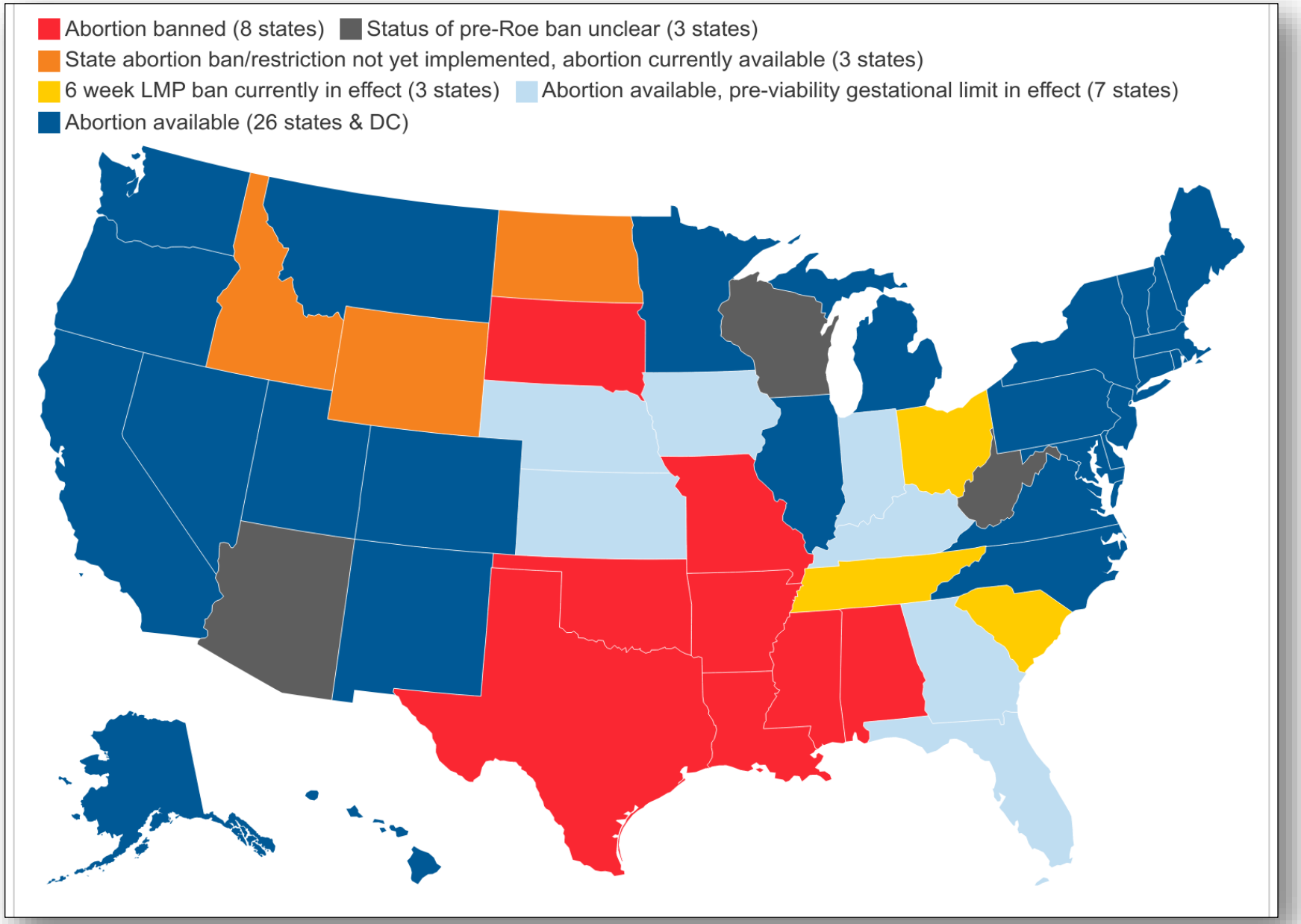
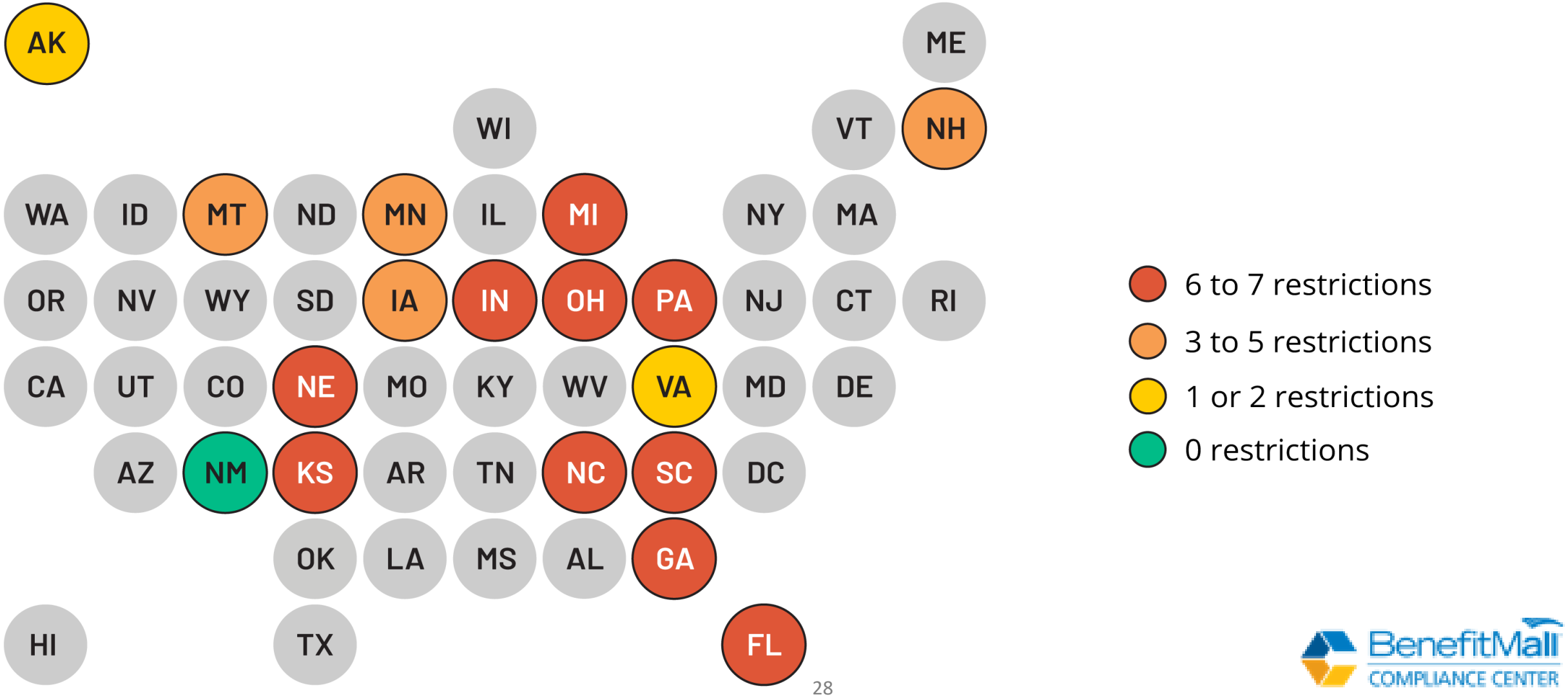
Dobbs v. Jackson – Executive Order

- President Biden's recent executive order will require federal agencies to evaluate additional privacy protections.
- One issue is whether HIPAA provisions allowing disclosure to law enforcement can include added protections for reproductive services information.
- States implementing abortion bans will likely use law enforcement tools to get information from and about providers, this includes seeking information from employer plans about employee provider encounters.
- States where abortion is legal are already starting to add restrictions on the subpoena of reproductive services information.
- Harder questions arise in those states with abortion bans, where local providers (including pharmacists) and local employers may be the focus of law enforcement.



Status of Abortion Access in the United States as of July 12, 2022

Most States Without Laws Expressly Protecting or Banning Abortion Have Numerous Abortion Restrictions



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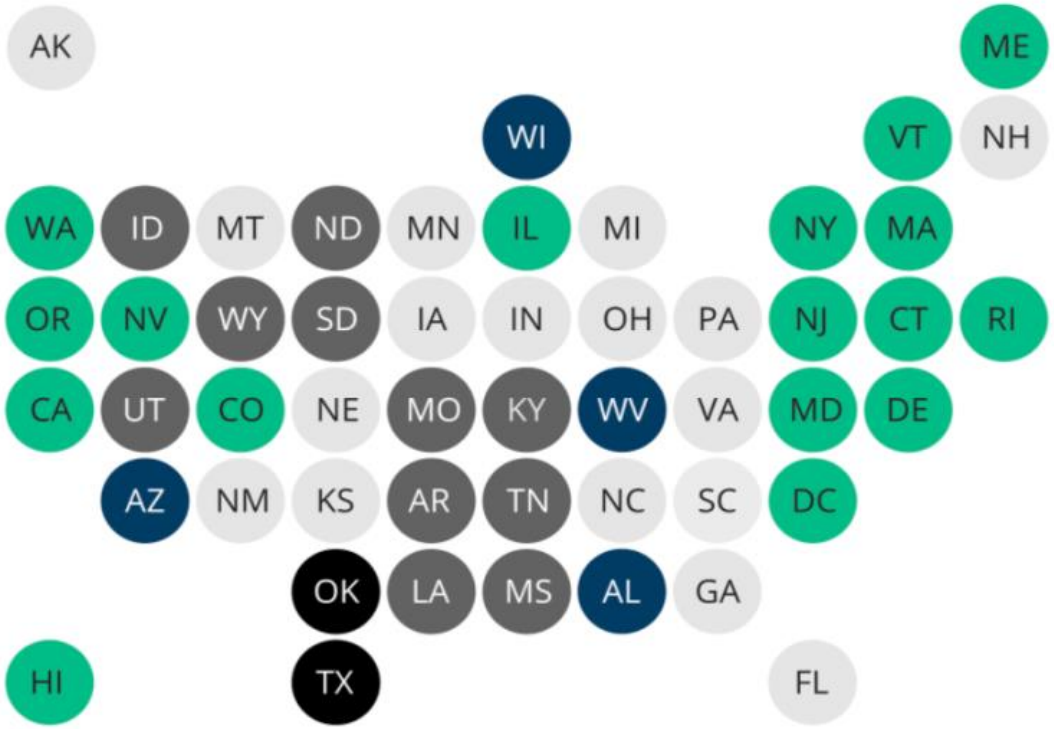
16 States and DC Have State Laws Protecting the Right to Abortion if *Roe v. Wade* is Overturned



- State Law Protecting the Right to Abortion (16 states & DC)
- Pre-Roe Abortion Ban Still State Law (4 states)
- State Law Banning Abortion if Roe is Overturned (11 states)
- Pre-Viability Ban in Effect and State Law Banning Abortion if Roe is Overturned (2 States)
- No State Law Expressly Protecting or Banning Abortion (17 states)

NOTE: A Michigan judge has temporarily blocked the enforcement of the pre-Roe ban while litigation challenging it proceeds. Texas has a 6 week ban enforced by civil penalties in effect. Oklahoma has a ban beginning at fertilization enforced by civil penalties in effect.
SOURCE: KFF, Abortion at SCOTUS: Dobbs v. Jackson Women's Health, Appendix 1: State Policies and Court Decisions Regarding the Legal Status of Abortion, May 2022

KFF

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New Compliance Resources

- Looking for all of our published materials?
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- 5500 Guide
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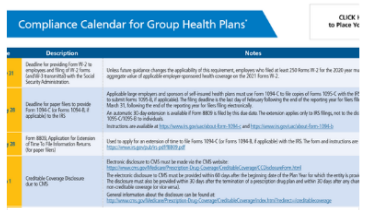
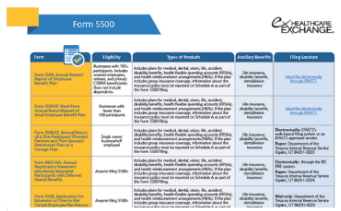
BenefitMall NEXT GENERATION BROKER SERVICES

SERVICES PRODUCTS TECHNOLOGY NEXT GEN RESOURCES AGENCY WORKSPACE



Compliance Calendar for Group Health Plans

Download Calendar



Form 5500 Guide

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PCORI Fee Filing Guide

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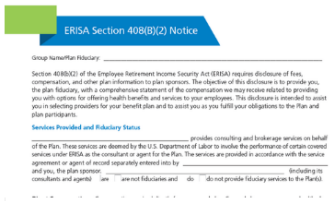

ERISA Section 408 Form

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- Sit back with your favorite cup of joe and listen to BenefitMall's compliance team discuss federal and state legislation and how it affects brokers and their clients.

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BenefitMall's Compliance & Legislative Team

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Questions?

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