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Expert Analysis

U.S. Employers Offer Cutting-Edge Family Benefits to Stay Competitive

As society continues to change, the work force becomes increasingly diverse, and new legislation impacts the employer-employee relationship, companies must work hard to attract and retain talented employees. In order to stay competitive, many employers have begun to offer a wider range of benefits, including some that are less conventional than in years past. U.S. companies may be more likely to offer these cutting-edge benefits than European, South American, or Asian companies because there is little federal legislation in the U.S. with regard to government-paid health care or paid parental leave.

This provides another opportunity for U.S. companies to compete for talent by offering added benefits.¹ This article will discuss some of these new, cutting-edge benefits, such as egg-freezing, adoption, and surrogacy as well as the underlying challenges that U.S.-based multinational companies face when rolling out these programs globally.

Freezing Eggs

In recent years, many U.S. companies have begun offering benefits for

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reproductive-related treatments, such as infertility treatments. Apple and Facebook, among other employers, for example, offer financial assistance for egg-freezing, which provides women with the opportunity to delay child-bearing. Employers may offer this benefit to stay competitive in

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the workplace, but it also may incentivize women to focus on their careers at a time when they may otherwise take leave to serve as the primary caregiver for newborns and young children.

Egg-freezing is very expensive. The cost of the procedure is between \$9,000 and \$20,000 per cycle, and additional, related drug costs range from \$2,000 to \$4,000 per cycle. In vitro fertilization (IVF) later implants the frozen eggs and costs approximately \$13,000. In addition, a woman may require several

cycles of IVF to increase the likelihood of becoming pregnant. Without financial support, many women cannot afford the procedure. Health insurance companies often only provide coverage for freezing eggs due to medical necessity, such as chemotherapy, and not if a woman undergoes the procedure for “social” reasons or as a “lifestyle preference.” In the United States, Connecticut House Bill No. 5230, for example, offers health insurance coverage for fertility preservation for insureds diagnosed with cancer, but no such coverage is provided if a woman chooses to reproduce later in life without a medical problem.

Similarly, some employers consider freezing eggs a “lifestyle choice” or a “luxury” that is not medically necessary health care because it does not cure or correct the cause of infertility. Such employers compare egg-freezing to elective cosmetic surgery and consequently do not offer the benefit.² This argument, however, may be challenged, as egg-freezing is a valued medical procedure that allows women to treat infertility as well as provides women with the choice to prevent and control the timing of pregnancies.

But if freezing eggs is considered an individual choice and employers offer egg-freezing benefits, employers must be aware that offering such benefits may

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lead to some issues and concerns. One such problem is that only a small number of employees likely will take advantage of this non-traditional benefit, as no male employees are able to use it, not all women are within the viable age range, and some women will not opt into the program. In addition, male employees could complain if not offered a similar benefit, such as sperm freezing, even if that process is not truly an equivalent procedure because, for example, female age is a more significant fertility factor than male age.

As such, offering egg-freezing could open the door for employees to request coverage for other elective procedures. To potentially address this problem, employers could allow male employees to use the egg-freezing benefit on behalf of their spouse who is either unemployed or working for an employer that does not offer the benefit.

Another issue is whether offering egg-freezing creates implied pressure on women to delay motherhood to succeed in their careers. Women may worry that opting out of the program demonstrates either less commitment to the employer or the intention to start a family soon and may be concerned about how this could impact decision-making when it comes to work assignments, promotional opportunities, or salary considerations. To address this concern, the company's employee handbook should state very clearly that the option to freeze eggs is an entirely optional benefit intended to empower women and to provide another choice, and that participation (or lack of participation) in the program will be kept confidential to the greatest extent practicable.

The United Kingdom, for example, has partially addressed this problem by offering shared parental leave with pay to support working parents. By offering to pay for egg-freezing but not for

similar services, such as sperm freezing to male employees, a UK employer arguably may violate the sex discrimination provisions of the Equality Act of 2010.³ Some U.K. companies nevertheless offer egg-freezing benefits to provide female employees with more freedom and the option to delay parenthood. Similarly, in the United States, this benefit also could present potential sex discrimination exposure under Title VII (and related state and local law). Because Title VII

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bars discriminatory employment practices with respect to an employee's sex, it is possible that litigation addressing sex discrimination on the basis of reproductive benefits may arise.

Surrogacy

Surrogacy is another cutting-edge benefit that some U.S. companies offer employees. In the United States, surrogacy is a very expensive process, a process that costs generally over \$100,000.⁴ To offset some of these costs, Columbia University, for example, offers a Surrogacy Assistance Program that provides benefits to employees who use a surrogate to assist in carrying and giving birth to a child. Laws on surrogacy vary both within the United States and globally, and employers should be aware of these differences when drafting surrogacy-related benefit programs.

Offering surrogacy benefits can be challenging, as surrogacy is largely

unregulated. Because the United States has no uniform national policy with regard to surrogacy coverage, and maternity coverage for surrogates can range between states and health insurance policies, employers must be aware of potential conflicts. In Wisconsin, for example, insurance companies transacting in the state cannot deny routine pregnancy services to surrogate mothers based solely on how they become pregnant. Furthermore, in some states, such as California and Rhode Island, surrogacy is permitted and pre-birth orders will be granted. A pre-birth order permits the legal documents assigning parentage to be signed by the seventh month of pregnancy.

Other states that permit surrogacy, however, only provide for a post-birth parentage order, and intended parents usually go to court within three to five days after the birth of the child to receive final legal parentage. Some states have no specific surrogacy law, while others, such as New York, prohibit compensated surrogacy contracts.

Internationally, commercial surrogacy is legal in several countries, including Georgia, Israel, Mexico, Russia, and Ukraine. But some countries restrict access to legal commercial surrogacy. Israel, for example, bars homosexual individuals' access to commercial surrogacy. Furthermore, commercial surrogacy is illegal in many countries, including Australia, Brazil, France, Germany, Greece, the Netherlands, Norway, South Africa, Spain, Switzerland, the UK, and, more recently, Nepal and Thailand.

In addition, India's government recently proposed the Surrogacy Bill 2016 which, if passed, would ban all commercial surrogacy in the country, allowing only "altruistic surrogacy," i.e. only infertile Indian couples who have been married for at least five years can seek a surrogate, who must be a close relative (e.g., a sister, sister-in-law, or daughter-in-law).

Due to the varying nature of surrogacy laws around the globe, employers that include a benefit providing for the use of surrogacy should confirm state and country laws and develop a policy that clearly addresses surrogacy coverage.

Adoption

In the United States, the Family and Medical Leave Act (FMLA) provides new parents with leave to care for a newborn biological son or daughter as well as an adopted child.⁵ In addition to FMLA coverage, employers are now more likely to offer not only adoption expense benefits to cover adoption costs, but also adoption leave. For example, Netflix provides unlimited paid parental leave during the first year after the birth or adoption of a child. Similarly, Adobe, Bank of America, Google, Facebook, and Microsoft offer generous leave benefits to both new biological and adoptive parents. Furthermore, some states, such as Colorado and Maryland, may require that employers offer equivalent leave for both adoption and childbirth.

Outside the United States, many countries have well-developed adoption laws. For example, as of July 1, 2016, in Singapore, the mother of an adopted child is entitled to government-paid adoption leave, subject to some eligibility restrictions, if the adopted child is under the age of 12 months at the time of the formal intent to adopt. Under government-paid adoption leave, a mother of an adopted child is entitled to four weeks of paid leave, capped at \$10,000. The mother's employer is reimbursed for the amount paid.

This new legislation in Singapore reflects the notion that adoption is a cheaper and more sustainable alternative to IVF. Many scholars have opined that adoption builds acceptance of different races, cultures, religions, and can bring a child from a deprived background into a

home. Singapore politicians argued that adoption provides genetic diversity and may spare infertile couples from emotional disappointment as well as time and money spent on a failed—or potentially multiple failed—IVF treatments.

Employers must be aware that adoption leave outside the United States also may be impacted by laws that require similarly situated employees to be treated equally. In France, for example, every leave is supposed to be treated the same, i.e. all leave receives equal time and benefits, but, practically speaking, parental leave generally is longer. Despite the obvious discrepancy here, the law does not appear to have been challenged as of yet. Multinational companies also should note that countries have varying anti-discrimination legislation, some of which may provide for potential claims based upon treating different types of leave policies differently. Accordingly, employers may wish to consider including country-specific provisions to address such issues.

Conclusion

In sum, new benefits continue to emerge in the workforce as science, technology, and society change. While developing new cutting-edge benefits policies to attract talent and in the process allow women to take advantage of reproductive technologies to enable conception later in life and to provide would-be parents with innovative ways to start a family, including through surrogacy and adoption, employers must be aware that laws differ not only within the United States, but also across countries. Companies also should understand that their benefits policies may have unintended consequences, as a generous benefit to some employees may be viewed as implicit pressure to prioritize a career over starting a family or can raise concerns about the potential for discrimination claims.

As such, to ensure good morale in the workplace, to retain productive employees, and to stay competitive in the evolving workplace, global companies must maintain compliance with these developing and varying international laws that address egg-freezing, adoption, and surrogacy, among other family-planning considerations and cutting-edge benefits.

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1. In addition to the benefits discussed in this article, other emerging benefits include, among others, company-provided fitness bands or activity trackers, company-organized fitness competitions, and company-provided student loan repayment.

2. Interestingly, egg-freezing started as a medical treatment for cancer patients and has evolved into an elective or "enhancement" procedure. Similarly, cosmetic surgery originally was developed to treat wounded soldiers and is now viewed as an elective procedure.

3. Note that the Equality Act of 2010 creates a risk if employers do not offer exactly equal benefits to men and women. If the employer still chooses to offer such a benefit, the employer must communicate that it supports parents of both sexes in the family-work balance.

4. The breakdown of the cost is approximately as follows: \$20,000-\$30,000 to the surrogate; \$5,000-\$10,000 to the egg donor; \$30,000 to the fertility clinic; \$20,000 to the surrogacy agency; and \$10,000 to the lawyers.

5. Some states, including Connecticut, Maryland, Massachusetts, Minnesota, and Washington, D.C., among others, also have their own "mini-FMLA" laws that may provide similar or greater coverage than federal FMLA, and may cover employees who may not otherwise be eligible for federal FMLA. In addition, beginning in January 2018, New York will join several states, including California, New Jersey, and Rhode Island, by instituting paid family leave benefits for eligible employees which will cover, among other things, leave to care for an adopted child.