Departments Outline Fertility Benefit Options for Employers

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Last week, the Departments of Treasury, Health and Human Services, and Labor released Affordable Care Act [FAQs Part 72], confirming that employers and other plan sponsors may offer fertility benefits through existing HIPAA "excepted benefit" structures. The guidance does not announce new methods for plan sponsors to provide fertility benefits, but it does confirm the Departments' thinking regarding fertility benefits structured as excepted benefits under the existing rules.

How does this guidance impact employers who currently offer fertility benefits ?

In short: It probably doesn't. By way of background, today, plan sponsors typically tend to offer family building benefits, such as infertility treatment, adoption benefits, and long-term fertility preservation, through a combination of traditional major medical coverage that is subject to ACA rules and non-ERISA reimbursement programs. The new guidance does not impact employers who currently provide fertility benefits through that structure.

Instead, the new FAQs confirm that, for employers who wish to offer fertility benefits through "independent non-coordinated excepted benefits" or through an "excepted benefit health reimbursement arrangement (HRA)," it is possible to do so. As explained in more detail below, while offering fertility benefits in this manner may be attractive to some employers, these structures tend to be less flexible and thus may be of limited interest to employers who already have a family building benefit in place.

Fertility benefits structured as independent non-coordinated excepted benefits

Today, employers may offer insurance coverage as independent non-coordinated excepted benefits; this coverage is limited to benefits payable on account of a specific illness or disease (*e.g.*, cancer indemnity policies) or hospital indemnity coverage. These types of benefits are excluded from certain ACA requirements provided that: (1) Benefits are provided under a separate insurance policy—in other words, the benefits must be fully-insured; (2) There is no coordination between the benefits available under the policy and the employer's group health plan; and (3) Benefits are paid under the policy without regard to whether benefits are paid under the employer's group health plan.

In the new ACA FAQs, the Departments confirm that fertility benefits may be offered as independent non-coordinated excepted benefits provided they meet the requirements summarized above. Additionally, the Departments state that they intend to conduct rulemaking confirming a new process by which plan sponsors might offer such coverage on a *self-insured* basis. Given that insurers might be hesitant to offer infertility-specific coverage in light of the potential for significant adverse selection—in other words, people who enroll in fertility benefit coverage might have an educated perspective on whether they would need the coverage—the potential future expansion to self-insurance may make this more workable for employers who want to offer fertility benefits through this structure.

Fertility benefits structured as an excepted benefit HRA

Today, employers may offer fertility coverage through an "excepted benefit HRA." If structured pursuant to regulatory requirements (see our blog post here), an employer can reimburse employees for up to $2,150 (indexed) per year for fertility-related medical expenses. This reimbursement arrangement can be structured to avoid triggering certain ACA requirements that would apply to employer-sponsored major medical plans. The ACA FAQs do not change the current rules for excepted benefit HRAs, but instead remind employers they are available to reimburse fertility expenses.

Next steps for employers?

As fertility benefits have become more popular, many employers have opted to offer comprehensive family building benefits through a combination of traditional major medical coverage and non-ERISA reimbursements for benefits such as adoption, surrogacy support, and long-term fertility preservation. Although the new guidance confirms the ability for plan sponsors to provide fertility benefits through the excepted benefit structures described above, plan sponsors with family building benefits already in place may want to sit tight for the time being and wait to see how the new options impact the overall family building benefit market before making changes.

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