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A Primer on Employer-Sponsored Family Building Benefits

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This article provides an overview of employer-sponsored family building benefits, including treatment under the Employee Retirement Income Security Act of 1974, the Patient Protection and Affordable Care Act, and the Internal Revenue Code. Recognizing that certain types of benefits may not be offered through tax-favored plans, this article describes some alternative ways to deliver family building benefits to employees. This article concludes by highlighting practice pointers for designing and administering family building benefit programs.

Lucy is age 32. A rising star in her field, she is becoming restless at her company. Incidentally, she is also trying to become pregnant. The last time she looked for a job, her focus had been on finding opportunities to build her network. Now, her priorities are different. Along with a competitive salary, she wants to find a job with benefits to help her build a family.[1]

Lucy's story is not unique. In recent years, many employees have shifted their attention from traditional employer-sponsored

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retirement and health benefits in favor of what was once considered a niche offering: benefits to help employees build their families.[2] For many employees, so-called "family building" benefits, such as group health coverage for in vitro fertilization treatment, adoption assistance, or reimbursement of surrogacy expenses, are just as or more important than compensation, retirement, or standard health benefits.[3]

At the same time, employers are reviewing family building benefit programs with an eye to whether such programs would help them meet their equitable workplace goals.[4]

Employers considering whether to offer or enhance their current family building benefit coverage may be surprised to learn about the scope of available benefits. Most employers are familiar with traditional benefits designed to assist employees with building their families. Group health plans that cover infertility treatment or adoption assistance programs are common examples. These benefits are usually offered through employer-sponsored tax-favored plans.

As reproductive technologies continue to advance, however, and the concept of family building continues to evolve, there is increasing demand for reproductive benefits that are less familiar – such as elective egg and sperm freezing or surrogacy benefits – that do not fit neatly into traditional tax-favored benefit plans.

WHAT ARE FAMILY BUILDING BENEFITS?

Benefits designed to help employees build their families take many different forms. This section summarizes the more popular reproductive technologies. Given the pace of scientific advances, this section does not cover every available treatment. Instead, this section provides a broad overview of the underlying procedures so practitioners can understand the relevant laws that apply when an employer subsidizes the cost of the treatment.

Infertility Treatment

For many employees looking to build families, the starting point is whether their group health plan covers infertility treatment. The American Society of Reproductive Medicine defines infertility as "the result of a disease (an interruption, cessation, or disorder of body functions, systems, or organs) of the male or female reproductive tract which prevents the conception of a child or the ability to carry a pregnancy to delivery."[5] Traditional medical treatment of infertility uses detailed assessments and testing to ascertain the root cause. In many

cases, opposite-sex couples are able to conceive following conventional drug and surgical treatment.

For couples who do not respond to the usual course of infertility treatment and for same-sex couples, assisted reproductive technologies may be used to conceive. Assisted reproductive technologies cover all treatments which include the handling of eggs, sperm, and embryos.

Many people are familiar with the assisted reproductive technology called in vitro fertilization or "IVF."[6] The IVF procedure is relatively straightforward. The intended mother takes hormones to stimulate egg production. The eggs are extracted once mature. The eggs are then fertilized with the intended father's sperm outside the womb and the resulting embryos are implanted in the intended mother's uterus.

In another example of assisted reproductive technology, if the root cause of infertility is determined to be a sperm disorder (for example, poor sperm mobility), intracytoplasmic sperm injection ("ISF") may be used along with IVF. This procedure involves injecting a single sperm into each egg.[7] In a variation on traditional IVF, some same-sex couples have pioneered the use of "reciprocal IVF," through which the egg is taken from one individual, fertilized, and then implanted in the other individual's uterus.[8]

Surrogacy

Surrogacy is the process whereby an individual is impregnated with the intention of giving the child to another individual or couple after carrying the child to term. Use of a surrogate may be recommended for individuals who are unable to conceive. Surrogacy may also help individuals who are able to conceive, but suffer from medical conditions that would prevent them from successfully carrying a baby to term.[9]

Traditional surrogacy requires the use of the surrogate's egg, which is inseminated with the intended parent's sperm. Gestational surrogacy requires a couple to create an embryo through IVF and then transfer the embryo to the surrogate for gestation, meaning that the surrogate is not genetically related to the child. Some couples may need the services of a gestational surrogate, in addition to using other assisted reproductive technologies. The use of a surrogate is typically regulated under state law and usually requires the coordination services of a third-party agency.

Elective Fertility Benefits

"Planned oocyte cryopreservation," or more informally, "freezing your eggs," occurs when individuals who want to protect against

future infertility due to reproductive aging or other causes freeze their eggs in advance of any infertility diagnosis.

Similar to IVF, an individual uses hormones to stimulate egg production; the eggs are removed and frozen unfertilized in a "flash freezing" process. Once the individual chooses to use the frozen eggs, the eggs are thawed and fertilized with sperm using IVF. Individuals who freeze their eggs cannot use them unless they subsequently undergo IVF to fertilize the eggs and have the embryos implanted. Similar to elective egg freezing, elective sperm freezing is also available to extend an individual's reproductive potential.[10]

Historically, individuals used egg and sperm freezing before undergoing medical treatments likely to leave them infertile, such as radiation and chemotherapy. As the practice became more widely known, individuals began to view egg and sperm freezing as a way to preserve reproductive potential if they were not yet ready to have children. Some reproductive health organizations initially counseled against elective egg freezing, concluding that the practice was not yet supported by sufficient data.

In 2018, however, the Ethics Committee for the American Society for Reproductive Medicine concluded that elective egg freezing "serves women's legitimate interests in reproductive autonomy," although "uncertainties exist regarding its efficacy, appropriate use, and long-term effects."[11] Debate remains vigorous about the usefulness and appropriateness of the procedure, as well as the employer's role in offering it.[12]

Adoption

For centuries, individuals unable to conceive relied on adoption as a different way to build a family.[13] Today, adoptions are accomplished under state law, with the assistance of social workers and lawyers. Depending on the circumstances, adoptions may be within a related family group, such as a spouse's children from a prior marriage, or a couple may choose to adopt an unrelated child. Adoption may also be relevant if an individual chooses to conceive via gestational surrogate. Depending on state law, the intended parent might need to adopt the child for formal recognition as a parent.

EMPLOYER-SPONSORED COVERAGE OF FAMILY BUILDING BENEFITS

This section addresses employer-sponsored coverage of family building benefits and examines the challenges associated with offering these benefits through tax-favored plans.

Group Health Coverage and Infertility Treatment

Employees seeking family building assistance may be surprised to learn that their health plan is not necessarily required to offer infertility benefits.[14] Today, approximately one in four large American companies provide some form of infertility coverage.[15] Outside of larger employers, coverage of infertility benefits varies considerably.[16] Whether a group health plan is required to provide infertility coverage depends in part on whether the plan is fully-insured or self-insured, as explained below.

A fully-insured group health plan is required to comply with any state insurance laws that require infertility coverage. Nineteen states have mandates that require insurers to cover some forms of infertility treatments.[17] The scope of each state's mandate is different.

For example, some state mandates exclude fertility drugs from required infertility coverage,[18] whereas other state mandates apply only to health maintenance organizations ("HMOs").[19] Thirteen states have mandates that require providing coverage for some costs associated with IVF.[20]

If a fully-insured plan does cover infertility treatments, the policy's coverage still might not meet the employer's objectives. Some insured plans require that an individual meet the policy's definition of "infertile" before receiving coverage for infertility benefits. The definition of "infertile" varies by insurer, but many definitions require that an individual demonstrate failure to achieve a successful pregnancy after 12 months or more of timed, unprotected intercourse.

Same-sex couples may face barriers to meeting this definition.[21] Depending on the circumstances, same-sex couples could be precluded from accessing infertility benefits on the same basis as an opposite-sex couple.[22] For example, a same-sex female couple may need to expend their own resources for sperm donation to demonstrate they meet the "infertile" definition.[23]

For employers considering whether to offer infertility benefits under a fully-insured health plan, there may not be much ability to comment on the design. The insurer will have a standard infertility coverage benefit, which may or may not include IVF or be accessible to same-sex couples.[24] An employer that wants to use infertility benefits as a recruiting or retention tool may find that its insured plan's infertility coverage is not attractive to the targeted employees.[25]

For a self-insured group health plan, there is no affirmative requirement to provide infertility benefits. Self-insured plan sponsors have significant latitude when designing the scope of benefits for coverage and may simply choose to forgo offering infertility benefits based on perceived utilization and potential costs. Employers that offer infertility benefits typically have flexibility when it comes to designing the

scope of infertility coverage.[26] For example, a self-insured employer can typically design its infertility benefit to ensure it is accessible to same-sex couples.[27]

Group Health Coverage and Surrogacy Benefits

Many individuals choose to use surrogates to build their families. This can happen for different reasons. For some same-sex couples, using a surrogate is the only way to have a child with a genetic link to one parent. Other couples may have health issues that prevent carrying a baby to term.

Whatever the reason, pursuing pregnancy through the use of a surrogate requires a significant outlay of resources. Most individuals seeking a gestational surrogate work through an agency; the agency matches the prospective parents and surrogate. The agency also arranges the fees and costs, which may exceed six figures. For employees seeking to use a surrogate to build a family, the natural question becomes whether their health plan covers any of their surrogacy costs. This question should be examined from two perspectives: first, from the perspective of the employee's group health plan and, second, from the perspective of the surrogate's group health plan.

The employee's group health plan is unlikely to recognize all of the expenses related to surrogacy services as medical expenses eligible for reimbursement under the plan.[28] Treatments performed on the covered employee in preparation of surrogacy (e.g., sperm retrieval or egg donation) may be covered the same way as if a surrogate were not used, assuming the plan offers infertility coverage and the individual meets any preauthorization requirement.[29]

However, expenses related to treatments and procedures performed on the surrogate's own body – such as the costs of the pregnancy and delivery – would generally not be considered eligible medical expenses under the employee's group health plan.

Under Section 105(b) of the Internal Revenue Code ("Code"), to qualify for tax-free reimbursement, expenses must be attributable to "medical care" as defined in Code Section 213(d) for the employee or the employee's spouse or eligible dependent. Code Section 213(d)(1)(A) defines "medical care" as amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure of function of the body."

Because the procedures in connection with surrogacy generally apply to the surrogate's body, and not the employee's, spouse's, or eligible dependent's body, services performed on a surrogate, in and of themselves, do not "affect any structure or function of the body."[30]

Accordingly, each court faced with the question so far has rejected the claim that surrogacy expenses are deductible by the intended parent on the basis they constitute medical care under Code Section 213(d)(1)(A).[31]

In a 2017 case on the issue, *Morrissey v. United States*, a gay man attempted to deduct expenses relating to the identification, retention, compensation, and care of an egg donor and a gestational surrogate.

The U.S. Court of Appeals for the Eleventh Circuit denied the taxpayer's claim, concluding that such expenses were not incurred for "the purpose of affecting any . . . function of [his] body" and therefore they were not deductible under Code Section 213.[32] The court reasoned that the taxpayer's body could perform its reproductive function before he engaged his female counterparts in the IVF process and that the taxpayer could perform its reproduction function "just the same" at the completion of the IVF process.[33]

Thus, the court rejected the taxpayer's claim to deduct the expenses under Code Section 213. Critics of the *Morrissey* decision noted that the Internal Revenue Service ("IRS") has allowed opposite-sex couples more flexibility to deduct certain egg donor expenses as medical expenses under Code Section 213(d)(1).[34]

From the perspective of the surrogate's health plan, coverage for medical expenses in connection with a surrogate pregnancy is not guaranteed. Courts have come to mixed results on this question.

In general, courts have deferred to insurers' interpretations of plan provisions that exclude coverage of pregnancy expenses for surrogate mothers.[35] Courts that have come to the opposite conclusion have done so for different reasons.

One court required an insurer to provide coverage of a surrogate's pregnancy expenses on the ground that the expenses were incurred to protect the participant's health.[36]

Another court required an insurer to provide coverage on the basis that a state law prohibited denial of coverage for pregnancy expenses solely because it was a surrogacy pregnancy.[37]

Interestingly, this marketplace gap for surrogate health coverage has resulted in a niche offering from some agencies that coordinate surrogacy services: "Specialty" health insurance plans that cover pregnancy and post-partum expenses for the surrogate if the surrogate's own health coverage declines to pay.[38]

Group Health Coverage and Elective Fertility Benefits

Traditional infertility care starts with the premise that the individual is unable to conceive without assistance. By contrast, "elective" fertility benefits, such as elective egg and sperm freezing, are designed for

individuals who may be able to conceive at the time of the procedure but are concerned that they may be infertile in the future. Freezing their eggs or sperm is intended to extend their reproductive potential by hedging against the risk of potential infertility.

To the extent that an employer wishes to offer group health coverage for elective egg and sperm freezing, the gateway question is whether the procedure constitutes "medical care" and would be eligible for reimbursement under a group health plan.

As noted above, under Code Section 105(b), expenses must be for "medical care," which is defined in Code Section 213(d)(1)(A) as amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."

The regulations issued under Code Section 213 state that "[d]eductions for expenditures for medical care allowable under [S]ection 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. . . . [A]n expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care."[39]

Individuals seeking to deduct egg donor expenses incurred in connection with infertility treatment have received favorable rulings from the IRS.[40] In IRS Chief Counsel Information Letter 2005-0102, a taxpayer requested a ruling confirming that egg donor fees were deductible medical care expenses. Reasoning that "[f]ertility is a function of the body, and treatment to overcome infertility is within the definition of medical care," the IRS concluded that expenses incurred in connection with obtaining an egg or embryo to be inserted into the taxpayer's body constituted medical care of the taxpayer and therefore would be deductible medical care expenses.[41]

The IRS has not issued similar rulings in the context of elective egg or sperm freezing, however. It is possible that the IRS would view elective egg or sperm retrieval, along with associated long-term freezing expenses, as procedures that do not qualify as "medical care"[42] because they are not "incurred primarily for the prevention or alleviation of a physical or mental defect or illness."[43] And, although elective egg and sperm retrieval arguably "affect the structure or function of the body," the IRS has not explicitly endorsed this position in the context of elective egg and sperm retrieval and freezing.

Change may be on the horizon, however. This spring, the IRS issued a private letter ruling that addressed a same-sex couple's request to deduct gestational surrogacy expenses under Code Section 213(d).[44] Neither taxpayer had a medical condition. The IRS disallowed the requested deduction for the most part, but concluded that the sperm

donation and freezing expenses were deductible, as they were "directly attributable" to the taxpayers.

The IRS's reasoning in this ruling may support future taxpayer arguments that elective egg or sperm retrieval and freezing should be considered medical care under Code Section 213(d) on the basis that such procedures are "directly attributable" to the taxpayer.[45] The outcome and ultimate success of such arguments remains to be seen.

Understanding that elective egg and sperm freezing may not fit the Code Section 213(d) definition of medical care, an employer may wonder whether it may nevertheless offer elective fertility coverage through its group health plan. For a fully-insured plan, the answer depends on the underlying policy (and the answer is likely "no"). For a self-insured plan, the answer is slightly more complicated. As noted above, elective egg and sperm freezing procedures may not qualify as Code Section 213(d) "medical care." It is not necessarily advisable to pay expenses that do not clearly meet the Code Section 213(d) definition of medical care from a self-insured plan.

First, payment of non-medical expenses would be taxable compensation, meaning the employer would need to track and report the payments as compensation to the employee.

Second, to the extent that a voluntary employee beneficiary association ("VEBA") is utilized to pay health plan expenses, reimbursements of elective egg or sperm freezing expenses that exceed a *de minimis* amount might risk the VEBA's tax-qualified status.[46]

Third, allowing reimbursement through a health reimbursement arrangement ("HRA") could disqualify the plan.[47]

Adoption Assistance Programs

In contrast to the foregoing discussion of infertility, surrogacy, and elective egg and sperm freezing benefits, which rely on relatively new reproductive technologies, individuals have been using adoption as an alternative way to build a family for centuries.

Similarly, the rules for employer-provided adoption assistance have been relatively settled for some time. Under Code Section 137, amounts paid or expenses incurred by an employer for "qualified adoption expenses" in connection with the adoption of an employee's child are excluded from the employee's gross income if furnished under a qualified "adoption assistance program" sponsored by the employer.[48]

To constitute a qualified adoption assistance program, the employer-sponsored program must be for the "exclusive benefit" of the employer's employees.[49] The program must be limited to reimbursing "qualified adoption expenses," which are generally defined

as reasonable and necessary adoption fees, court costs, attorney fees, and other expenses related to the legal adoption of an eligible child by a taxpayer.[50] The IRS has confirmed that an adoption assistance program may be included as a component of a larger benefit plan.[51]

For employers that wish to offer a qualified adoption program as part of a comprehensive family benefit program, particular attention should be paid to the definition of qualified adoption expenses. The definition excludes expenses "incurred in any surrogate parenting arrangement," as well as expenses that "violate state or federal law."[52] As noted previously, using a surrogate to build a family may require a pre-birth order or separate adoption following the birth to establish the child's parentage.

Accordingly, employees choosing to build a family using a surrogate may seek to recoup adoption-related expenses under the employer's adoption assistance program. Under the current definition of qualified adoption expenses, however, employees cannot be reimbursed for adoption expenses incurred in connection with any surrogacy arrangement.

In addition, certain states prohibit paid surrogacy arrangements, meaning that adoption expenses related to those surrogacy arrangements might also be excluded on the basis they violate state law.[53]

ALTERNATIVES TO TRADITIONAL TAX-FAVORED PLANS FOR FAMILY BUILDING BENEFITS

For the reasons summarized in the preceding section, some employers that want to offer more comprehensive family building benefits – such as elective egg and sperm freezing and surrogacy benefits – have found that traditional tax-favored plans are not available or sufficiently flexible to offer such benefits. In addition, employers that want to offer more inclusive family building benefits have found that same-sex couples are often unable to avail themselves of group health coverage for infertility benefits on the same basis as opposite-sex couples.

To address this issue, some employers have turned to after-tax reimbursement programs to deliver family building benefits. Typically, the program provides after-tax reimbursement of qualifying family building expenses incurred by eligible employees, up to a predetermined annual or lifetime cap. Designing an after-tax program like this allows employers to provide some measure of family building benefits without the restrictions associated with traditional tax-favored plans. Of course, although these arrangements sidestep some of the constraints described in the prior section, they create their own sets of issues, as explained below.

ERISA Implications

Employers have significant latitude in deciding the benefits to cover under an after-tax reimbursement program. That said, when determining the benefits that will be reimbursed under the program, employers should remain mindful not to "accidentally" create a welfare benefit plan under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The risk that an after-tax program could constitute an ERISA welfare benefit plan can be mitigated (if not completely eliminated) through careful planning regarding the types of expenses reimbursed under the program. Aside from the ERISA considerations described below, employers will also need to consider the tax implications of any reimbursement program.

First, definitions. An ERISA employee welfare benefit plan is "any plan, fund, or program" which is "established or maintained by an employer" for the purposes of providing "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability" for its participants.[54]

Medical care is not defined for purposes of the definition of "welfare plan." An ERISA-covered group health plan is defined as "an employee welfare benefit plan to the extent that the plan provides medical care and including items and services paid for medical care to employees or their dependents."[55] For purposes of the definition of group health plan, medical care is defined as "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body."[56]

Employers and advisers should keep these definitions in mind when designing any after-tax family building benefit program. These considerations are explained in more detail below.

Expanded Infertility Coverage

Under some group health plans, same-sex employees are unable to utilize infertility benefits on the same basis as opposite-sex couples. Alternatively, some employers may want to offer certain infertility benefits (such as IVF) to all employees through standalone reimbursement programs rather than add the benefit to their group health plans.[57] It is certainly possible to offer infertility coverage through an after-tax reimbursement program.

However, because traditional infertility treatment constitutes medical care, the provision of such benefits through an after-tax program would almost certainly create a group health plan under ERISA Section 733(a)(1) and require compliance with the group health plan rules. Depending on the employer's objectives, creating a separate group

health plan to deliver expanded infertility benefits may not be a desirable outcome.

Surrogacy Benefits

The prior section explained that many expenses related to surrogacy are not considered "medical care" expenses. This is because those expenses do not necessarily affect the "structure or function" of the intended parent's body.[58]

Accordingly, certain expenses associated with surrogacy arrangements (such as legal fees, agency fees, and non-medical expenses incurred by the intended parent) might be eligible for reimbursement from an after-tax program without turning the program into an ERISA welfare benefit plan, subject to the following caveats.

First, the program document should make clear that the surrogate's medical expenses are not eligible for reimbursement, unless payment of the expenses is made directly to the employee and the medical expenses are part of the overall cost of the surrogacy arrangement. Directly reimbursing surrogates for their medical expenses could result in unintentionally creating a group health plan.

Second, employers should bear in mind that the legality of surrogacy arrangements varies by state. Although many countries regulate the use of surrogates on a national level, in the United States, surrogacy arrangements are regulated by conflicting state laws; and, ERISA preemption is not available for a non-ERISA program.[59]

For example, Michigan and Louisiana prohibit commercial surrogacy contracts, declaring them void and unenforceable.[60]

Other states, like California, permit paid surrogacy contracts.[61] New York recently lifted its prohibition on paying surrogates.[62]

The employer may want to require that the employee attest that the arrangement is legal under the applicable state law before providing reimbursement under the program.

Elective Egg and Sperm Freezing

It is possible that certain expenses related to elective egg and sperm freezing could constitute "medical care" for purposes of determining whether the program is an ERISA welfare plan. This is because the treatment, which involves extracting eggs and sperm for cryopreservation from the employee's body, arguably affects the structure and function of the employee's body.[63]

However, other aspects of elective egg and sperm freezing – such as the cryopreservation of eggs and sperm and the storage fees for frozen eggs and sperm – are not expenses that affect the body.

These types of expenses could be reimbursed under an after-tax program without necessarily turning the arrangement into a welfare plan. Plan sponsors should carefully draft the underlying reimbursement program document to ensure that only expenses associated with elective egg and sperm freezing that are not "medical care" expenses are eligible for reimbursement.

Consequences of Creating an ERISA Welfare Plan

If the after-tax program constitutes an ERISA welfare benefit plan, the employer would need to treat the program like any other ERISA-covered welfare plan. This means complying with the ERISA reporting and disclosure requirements for the program. For example, the employer would need to comply with the Form 5500 requirements, distribute a summary plan description ("SPD") to participants, and comply with the ERISA claims and appeals procedure regulation with respect to any benefit claims filed under the program.

Furthermore, to the extent that the program is deemed to be an ERISA-covered standalone group health plan, the program would be subject to ACA rules, such as the requirement to provide preventive services without cost-sharing.[64]

Additionally, if the program constituted a group health plan, the Consolidated Omnibus Budget Reconciliation Act ("COBRA") continuation coverage rules would apply to the program, including the requirement to distribute general information and election notices.[65]

PRACTICE POINTERS FOR FAMILY BUILDING BENEFIT PROGRAMS

Employers must carefully specify the types of expenses that may be reimbursed under the program to avoid classification as an ERISA-covered welfare plan, as summarized in the prior section. Employers interested in setting up a family building benefit program may also want to consider the following practice pointers for designing a family building benefit program.

Tax Implications for Employees

Amounts paid to reimburse employees for qualifying expenses under an after-tax program are treated like any other taxable compensation paid to an employee. Reimbursements of qualifying expenses

will be subject to withholding for federal and state income tax, Social Security, and Medicare.

Because reimbursements are subject to withholding, employees will receive less than full reimbursement of qualified expenses. Employers that wish to offer the "full" reimbursement amount to employees may choose to offer a tax gross-up in connection with the reimbursement, but a gross-up adds significant cost to the benefit.

To avoid any confusion about reimbursements, employers should ensure that all communications distributed in connection with the program make clear that reimbursements are taxable to the employee.

Deferred Compensation

If the employee incurs expenses and delays reimbursement to a future year, the employee is deferring compensation that may be subject to Code Section 409A. Failure to comply with Code Section 409A may result in the employee being liable for a 20 percent excise tax on the reimbursement. To address this issue, employers should carefully review the reimbursement guidelines for the program to ensure that any reimbursements comply with Code Section 409A.

This issue can be avoided if reimbursement is conditioned on being employed to the payment date. Alternatively, the program can be structured to comply with the expense reimbursement rules under the Code Section 409A regulations.[66]

HIPAA and State Privacy Laws

If employees are required to submit substantiation of qualifying expenses to receive reimbursement, the employer may receive health information about the employee. Employers may wonder if processing these reimbursement requests is subject to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Health information is not subject to the HIPAA privacy rule unless the entity receiving the information is a "covered entity."[67]

In general, an employer is not a covered entity. That said, if the employer sponsors a group health plan under which the family building expenses are reimbursed, the group health plan and plan administrator is a covered entity and would need to comply with HIPAA.

In addition to HIPAA, employers should carefully review any privacy laws that apply to reimbursement requests and would likely want to retain some level of protection around the records. Although an employee would presumably consent to disclosure of information

included as part of a request for reimbursement, it may be wise for an employer to require a voluntary consent form in connection with the reimbursement request.

One final caveat: Employers should review the family building program for compliance with any state-specific reproductive privacy laws.[68]

Compensation Under Other Plans

Plan sponsors should review the impact of any after-tax reimbursement program on their other plans. Many tax-qualified retirement plans, nonqualified deferred compensation plans, and short-term and long-term disability plans are keyed to a definition of "compensation" that uses W-2 wages.

As discussed, employees may receive additional W-2 compensation in connection with reimbursements of family building expenses. This means that reimbursements could be included in the definition of "compensation" for purposes of the employer's other plans, unless the plan sponsor takes action to carve out reimbursements from the definition of "compensation" used for its other plans.

Potential Title VII Implications

The provision of employer-sponsored family building benefits may implicate federal and state employment nondiscrimination laws. Title VII of the Civil Rights Act of 1964, along with its companion statutes, requires that all employee benefits be provided in a nondiscriminatory manner unless a statutory exception provides otherwise. Employers should carefully review the eligibility guidelines for any family building benefit program to confirm that they do not violate Title VII's bar on discrimination on the basis of sex.[69]

In addition, on June 15, 2020, the U.S. Supreme Court held in *Bostock v. Clayton County* that Title VII's prohibition on discrimination on the basis of sex or gender also extends to discrimination on the basis of sexual orientation or gender identity.[70] It is possible that the Court's decision in *Bostock* may frame future employer decisions about offering coverage for family building benefits.

PLANNING MAKES PERFECT

Offering family building benefits may be a new way for employers to attract and retain top talent. Expanding current fertility coverage

may also help employers build a more equitable workplace for their employees in same-sex or nontraditional relationships. Employers that want to offer a family building benefit program should carefully review the ERISA and tax rules that apply to these programs.

As discussed, many reproductive technologies that employees may use to build a family are not covered by employer-sponsored tax-favored plans. Employers may need to think creatively about how best to deliver these benefits to employees. For some employers, offering family building benefits through an after-tax reimbursement program may be an attractive option.

Careful design of the available benefits under the program may mitigate the risk of creating an "accidental" ERISA welfare plan. As with all things, "planning makes perfect."

NOTES

1. Vanessa Grigoriadis, "I.V.F. Coverage Is The Benefit Everyone Wants," N.Y. Times (Jan. 30, 2019).

2. "Fertility Benefits: Fert Perks," Economist (Aug. 10, 2019).

3. Grigoriaidis, *supra* note 1.

4. David Kaufman, "The Fight for Fertility Equality," N.Y. Times (July 24, 2020).

5. Definition of "Infertility," Am. Soc'y for Reprod. Med., *https://www.asrm.org/topics/topic-index/infertility/*.

6. Gretchen Livingston, "A third of U.S. adults say they have used fertility treatments or know someone who has," Pew Rsch. Ctr. (July 17, 2018). In 2016, more than 75,000 babies were conceived using assisted reproductive technologies.

7. "ART and Intracytoplasmic Sperm Injections (ICSI) in the United States," Ctrs. for Disease Control & Prevention (Oct. 12, 2016), *https://www.cdc.gov/art/key-findings/icsi.html*.

8. "Reciprocal IVF," Fertility Smarts (June 30, 2020), *https://tinyurl.com/yyj4arc7*.

9. "Family Building Through Gestational Surrogacy," Comm. Op. No. 660, Am. Coll. of Obstetricians & Gynecologists (Mar. 2016).

10. "Planned oocyte cryopreservation for women seeking to preserve future reproductive potential: an Ethics Committee opinion," Ethics Comm., Am. Soc'y for Reproductive Med., Fertility & Sterility, Vol. 110, No. 6 (Nov. 2018) ("It is worth observing that there is little if any criticism when men cryopreserve sperm to protect their future fertility.").

11. *Id.*

12. *See* Ann C. McGinley, "Subsidized Egg Freezing in Employment: Autonomy, Coercion, or Discrimination," 20 Emp. Rts. & Emp. Pol'y J. 331 (2016).

13. Ellen Herman, "Kinship by Design: A History of Adoption in the Modern United States" (Univ. of Chicago Press 2005).

14. Iris G. Insogna & Elizabeth S. Ginsburg, "Infertility, Inequality, and How Lack of Insurance Coverage Compromises Reproductive Autonomy," AMA Journal of Ethics, Vol. 20, No. 12:E1152-1159 (Dec. 2018).

15. "Fertility Benefits: Fert Perks," *supra* note 2 (citing a study performed by Mercer).

16. *Id.* (noting that Tesla offers unlimited IVF coverage); *see* Caroline Hroncich, "Starbucks expands fertility benefits to cover surrogacy, boosts reimbursements," Employee Benefits News (Oct. 2, 2019), *https://www.benefitnews.com/news/starbucks-expands-fertility-benefits*.

17. These states are: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Texas, Utah, and West Virginia. Note that some state mandates have a delayed effective date; for example, Colorado's mandate is effective for policies issued on or after January 1, 2022. *See* 2020 Col. Rev. Stat. § 10-16-104, (23).

18. *See, e.g.*, La. Rev. Stat. § 22:1036.

19. *See, e.g.*, Ohio Rev. Code Ann. § 1751.01(A)(7).

20. These states are: Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Utah. The scope of each IVF mandate varies by state.

21. There are signs of change on the horizon – at least in New York. On February 11, 2021, Governor Andrew Cuomo directed the New York Department of Financial Services to require insurers to provide immediate coverage of infertility benefits for same-sex couples. Press Release, New York Department of Financial Services, Governor Cuomo Announces New Actions to Expand Access to Fertility Coverage for Same Sex Couples as Part of 2021 Women's Agenda (Feb. 11, 2021), *https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202102111*.

22. Stephanie Fairyington, "Should Same-Sex Couples Receive Fertility Benefits?" N.Y. Times (Nov. 2, 2015); Kaufman, *supra* note 4.

23. For this reason, some advocates have contended that infertility should not be defined as a physical condition but a "social one" – and that a category of "social infertility" could provide those biologically unable to form families with the legal tools to do so. *See id.*

24. Alice Broster, "LBGTQ+ Parents Face Unique Barriers During Fertility Treatment," Forbes (July 6, 2020), *https://tinyurl.com/y5aqhtfa*.

25. Amanda Schiavo, "Your fertility benefits may be excluding LGBTQ+ employees from treatments," Employee Benefits News (June 25, 2020).

26. The only caveat is that self-insured plans are required to identify "essential health benefits" ("EHBs") for purposes of complying with the Patient Protection and Affordable Care Act ("ACA") prohibition on imposing annual or lifetime dollar limits on EHBs. A self-insured plan may use a benchmark plan from any state to identify EHBs. If a self-insured plan offers infertility coverage and its benchmark plan has identified infertility coverage as an EHB, the self-insured plan would need to comply with the ACA rules regarding EHB limits.

27. If the self-insured plan sponsor changes the scope of available benefits to offer infertility coverage, this change should be coordinated with their stop-loss insurance coverage carrier.

28. I.R.S. Chief Couns. Ltr. INFO 2004-0187 (Mar. 29, 2005) (concluding that "legal expenses incurred in connection with a surrogate mother are typically not in connection with otherwise-deductible medical care expenses" and therefore would not be deductible under Section 213).

29. For example, in April 2021, the IRS released a private letter ruling that permitted a same-sex male couple to deduct sperm donation and sperm freezing expenses incurred as part of the couple's gestational surrogacy arrangement, reasoning that medical costs and fees directly attributable to the taxpayers were within the limitations of I.R.C. § 213(d). I.R.S. Priv. Ltr. Rul. 202114001 (Apr. 9, 2021).

30. I.R.S. Chief Couns. Ltr. INFO 2002-0291 (Aug. 12, 2002) (concluding that medical and legal expenses incurred for a surrogate mother would not qualify for deduction under Section 213(d), reasoning that "[a] surrogate mother is, of course, neither the taxpayer nor the taxpayer's spouse, and typically is not a dependent of the taxpayers").

31. *See, e.g.*, *Magdalin v. Comm'r*, 96 T.C.M. (CCH) 491 (2008), *aff'd*, No. 09-1153, 2009 U.S. App. LEXIS 28966 (1st Cir. Dec. 17, 2009) (denying the taxpayer's request for deduction in connection with surrogacy on the basis that the treatments did not affect the structure or function of his body, but instead "affected the structures or functions of the bodies of the unrelated surrogate mothers.").

32. *Morrissey v. United States*, 871 F.3d 1260, 1267 (11th Cir. 2017).

33. *Id.*

34. Paul Caron, "Pratt: *Morrissey* Creates New Uncertainty Regarding Tax Deductions for IVF, Egg Donation, and Surrogacy," TaxProfBlog (Oct. 26, 2017) *https://tinyurl.com/y4zfps6g*.

35. *See Moon v. Tall Tree Adm'rs, LLC*, No. 18-4034, 2020 U.S. App. LEXIS 15936 (10th Cir. May 19, 2020) (deferring to plan administrator's interpretation of a clause excluding "non-traditional medical services and treatments . . . including, but not limited to pregnancy charges acting as a surrogate mother"); *Roibas v. EBPA, LLC*, 346 F. Supp. 3d 164 (D. Me. 2018) (reasoning that the plan administrator's construction, which denied pregnancy benefits for the surrogate participants, was "more closely aligned" with the plan's purpose of providing medical benefits for all covered employees); *Spectrum Health Hosp. v. Lebr*, No. 298688, 2011 WL 3962997 (Mich. Ct. App. Sept. 8, 2011).

36. *Mid-South Ins. Co. v. Doe*, 274 F. Supp. 2d 757 (D.S.C. 2003).

37. *MercyCare Ins. Co. v. Wis. Comm'r of Ins.*, 786 N.W.2d 785 (Wis. 2010).

38. New Life Agency offers various "insurance plans" designed for surrogates and prospective parents using a surrogate. The "Back Up Plan 3000" is designed to kick in once the surrogate's medical insurance declines coverage: "Plan Description: Not sure your Surrogate's major medical insurance will cover surrogacy? Secure your underwriting approval without activating your surrogate's policy or paying full premiums or deductibles upfront. Peace of Mind Insurance Coverage through New Life Agency. If the Surrogate Maternity Coverage Certificate is activated full premium of $11,950 and Claims Fund Account Deductible Deposit is requested."

39. Treas. Reg. § 1.213-1(e)(1)(ii).

40. I.R.S. Priv. Ltr. Rul. 200318017 (Jan. 9, 2003) (concluding that taxpayer expenses incurred in connection with obtaining an egg donor, including the donor's expenses, were "directly related and preparatory to the taxpayer's receiving the donated egg or embryo. The expenses are therefore the taxpayer's medical expenses and are deductible by the taxpayer in the year paid."); I.R.S. Chief Couns. Ltr., INFO 2005-0102

(reasoning that "[f]ertility is a function of the body, and treatment to overcome infertility is within the definition of medical care above. . . . Thus, surgical, hospital, laboratory, and transportation expenses paid by or on behalf of a donor or prospective donor in connection with an egg or embryo transplant operation are deductible medical expenses for the years in which paid.").

41. I.R.S. Chief Couns. Ltr., INFO 2005-0102 (Mar. 29, 2005).

42. There are creative policy arguments to the contrary – including that elective egg freezing should be viewed as "preventive care" and therefore covered under Section 213(d). *See* Tessa R. Davis, "Freezing the Future: Elective Egg Freezing and the Limits of the Medical Expense Deduction," 107 Ky. L.J. 373 (2018-19).

43. *See* I.R.S. Chief Couns. Ltr., INFO 2010-0017 (Nov. 2, 2009) (noting that courts have interpreted "cure, mitigation, and treatment" as actions that address an "*existing* or *imminently probable* disease, physical, or mental defect or illness" and therefore banking umbilical cord blood as a precaution to treat a disease that might possibly develop in the future does not satisfy the existing legal standard that at a minimum a disease must be imminently probable).

44. The taxpayers sought to deduct the following costs: donor egg retrieval, sperm donation and freezing, IVF medical costs, childbirth expenses and health coverage for the surrogate, legal and agency fees for the surrogacy, and any other medical expenses arising from the surrogacy. I.R.S. Priv. Ltr. Rul. 202114001 (Apr. 9, 2021).

45. An open question is whether I.R.S. Priv. Ltr. Rul. 202114001 can be squared with prior IRS guidance that espoused a narrower view of the medical expense deduction. *See, e.g.*, *Magdalin* at 1600 n.5.

46. Treas. Reg. § 1.501(c)(9)-3(a); *see* I.R.S. Priv. Ltr. Rul. 201415011 (Jan. 13, 2014) (concluding that VEBA that paid benefits to domestic partners who were not dependents under Code Section 152 did not violate the "de minimis" requirement where the total amount of impermissible benefits did not exceed 3% of the overall benefits expended by the VEBA).

47. *See* I.R.S. Notice 2002-45 (concluding that because employer-provided expense reimbursements were made irrespective of whether any medical expenses had been incurred, all payments made during the year, including amounts paid to reimburse medical expenses, were included in the employee's gross income).

48. I.R.C. § 137(a)(1) ("Gross income of an employee does not include amounts paid or expenses incurred by the employer for qualified adoption expenses in connection with the adoption of a child by an employee if such amounts are furnished pursuant to an adoption assistance program.").

49. I.R.C. § 137(c).

50. I.R.C. § 23(d)(1); *see* I.R.C. § 137(d).

51. I.R.C. § 137(c)(2); *see* I.R.S. Notice 97-9 (noting that "an adoption assistance program may be part of a more comprehensive benefit plan").

52. I.R.C. § 137(d) (incorporating I.R.C. § 23(d)(2)).

53. For a discussion of these issues, see note 59.

54. ERISA § 3(1), 29 C.F.R. § 2510.3-1(a)(1).

55. ERISA § 733(a)(1), 29 U.S.C. § 1191b(a)(1).

56. ERISA § 733(a)(2), 29 U.S.C. § 1191b(a)(2).

57. For example, if the plan is fully-insured, coverage for certain infertility treatments may not be available under the policy.

58. This analysis focuses on the expenses related to the surrogacy and not any preparatory expenses, such as egg extraction from the intended parent, that may be covered by the intended parent's health plan.

59. Mark Hansen, "As Surrogacy Becomes More Popular, Legal Problems Proliferate," ABA Journal (Mar. 1, 2011).

60. Mich. Comp. Laws § 722.859; La. Rev. Stat. § 9:2719.

61. Cal. Fam. Code § 7962.

62. Kaufman, *supra* note 4.

63. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 202114001 (Apr. 9, 2021) ("[T]here are a comparatively smaller number of medical costs or fees paid for medical care directly attributable to taxpayers, examples in this case being sperm donation and sperm freezing. . . .").

64. 29 C.F.R. § 2590.715-2713.

65. *See* Treas. Reg. § 54.4980B-2, Q&A-1(a).

66. *See* Treas. Reg. § 1.409A-3(i)(1)(iv).

67. 45 C.F.R. § 160.103.

68. For example, New York prohibits an employer from accessing an employee's personal information regarding reproductive decision making without prior affirmative written consent. N.Y. Lab. Law § 203-E.

69. *See* EEOC Guidelines, Section 3, Employee Benefits, Health Insurance Benefits ("Where both men and women are, or could be, affected by the same condition or helped by the same treatment, the employer will be liable for sex discrimination if it provides different coverage to employees of each gender on the basis of gender."), *https://tinyurl.com/y2d4m3jh* (last visited Aug. 14, 2020).

70. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).