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MAGAZINE

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When creating and operating family planning benefits—such as adoption assistance and coverage of fertility services and surrogacy expenses—employers and plan sponsors need to consider several tax and compliance issues.

More Than Meets the Eye:

Offering Family Planning Benefits

by | **Erin E. Shick**

In this era of difficulty surrounding attracting and retaining top talent, organizations may want to consider adding family planning benefits to their arsenal of recruitment and retention tools.

According to the World Health Organization, one in six people globally is affected by infertility.[1] One survey showed that 60% of women in the United States said they would opt for a company that offers fertility benefits over a company that doesn't.[2] The International Foundation of Employee Benefit Plans 2022 *Employee Benefits Survey* found that more than half of employers with 5,000 or more employees offer fertility benefits.[3] It is becoming a benefit that employees at companies of a certain size are starting to expect.

Employers that don't offer family planning benefits may think they are in the clear if they haven't received any requests for these types of benefits. The problem is that even if employees are struggling with infertility and want these benefits, they may not feel comfortable asking because infertility is somewhat of a taboo topic in our society. Only 15% of adults say they are comfortable discussing fertility in the workplace. Because of this, employers may also be unaware of the stress and anxiety infertility is causing among employees.[4]

While the number of employers and plans offering robust and comprehensive family planning benefits is growing, as they say, "No good deed goes unpunished." Employers and plan sponsors need to consider several tax and compliance issues when creating and operating these benefit programs. This article is intended to provide an overview of some of those potential hazards.

Fertility Benefits and Surrogacy

Arguably the most commonly requested family planning benefit is infertility benefits. That is understandable since in vitro fertilization (IVF) can cost $20,000 per round, and egg freezing can cost $10,000 or more.[5] Workers look to their group health plan for coverage for these expensive services and can sometimes find no coverage or significant gaps in coverage. More than 80% of people who undergo fertility treatments have little to no insurance coverage.[6]

Family Planning Benefits on the Rise

The International Foundation of Employee Benefit Plans has been tracking fertility and family-forming benefits over the past seven years.

According to *Employee Benefits Survey: 2022 Results,* 40% of U.S. organizations, including multiemployer plans, public employer plans and single employers, offer fertility benefits (an increase from 30% in 2020). In addition:

- 28% cover fertility medications (8% covered in 2016, 14% in 2018, 24% in 2020)
- 30% cover in vitro fertilization (IVF) treatments (13% in 2016, 17% in 2018, 24% in 2020)
- 16% cover genetic testing to determine infertility issues (11% in 2018, 12% in 2020)
- 17% cover non-IVF fertility treatments (6% in 2016, 11% in 2018, 11% in 2020)

The survey also showed that the prevalence of adoption-related benefit offerings, including paid adoption leave and financial assistance, also is increasing:

- 34% offer paid adoption leave (19% offered in 2016, 21% in 2018, 27% in 2020)
- 19% offer financial assistance with adoption (17% offered in 2016, 2018 and 2020)

Fully Insured Group Health Plans

Some states have attempted to regulate infertility benefits by requiring group health insurance plans to provide benefits for IVF and fertility preservation. According to the National Infertility Association, as of June 2022, 20 states had passed fertility insurance laws. Fourteen of those laws required IVF coverage, and 12 states require coverage of fertility preservation for *medically induced infertility,* which occurs when a medical treatment for another condition, such as cancer, causes infertility.[7] However, because of Employee Retirement Income Security Act (ERISA) preemption issues, none of these state laws applies to group health plans that employers self-insure. In addition, sponsors of fully insured plans in states that do not mandate coverage have little to no flexibility as it relates to plan design and may have a fully insured group health plan that offers no coverage for fertility services.

Self-Insured Group Health Plans

Plans that do self-insure can choose to offer fertility benefits as part of their major medical programs, but there are no laws requiring them to do so. Some third-party administrators (TPAs) that administer self-insured group health plans may consider fertility treatments as not "medically necessary" and not cover them at all—or the coverage may have significant gaps. For example, the plan may cover IVF but not the injections needed to complete the IVF cycle. Employers that want to ensure that the gaps are filled need to work very carefully with their TPAs to review their plan design and administration, which can be a tedious process. Sometimes the TPAs are still unwilling or unable to offer or cover some services. For example, a major medical plan cannot provide coverage for certain services using pretax premiums because of the Internal Revenue Code, as discussed further below. Ultimately, even if a plan sponsor believes it is providing broad-based infertility coverage, the participant may still receive unexpected denials of coverage that a plan sponsor may never become aware of.

Vendors and Combined Family Planning Packages

To combat gaps in coverage, some employers seek out fertility benefit vendors to carve out some fertility and family-forming services, but other services remain integrated with the existing group health plan, where applicable. These programs wrap around the existing group health plan and typically bundle a variety of services—fertility, egg preser-

vation, surrogacy and adoption—into one program. The problem with the bundled model is that the tax implications vary by service and by who receives the service. As a result, plan sponsors need to work closely with counsel to examine each service and discuss the appropriate tax treatment. These vendors will work with plan sponsors to accommodate their preferred tax treatment, but that requires plan sponsors to understand what the tax implications are.

"Medical Care" and Tax Treatment

One of the most complicated questions is what constitutes "medical care." Although it seems straightforward, tax-favored treatment (e.g., receiving services pretax or through pretax premiums) is granted only to expenses that constitute medical care under Code Section 213(d).[8] Medical care under Section 213(d) includes 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."[9] The Internal Revenue Service (IRS) defines medical care under Section 213(d) very narrowly.

In January 2021, the agency issued a private letter ruling (PLR)[10] in response to a request for an opinion on the deductibility of medical costs and fees arising from IVF procedures, gestational surrogacy and related items. The individuals requesting the letter were a married same-sex male couple. The couple in question wanted to use the sperm from one husband (Taxpayer A) and the egg from the other husband's sister (Taxpayer B) to implant in a gestational surrogate (an unrelated party). The expenses involved in this arrangement included medical expenses directly related to both spouses, egg retrieval, medical expenses of sperm donation, sperm freezing, IVF medical costs, childbirth expenses for the surrogate, surrogate medical insurance related to the pregnancy, legal and agency fees for the surrogate, and other medical expenses arising from the surrogacy.

Citing tax court opinions, IRS held that tax-favored medical expenses have always been defined narrowly. The taxpayers argued that IVF, surrogacy and related costs "affected the structure or function of the body," but IRS held that the expenses would not be incurred to treat a medical condition and were therefore not tax-deductible. When considering the deductibility of IVF, the taxpayers themselves (or in this case, plan participants) must have a defect that prevents them from naturally conceiving children.[11] This conclusion has significant implications for the LGBTQ+ community.

takeaways

- Family planning benefits include coverage of fertility preservation, infertility treatment and surrogacy expenses as well as adoption assistance.
- Forty percent of U.S. organizations offer fertility benefits, including employers with more than 500 employees. But more than 80% of people who undergo fertility treatment have little to no insurance coverage.
- Some states require fully insured group insurance health plans to provide benefits for in vitro fertilization and fertility preservation. These state laws do not cover self-insured group health plans, and some self-insured fertility coverage has significant gaps.
- Other options for providing overage include carving out fertility services and contracting with a fertility benefit vendor as well as setting up a health reimbursement account to cover fertility benefits.
- Proper tax treatment and what constitutes medical care are complicated questions surrounding fertility benefits.
- Adoption assistance programs are another way to help employees grow their families. These benefits typically reimburse employees for qualifying expenses related to the cost of adoption.

The LGBTQ+ Community

In the PLR, IRS cited an 11th Circuit case, *Morrissey v. United States*,[12] where a male in a same-sex union wanted to deduct the costs he incurred to retain, compensate and care for the woman serving as egg donor and gestational surrogate of his child. In that case, Morrissey conceded that while he was not medically infertile, he was effectively infertile because he was homosexual. The court concluded that the expenses were not deductible because the taxpayer's own function in the reproductive process was to produce healthy sperm, which he remained able to do without the IVF and surrogacy procedures.

Using this rationale, IRS concluded that as it relates to the request, the expenses associated with the sperm donation and freezing were considered medical costs, but costs and fees related to the egg donation, IVF procedure and gestational surrogacy did not qualify as deductible medical expenses.

This precedent means that large portions of the family-building process for the LGBTQ+ community are not eligible for tax-favored treatment. In the situation involving two same-sex married partners, the expenses associated with the eggs or sperm of one partner can be covered under the

group health plan but not the expenses associated with using donor eggs or sperm because the couple is not medically infertile (but is effectively infertile). In contrast, an opposite-sex couple experiencing medical infertility would likely find most of their medical costs relating to IVF procedures deductible. Logically, both an opposite-sex medically infertile couple and a same-sex couple would not be able to directly conceive a child together, but there are different tax implications according to IRS.

Even more complicated for plan sponsors is the fact that Section 1557, which applies to many health insurers and some TPAs, prohibits discrimination on the "basis of sex."[13] The Office for Civil Rights (OCR) within the Department of Health and Human Services (HHS) announced that its interpretation of "on the basis of sex" includes discrimination on the basis of sexual orientation and gender identity. This decision was in light of the *Bostock v. Clayton County*[14] case where the Supreme Court held that the Title VII ban on sex discrimination bars workplace discrimination because someone is gay or transgender.

This leaves plan sponsors in a particularly difficult situation with more questions than answers. Do plan sponsors want to potentially run afoul of Title VII and provide different tax treatment within the group health plan to LGBTQ+ employees? Do employers want to deal with the publicity of that potential Title VII suit? If they treat LGBTQ+ and heterosexual employees the same with regard to the tax treatment of fertility benefits, what are the ramifications from IRS? Would the qualified status of the Section 125 plan be compromised? Would a TPA covered by Section 1557 even agree to administer a benefit pretax or after-tax based on the sexual orientation of the participant?

Again, there are a lot of questions with no good answers. Employers and plan sponsors likely need to seek the help of qualified legal counsel to help parse through the questions above and determine the best approach for their plan participants and the plan.

Imputing Income and After-Tax Treatment

Eventually, plans get to the point where some services need to be taxed. For example, irrespective of the LGBTQ+ issues discussed above, surrogacy expenses can never be a tax-favored benefit. One way to deal with the tax implications of non-tax-deductible benefits is to have employees pay premiums for the non-tax-favored benefits posttax. However, typically with family planning benefits, the employer pays the entire premium for the family planning benefits, or an employee pays a portion of the premium for major medical care and the family planning benefits are included. If an employee can have surrogacy expenses reimbursed as part of a family planning benefit that is bundled with the major medical plan, it does not make sense to pay the medical plan premiums posttax because most of the services that the premium covers are eligible for tax-favorable treatment. As a result, many employers choose to impute the value of the surrogacy services received or the amount reimbursed to the employee as income. By imputing the services or reimbursement as income, the benefits are added as W-2 income, which requires the employee to pay federal, state and FICA taxes as applicable on the value of the benefits. Although most plan sponsors take this approach, imputing income can be challenging to coordinate with payroll and difficult for employees to understand.

Reimbursement From Other Accounts

Health flexible spending accounts (FSAs) and health savings accounts (HSAs) are typically used to cover the basics like pregnancy tests, ovulation tests, electronic ovulation tracking devices and at-home hormone testing. However, they can also be used for IVF treatment. In addition, some companies have set up health reimbursement accounts (HRAs) to cover fertility benefits. A fertility HRA is a popular option when the employer offers a fully insured group health plan and wants to offer fertility coverage but has little to no control over the fully insured plan design. However, FSAs, HSAs and HRAs are all tax-favored reimbursement

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accounts, so they are subject to the same IRS limitations discussed above and can only reimburse "medical care" as defined by IRS.

Adoption Assistance Benefits

In addition to fertility benefits, many employers provide adoption assistance benefits to prospective parents looking to grow their families through adoption. The utilization of the benefit is typically low, but it can really help employees who are going through the adoption process since domestic private adoptions can cost more than $40,000 and international adoptions cost upwards of $50,000.[15] An adoption benefit plan typically reimburses employees for qualifying expenses related to the cost of adoption (e.g., adoption agency fees, legal fees, placement fees and travel expenses related to the adoption). Not surprisingly, plan sponsors administering an adoption assistance program have some complicated tax considerations.

Tax Implications

Any reimbursement for adoption services needs to be included in the employee's income unless there is a tax exclusion. IRS establishes the maximum amount of employer-provided adoption assistance that can be excluded from an employee's income. For the 2022 tax year, the maximum dollar amount is $14,890. However, the exclusion (and potential adoption tax credit) is subject to a phaseout depending on the taxpayer's modified adjusted gross income (MAGI). For the 2022 tax year, the MAGI phaseout begins at $223,410 and ends at $263,410. Individuals may be able to both claim the income exclusion for amounts reimbursed by the employer and claim the adoption tax credit for any amounts unreimbursed by the employer. Any amounts reimbursed over the maximum dollar exclusion (factoring in the MAGI phaseout) need to be treated as income to the employee.

Employers offering an adoption assistance benefit should strongly encourage participants taking advantage of the program to seek assistance from their own tax professionals regarding the implications and intersections of the adoption tax credit and adoption income exclusion. In addition, employers need to assess each reimbursement on a case-by-case basis in determining whether and to what extent it needs to be included in the employee's income.

Conclusion

This article is in no way meant to dissuade employers from considering offering family planning benefits to employees. These benefits can promote employee loyalty and retention as well as positively impact employee morale, health and mental well-being. The pitfall is that because employers and plan sponsors may consider family planning benefits to be "societally good," they assume that there are no compliance issues and can offer it to all employees on a tax-advantaged basis. Since that is not the case, employers should work closely with legal counsel to ensure compliance.

bio

Erin E. Shick is a member of the pension, benefits and executive compensation practice at Dentons law firm in Cincinnati, Ohio. She has significant experience working with employers to establish and maintain compliance for qualified retirement plans, health and welfare plans, and executive compensation arrangements. Shick assists clients on the compensation and benefits-related aspects of corporate transactions and often advises benefits committees, boards of directors and plan trustees in fiduciary and administrative obligations with respect to benefit plans. She holds a bachelor's degree from Hillsdale College and a J.D. degree from the University of Cincinnati College of Law.

Endnotes

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