Family Formation and Reproductive Health in Employer Group Health Plans

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Agenda

- DEI Opportunity
- Family Formation Benefits
- Abortion, Contraception and Reproductive Health Considerations
- Section 1557 Nondiscrimination

DEI Opportunity

DEI Opportunity

Create Meaningful Family Formation Benefits

- Paid Parental Leave
  - Not tied to gender or giving birth
- Consider Adoption Benefits
- Resources for Fertility and other Family Planning options

Family Formation Benefits

Family Formation Benefits

Group Health Plan coverages and exclusions

- Question: does employer plan provide fertility benefits?
- Possible federal requirements?
  - Infertility affecting a structure or function of the body (classic disability description)
- State requirements?
  - Don’t reach self funded employer plans, only insurance policies
- What are common fertility benefits?

Family Formation Benefits

Group Health Plan coverages and exclusions

- Possible state coverage mandates
  - 15 states require insurance coverage for infertility benefits
  - 2 states require insurers to offer infertility benefit coverage

Family Formation Benefits

Fertility Benefits

- Fertility Benefits – overcoming infertility that affects a structure or function of the body
- Common Types of Fertility benefits
  - Assisted Reproductive Technology (ART)
  - Artificial or Intrauterine Insemination
  - In Vitro Fertilization (IVF)
  - Co-IVF
    - Female bodied couple – egg from one combined with donor sperm and implanted in second person

Family Formation Benefits

Fertility Benefits

- Transgender Persons
  - Fertility Preservation options
  - ART
    - IUV
    - IVF
    - Traditional or gestational surrogacy
  - Some persons may not need fertility intervention services

Family Formation Benefits

Surrogacy Benefits

- Types of Surrogacy
  - "Traditional" – surrogate mother provides genetic material
  - Gestational surrogacy
    - Gestational carrier carries the genetic material of others
      - Egg donor, sperm donor
      - Egg and or sperm of individuals seeking surrogacy
- Male bodied couples generally need surrogacy options

Family Formation Benefits

Surrogacy Benefits

- Legality of surrogacy
  - https://www.creativefamilyconnections.com/us-surrogacy-law-map/
  - Helpful resource for current options in those states
- Green light states: CA, CO, CT, DC, DE, ME, NH, NJ, NV, VT, WA
  - Light green states: AL, AK, AR, FL, GA, HI, IL, IA, KS, KY, MA, MD, MN, MO, MS, MT, NY*, NC, ND, NM, OH, OK, OR, PA, RI*, SC, SD, TX, UT, WI, WV
- Yellow light states: ID, TN, VA, WV
  - Orange light states: AZ, IN
- Red light states: LA*, MI, NE

Family Formation Benefits

Surrogacy Benefits – Legal and other expenses

- Agency fees
- Legal and court costs
- Travel
- Uncovered Medical Expenses
- Egg donor fees
- Sperm donor fees
- Egg/embryo freezing/storage fees

Family Formation Benefits

Surrogacy Benefits – Group Health Plan coverages and exclusions

- Employer group health plans provide benefits for employees and dependents
  - Surrogate is often not an employee or dependent

Family Formation Benefits

Surrogacy Benefits – Group Health Plan coverages and exclusions

- What about surrogate's employer group health plan?
  - Some plans contain exclusions for surrogacy
    - Violation of Title VII – Pregnancy discrimination
    - ACA issues
      - required preventative services generally include prenatal/postnatal care
      - Essential Health Benefits (EHBs) must be covered without annual or lifetime limits – maternity and newborn care may be EHBs

Family Formation Benefits

Employer provided benefits outside of GHP

- Common inclusions
  - Agency fees
  - Legal and court costs
  - Travel
  - Sometimes uncovered medical expenses incurred by employee/spouse

Family Formation Benefits

Employer provided benefits outside of GHP

- Common exclusions
  - Surrogacy fee to carrier
  - Medical insurance for non-employee surrogate
  - Donor fees
    - Egg, sperm
  - Storage/freezing fees
    - Egg/embryo

Family Formation Benefits

Tax Considerations

- Pre-tax benefits
  - GHP coverage for employee/taxpayer and dependent
  - Key is relationship of expense to employee
- Non GHP benefits are generally taxable
  - Some adoption expenses can be pre-tax

Family Formation Benefits

Employer provided benefits outside of GHP

- Adoption Assistance
  - Pre-tax options
    - Employer provided benefits
    - Pre-tax deductions by employee
  - Qualified Expenses
    - Reasonable and necessary adoption fees
    - Court costs and attorney fees
    - Travel, lodging and food expenses
    - Other expenses directly related to and for the principal purpose of adopting an eligible child

Family Formation Benefits

Employer provided benefits outside of GHP

- Adoption Assistance
  - Income and dollar limits
    - Income Limit – Modified Adjusted Gross Income (MAGI) – benefit phases out between $239,230 and $279,230
    - Dollar Limit -- $15,950 (combined limit for employer and employee)
  - Timing, depends on
    - When expenses are paid
    - Whether adoption is domestic or foreign
    - When and if the adoption is finalized

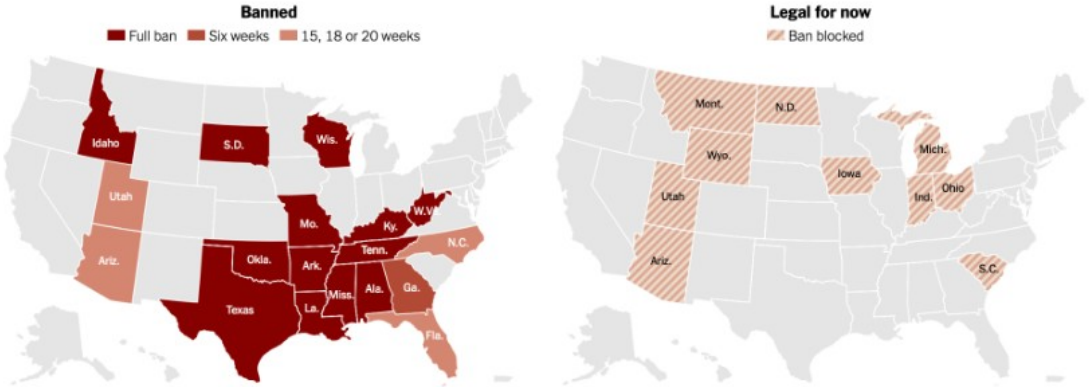
Abortion, Contraception and Reproductive Health Considerations

Recent U.S. Supreme Court Ruling

Abortion Coverage

- The Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson*
- **State governments** now have the ability to enact more restrictive abortion laws, including complete bans

Legal Status of Abortions



Retrieved on 2022.10.12
Source: New York Times at https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html

Federal Laws

Considerations in a fluid situation

The Pregnancy Discrimination Act (PDA)

- Does not require employer-sponsored group plans to pay for abortion services, except where the life of the mother would be endangered if the fetus were carried to term
- A plan must also cover medical complications that arise from an abortion

The Equal Employment Opportunity Commission (EEOC)

- If an employer covers the cost of abortion services, the EEOC indicates that the plan must do so in the same degree as it covers medical conditions

Both PDA and EEOC guidance is unaffected by the U.S. Supreme Court Ruling, meaning…

Group health plans will remain subject to PDA

Roe v Wade

Plan Coverage Considerations

- Federal requirements in this area are limited
  - The Pregnancy Discrimination Act (PDA) does not require health plans to pay for abortions unless the mother's life would be endangered by the pregnancy if the fetus were to be carried to term. Further, if complications arise during the course of an abortion, such as excessive hemorrhaging, plans are required to pay those costs attributable to such complications. However, the plan is not required to pay for the abortion itself, unless the life of the mother would be endangered if the fetus were to be carried to term.
  - The PDA also provides that a plan is not precluded from providing benefits for abortions. The EEOC interprets this provision to mean that, if the plan does cover abortions, it must do so in the same manner and to the same degree as it covers other medical conditions (it is unclear what the EEOC means by this, but medical necessity determinations and protocols would likely have to be applied in the same way as for other plan coverage; and participant cost-sharing would likely have to be the same).

Benefit Considerations

- Enhancing travel and lodging benefits for out-of-state abortion-related services
  - IRC Section 213(d) medical care expenses
  - Plan Administration
  - Plan Coverage
  - HDHP/HSA
- EAP/grief counseling
- Resources for participants to obtain information about the nearest state allowing abortion services
- Enhancing telehealth and prescription drug services for medication abortions
- Employment law issues: PTO (typically two to three days, but some employees could need as much as one week with travel and follow-up appointment)
  - PTO donation program

Other Considerations

- Mid-year election change rules under Internal Revenue Code Section 125
- Tax considerations for added benefits
- State law considerations on coverage to assist participants to travel for services
  - ERISA doesn’t preempt generally applicable criminal laws
- Review all in context of full family planning/reproductive health program
  - Contraceptives/Fertility/Family Leave/Child Care/Menopause service
- Privacy and Mental Health Parity issues
- Federal, State, County and Local contractor requirements
- Governmental entity requirements

Roe v Wade

Plan Coverage Considerations

- Leverage the resources and knowledge of our carrier partners, who know what employers generally cover or exclude today.
- We expect that some states will begin to pass and enforce laws that prohibit abortions generally
  - Example is the Texas Heartbeat Law. While this is not a benefits-focused law, this law prohibits abortions if there is a fetal heartbeat, including (among other things) “paying for or reimbursing the costs of an abortion through insurance or otherwise.” Would a court find that this law is preempted by ERISA with respect to employee benefit plans?
  - Mississippi’s Gestational Age Act – ban after 15 weeks’ gestation is the crux of the case before SCOTUS

Roe v Wade

Plan Coverage Considerations

- Travel expenses
  - It is possible for a group health plan to cover certain travel expenses for medical care. Specifically, Internal Revenue Code Section 213 provides that medical care includes amounts paid “for transportation primarily for and essential to medical care.”
  - This may become an option that is extended by carriers/TPAs in the future.
- For fully-insured benefits, there may be less decision-making freedom – carriers will make their own decisions in this area as to what is permitted or required by state law for the products that they sell, and carriers will communicate with their group policyholders accordingly.
- Due to the lack of guidance in this area, we recommend that employers discuss these issues and their strategy further with their legal counsel.

Employer Considerations

Steps to Compliance

Current Offerings

- Determine what the plan(s) currently offer
- Remember that a client may have both a self-insured plan and a fully-insured plan which may have different benefits

State Laws

- Consider impact of state laws on fully-insured plans
- Some states have criminal statutes that make it a crime to aid someone who is seeking an abortion

Travel Benefits

- Consider whether carrier or TPA can handle travel benefits as employer likely wouldn't want to administer
- Limitations on reimbursements apply

Employee Communications

- Consider what will be communicated to employees about any plan design changes
- Include as part of family planning

Employer Considerations

- Step 1: Be ready to engage with legal counsel.
- Step 2: **Know what coverage your plan currently has for abortion services**.
  - Elective v. therapeutic
  - Fully-insured – Subject to State law and mandates
  - Self-insured plans and ERISA preemption
- Step 3: **What is currently communicated** in plan documents and employee materials?
  - If you have two different plans (PPO and Local HMO), are they providing similar coverage? Do you need/want to highlight the differences.

Employer Considerations

- Step 4: ***Where* are your employees located**?
- Step 5: Prepare for organizational discussions with executives and plan fiduciaries.
  - Internal employee communications
  - External media communications
- Step 6: Determine plan design changes in benefits, either mandated or requested.
- Step 7: Implement any changes with vendors and communicate with employees.

Employer Considerations

Travel Benefits to obtain medical services unavailable locally

- **Can I provide a standalone travel benefit?**
  - Probably not. A standalone travel benefit that reimburses medical-related travel – whether designed as an HRA or otherwise, is considered a group health plan. Non-grandfathered group health plans are subject to a variety of ACA market reforms, including the preventive care mandate, essential health benefits, and annual limit requirements. A standalone benefit cannot comply with ACA by itself. Rather, the benefit would need to be designed to be a part of the larger group health plan (which meets the ACA requirements) or an integrated HRA.

Employer Considerations

Travel Benefits to obtain medical services unavailable locally

- **If I add a travel reimbursement benefit to my major medical group health plan, EAP, or HRA, can I limit it to abortion services?**
  - Employers may limit reimbursement to abortion-related travel; however, based on the risks involved, a more holistic approach of providing reimbursement for any unavailable in-state care may provide some reduced risk for the employer since they are not specifically targeting a service considered illegal in some states.
  - Additionally, if adding the feature to a major medical group health plan or HRA, expanding the travel reimbursements to incorporate mental health and substance use disorder benefits that are otherwise unavailable in the employee's state of residence (or work location) may assist in compliance with MHPAEA. Employers that offer mental health and substance use disorder benefits in their group health plan must provide parity between the same classification of benefits for mental health and substance use disorder benefits as the medical and surgical benefits in the plan. If the travel reimbursements are provided for unavailable mental health and substance use disorder benefits in the employee's state of residence (or work location), then this may alleviate the specific issue raised by adding a medical-related travel benefit.
  - If the service is added to an EAP, which is designed as an excepted benefit, then the same MHPAEA issue does not exist. However, further considerations apply to the EAP,.

Contraceptive Coverage

- DOL issued FAQs on July 28, 2022
- Non-grandfathered group health plans must cover, without cost-sharing, certain preventive services
  - For women, includes evidence-based items or services that have in effect a rating of “A” or “B” in the current recommendations of the United States Preventive Services Task Force (USPSTF), and additional preventive care and screenings supported by the Health Resources and Services Administration (HRSA)
- Plans must comply with the current 2019 HRSA-Supported Guidelines, which include 18 categories of contraceptive methods, including IUDs, shot, oral contraceptives, patch, contraceptive rings and sponges, diaphrams, emergency contraceptive, etc.
  - Plans are required to cover without cost sharing at least one form of contraception in each of the 18 categories
  - Plans are still required to cover without cost sharing any contraceptive services and FDA approved contraceptive products that an individual and their attending provider have determined to be medically appropriate, regardless of whether those services or products are specifically identified in the categories listed in the HRSA-Supported Guidelines
  - Plans are required to cover FDA-approved emergency contraception, including OTC when prescribed

Contraceptive Coverage

- Plans can use medical management techniques for FDA approved, cleared, or granted contraceptive products, *not* described in the HRSA-Supported Guidelines, to determine which specific products to cover without cost sharing only if multiple, substantially similar services or products are available and are medically appropriate for the individual
  - If an individual's doctor recommends a particular service or FDA-approved product not included in a category described in the HRSA-Supported Guidelines based on a determination of medical necessity, including if there is only one service or product that is medically appropriate for the individual, the plan must cover that service or product without cost sharing.
  - Plans can utilize reasonable medical management techniques within a specified category of contraception only to the extent the HRSA-Supported Guidelines do not specify the frequency, method, treatment, or setting for the provision of the contraception
  - If a plan uses medical management techniques, then it must have an "easily accessible, transparent, and sufficiently expedient" exceptions process that is not unduly burdensome on the individual or provider
    - The Departments consider an exceptions process to be easily accessible if plan documents include relevant information regarding the exceptions process, including how to access the exceptions process, the types of information the plan requires as part of a request, and contact information for a representative of the plan who can answer questions related to the exceptions process

Contraceptive Coverage

- Plans subject to the PHSA and ERISA are required to comply with the preventive services mandate, including contraceptive coverage
  - State law that prevents the application of the PHSA will be preempted by federal law
  - In the event that a state fails to enforce the required contraceptive coverage mandate on insurance in the individual or group market, HHS has the authority to step in to enforce the requirement within that state.
- An HSA, HRA, or health FSA may reimburse the cost of OTC contraception to the extent that cost is not paid or reimbursed by another plan or coverage
  - If the OTC emergency contraception is prescribed, the medical plan must cover it with no cost sharing
  - If an employer-sponsored HRA or health FSA limits the types of reimbursable expenses, the HRA or health FSA plan documents may need to be amended to cover such costs

1557 Proposed Rules Issued

Section 1557 Nondiscrimination

- The ACA's §1557 regulations released in 2016 prohibited discrimination in certain health programs and activities on the basis of race, color, national origin, sex, age, or disability
  - HHS released proposed regulations on August 4, 2022 restoring the scope and requirements of the ACA's §1557 nondiscrimination provision from the 2020 regulations
- The U.S. Supreme Court ruled in *Bostock v. Clayton County* that discrimination based on sex for Title VII purposes includes discrimination based on sexual orientation and gender identity
- HHS announced that, consistent with the Supreme Court's decision in *Bostock*, it will now interpret Section 1557 to include:
  - Discrimination on the basis of sexual orientation; and
  - Discrimination on the basis of gender identity

Section 1557 Nondiscrimination

Proposed rules

- Expands the scope of Section 1557 to apply to health insurance issuers and other health programs or activities that receive funds from federal agencies or in relation to federal programs such as federal or state exchanges, Medicare and Medicaid, and other HHS programs
  - Rules will directly or indirectly apply to fully insured plans and to health insurance carriers acting as third-party administrators for self-insured plans
  - They would also apply to self-insured plans that receive federal funding through the Retiree Drug Subsidies program
- The rules define discrimination on the basis of sex to include discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity
  - This will effectively ban covered entities from applying blanket exclusions for gender-affirming care.
- These are proposed rules and will not be effective until 60 days following finalization
  - For plans requiring design changes to comply, this means the final rules will apply to plan years beginning on or after the rules are finalized
  - While we wait on these rules to be finalized, the final regulation from June 12, 2020, are still in effect

Title VII

- Even if Section 1557 does not apply to the group health plan, other laws likely will, such as Title VII of the Civil Rights Act
- Action Steps: Employers that have plan provisions that could be deemed discriminatory against gay or transgender employees should review those provisions with their legal counsel

Questions?

Thank You!

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