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Insights

NAVIGATING THE PROPOSED RULE ON STAND-ALONE FERTILITY BENEFITS: GUIDANCE FOR EMPLOYERS

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The Departments of Labor (“DOL”), Health and Human Services (“HHS”), and Treasury (collectively, the “Departments”) jointly proposed a rule (the “Proposed Rule”) creating a new category of "excepted fertility benefits" — a limited excepted benefit generally exempt from the market requirements imposed by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), the Affordable Care Act (the “ACA”), the No Surprises Act, and related federal laws governing group health plans. Issued in response to Executive Order 14216 on expanding access to in vitro fertilization ("IVF"), the Proposed Rule seeks to reduce regulatory burden for employers offering fertility benefits to employees, while ensuring reliable access to IVF treatment and more affordable treatment options.

Although the Proposed Rule is not in final form, employers considering expanding or making changes to the fertility benefits offered to employees will want to commence preparation around the new benefits, which are proposed to be effective January 1, 2027 (or potentially sooner if the rule is finalized with an earlier effective date). Given the time required for planning, implementing services agreements, and preparing enrollment materials, starting now may yield advantages later in the year when the Proposed Rule is finalized. Comments on the Proposed Rule are due no later than July 13, 2026.

The Proposed Rule

Eligibility and Scope of Excepted Fertility Benefits

To qualify as an excepted fertility benefit, coverage must be limited to benefits substantially all of which are for the diagnosis, mitigation, or treatment of infertility or infertility-related reproductive health conditions and substantially all of which are provided by authorized medical professionals, including medically appropriate items or services targeted to address underlying medical causes of infertility.

The services covered by the Proposed Rule are broad in scope and include:

- Lab tests, imaging, and diagnostic procedures such as laparoscopies and hysteroscopies, blood tests to measure hormones for both men and women, semen analyses, and urine tests to measure levels of luteinizing hormone for women.
- Benefits to mitigate infertility, including health and lifestyle examination, elimination of environmental endocrine disruptors, fertility awareness-based methods, fertility education and medical management, surgical procedures, and pre-conception care.
- Ovulation induction through oral or injectable medications, surgical removal of fibroids or endometriosis tissue, and IVF.
- Fertility counseling and general fertility education, provided substantially all benefits remain at the direction of an authorized medical professional.
- Male-factor infertility treatments, including evaluation of a patient's medical history, physical examination, semen analysis, and surgical approaches including robotic surgery, as well as ultrasound scanning, urinalysis, genetic tests, testicular biopsies, and other tests to determine sperm function.

A footnote to the preamble of the Proposed Rule states that abortion or abortion-related services would not qualify as excepted fertility benefits under the Proposed Rule.

Services qualifying as excepted fertility benefits under the Proposed Rule would not be limited by frequency (e.g., a limit in IVF cycles). Instead, the Proposed Rule includes a total lifetime limit of $120,000 per participant (together with their eligible beneficiaries). For plan years beginning after December 31, 2027, this amount would be adjusted for medical inflation.

Impact on Existing Plan Coverage

To qualify as a limited excepted benefit, fertility benefits must either:

- be provided under a separate policy, certificate, or contract of insurance; or
- otherwise not be an integral part of the group health plan.

Both insured and self-insured coverage may qualify under the second test; only insured coverage qualifies under the first. For a fertility benefit to be considered not an integral part of the plan, the plan sponsor must make available a group health plan (other than one limited to excepted benefits or an HRA/account-based plan) for the plan year during which the participant is offered the fertility benefit. Participants, however, may decline the offered group health coverage.

Market Reform Exemptions

Under the Proposed Rule, a qualifying excepted fertility benefit would generally ***not*** be subject to:

- ACA market reforms (e.g., prohibition on lifetime/annual dollar limits, preventive services coverage mandates, and out-of-pocket maximum requirements)
- HIPAA portability and nondiscrimination requirements
- No Surprises Act protections (e.g., surprise billing rules and related disclosure requirements)
- Mental Health Parity and Addiction Equity Act requirements

Notice Requirements

The most concrete new compliance obligation would be a new required written notice (the "Notice") to all eligible participants and beneficiaries. The Proposed Rule would require the Notice to include:

- A description of coverage with a summary of benefits and limitations (including the lifetime dollar limit);
- An explanation of how to identify and utilize a network provider (if applicable);
- Claims submission procedures (including electronic and paper options); and
- Whether the benefit uses the same claims procedures as the sponsor's other group health plans.

The Notice would be required to be provided no later than the first date the participant is eligible to enroll and annually thereafter. The Notice must also be provided upon request. The Proposed Rule would permit the Notice to be included with other ERISA-required documents.

Additional Items the Departments Are Considering for the Final Rules

The Departments identified six areas where the final rule may differ materially from the Proposed Rule:

- Whether the proposed $120,000 lifetime cap is appropriate or necessary given the limited scope of the excepted fertility benefits;
- Whether the benefit limit should allow for an annual limit (potentially with a carryover to subsequent years) similar to health reimbursement arrangements;
- Whether to require, as a condition of qualification, that no employee premiums, contributions, or cost-sharing may be imposed;
- Whether the benefit should extend to the individual market;

- An effective date earlier than January 1, 2027 (which could allow for benefits to be offered immediately in 2026 with an initial carryover to 2027); and
- An alternative method of calculating medical inflation for purposes of the lifetime (or annual) dollar limitation.

Key Takeaways

Effective Date	Plan years beginning on or after January 1, 2027 (proposed; earlier date under consideration).
Voluntary	Offering excepted fertility benefits is entirely optional for employers.
Lifetime Cap	$120,000 per participant (plus beneficiaries if eligible), indexed for medical inflation after 2027 (as proposed; annual limit with carryover under consideration for the final rule).
Scope of Coverage	Substantially all benefits must be for infertility diagnosis, mitigation, or treatment, provided by licensed medical professionals.
Structural Options	Both insured (separate policy) and self-insured structures qualify; self-insured plans must also offer a traditional group health plan.
Notice Requirement	Written participant/beneficiary notice required as a condition of qualifying as an excepted fertility benefit.
No Cycle Limits	No limit on IVF cycles, subject to the proposed lifetime dollar limit on benefits.
Abortion Excluded	Coverage for abortion or abortion-related services is expressly excluded.

Action Items for Employers

Immediate Actions (Before Final Rule)

1. **Inventory existing fertility benefits.** Determine whether your plan currently covers IVF or other fertility services, and whether those benefits are integrated into your major medical plan or already offered through a specialty vendor or carve-out arrangement.
2. **Assess state requirements.** At least 15 states and the District of Columbia require health insurance coverage to include IVF benefits, often with procedural limitations. Fully-insured plan sponsors in those states may not be able to use the proposed excepted fertility benefits to satisfy state mandates. Self-insured sponsors are generally unaffected.

Planning (Once Final Rule Is Published)

1. **Decide whether to adopt excepted fertility benefits.** The Proposed Rule offers flexibility in benefit design and does not require a set employer contribution, allowing employers to tailor the benefit to align with their overall benefits strategy.

2. **Choose a delivery structure.**

   - **Fully insured option:** Contract with a specialty fertility benefit vendor or insurer to deliver benefits under a separate insurance policy.

   - **Self-insured option:** Design a standalone self-funded fertility benefit arrangement. Ensure you are also offering a qualifying traditional group health plan.

3. **Set benefit parameters.** Plans must stay at or below the $120,000 lifetime cap per participant, subject to change in the final rule.

4. **Prepare required participant notices.** Prepare the required written notice and plan for annual distribution (e.g., with open enrollment materials).

5. **Review summary plan descriptions ("SPDs") and plan documents.** For excepted benefits that are ERISA welfare benefit plans, the fertility benefits notice is in addition to existing disclosure obligations, including the SPD under ERISA section 102. Update plan documents and SPDs before the benefit goes live.

6. **Coordinate with benefits counsel on tax treatment.** Confirm whether employee premiums under the new benefit will be paid pre-tax and coordinate with Section 125 cafeteria plan requirements.

This alert is based on the proposed rule as submitted for Federal Register publication. It is for general informational purposes and does not constitute legal advice. Please contact a member of the BCLP employee benefits & executive compensation team or your trusted BCLP counsel with any questions.

Related Capabilities

- Employee Benefits & Executive Compensation

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