Proskauer

Recent Health Plan Litigation Puts Family Building Benefits in Focus

Employee Benefits & Executive Compensation on **August 19, 2024**

Family building benefits continue to be top of mind as employers and plan sponsors implement new benefit programs to support family building journeys for their employees. At the same time, there have been a few recent lawsuits challenging health plan eligibility criteria for infertility treatment coverage. This post summarizes the recent litigation and challenges for employers and plan sponsors in this space.

What are family building benefits? The scope of family building benefits varies depending on what the plan sponsor has implemented. Most programs include one or more of the following components: (1) coverage of infertility treatment expenses, (2) coverage of long-term fertility preservation expenses (egg, sperm, and embryo freezing), and (3) reimbursement of adoption and surrogacy costs. These benefits can be offered through major medical coverage and/or administered by a specialized vendor.

How do employers structure family building benefits? Again, it varies. If offered, the typical approach is for employers and other plan sponsors to cover some fertility treatments through their major medical plans. Reimbursement of long-term fertility preservation expenses and surrogacy costs may be accomplished through a taxable payment program, as available guidance to date suggests these expenses may not be eligible for tax-free reimbursement under a group health plan. Adoption expenses may be reimbursed through a tax-advantaged qualified adoption assistance program under Section 137 of the Internal Revenue Code (the “Code”) or through a taxable payment program.

What is the recent "infertility definition" litigation about? In two recent cases, *Berton v. Aetna* and *Goidel v. Aetna*, the plaintiffs challenged the medical necessity criteria used by group health plans and insurers to determine participant eligibility for infertility treatment. Historically, group health plans and insurers have required that participants establish a medical diagnosis of infertility to access coverage for assistive reproductive treatments (such as IVF and IUI) and defined "infertility" as the demonstrated inability to conceive after a year (or 6 months for women over 35) of (1) frequent unprotected intercourse (as represented by the individual to their doctor) or (2) failing to conceive through 12 cycles (or 6 for women over 35) of donor insemination.

In these cases, the plaintiffs challenged the eligibility criteria as discriminatory under Section 1557 of the ACA on the basis that while individuals in heterosexual relationships are able to satisfy either prong (1) or (2) to show infertility and receive plan benefits for assistive reproductive technologies, individuals in same-sex relationships must pay out-of-pocket to show infertility under prong (2) and then receive plan benefits for infertility treatment. The plaintiffs claim that application of these criteria violate Section 1557 of the ACA, which prohibits any health program or activity, any part of which receives federal financial assistance, from discriminating on the basis of sex in the provision or administration of health insurance coverage and other health-related coverage.

In *Berton*,the defendants moved to dismiss the case on the grounds that plaintiffs failed to state a claim under Section 1557 of the ACA. The defendants also contended that because the plan in question was self-insured, the employer plan sponsor was a necessary party to the litigation. The court denied the defendants' motion to dismiss, reasoning that the plaintiffs sufficiently alleged that the health plan criteria could require individuals in same-sex relationships to meet more stringent (and expensive) requirements than individuals in opposite-sex relationships, and that conduct violated Section 1557's prohibition of discrimination on the basis of sex. The court also concluded that the employer plan sponsor was not a necessary party.

While the case in *Berton* is ongoing, and a motion for class certification is due by the end of the year, the parties in *Goidel* settled before any substantive motions were filed with the court. As part of the *Goidel* settlement, the defendant insurer agreed to change its clinical policy to conform the infertility definition to recently updated guidelines published by the American Society for Reproductive Medicine, which acknowledge that "[n]othing in [its] definition shall be used to deny or delay treatment to any individual, regardless or relationship status or sexual orientation".

Okay, what about the Title VII case? The cases described above stated claims under Section 1557 of the ACA. By contrast, in *Briskin v. City of New York*, the plaintiffs filed claims under Title VII and the New York City Human Rights Law, alleging that the City's health plan discriminates against gay male employees by basing eligibility for IVF benefits on the employee's sex. Plaintiffs allege the plan requires participants to be deemed "infertile" to qualify for IVF treatment, which plaintiffs contend has the effect of excluding gay men and violates employment anti-discrimination laws. Given it is early days yet and this complaint was filed more recently than the *Berton* and *Goidel* cases discussed above, it may be some time before any substantive ruling is issued.

Does eliminating the infertility requirement for a participant to receive health plan benefits create any administrative issues? Potentially. Tax-free reimbursement of medical expenses under a health plan is generally limited to expenses that qualify under Code Section 213(d), which requires that the expenses are amounts paid for the diagnosis, cure, mitigation, or treatment of a disease or treatments affecting any structure or the function of the body. By reimbursing expenses for assistive reproductive technology without requiring that participants demonstrate a medical diagnosis of infertility, there is an argument that such expenses are not eligible for tax-free reimbursement. However, one counterargument may be that participants would not be able to conceive without assisted reproductive technology, and in that sense, the expenses address a taxpayer's inability to have children, which should be considered the same as infertility.

Takeaways for plan sponsors and employers? Structuring family building benefit programs raises a number of complicated issues. In response to recent cases and participant requests, many plan sponsors are considering elimination of the medical diagnosis of infertility requirement for infertility plan benefits (and many large third-party administrators are pushing this as the default design). While elimination of the requirement may ward off potential litigation, it raises counter-issues regarding benefits taxation that sponsors should consider as part of the decision-making process.

View original.

Related Professionals

- **Jennifer Rigterink**
  Senior Counsel
- **Katrina E. McCann**
  Senior Counsel