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Family-Forming Benefit Plans—ERISA and Tax Considerations

Presented By: Mary Powell & Alaina Harwood

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Introduction

- Family-forming benefit plans have grown in popularity amongst employers
- These benefits can be offered in various ways, such as through the expansion of fertility benefits in major medical plans, fertility health reimbursement arrangements (HRAs), adoption assistance plans, and surrogacy plans
- Each of these options have different legal considerations

Agenda

- Benefits Under Major Medical Plans
- Fertility Health Reimbursement Arrangements (HRAs)
  - Taxation of benefits
  - Coverage under ERISA, COBRA, HIPAA, and Mental Health Parity
  - Issues to consider under the Affordable Care Act (ACA) and the Consolidated Appropriations Act, 2021 (CAA)
  - Recent Case
- Adoption Assistance Plans
  - Requirements under the Internal Revenue Code
- Surrogacy Plans
  - Tax issues
  - Other considerations

BENEFITS UNDER MAJOR MEDICAL PLANS

Adding Fertility Benefits to a Major Medical Plan

- Adding fertility benefits to an existing major medical plan is likely the most straight forward way to offer fertility benefits
- Added benefits may include:
  - Lab Tests
  - Semen Analysis
  - Imaging (e.g., pelvic ultrasound, hysterosalpingogram)
  - Diagnostic procedures
  - Medications
  - Surgery
  - Intrauterine insemination
  - In vitro fertilization
  - Egg/sperm "freezing"

Adding Fertility Benefits to a Major Medical Plan

- Some employers have not chosen this route for various reasons, such as:
  - Cost to add this benefit to an insured plan
  - Scope of the benefit offered by the insurance carrier
  - The insurance carrier (or the TPA for a self-funded major medical plan) having a limited network of fertility specialist providers
- Given these issues, many large employers have adopted fertility HRAs

FERTILITY HRA – TAX ISSUES

Basic HRA Requirements

- This webinar does not discuss in detail all the requirements under the Internal Revenue Code ("Code") for general HRAs
- There is no specific Code section governing general HRAs
  - However, the IRS has issued a series of rulings and other guidance describing requirements plan sponsors must follow if they decide to provide an HRA

Basic HRA Requirements

- Some general HRA requirements:
  - Funded solely with employer contributions
  - May reimburse **medical care expenses** only if they were incurred by employees or former employees and their spouses, tax dependents, and children who are under age 27 as of the end of the taxable year
    - ACA requirements for eligibility are discussed later
    - Note: reimbursements for expenses incurred by a domestic partner must be considered W-2 wages to the employee (unless the domestic partner qualifies as a dependent for federal tax purposes—special state tax rules may also apply)
  - Can reimburse only substantiated medical expenses described in Code Section 213(d) that have not been reimbursed elsewhere
  - Unused HRA amounts may not be cashed out

Taxation of Benefits – "Medical Care"

- If fertility benefits are added to an existing major medical plan or through an HRA, the employer must understand how these benefits will be taxed
- One requirement is that the benefit must be considered "medical care" as that term is defined under Code Section 213(d)
  - "…[t]he term 'medical care' means 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…"
- What that means for fertility benefits has been discussed in various guidance, including case law and Private Letter Rulings (PLRs) issued by the IRS

Taxation of Benefits – "Medical Care"

- This issue was discussed by the 11th Circuit in *Morrissey v. United States* (2017)
- The Plaintiff was in a same–sex relationship
- In 2010, the Plaintiff and his partner decided to try to have children through IVF, with the Plaintiff serving as the biological father
- He sought a deduction for certain expenses, claiming that they constituted "medical care" under Code Section 213(d)
  - These expenses included procedures performed directly to his body—blood tests and sperm collection
  - He also included expenses that related to identifying and retaining the women who served as the egg donor and the gestational surrogate

Taxation of Benefits – "Medical Care"

- The court held that the procedures to the Plaintiff's own body qualified as medical care under Code Section 213(d) and could be taken as a tax deduction
- The court also held that the procedures performed on the egg donor and surrogate could not be considered "medical care" for purposes of the Plaintiff's requested tax deduction
- The court stated that because the costs attributable to the identification, retention, compensation, and care of the egg donor and the surrogate weren't incurred for the purpose of affecting any function of the Plaintiff's body, he could not deduct them as "medical care" expenses under Code Section 213(d)

Taxation of Benefits – "Medical Care"

- A similar issue was discussed in PLR 202114001
- The taxpayers were a male same-sex couple
- Taxpayer A donated sperm, one woman donated the egg, and a different woman was the gestational carrier
- Taxpayer A requested that the following expenses be considered "medical care" for deductions on his tax return:
  - Medical expenses directly attributed 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

Taxation of Benefits – "Medical Care"

- The medical expenses for procedures performed on Taxpayer A's own body were considered "medical care" however, the procedures undertaken by the women did not fall under the definition of medical care for Taxpayer A's tax return
- "Only costs and fees directly attributable to medical care for diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body of the taxpayer, the taxpayer's spouse, or taxpayer's dependent qualify as eligible medical expenses. Expenses involving egg donation, IVF procedures, and gestational surrogacy incurred for third parties are not incurred for treatment of disease nor are they for the purpose of affecting any structure or function of taxpayers' bodies."

Taxation of Benefits – "Medical Care"

- IRS Publication 502 provides that the "temporary" storage of eggs or sperm is a medical expense
  - Temporary is undefined
- Based on other guidance related to certain storage fees, the applicable test would most likely be whether the usage of such eggs or sperm is imminent (e.g., such as within a year)
- Arguably reimbursing the cost of storage fees for one year can be done on a non-taxable basis
  - A longer period of time may apply when the storage is to help preserve fertility for individuals undergoing cancer treatment

Taxation of Benefits – "Medical Care"

- If the expense that is being covered or reimbursed under an HRA (or the medical plan) does not qualify as medical care under Code Section 213(d), such reimbursement must be treated as a taxable reimbursement
  - There is some question if an HRA can even include a non-medical care benefit
- Any non-medical care reimbursement should be included as wages on the employee's W-2 and subject to applicable withholdings
  - It is not reported on a 1099, but on a W-2

Taxation of Benefits – Paid vs Incurred

- Even if a fertility expense qualifies as medical care, the claim cannot be reimbursed until the expense has been incurred
  - This is a requirement for all HRAs (IRS Notice 2002-45)
- HRAs can only reimburse medical care expenses that are actually incurred during the period of coverage
- Some fertility treatment programs require participants to make payments before medical services are provided

Taxation of Benefits

- Determining the taxation of these benefits is complicated
- Some vendors create two different programs—a fertility HRA that only reimburses non-taxable benefits and a taxable reimbursement plan
  - This is the recommended structure, given that an HRA should only reimburse medical care expenses, as defined under Code Section 213(d)
- Even if a vendor does not offer those options, your contract should state that the vendor will flag which reimbursements are taxable and which ones are not
- In most cases, the employer does not see HRA claims and cannot make this determination—it must rely on the vendor

High Deductible Health Plans

- Assume that an employer maintains a high deductible health plan (HDHP) and adopts a fertility HRA
- For anyone who is enrolled in the HDHP, the fertility HRA must be designed as a "post-deductible" HRA to preserve the participant's HSA eligibility
- This means that the HRA cannot reimburse any expense that is incurred before the participant has reached the statutory minimum deductible in expenses covered by the HDHP ($1,500 self-only/$3,000 family in 2023)

Code Section 409A

- If the reimbursement is taxable, it arguably needs to come within an exception under Code Section 409A
- We will talk more about this issue later during the surrogacy section of this webinar

FERTILITY HRA – ERISA, COBRA, HIPAA & MENTAL HEALTH PARITY COMPLIANCE ISSUES

FEDERAL LAWS IMPACTING FERTILITY HRAs

- A fertility HRA is considered a group health plan under ERISA, COBRA, and the HIPAA rules
- Each of these statutes has numerous requirements, which are not discussed in detail in this webinar
- Some of the requirements are:
  - Plan document and summary plan description
  - Claims and appeals process
  - COBRA notice and election
  - HIPAA privacy notice
  - HIPAA privacy policies and procedures

COBRA

- Regarding COBRA, there are a few things that need to be considered with a fertility HRA:
  - COBRA premium rates should be based solely on the medical care benefits offered under a fertility HRA
    - Other benefits offered under a fertility HRA that do not qualify as "medical care" will not be included for purposes of COBRA premium calculations
  - The vendor needs to separate out the taxable and non-taxable benefits (medical care versus non-medical care) in order for the vendor (or a consultant) to determine the COBRA premium

Mental Health Parity and Addiction Equity Act

- As group health plans, HRAs will generally be subject to the Mental Health Parity and Addiction Equity Act (MHPAEA)
- When a general HRA overlaps with benefits under an employer's major medical plan and simply serves to reduce cost-sharing for participants, the major medical plan's compliance with MHPAEA should serve to ensure the HRA's compliance
- However, when HRA benefits are limited to certain treatments (such as fertility), MHPAEA compliance issues may arise
- Ensure that these benefits are considered when conducting MHPAEA testing

FERTILITY HRA – COMPLIANCE ISSUES UNDER THE ACA AND THE CAA

Integration

- Fertility HRAs are subject to the ACA
- Stand-alone HRAs cannot comply with the ACA's requirements—with certain exceptions, such as if the HRA solely reimburses excepted benefits (e.g., dental and vision coverage)
- As an example, a general HRA cannot meet the ACA requirement that group health plans must cover all preventive care at no cost
- To comply with the ACA's requirements, a fertility HRA must be "integrated" with a major medical group health plan
- To be an "integrated" HRA, the HRA must limit eligibility to:
  - (1) employees and their dependents who are actually enrolled in the employer's major medical plan or
  - (2) those employees and their dependents who are enrolled in another employer's major medical plan (not an individual policy)

Excessive Waiting Period

- Group health plans are prohibited from applying a waiting period that exceeds 90 days
  - A waiting period is defined as the period that must pass before coverage for an individual who is otherwise eligible to enroll under the terms of a group health plan can become effective
- Fertility HRAs are group health plans and subject to this prohibition
  - Don't add an excessive waiting period for the fertility HRA

Lifetime Limit

- The ACA does not permit a group health plan to have a lifetime limit on essential health benefits
- Self-funded group health plans must select a "benchmark plan" of a state to determine what is considered an essential health benefit
- Many employers select the Utah benchmark plan, as it does not include most fertility benefits as essential health benefits
- This allows the fertility HRA to have a lifetime limit
- Ensure that somewhere, the employer has documented its benchmark plan

Transparency in Coverage

- The ACA requires most health plans to disclose cost-sharing information upon request, to a participant, including an estimate of the individual's cost-sharing liability for covered items or services furnished by a particular provider
- Plans must make such information available on an internet-based self-service tool and, if requested, on paper
- The ACA also requires plans to disclose in-network provider negotiated rates and historical out-of-network allowed amounts for providers through machine-readable files posted on an internet website, updated monthly
- The question is whether these requirements apply to certain fertility HRAs

Transparency in Coverage

- Account based plans are generally not subject to these transparency in coverage requirements because cost-sharing and price-setting concepts do not apply
- However, what about HRAs that require the use of a specific network of fertility providers?
  - Guidance from the applicable government agencies (IRS, DOL and HHS) is needed

Provider Directory Disclosure

- A group health plan must establish a database on a public website of the plan that contains both (1) a list of each health care provider and health care facility with which the plan has a direct or indirect contractual relationship for furnishing items and services under the plan, and (2) provider directory information with respect to each such provider and facility
  - This is required under the CAA
- There must be a verification process under which the plan verifies and updates, at least once every 90 days, the provider directory information
- Does this apply to a fertility HRA?

Provider Directory Disclosure

- It seems that this requirement would apply to an HRA that requires the use of certain providers
- We have seen this design for some fertility HRAs
  - The participant must go to certain approved providers in order for the expense to be covered by the HRA
- Address this issue in the vendor contract

Suggested HRA Vendor Contract Provisions

- Get the vendor to assist with some of these obligations. Include in the contract that the vendor will:
  - Provide the employer with a form plan document and summary plan description
  - Determine (and notify the employer) which reimbursements are taxable and non-taxable
  - Provide the employer with the COBRA rates
  - Determine all claims and appeals
  - Maintain records sufficient for the employer to meet the ERISA record retention requirements
  - Provide all needed data for the employer to run mental health parity testing
  - Do all needed actions for compliance with ACA and CAA (be specific about these terms)

FERTILITY BENEFITS—RECENT CASE

Potential Issues – Recent Lawsuit

- A recent case was filed in the 9th circuit, Berton v. Aetna (2023)
- The lawsuit alleges that Aetna's fertility benefits policy violates Section 1557 of the ACA, which prohibits discrimination based on sex, which includes sexual orientation and gender identity
- The plaintiff stated that she had been undergoing fertility treatments for over a year, but that Aetna wouldn't cover the treatments until she could show that she was infertile
- Under Aetna's policy, a woman would be considered infertile if no pregnancy resulted within six to twelve months of unprotected heterosexual intercourse
  - However, a woman without a male partner could be considered infertile if no pregnancy resulted after six to twelve cycles of donor insemination, which would require substantial out-of-pocket costs

Potential Issues – Recent Lawsuit

- Section 1557 of the ACA applies to any "health program or activity," any part of which is receiving federal financial assistance provided by the Department of Health and Human Services
- Most employer-sponsored group health plans will not need to change fertility benefits based on Section 1557 of the ACA because they do not receive the required federal financial assistance for this rule to apply
- However, employers may want to review the insurer's or TPA's fertility policy to see if it matches the employer's philosophy for health coverage

ADOPTION ASSISTANCE PLANS

Requirements

- The rules for adoption assistance plans are contained in Code Section 137
- There are numerous requirements for adoption assistance plans to be considered qualified under the Code
- **#1–Program Must Be Employer Provided**
  - The program is defined under the rules as a plan of the employer. The term "employer" includes many kinds of entities, including governmental entities.

Requirements

- **#2—Must Be For Employees**
  - It must be for the exclusive benefit of the employer's employees. Accordingly, it should only be offered to common law employees of the employer.
  - Former employees cannot be eligible for this benefit. This means that the plan should not reimburse adoption assistance expenses that are incurred by an employee *before* his employment date or after his termination date
  - Self-employed individuals (e.g., partners, sole proprietors, and independent contractors) are ineligible

Requirements

- **#3—Plan Document**
  - The rule requires a written plan document
  - IRS Notice 97-9 states that the income exclusion for amounts paid or reimbursed under the adoption assistance program is not available unless, before adoption expenses are incurred, the written plan document is in place
  - The plan document should define the group of employees eligible to receive benefits, and it should describe the types of benefits offered and any applicable limitations. It should also state that it can be amended or terminated at any time.

Requirements

- **#4—Reasonable Notification**
  - Reasonable notification and availability and terms of the program must be provided to eligible employees
  - The income exclusion for amounts paid or reimbursed under the program is not available unless, before adoption expenses are incurred, the employee receives notification of the existence of the program
    - The rule does not state how the notification is to be provided

Requirements

- **#5–Qualified Adoption Expenses**
  - IRS Notice 97-9 requires that the adoption assistance program reimburse "qualified adoption expenses" defined as follows:
    - Reasonable and necessary adoption fees, court costs, attorney's fees, traveling expenses (including amounts expended for meals and lodging) while away from home
    - Other expenses that are directly related to the legal adoption of an eligible child by the taxpayer
  - Qualified adoption expenses do not include expenses:
    - For which the taxpayer received funds from any state, local, or federal program
    - That violate state or federal law
    - For carrying out any surrogate parenting arrangement
    - For the adoption of a child of the taxpayer's spouse, or
    - Reimbursed by another program

Requirements

- **Rule #5 Continued**
  - An eligible child is any individual who, at the time a qualified adoption expense is paid or incurred, is under the age of 18, or is physically or mentally incapable of caring for himself or herself
  - There are additional rules for children with special needs

Requirements

- **#6—Employer Must Obtain Expense Substantiation**
  - An employee receiving payments under an adoption assistance program must provide the employer with reasonable substantiation that payments or reimbursements made under the program constitute qualified adoption expenses
  - The IRS has not offered guidance about what constitutes reasonable substantiation

Requirements

- **#7—Nondiscrimination**. There are 2 nondiscrimination tests—the eligibility test and the benefits tests.
  - Eligibility Test. The program "shall not benefit employees who qualify under a classification set up by the employer and founded by the Secretary not to be discriminatory in favor of employees who are highly compensated employees…"
  - Benefits Test. A program is not qualified for any year in which more than 5% of the amounts paid or incurred by the employer for adoption assistance benefits during the year are provided to more-than-5% owners, or to their spouses or dependents who are themselves employees of the employer
  - This webinar does not go into the details about the nondiscrimination rules

Maximum Amount

- The maximum amount that can be excluded from an employee's gross income under the program is the same as the maximum adoption tax credit (which is not described in this webinar)
  - See IRS Instructions to Form 8839
- For 2023, the maximum is $15,950 (which is applied per child)
- The income exclusion is reduced for taxpayers whose modified adjusted gross income falls above a specified amount ($239,230 for 2023) and becomes completely unavailable for taxpayers whose modified adjusted gross exceeds a certain amount ($279,230 for 2023)
- Employers are not responsible for determining whether the income limit reduces or eliminates the amount of assistance excludable from the income for particular employees

Taxation

- Amounts paid under the program are not subject to federal income tax withholding and are not reported as wages in box 1 on the W-2
- Amounts paid under the program are considered wages subject to withholding for federal Social Security and Medicare tax (FICA), federal unemployment tax (FUTA) and the railroad retirement tax (RRTA)
- The total amount of qualified adoption expenses paid or reimbursed under the program must be reported in box 12 of Form W-2, using a Code T
  - See IRS Notice 97-9

Tricky Tax Issue

- When an employee receives a reimbursement, they must complete special tax forms. It may be that the employee must include the reimbursement as income for a year, as explained below (from IRS Instructions to Form 8839):
- Domestic Child
  - If an employer pays for qualifying expenses under an adoption assistance program in any year, then a taxpayer should take the exclusion in the year they received reimbursement
- Foreign Child
  - If an employer pays for qualifying expenses under an adoption assistance program in any year before the year the adoption becomes final, then a taxpayer should take the exclusion in the year the adoption becomes final
  - If an employer pays for qualifying expenses under an adoption assistance program the year the adoption becomes final, then a taxpayer should take the exclusion the year the adoption becomes final

Tricky Tax Issue

- The issue to note is that for the adoption of a foreign child, the employee may need to include in their income the payment received by the employer if the adoption is not finalized in the year of payment
  - This is done by the employee on his tax return
- The employee will take a deduction when the adoption of a foreign child is final
- While these rules are not employer obligations, it is something that an employer may want to inform employees about

Application of Other Laws

- ERISA does not apply to adoption assistance plans
  - This means that requirements such as Form 5500 filings do not apply to adoption assistance plans
- The ACA and the CAA do not apply to adoption assistance plans because they are not group health plans
- However, state laws, including state tax laws, may apply and will vary from state to state

SURROGACY PLANS

General Benefits

- Surrogacy plans can reimburse employees for various expenses, such as:
  - Surrogate agency administrative fees associated with the costs of locating and interviewing a surrogate
  - Surrogacy agency administrative fees for managing the surrogacy
  - Legal fees incurred for review and negotiation of the surrogacy contract
  - Legal fees incurred in connection with acquiring legal parentage rights
  - Travel fees associated with the surrogacy
- Some employers exclude the reimbursement of medical fees for surrogates, fearing that could create an impermissible group heath plan
  - IRS guidance on this issue is needed

Tax Issues – Taxable Income

- As explained earlier in the fertility HRA section of the webinar, reimbursements to an employee of surrogacy expenses are taxable
- These amounts are not considered non-taxable "medical care" for the employee or their spouse
- The reimbursements need to be included as taxable income on the employee's W-2

Tax Issues – Taxable Income

- This issue was addressed in IRS Information Letter 2002-0291
- The IRS stated that medical expenses paid for a surrogate mother and her unborn child would not qualify as medical care (such that the taxpayer could take a deduction for those costs)
- The IRS also noted that legal expenses incurred by a taxpayer in connection with a surrogate mother and her unborn child would not be medical care under Code Section 213(d)
- The IRS noted that legal fees qualify as medical expenses only in very limited circumstances and that legal expenses incurred in connection with a surrogate mother typically are not related to obtaining medical care expenses

Code Section 409A

- Subject to certain exceptions, Code Section 409A requires that any compensation promised in one year that could by its terms be paid in a later tax year must be paid only upon certain permissible payment "events," such as, for example, a fixed date or schedule
- An agreement to reimburse an employee for surrogacy expenses may cross tax years
  - For example, the employee incurs the cost in year 1 and can submit for reimbursement in either year 1 or year 2
- This means that the program must either come within an exception from Code Section 409A or comply with the taxable reimbursement plan rules

Code Section 409A

- Short-term deferral – To qualify for this exception under Code Section 409A, the payment must be required to be made, and must actually be made, on or before the 15th day of the third month following the end of the employee's tax year or the employer's tax year, whichever is later, in which the right to the payment vests (i.e., is no longer subject to a substantial risk of forfeiture)
  - For calendar year taxpayers, this means March 15th of the following year
- For example, the employee incurs the surrogacy expense in June of 2023 that is reimbursable under the surrogacy plan
- If the plan states that the payment of the expense must be made no later than March 15, 2024, then this exception would apply

Code Section 409A

- It can be hard to administer a plan such that it comes within this exception to Code Section 409A
- This is because claims are made throughout the year
  - If there is an appeal process for any denied claim, that may further extend when payment can be made
- Consider this issue when designing a surrogacy plan
- Rather than come within an exception under Code Section 409A, the plan could be drafted to comply with the taxable reimbursement program rules

Code Section 409A

- For a taxable reimbursement plan, the requirements of Code Section 409A can be met if there is a written document that provides:
  - (1) an objectively determinable non-discretionary definition of the expenses eligible for reimbursement,
  - (2) the reimbursement will be for expenses incurred during an objectively and specifically prescribed period,
  - (3) that the amount of expenses eligible for reimbursement in one year will not affect the expenses eligible for reimbursement in any other year
  - (4) the reimbursement must be made on or before the last day of the employee's tax year following the year in which the expense was incurred, and
  - (5) the right to the reimbursement cannot be exchanged for another benefit

Code Section 409A

- While it is easy to meet most of these requirements, it is the requirement in #3 that can be the issue
  - That the amount of expenses eligible for reimbursement in one year will not affect the expenses eligible for reimbursement in any other year
- Many plans have a lifetime limit—such as $25,000
  - It seems that a lifetime limit will not meet the rule above
  - An annual limit would, but that is not how most surrogacy plans are written
- Consider this issue when designing a surrogacy plan

Surrogacy Plan

- Aside from the tax issues, state laws may limit, prohibit or highly regulate the surrogacy/gestational carrier process
- This could include limiting compensation in surrogacy contracts, limiting surrogacy to married couples or prohibiting surrogacy contracts entirely
  - A vendor offering to administer this plan should be aware of these issues
- In addition, there are numerous foreign laws that apply to expenses associated with a surrogacy contract outside the United States
  - Many plans exclude these expenses

Surrogacy Plan

- Most employers require that surrogacy expenses be incurred while the person is an employee of the company when the expense is approved
- In addition, plans often require that the employee's parenting rights must be recognized under applicable state law in order to receive any reimbursement
- These are design decisions that should be discussed with legal counsel

Contact

- Mary Powell, Esq., mpowell@truckerhuss.com
- Alaina Harwood, Esq., aharwood@truckerhuss.com
- Trucker ✦ Huss, APC
  135 Main Street
  9th Floor
  San Francisco, CA 94105

  (415) 788-3111

  www.truckerhuss.com

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