

Family Building Benefits Multiemployer Fund Perspectives

Proskauer»

Family Building Benefits – What Are They?

- Catch-all name applied to benefits to assist participants (and covered dependents, in some cases) with reproductive needs:
 - Infertility treatment
 - Elective cryopreservation of reproductive material
 - Surrogacy
- Can be administered in-house or through dedicated vendor
 - In-house: Usually limited to reimbursement
 - Vendor: Reimbursement of costs *plus* dedicated online “tracks” v. managed care

Family Building Benefits – At a Glance

Topic	Key Concepts	Vehicle	Taxation
Infertility treatment	<ul style="list-style-type: none"> -Flexibility for self-insured plan to enhance infertility coverage (may be limited in fully insured context) -May require medical diagnosis of infertility (state mandate implications) 	<ul style="list-style-type: none"> -May be paid under group health plan/voluntary employee beneficiary association (VEBA) -Specialty network/vendor 	<ul style="list-style-type: none"> -Assuming medically necessary, eligible for IRC §213(d) treatment and reimbursed tax-free
Elective cryopreservation of reproductive material	<ul style="list-style-type: none"> -Hedges against future risk of infertility by preserving reproductive material -Distinguish long-term elective freezing from short-term freezing in anticipation of iatrogenic infertility; e.g., on account of radiation treatment 	<ul style="list-style-type: none"> -May be paid under group health plan, but risk in treating as IRC §213(d) medical expenses -If paid under VEBA, could risk tax-exempt status 	<ul style="list-style-type: none"> -Not eligible for IRC §213(d) treatment based on available IRS guidance
Surrogacy	<ul style="list-style-type: none"> -Wide range of expenses: legal, surrogate and donor compensation, agency fees -Avoid direct reimbursement of medical costs 	<ul style="list-style-type: none"> -Cannot be paid under group health plan (limited exception for employee/participant expenses) -Same risks with VEBA as for elective cryopreservation 	<ul style="list-style-type: none"> -Generally ineligible for IRC §213(d) treatment based on available guidance

Infertility Treatment

- Requires that individual meet plan definition of infertility to access infertility treatment (IUI, IVF, iatrogenic infertility)
- “Infertility” definition – varies by plan or insurer
- **American Society of Reproductive Medicine (ASRM) definition:**
 - “Infertility” is a disease, condition, or status characterized by any of the following:
 - Inability to achieve a successful pregnancy based on a patient’s medical, sexual, and reproductive history, age, physical findings, diagnostic testing, or any combination of those factors.
 - The need for medical intervention (e.g., the use of donor gametes or donor embryos) in order to achieve a successful pregnancy either as an individual or with a partner.
 - Nothing in this definition shall be used to deny or delay treatment to any individual, regardless of relationship status or sexual orientation.

Elective Cryopreservation of Reproductive Material

- Elective cryopreservation benefits hedge against future “risk” of infertility
 - Compare with IRC §213(d), which requires that amounts must be paid for:
 - Diagnosis, cure, mitigation, treatment, or prevention of diseases
 - For the purpose of affecting any structure or function of the body
- IRS distinction between infertility and “potential” infertility
 - IRS Chief Counsel Information Letter 2005-0102
 - Egg donor and embryo expenses to “overcome infertility” fit within IRC §213(d)
 - IRS Chief Counsel Information Letter 2010-0017
 - Must address “*existing or imminently probable* disease, physical, or mental defect or illness”
 - IRS PLR 202114001
 - Permitted deduction under IRC §213(d) for sperm donation and freezing; excluded all other reproductive expenses in connection with surrogacy

Surrogacy

- Surrogacy expenses – categorization
 - Medical expenses for surrogate
 - Medical expenses for intended parents
 - Expenses for intended parent may be limited
 - Medical expenses for egg or sperm donor
 - Other expenses: legal, agency, adoption, surrogacy and donor compensation
- Surrogacy expenses – taxation
 - Most surrogacy-related expenses do not fit into IRC §213(d)
 - *Morrissey v. United States* (11th Cir. 2017)
 - IRS PLR 202114001: All expenses other than intended parent taxpayer's sperm donation and freezing expenses were disallowed under IRC §213(d)

Implications for Multiemployer Plans

Family building benefits: Tax considerations

Benefits	Tax treatment	Considerations
Infertility treatment (IUI, IVF) Elective short-term preservation (iatrogenic infertility)	Eligible for tax-free reimbursement under IRC §213(d)	<ul style="list-style-type: none"> • Infertility treatment must be performed on participant and/or beneficiary for tax-free treatment • “Short-term” preservation
Elective long-term preservation Surrogacy expenses	Challenges with tax-free reimbursement under IRC §213(d)	<ul style="list-style-type: none"> • VEBA’s may provide life, sick, accident, or other benefits • VEBA may provide small amount (3% <i>de minimis</i>) of non-qualifying benefits without losing its tax-exempt status (See, e.g., PLR 201415011) • Complications in accounting, administering benefits, and classifying benefits as taxable/non-taxable • Health fund must either withhold applicable tax on taxable benefit payments or impute income to participant

Health Reimbursement Arrangements

- Health reimbursement arrangements
 - Reimbursement limited to IRC §213(d) medical care expenses
 - Implications for certain family building benefits
 - Can't reimburse IRC §213(d) and non-medical expenses from same account
 - IRS Notice 2002-45: “An HRA does not qualify for the exclusion under § 105(b) if any person has the right to receive cash or any other taxable or non-taxable benefit under the arrangement other than the reimbursement of medical care expenses.”
 - If an ineligible expense is paid, all distributions to all participants in the current tax year are taxable, even amounts paid to reimburse eligible medical expenses
- Other HRA issues
 - ACA integration considerations
 - COBRA considerations

ACA FAQs Part 72: Fertility benefits

- FAQs about ACA Implementation Part 72 (DOL, HHS, Treasury)
 - Clarifies fertility benefits may be offered through HIPAA excepted benefit structures
 - Current set-up limited to fully-insured benefits, but may see self-insurance expansion
- Independent non-coordinated excepted benefit requirements
 - Under separate policy
 - No coordination with group health plan benefits
 - Independent coverage from group health plan
- Excepted benefit HRA
 - Up to \$2,200 (indexed) can be reimbursed per year for IRC §213(d) medical expenses



The information provided in this slide presentation is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the firm, our lawyers or our clients. No client-lawyer relationship between you and the firm is or may be created by your access to or use of this presentation or any information contained on them. Rather, the content is intended as a general overview of the subject matter covered. Proskauer Rose LLP (Proskauer) is not obligated to provide updates on the information presented herein. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Proskauer Rose LLP. All Rights Reserved.