National Compliance Update
USI EMPLOYEE BENEFITS

October 23, 2025

Fertility Services as Excepted Benefits

The expansion of access to infertility treatment and specifically IVF[1] has been a priority of the Trump Administration. On October 16, 2025, the Departments of Labor, Health and Human Services, and the Treasury (collectively, "the Departments") issued FAQs about Affordable Care Act Implementation Part 72 ("FAQ 72") to provide new guidance that allows employers to offer coverage to employees for fertility treatments as excepted benefits.

BACKGROUND

Under the Affordable Care Act ("ACA"), group health plans ("GHPs") offered to employees must satisfy various market reform provisions[2] or risk significant penalties.[3] There are four categories of benefits that are not subject to the ACA market reforms if they meet stringent requirements to qualify as excepted benefits. They are:

1. Benefits that are generally not health coverage – e.g., automobile insurance, liability insurance, and workers' compensation insurance.
2. Limited excepted benefits – e.g., limited scope dental and vision insurance, long term care, and nursing home care.
    - Pursuant to subsequent rule making, the following benefits may qualify as limited excepted benefits: certain employee assistance programs ("EAPs"), and excepted benefit health reimbursement arrangements ("EBHRAs").
3. Independent, non-coordinated excepted benefits – e.g., coverage for a specified disease or illness, hospital indemnity, and other fixed indemnity insurance.
4. Supplemental excepted benefits – e.g., Medigap, CHAMPVA, or similar coverage that is supplemental to GHP coverage.

[1] In vitro fertilization
[2] https://www.cms.gov/marketplace/health-plans-issuers/insurance-market-reforms
[3] https://www.law.cornell.edu/uscode/text/26/4980D

FAQ 72 provides a mechanism for certain fertility benefits to be provided as independent, non-coordinated excepted benefits (3) or limited excepted benefits (2) above.

INDEPENDENT NON-COORDINATED EXCEPTED BENEFITS

Coverage for specified diseases or illnesses, such as cancer-only policies, or hospital indemnity or other fixed indemnity coverage, can be excepted benefits when they satisfy the following conditions:

- The benefits are provided under a separate policy, certificate, or contract of insurance,
- There is no coordination between the provisions of such benefits and any exclusion of benefits under any GHP maintained by the same employer, and
- The benefits are paid with respect to an event regardless of whether there is other coverage under any GHP offered by the same employer, or individual coverage offered by the same carrier.

Based on FAQ 72, employers may now offer fertility benefits that satisfy the above conditions as excepted benefits. This includes employers that do not offer a traditional GHP with major medical coverage, as well as coverage for employees that are not enrolled in major medical coverage offered by their employer.

Importantly, to qualify as an excepted benefit under this definition the benefit must be provided under an insurance policy. A self-funded fertility benefit will not meet this definition. Additionally, there can be no coordination between the benefits provided by the excepted fertility benefits and any exclusion of benefits under any GHP offered by the same plan sponsor.

> ***USI Note***. Currently, there may not be options in the insurance market to purchase fertility coverage that meets the requirements to qualify as an excepted benefit. It will be interesting to see whether the market develops specific disease/illness insurance policies that provide fertility benefits.

HSA Contribution Compatibility

Employees covered on a high-deductible health plan ("HDHP") may not have other impermissible coverage in order to maintain eligibility to make or receive HSA contributions. However, additional coverage for a specific disease or illness is permitted.[4] FAQ 72 makes clear that fertility treatment coverage offered as a non-coordinated excepted benefit can be provided to employees with HDHP coverage with no impact on their eligibility to make or receive HSA contributions.

LIMITED EXCEPTED BENEFITS

Under the limited excepted benefits rules, employers may offer an EBHRA that satisfies the following conditions:

- Other GHP coverage that is not limited to excepted benefits is made available by the plan sponsor
- Benefits are limited in amount – $2,200 for plan years beginning in 2026 and indexed annually

[4] https://www.irs.gov/publications/p969

- The HRA may not reimburse premiums for other individual coverage, group coverage, or Medicare coverage that are not excepted benefits
- The HRA must be offered on the same terms to all similarly situated individuals

EBHRAs must comply with ERISA notice requirements and provide notice including the following:

- a description of eligibility conditions to receive benefits,
- annual or lifetime dollar limits,
- other limits on benefits under the plan, and
- a description or summary of the benefits

If the above conditions are satisfied, an employer may provide coverage for fertility services via an EBHRA that reimburses out of pocket costs related to fertility services.

> ***USI Note***. While this relief is helpful, the annual EBHRA benefit limit ($2,200 for 2026) may not be enough to cover the out-of-pocket costs associated with fertility expenses.

Employee Assistance Programs

The guidance further allows employers to include coaching and navigator services to help employees understand their fertility options under an EAP that qualifies as a limited excepted benefit.[5] The FAQ makes clear that the addition of fertility-related coaching or navigator services to an EAP will not risk the EAP's status as an excepted benefit.

Importantly, the FAQ notes that an EAP cannot qualify as an excepted benefit if it:

- offers any fertility benefits that are significant benefits for medical care,
- coordinates benefits with any GHP,
- requires employees to pay premiums for coverage, or
- imposes any cost sharing

PENALTIES

If fertility benefits are not integrated with major medical coverage or do not meet the definition of an excepted benefit (as described above), these benefits may not satisfy the ACA's market reforms and risk a penalty equal to $100 per person per day ($36,500 annually).

Many employers integrate the fertility benefits/program into a major medical group health plan that otherwise satisfies the ACA market reforms.

EMPLOYER NEXT STEPS

Many vendors provide fertility services through programs that are not structured to qualify as excepted benefits. Usually, the fertility benefits are integrated into the major medical plan coverage (which otherwise meets the ACA's market reforms).

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[5] EAPs are excepted benefits if they do not provide significant benefits in the nature of medical care and meet other requirements identified in regulations available here: https://www.ecfr.gov/current/title-26/chapter-I/subchapter-D/part-54/section-54.9831-1

Importantly, the guidance does not limit employers to providing fertility benefits through these excepted benefits options. Rather, the FAQ is providing clarity on additional avenues through which an employer may provide fertility services as excepted benefits to avoid risking ACA market reform violations.

Employers currently offering fertility benefits should discuss FAQ 72 with their vendor to determine if the program currently qualifies as an excepted benefit or whether any changes are needed. Again, a self-funded fertility benefit will not be able to qualify as an independent non-coordinated excepted benefit.

Employers considering adding fertility benefits should carefully review the guidance to determine whether providing fertility services as an excepted benefit meets their needs.

Employers sponsoring EAPs that would like to add fertility coaching or navigator services should reach out to the EAP provider to ensure these services are provided within the boundaries of the guidance.

RESOURCES

- For FAQ 72, visit: https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-72

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