



IVF Benefits and the Alabama Decision: Implications for Plan Sponsors

Two years after the *Dobbs* decision, in which the U.S. Supreme Court overturned the federal constitutional right to abortion, reproductive health care and fertility benefits continue to present challenges for employers and the health plans they sponsor. With state laws constantly changing, navigating the risks of offering benefits to employees that implicate “fetal personhood” has become increasingly complex.

The Alabama Case

In Alabama, three couples experiencing infertility issues sued their fertility clinic and the hospital associated with the clinic after their embryos were destroyed by a hospital patient. During in vitro fertilization (IVF), eggs are fertilized outside the body to create an embryo. The Alabama couples claimed that the destruction of their embryos violated Alabama’s Wrongful Death of a Minor Act.

What’s an Embryo?

Defined as “an unborn or unhatched offspring in the process of development, in particular in human offspring during the period from approximately the second to the eighth week after fertilization (after which it is usually termed a fetus),” embryos are generally frozen and stored until patients are ready for implant. However, some embryos may be discarded for various reasons.

What Happened in the Alabama Lawsuit?

In *LePage v. Center for Reproductive Medicine*, the trial court dismissed the couples’ claims for wrongful death and negligence, finding that embryos were not

considered children under the Act. The couples appealed to the Alabama Supreme Court, which ruled in February that frozen embryos are considered children under state law and thus, the embryos are protected from destruction under the Act. Specifically, the Alabama Supreme Court said that “all members of this Court agree that an unborn child is a genetically unique human being whose life begins at fertilization and ends at death.”

Initially, the *LePage* decision severely disrupted access to fertility care services in Alabama. However, the Alabama state legislature acted quickly after the decision to shield IVF providers and patients from liability. Nevertheless, the ruling caused a significant change in the IVF landscape. The unintentional ripple effect could inadvertently create significant liabilities for IVF clinics, health plans that cover IVF treatment, and employers that assist their employees in obtaining reproductive care throughout the nation.

Implications for Benefit Plans

While IVF treatment is not illegal in Alabama, the *LePage* case demonstrates how state-level regulation of reproductive care can have broad implications for employers and health plans. At this time, at least 11 states have laws that define “person” broadly enough to potentially include fetuses, and 14 more are considering personhood bills. In Missouri, for example, unborn children “at every stage of development” must be afforded all of the rights available to “other persons, citizens, and residents.” Some commenters worry that attorneys general in those states could invoke theories of accomplice liability that have been applied to abortion care to reach employers and health plans that provide IVF or other reproductive benefits. Thus, as was the case after the *Dobbs*’ decision, employers must now decide whether providing assistance (either directly or through their health plans) to employees who need fertility treatments is worth the increased risk for the employers and their plans.

What Can Employers Do?

The strategies available to employers who want to help employees with IVF treatment are similar to those that many considered after the *Dobbs* decision, including:

- Travel benefits – employers may offer subsidies to employees who choose to travel to another state to receive IVF or other fertility treatments.
- Leave of absence – employers may offer paid or unpaid leave for employees seeking fertility treatment in another state.
- Embryo transport, storage, or destruction – for employees who already have frozen embryos, employers may offer transport benefits to assist employees in transporting and storing their embryos outside of Alabama.

Key Takeaways

While the immediate effect of the Alabama supreme court's decision may be limited, employers should be proactive and:

- Discuss options and risks with benefit providers and legal counsel, and consider amending benefit plans;
- Determine the need for access to fertility treatments in states that broadly define personhood; and
- Have discussions with employees about their options and how the employer can address their concerns.

As the reproductive health care and fertility landscape continues to change, creating an untested area of law with myriad issues for employers and health plans, employers need to carefully navigate whether and how they offer fertility benefits to ensure adequate coverage for employees and compliance with federal and state laws.

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