

Proposed Rules Provide Employers Flexibility to Offer Robust Fertility Benefits

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In response to the Executive Order, "Expanding Access to In Vitro Fertilization," the Departments of Labor, Health and Human Services, and Treasury (the Departments) have issued proposed regulations that would recognize fertility benefits as a new category of limited-scope excepted benefits.

If finalized, these rules would apply to group health plans and insurers in the group market for plan years beginning on or after January 1, 2027.

Background

Excepted benefits are generally exempt from certain ACA market reforms—such as annual and lifetime dollar limit restrictions, cost-sharing limitations, Mental Health Parity requirements, and No Surprises Act protections so long as they meet specific design criteria.

In October 2025, the Department of Labor issued ACA FAQ 72, which outlined alternative pathways for employers to offer fertility-related benefits as excepted benefits. These included:

- Non-coordinated benefits (e.g., specified disease policies), primarily available through fully insured products
- Excepted benefit HRAs, subject to relatively low reimbursement limits
- Employee Assistance Programs (EAPs), which cannot provide significant medical care or cost-sharing

These approaches limited the scope and accessibility of fertility benefits.

Fertility Benefits as Limited-Scope Excepted Benefits

The proposed rules would formally add fertility benefits to the list of limited-scope excepted benefits (currently limited to dental, vision, and long-term care). As a result, fertility benefits would be permitted if they meet existing limited-scope criteria, along with new fertility-specific requirements.

To qualify as an excepted benefit, a fertility benefit must meet the following:

1. **Substantially All Standard:** Coverage must include “substantially all” services related to the diagnosis, mitigation, and treatment of infertility, as well as treatment of underlying reproductive health conditions. Services must be medically appropriate and provided under the direction of a licensed medical professional.

Permitted services may include:

- Diagnostic procedures (e.g., laparoscopy for endometriosis)
- Ovulation induction medications
- Evaluation and treatment of male factor infertility
- IVF cycles (coverage may be limited by employers due to cost)
- Fertility awareness methods and preconception care
- Fertility education and counseling (if part of a medically directed program)

2. **Separate or Non-Integrated Coverage:** The benefit must be:

- Offered under a separate insurance policy, certificate, or contract; or
- Not an integral part of the group health plan

For self-insured plans, this generally requires a separate election or claims administration.

3. **Lifetime Benefit Maximum:** A lifetime maximum of \$120,000 per participant (including dependents) would apply, with annual indexing. It remains unclear whether this limit applies per plan basis or across all fertility benefits for an individual.
4. **Required Notice:** Plans must provide a separate notice describing the availability and scope of the fertility benefit, including any limitations. The notice:
 - Must be provided at enrollment (including open enrollment materials)
 - Must be distributed to newly eligible individuals by their first day of eligibility
 - Must be provided annually thereafter

Employer Considerations

- The proposed rules do not address HSA compatibility. Based on current IRS guidance, limited-scope excepted benefits are typically treated as “permitted insurance,” which does not impact HSA eligibility. However, additional IRS guidance would be needed to confirm this treatment for fertility benefits.
- Given the level of medical care provided, fertility benefits structured as excepted benefits would likely be subject to COBRA requirements.
- Employers in states with fertility coverage mandates should evaluate whether an excepted benefit design satisfies state requirements. Overlap between a fully insured medical plan and an excepted fertility benefit may create coordination concerns.
- Excepted benefits remain subject to ERISA, including reporting and disclosure obligations such as SPDs, plan documents, and Form 5500 filings.
- Stay tuned for updates!