

The Year Ahead 2024: Employee Benefits

By Melissa Ostrower & Kellie M. Thomas

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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, [JacksonLewis.com](https://www.JacksonLewis.com), or listen to the podcast series on whichever platform you turn to for compelling content.

Melissa Ostrower:

Hello everyone, and thank you for joining us for this special episode of We get work™ for The Year Ahead 2024 report. Today we're talking about family forming benefits including fertility, surrogacy and adoption benefits, and I'm here with my partner Kellie Thomas, who is going to be providing very helpful information about this topic. Kellie, would you like to introduce yourself?

Kellie Thomas:

Sure, thanks Melissa. I've been at Jackson Lewis since about 2015, and when I came here I started to really delve into the health and welfare plan world. But over the last few years, as we've seen a pretty active job market, we've gotten a lot of calls from clients looking for new ways to incentivize and retain employees. And one of the biggest ways that they've been doing that is with these family forming benefits. So I'm happy to be here today to talk about them.

Melissa Ostrower:

Thank you. So Kellie, as the firm leader in fertility adoption and surrogacy benefits, what would you say was the top trend in this area in 2023 and what are you anticipating will be the top trend in 2024? Don't worry, I know you don't have a crystal ball, but just based on your experience last year.

Kellie Thomas:

Absolutely. So I would say the first thing that we've really started to see an increase of is a change in health plan benefits from what we would call strictly

infertility benefits to fertility benefits. And what I mean by that is infertility benefits traditionally have been the sort of benefits, IVF, IUI, things like that, that employers will cover when an employee has a medical diagnosis of infertility, which generally requires a male and a female and 12 months of trying and not successfully having a child.

Kellie Thomas:

As part of just an overall move that we see toward new DEI efforts, that type of thing, a more inclusive workplace, now we're seeing fertility benefits which basically don't require that diagnosis. And so they can be utilized by say a single woman who wants to have a baby on her own, same sex couples, that type of thing. So it covers the same types of procedures and medications, that type of thing, but without that diagnosis.

Kellie Thomas:

So that's probably the number one thing that I've really seen evolving over the last few years. And those are benefits specifically that are sometimes offered just directly through an employer's health plan, but there are also ways to structure it so that it can be offered as a benefit that's integrated with, but still separate from the employer group health plan.

Kellie Thomas:

Along with that, there's also an increase in other tax favored benefits. So for example, qualified adoption assistance plans that allow employers to reimburse set amount of adoption expenses on a tax favored basis, surrogacy benefits. And as a side note to our discussion here, even tax favored tuition benefits, which we've been seeing a lot of requests for. So I think it's just a general theme of employers looking for a way to reach out and benefit people in their whole lives through their benefit packages.

Melissa Ostrower:

Thank you. Very interesting. So I'm sure a lot of employers are listening to this and really getting excited, but they might be thinking, "What types of laws are implicated when offering these benefits? Are there things I need to think about that I may not have thought about before?"

Kellie Thomas:

Yeah, absolutely. And that's really the question of the hour because fertility in particular is a tricky one because if it's not offered in your regular group health plan, you're actually creating a new group health plan. And that's where employers get nervous because we start throwing all the acronyms at them. So there's ERISA, there's the Affordable Care Act, ACA, there's COBRA, there's HIPAA, basically everything you have to worry about generally for what you think of as your standard health plan can come into play for these fertility benefits.

Kellie Thomas:

There's also tax code implications for all three types of these family forming

benefits. And so there are certain benefits under a fertility called an HRA, health reimbursement arrangement can be offered on a pre-tax basis, but not everything. And then qualified adoption expenses, same thing. We have the code to worry about, the internal revenue code. Surrogacy benefits are taxable, including some technical issues that we'll talk about in a minute that need to be considered. So the big statutes that everyone's worried about when it comes to employee benefit plans factor in one way or another to each of these benefits.

Melissa Ostrower:

Thank you. Very interesting. So what are the traps that you like to highlight that employers should definitely consider before putting in this benefit or if they have this type of benefit in place making sure they're compliant?

Kellie Thomas:

Absolutely. So as I mentioned before, the biggest one is you don't want to create the inadvertent group health plan, which is a term I started using because it came up a lot when employers were putting travel benefits in place post the Supreme Court decision in Dobbs. And so we'd get these calls and usually a panicked HR person who would say, "They just did a big announcement to the whole company that we're going to have this new travel benefit, but I didn't know about it. And how do we do this and how is it compliant?"

Kellie Thomas:

So it's really the same considerations here. When an employer is paying medical expenses for an employee, their spouse or their dependents, that can create a group health plan. And so while there are certain fertility benefits that may fall outside of that medical care umbrella, just by way of example, long-term egg storage, when there's not a medical infertility diagnosis and certain other more discreet examples, most of what we think of as a fertility benefit is going to be medical care. So therefore you have the group health plan issue.

Kellie Thomas:

There are pretty strong penalties for non-compliance when you have a group health plan. The biggest one, the biggest sort of sludge hammer penalty, it can become under the ACA. If you have a fertility benefit HRA that's not integrated with your group health plan coverage, that actually violates ACA market reforms and that can be thousands of dollars a day for that type of violation. So these are absolutely benefits that can be fine and structured properly, but there are certain rules that we need to make sure are followed.

Kellie Thomas:

Other things to think about, although certainly not quite as scary as the ACA market reform violations, but with qualified adoption expenses because you have a tax favored benefit, those non-discrimination rules under the code that we hear and talk about with certain other benefits also come into play. So that's generally referring to discrimination in favor of your more highly compensated employees. So often we have to structure those so that they're wider basis an employer may

initially think of when they're structuring the benefit.

Kellie Thomas:

And then under the surrogacy, it's a funny one, surrogacy benefits are taxable, but under code section 409A, which is one that makes everyone's toes curl when they talk about it, there are rules about taxable reimbursements. And so if you're structuring your surrogacy benefit to have a lifetime limit, you may inadvertently trip over that rule. That's one, just raise a flag on that one. There are ways we can work around that issue, but again, we just need to be careful on how the benefit is structured.

Melissa Ostrower:

Thank you. Well, this is really helpful information. On the one hand, these benefits can be very helpful to employees and really fill a void and help attract and retain talent, but there also are quite a few compliance burdens, so to speak.

Kellie Thomas:

Absolutely.

Melissa Ostrower:

So which types of employers do you think would want to consider implementing these types of benefits, given the compliance issues involved and there is some cost to setting up and making sure our plan is compliant?

Kellie Thomas:

Yeah, absolutely. The nice thing about these benefits is they can really work for an employer of any size. And the reason for that is it's relatively low cost to set these up, and I'll put them in the two different categories. It's a little more involved when you're putting a fertility benefit in place. There's more avenues you have to think about. Adoption and surrogacy in particular. You need a plan document, you need a structure and you need a way to administer it. And from a budget perspective, you can set your own reimbursement limits on these, really all three of them. And so it makes it easier to budget than certain other types of benefits because you can look at who is your population? What's your expected utilization rate? Where do you want to be in terms of overall costs, say on an annual basis? And you can back out from there to come up with a limit that you want to impose.

Kellie Thomas:

There's no minimum, you could have an adoption or surrogacy benefits that's \$1,000 or something. So it doesn't have to be huge and you can try it out, you can adjust it on a go forward basis. And so I think that ease of setup and flexibility makes this really appealing. And as I mentioned before, it often not only these are requested by employees on a somewhat regular basis, and it does fit into a general message to employees that you are thinking about your workforce in an inclusive way.

Melissa Ostrower:

Thank you, Kellie. And as a final question, for those employers listening right now who want to explore adding these benefits in 2024, what would you say is the first step that they should undertake in doing so?

Kellie Thomas:

I would say definitely call us. So I do think really getting ahead of these issues is always much easier than chasing them. So we can help with design, overall design and documentation. And then usually you're going to want to pull in a third party administrator to help you administer the benefits. There are three main players in the market right now. We're familiar with their agreements, we're familiar with their documents, and we can work within that structure to help put this benefit into place.

Kellie Thomas:

And we do recommend, so particularly fertility benefits, it's good to have an outside claims administrator. If you think through it, you don't necessarily want, say your HR folks getting people's medical information and making claims decisions. And so these companies can handle that. They can offload that burden for you, so they would be able to handle those.

Melissa Ostrower:

Perfect. Well, thank you so much, Kellie. This information was very helpful and informative. So to all of you listeners, please feel free to reach out to Kellie Thomas, me, Melissa Ostrower, or any other member of our group here at Jackson Lewis, and we would be happy to talk about these issues or any other benefits issues you have. Happy 2024 everyone.

Kellie Thomas:

Thank you.

Melissa Ostrower:

Thank you.

Alitia Faccone:

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