

ON ICE: THE SLIPPERY SLOPE OF EMPLOYER-PAID EGG FREEZING

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Introduction

Gender inequality persists in being a complex workplace issue. Though women comprise half of today's workforce, they are still "underrepresented at every level of the [talent] pipeline," but most significantly in senior leadership and executive positions.¹ One survey of 118 U.S. corporations asserted that, "at the rate of progress of the past three years, it will take more than 100 years for the upper reaches of U.S. corporations to achieve gender parity."² Significant economic outcomes are at stake: Another recent study calculates that further advancement of gender parity could add an estimated \$4.3 trillion, or ten percent, to U.S. economic growth by

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¹ *Women in the Workplace*, MCKINSEY & CO. & LEANIN.ORG (Sept. 2016), <http://www.mckinsey.com/business-functions/organization/our-insights/women-in-the-workplace-2016?cid=mckwomen-eml-alt-mip-mck-oth-1609>. Women comprise forty-six percent of entry-level positions, thirty-three percent of director positions, but only nineteen percent of C-suite positions.

² *Women in the Workplace*, MCKINSEY & CO. & LEANIN.ORG (Sept. 2015), <http://www.mckinsey.com/business-functions/organization/our-insights/women-in-the-workplace>.

2025.³

Yet translating the notion of gender equality into practical, effective workplace programs is no simple task—eliminating deeply-rooted inequality requires innovative thinking and time. One significant barrier to eliminating workplace gender disparity is the biological reality that women’s childbearing years are limited, but men’s are not.⁴ Until recently, women had to choose between career advancement and starting a family, resulting in women’s lower career and pay trajectories.⁵ However, in late 2012, reproductive technology advances afforded female workers a new way to have both a career and a family: egg freezing.⁶ While egg freezing was

³ Kweilin Ellingrud, Anu Madgavkar, James Manyika, Jonathan Woetzel, Vivian Riefberg, Mekala Krishnan & Mili Seoni, *The Power of Parity: Advancing Women’s Equality in the United States*, MCKINSEY GLOBAL INSTITUTE REPORT (Apr. 2016) <http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>.

⁴ June Carbone & Naomi Cahn, *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*, 8 FIU L. REV. 287, 299-300 (2013).

⁵ See *Women in the Workplace*, *supra* notes 1 and 2; Carbone & Cahn, *supra* note 4, at 296-98.

⁶ See, e.g., Carbone & Cahn, *supra* note 4, at 300-01; Seema Mohapatra, *Using Egg Freezing to Extend the Biological Clock: Fertility Insurance or False Hope?*, 8 HARV. L. & POLICY REV. 381, 381-82 (2014); John Robertson, *Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction*, 1 J. LAW BIOSCI. 113, 114 (2014).

developed for fertility preservation for women faced with imminent cancer treatment,⁷ the procedure also permits delaying childbearing for social reasons including education, career development, and the need to find the right partner.⁸

Employers quickly capitalized on egg freezing technology as a means to promote workforce gender equality. In 2014, social media giant Facebook and technology pioneer Apple started reimbursing employees up to \$20,000 for the egg freezing procedure.⁹ The financial services industry followed when Citigroup and JP Morgan Chase added optional health insurance coverage for in vitro fertilization and elective egg freezing for medical reasons.¹⁰ In 2015,

⁷ Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, *Mature Oocyte Cryopreservation: A Guideline*, FERTILITY AND STERILITY 99:1, 41 (2013) [hereinafter Practice Committees].

⁸ See, e.g., Carbone & Cahn, *supra* note 4, at 300-01; Emma Rosenblum, *Later Baby: Will Freezing Your Eggs Free Your Career?* BLOOMBERG BUSINESSWEEK (Apr. 17, 2014, 8:11 PM), <http://www.bloomberg.com/news/articles/2014-04-17/new-egg-freezing-technology-eases-womens-career-family-angst>; Sarah McHaney & Rebecca Jacobson, *Seven Things Every Woman Should Know Before Freezing Her Eggs*, PBS NEWSHOUR (Dec. 10, 2014, 1:09 PM), <http://www.pbs.org/newshour/updates/freeze-eggs/>.

⁹ Laura Sydell, *Silicon Valley Companies Add New Benefit for Women: Egg Freezing*, NPR ALL TECH CONSIDERED (October 17, 2014, 3:21 AM), <http://www.npr.org/sections/alltechconsidered/2014/10/17/356765423/silicon-valley-companies-add-new-benefit-for-women-egg-freezing>.

¹⁰ See Jessica Bennett, *Company-Paid Egg Freezing Will Be the Great Equalizer*, TIME (Oct. 16, 2014, 11:25 AM), <http://time.com/3509930/company-paid-egg-freezing-will-be-the-great-equalizer/>.

Richard Branson, founder of Virgin Group, stated that he wants to “steal the idea” for his conglomerate of diverse businesses.¹¹ In early 2016, the Pentagon announced a pilot program for military personnel who want to freeze their eggs or sperm prior to deployment,¹² and in late 2016, the Department of Veterans Affairs announced it would cover in vitro fertilization costs for wounded veterans.¹³ While alluring to young, ambitious professionals, employer-paid egg-freezing programs precipitate several social, moral, and legal considerations.

This article explores whether the potential benefits of employer-paid egg-freezing programs are outweighed by their risks, including potential employment discrimination claims.¹⁴ Part I defines the egg-freezing process and key terms. Part II considers the advantages and disadvantages of egg freezing. Part III identifies relevant legal protections under anti-discrimination and job-protected leave laws, and explains how employer-paid egg-freezing

¹¹ Interview by Emily Chang with Sheryl Sandberg, COO, Facebook, and Richard Branson, Virgin Group Founder (Apr. 24, 2015), <http://www.bloomberg.com/news/videos/2015-04-24/sandberg-branson-defend-facebook-s-egg-freezing-policy>.

¹² Michael Schmidt, *Pentagon to Offer Plan to Store Eggs and Sperm to Retain Young Troops*, N.Y. TIMES (Feb. 3, 2016), <http://mobile.nytimes.com/2016/02/04/us/politics/pentagon-to-offer-plan-to-store-eggs-and-sperm-to-retain-young-troops.html>.

¹³ Emily Wax-Thibodeaux, *Veterans Affairs Will Begin Covering IVF and Adoption Costs for Wounded Veterans*, THE WASHINGTON POST (Oct. 6, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/10/06/veterans-affairs-will-begin-covering-ivf-and-adoption-costs-for-wounded-veterans/?hpid=hp_hp-more-top-stories_vets-930am%3Ahomepage%2Fstory

¹⁴ Because this article is focused on employer-paid egg freezing for social reasons, egg freezing for medical reasons is generally outside the scope of this discussion.

programs may trigger legal liability. Part IV offers practical advice for employers.

I. Freezing Your Eggs: It's Not as Easy as It Sounds

A woman's fertility peaks in her twenties, and steadily declines until her mid-thirties, with a rapid decline by age forty.¹⁵ "Women become less likely to become pregnant and more likely to have miscarriages [as they age] because egg quality [and quantity] decreases."¹⁶ Miscarriage rates quadruple from twenty percent at age thirty-five to eighty percent at forty-five.¹⁷ Thus, women who want to postpone childbearing must choose between a burdensome egg-freezing procedure and possible infertility, which for some women are not "real options."¹⁸ To assess employer involvement in egg freezing, one needs to understand the detailed process of egg harvesting and retrieval, and the procedure of in vitro fertilization. Although egg freezing has become more widely accepted and understood in recent years, it remains both difficult and expensive for women who choose to freeze their eggs.

A. The Reproductive Technology of Egg Freezing

"Egg freezing promises, literally, to stop the biological clock, [and preserve] a woman's

¹⁵ *Age and Fertility: A Guide for Patients*, AM. SOC'Y FOR REPROD. MED 1, 4 (2012), https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/agefertility.pdf; *Elective Egg Freezing*, COLO. CTR. FOR REPROD. MED., <https://www.ccrmivf.com/services/elective-egg-freezing/> (last visited Sept. 30, 2016).

¹⁶ *Age and Fertility*, *supra* note 15, at 5-6.

¹⁷ Dan Tennenhouse, M.D., *Miscarriage*, in 2 ATTORNEYS MEDICAL DESKBOOK § 24:35 (4th ed. 2015).

¹⁸ Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER, RACE & JUST. 1, 2-3, 46 (2005).

eggs from the ravages of time until she is ready to use them.”¹⁹ Women have a finite number of eggs, determined at birth, but men produce sperm throughout their lifetime.²⁰ That biology makes it easier for men to prioritize career development before starting a family, without undermining their reproductive capacity.²¹ Both sperm and egg quality decrease with age, but the number of women’s chromosomally normal eggs declines drastically at age thirty-five.²² Embryonic age-related chromosomal abnormalities are a primary cause of miscarriage.²³

Egg freezing (oocyte cryopreservation) allows women to delay childbearing into their thirties, forties, and early fifties – even after menopause, the biological end of a woman’s natural childbearing capacity.²⁴ The live birth rate for women in their late thirties and early forties has more than doubled over the last thirty years.²⁵ Some studies suggest this increase is correlated with technological advances in reproductive medicine, including egg freezing, in vitro

¹⁹ Carbone & Cahn, *supra* note 4, at 299.

²⁰ *See, e.g.*, Carbone & Cahn, *supra* note 4, at 299; Robertson, *supra* note 6, at 115.

²¹ Carbone & Cahn, *supra* note 4, at 299.

²² *See, e.g.*, Carbone & Cahn, *supra* note 4, at 299; *Age and Fertility*, *supra* note 15, at 4.

²³ *Age and Fertility*, *supra* note 15, at 5; Tennenhouse, *supra* note 17.

²⁴ *Age and Fertility*, *supra* note 15, at 9; McHaney & Jacobson, *supra* note 8.

²⁵ *National Vital Statistics Report*, CENTER FOR DISEASE CONTROL 1, 19 (2015),

http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf. The live birth rate per 1,000 women for all races, ages 35 to 39 in 1983 was 22.0, compared to 49.3 in 2013. The live birth rate for all races, ages 40 to 44 was 3.9 in 1983, compared to 10.4 in 2013.

fertilization, and frozen embryo transfer.²⁶

Frozen sperm and embryos have been successfully used in reproductive medicine for decades, but until recently, freezing technology was not as effective for the more delicate and less resilient female eggs.²⁷ In the early 2000s, Italian researchers discovered vitrification, a flash freezing method to prevent formation of frozen crystals within eggs.²⁸ In 2013, when the flash freezing technology showed clinical evidence of success, the professional organizations that set reporting requirements and practice standards for reproductive medicine clinics and practitioners lifted the “experimental” label from egg freezing for medical purposes.²⁹ Since then, egg freezing has become a hot, albeit controversial, topic for women seeking a way to preserve fertility while developing a career.³⁰ Within a year, the average age of women pursuing

²⁶ See *Assisted Reproductive Technology: 2013 National Summary Report*, CDC NAT’L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, DIV. OF REPROD. HEALTH 1, 9, 49 (Oct. 2015), http://www.cdc.gov/art/pdf/2013-report/art_2013_national_summary_report.pdf [hereinafter *Assisted Reproductive Technology*]. Women age thirty-five and older comprised approximately sixty-two percent of the assisted reproductive technology cycles in 2013, the number of which increased twenty-five percent from 127,977 in 2004 to 160,554 in 2013. Live-birth deliveries (including multiple infants) conceived using assisted reproductive technology increased twenty-six percent from 49,458 in 2004 to 66,706 in 2013.

²⁷ Robertson, *supra* note 6, at 115.

²⁸ Robertson, *supra* note 6, at 115.

²⁹ Practice Committees, *supra* note 6, at 41.

³⁰ See, e.g., Rosenblum, *supra* note 8; Bennett, *supra* note 10; but see Sabrina Parsons, *Female Tech CEO: Egg-Freezing ‘Benefit’ Sends the Wrong Message to Women*, BUSINESS INSIDER

egg freezing declined from thirty-nine to thirty-six,³¹ and the number of egg-freezing cycles performed in the United States increased by almost thirty percent.³² Studies now estimate that two percent of babies born in the United States are conceived through advanced reproductive medicine.³³

B. The Chilly Egg Freezing Procedure

The process of egg freezing is as chilling as it sounds. It starts with a series of reproductive endocrinologist consultations, blood work, and gynecological procedures to confirm overall reproductive health and ovarian reserve.³⁴ If a woman is a good candidate for egg freezing, she self-administers a three- to four-week course of egg follicle suppression medication, using birth control pills or hormone injections.³⁵ Then, the woman injects egg

(Oct. 20, 2014 10:50 AM), <http://www.businessinsider.com/apple-facebook-egg-freezing-benefit-is-bad-for-women-2014-10>.

³¹ *Assisted Reproductive Technology*, *supra* note 26, at 9; Rosenblum, *supra* note 27.

³² *Assisted Reproductive Technology*, *supra* note 26, at 50. The number of egg or embryo banking cycles increased from approximately 19,000 in 2012 to 27,500 in 2013.

³³ *See National Vital Statistics Report*, *supra* note 25, at 2; *Assisted Reproductive Technology*, *supra* note 26, at 3. In 2013, 67,996 living infants were born from assisted reproductive technology cycles out of 3,932,181 live births registered in the United States.

³⁴ *See, e.g., Evaluation Before IVF, Prerequisite Testing*, SOC'Y FOR ASSISTED REPROD. TECH., http://www.sart.org/SART_Patient_Evaluation/ and <http://www.sart.org/Prerequisite/> (last visited September 30, 2016); *Elective Egg Freezing*, *supra* note 14.

³⁵ *ART: Step-by-Step Guide*, SOC'Y FOR ASSISTED REPROD. TECH., http://www.sart.org/ART_Step-by-Step_Guide/ (last visited September 30, 2016).

stimulation hormones into her abdomen multiple times daily for approximately fourteen days, with daily blood work and ultrasounds to confirm size and growth of eggs.³⁶ “The purpose of the medications taken during treatment is to safely stimulate the ovaries to produce more mature eggs than are produced in a natural cycle.”³⁷ A natural ovulation cycle typically produces one or two eggs,³⁸ but a single stimulation cycle produces on average fifteen eggs,³⁹ within a range of zero up to forty-five.⁴⁰ This process risks ovarian torsion from the developing egg quantity and ovarian size.⁴¹ This risk is mitigated by restricting physical activity for approximately two weeks of the harvest procedure.⁴²

The eggs are mature and ready to be retrieved when some follicles measure fifteen to twenty millimeters diameter on daily ultrasounds.⁴³ A shot is administered to induce ovulation,

³⁶ Mohapatra, *supra* note 6, at 386; *ART: Step-by-Step Guide*, *supra* note 35.

³⁷ *Elective Egg Freezing*, *supra* note 14.

³⁸ *Age and Fertility*, *supra* note 15, at 3.

³⁹ Mohapatra, *supra* note 6, at 386-87.

⁴⁰ *How Many Eggs Should I Freeze?*, EGGBANXX, <https://www.eggbanxx.com/how-many-eggs-should-i-freeze> (last visited October 5, 2016).

⁴¹ *Exercise and Stress Reduction During Fertility Treatments*, NE. REPROD. MED., <http://www.nrmvt.com/exercise-and-stress-reduction-during-fertility-therapy-what-can-i-do/> (last visited October 5, 2016).

⁴² *Exercise and Stress Reduction During Fertility Treatments*, *supra* note 41.

⁴³ See, e.g., Mohapatra, *supra* note 6, at 386; *ART: Step-by-Step Guide*, *supra* note 35; Theresa Abney, *Working Women Seeking Infertility Treatments: Does the ADA or Title VII Offer Any Protection?* 58 *DRAKE L. REV.* 295, 298 (2009); Richard Sherbahn, M.D., *Ovarian Stimulation*

which releases all eggs from the ovaries into the fallopian tubes,⁴⁴ and a reproductive endocrinologist approximately thirty-five hours later retrieves the eggs with a long needle, where the woman is under general anesthesia.⁴⁵ Within a week after egg retrieval, a patient may develop ovarian hyperstimulation syndrome (OHSS), in which the ovaries swell with fluid and become painful from the use of injectable ovary stimulation hormones.⁴⁶ OHSS symptoms usually are mild; however, the condition can require hospitalization for kidney failure or blood clots.⁴⁷ The prevalence of OHSS is unclear due to inconsistent reporting, but estimates suggest that up to twenty-five percent of women experience mild OHSS symptoms, and up to five percent have severe symptoms.⁴⁸

IVF Protocols: Medications and Drugs for In Vitro Fertilization, ADVANCED FERTILITY CTR. OF CHI., <http://www.advancedfertility.com/ivfstim.htm> (last visited October 5, 2016).

⁴⁴ See *ART: Step-by-Step Guide*, *supra* note 35.

⁴⁵ Mohapatra, *supra* note 6, at 386; *ART: Step-by-Step Guide*, *supra* note 35 (includes a diagram of the egg retrieval procedure); Abney, *supra* note 43, at 298.

⁴⁶ Mohapatra, *supra* note 6, at 385; *In Vitro Fertilization (IVF): What Are the Risks?*, AM. SOC'Y FOR REPROD. MED. (2015), http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/risksofivf.pdf; *Ovarian Hyperstimulation Syndrome*, SOC'Y FOR ASSISTED REPROD. TECH., http://www.sart.org/Ovarian_Hyperstimulation_Syndrome/ (last visited September 30, 2016).

⁴⁷ Mohapatra, *supra* note 6, at 385; *Ovarian Hyperstimulation Syndrome*, *supra* note 46.

⁴⁸ Richard Scott Lucidi, M.D., *Ovarian Hyperstimulation Syndrome: Epidemiology*, MEDSCAPE, <http://emedicine.medscape.com/article/1343572-overview#a5> (last visited Oct. 5, 2016).

After the egg harvest, quality is measured only by visual appearance and size, because there is no screening mechanism for chromosomal abnormalities at this stage.⁴⁹ Selected eggs are flash frozen immediately,⁵⁰ or within twenty-four hours if the eggs are monitored for continued growth.⁵¹ The eggs may remain frozen until the woman reaches the age of fifty-three, at which unused eggs are usually discarded.⁵² The cost of the procedure is \$9000 to \$20,000, plus \$2000 to \$4000 per cycle for stimulation medication, and a \$500 to \$1000 annual storage fee.⁵³ The entire egg freezing process takes approximately four to six weeks,⁵⁴ and is rarely covered by insurance.⁵⁵

C. In Vitro Fertilization: Making Babies from Frozen Eggs

This process of stimulating, harvesting, and retrieving eggs however, is only the first step

⁴⁹ *Patient Information*, COLO. CTR. FOR REPROD. MED. (2013). [unable to find alternative source to reference]

⁵⁰ Mohapatra, *supra* note 6, at 386.

⁵¹ *Patient Information*, *supra* note 49. [unable to find alternative source to reference]

⁵² *Patient Information*, *supra* note 49. [unable to find alternative source to reference]

⁵³ *See, e.g.*, Mohapatra, *supra* note 6, at 386; Abney, *supra* note 43, at 299; Sarah Z. Wexler, *Four Things You Need to Know About Freezing Your Eggs*, HUFFINGTON POST (June 24, 2015 9:00 AM), http://www.huffingtonpost.com/2015/06/24/freezing-your-eggs_n_7623822.html.

The cost of egg freezing varies by the clinic and individual protocol. Some medications are more expensive and some of the less expensive medications and diagnostic testing may be covered by insurance.

⁵⁴ Mohapatra, *supra* note 6, at 386; *ART: Step-by-Step Guide*, *supra* note 35.

⁵⁵ Rosenblum, *supra* note 8; Wexler, *supra* note 53.

of the in vitro fertilization and embryo transfer process.⁵⁶ When a woman chooses to use her frozen eggs, they are warmed and then fertilized by sperm in vitro, using advanced reproductive technologies.⁵⁷ Embryologists then observe the fertilized eggs for proper cell growth, which can be negatively impacted by fertilization failures, chromosomal abnormalities, egg degeneration, bacterial contamination, or even laboratory equipment failure.⁵⁸

After several days of successful cell growth of the fertilized egg, resulting blastocysts may be biopsied for genetic testing and frozen for later implantation.⁵⁹ If a patient declines genetic testing, selected embryos are transferred to the uterus using a guided catheter.⁶⁰ Remaining embryos may be frozen indefinitely for future embryo transfer, without comprising

⁵⁶ Mohapatra, *supra* note 6, at 386; *ART: Step-by-Step Guide*, *supra* note 35.

⁵⁷ Mohapatra, *supra* note 6, at 386; Abney, *supra* note 43, at 298.

⁵⁸ *ART: Step-by-Step Guide*, *supra* note 35.

⁵⁹ *Age and Fertility*, *supra* note 14, at 9; *ART: Step-by-Step Guide*, *supra* note 35;

Preimplantation Genetic Testing, AM. SOC'Y FOR REPROD. MED. (2014),

http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/PGT_2014.pdf.

⁶⁰ Mohapatra, *supra* note 6, at 386; Abney, *supra* note 43, at 298; *ART: Step-by-Step Guide*, *supra* note 35. The Society for Assisted Reproductive Technology and American Society for Reproductive Medicine set strict guidelines for the number of embryos to transfer, largely based on age and embryo quality.

quality.⁶¹ Prior to embryo transfer, and after in vitro fertilization, a patient daily self-injects hormones for several weeks to prepare the uterine lining for embryo implantation.⁶² Successful embryo transfer and implantation progresses to a clinical pregnancy.⁶³

Approximately ninety percent of frozen eggs survive the thawing process;⁶⁴ and statistically, at least eight eggs are required to achieve one clinical pregnancy.⁶⁵ “The older [a woman’s age] at the time of egg freezing, the lower the likelihood [of] a live birth”⁶⁶ “Most women undergo several cycles before pregnancy occurs, or until they suspend treatments.”⁶⁷ One complete egg freezing, in vitro fertilization, and embryo transfer cycle costs approximately \$50,000, depending on such various factors as age, responsiveness to medications, and number of

⁶¹ *ART: Step-by-Step Guide*, *supra* note 35. Chromosomally abnormal embryos are typically discarded, or used for clinical research. *Patient Information*, *supra* note 49. [unable to find alternative source to reference].

⁶² See *Progesterone Supplementation During In Vitro Fertilization (IVF) Cycles*, AM. SOC’Y FOR REPROD. MED. (2011), http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/Progesterone-final_1-5-12.pdf.

⁶³ Goodwin, *supra* note 18, at 29; *ART: Step-by-Step Guide*, *supra* note 35.

⁶⁴ *Elective Egg Freezing*, *supra* note 14; *Egg Freezing Procedure Details*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/egg-freezing/details/results/rsc-20169015> (last visited Oct. 5, 2016).

⁶⁵ Rosenblum, *supra* note 8.

⁶⁶ *Egg Freezing Procedure Details*, *supra* note 64.

⁶⁷ Goodwin, *supra* note 18, at 29.

viable eggs.⁶⁸

II. The Advantages and Disadvantages of Employer-Paid Egg Freezing

With the egg freezing and in vitro fertilization process in mind, now consider egg freezing in the employment context. Advantages of employer-paid egg freezing include that (1) it advances gender parity in the workplace; (2) employers are indirectly leveling the financial playing field; and (3) long standing public policy promotes protecting female childbearing capability. On the other hand, disadvantages include that (1) it may detrimentally affect workplace culture, and (2) the long-term health risks and success rates are generally unknown.

A. Advantages

1. Egg Freezing Advances Gender Parity in the Workplace

A compelling argument for social egg freezing is that “[e]gg insurance against future infertility [enables] equal protection in employment,” thereby advancing gender parity in the workplace.⁶⁹ Female fertility peaks at the same time women are investing time and energy into their education and careers.⁷⁰ With egg freezing, biology no longer dictates when a woman must

⁶⁸ *Supra* note 53; *IVF Costs & Fertility Treatment Costs – Colorado*, COLO. CTR. FOR REPROD. MED., <https://www.ccrmivf.com/colorado/treatment-costs/> (last visited Oct. 5, 2016). Estimate assumes \$20,000 for the egg-freezing medication and procedure, and \$30,240 for in vitro fertilization and embryo transfer medications and procedures.

⁶⁹ Robertson, *supra* note 6, at 118.

⁷⁰ *See, e.g.*, Carbone & Cahn, *supra* note 4, at 296; *Age and Fertility*, *supra* note 15, at 4; Christine Rosen, *The Ethics of Egg Freezing*, WALL STREET JOURNAL (May 3, 2013, 7:20 PM), <http://www.wsj.com/articles/SB10001424127887323628004578459182762199520>.

exit and re-enter the workforce to start or grow a family.⁷¹ When an employer assumes the cost of egg freezing, women may continue working until they are professionally and personally ready for children.⁷² As a result, women remain in the talent pipeline for senior leadership positions and gender parity advances.

Employers also see egg freezing as a means to foster a more family-friendly workplace. Facebook decided to pay for egg freezing for employees and their spouses because employees were asking for it.⁷³ Sir Richard Branson, founder of Virgin Group, views egg freezing as a “fantastic” choice for a woman who has not “met the man of her dreams” by her late thirties, and states “it makes sense—the earlier you can freeze [the eggs], the better.”⁷⁴ Both Apple and Facebook include egg freezing in their overall family benefit options, which include employer-subsidized adoption and surrogacy, generous parental leave policies, on-site healthcare, and day care benefits.⁷⁵ Such benefits may improve employers’ ability to attract and retain workers who have or want children.

Others suggest that egg freezing promotes women’s empowerment.⁷⁶ Apple says egg

⁷¹ Rosen, *supra* note 70.

⁷² Rosen, *supra* note 70.

⁷³ Sydell, *supra* note 9; Charlotte Alter, *Sheryl Sandberg Explains Why Facebook Covers Egg-Freezing*, TIME.COM (April 25, 2015, 10:49 AM), <http://time.com/3835233/sheryl-sandberg-explains-why-facebook-covers-egg-freezing/>.

⁷⁴ Bloomberg Interview, *supra* note 11; Alter, *supra* note 73.

⁷⁵ Sydell, *supra* note 9.

⁷⁶ *See, e.g.*, Carbone & Cahn, *supra* note 4, at 300; Robertson, *supra* note 6, at 118; Rosen, *supra* note 70.

freezing enables its female workforce to “do the best work of their lives.”⁷⁷ Generally, egg freezing offers female employees the choice to develop a career before starting a family, and it gives a woman time to decide if she wants children.⁷⁸ The idea of preserved fertility offers “actual and symbolic freedom, security, and time.”⁷⁹ One woman who froze her eggs said that her “future seemed full of possibility again,” and “[b]y freezing, you’ve done something about it . . . and that can pay off in both your work and romantic lives.”⁸⁰ Egg freezing empowers a woman to snooze her biological clock while she advances her career alongside her male counterparts.

2. The Financial Playing Field Is More Level

Employer-paid egg freezing helps to level an uneven financial playing field. “The cost (of egg freezing) is prohibitively high for most women”⁸¹ By subsidizing the high cost of the procedure, employers make egg freezing available not only to women who want to advance their career before starting a family, but also to women who otherwise may not be able to afford

⁷⁷ Sydell, *supra* note 9.

⁷⁸ Robertson, *supra* note 6, at 118; Mohapatra, *supra* note 6, at 389-90.

⁷⁹ Alicia Paller, *A Chilling Experience: An Analysis of the Legal and Ethical Issues Surrounding Egg Freezing, and a Contractual Solution*, 99 MINN. L. REV. 1571, 1583 (2015).

⁸⁰ Sara Elizabeth Richards, *Why I Froze My Eggs (And You Should Too)*, WALL STREET JOURNAL (May 3, 2013 7:16 PM), <http://www.wsj.com/articles/SB10001424127887323628004578458882165244260>; *see also* SARA ELIZABETH RICHARDS, *MOTHERHOOD, RESCHEDULED: THE NEW FRONTIER OF EGG FREEZING AND THE WOMEN WHO TRIED IT*, Simon & Schuster (Kindle Ed. 2013).

⁸¹ Richards, *supra* note 80.

it.⁸² Women who freeze eggs tend to be middle-class and college-educated, while women with fewer skills and economic resources tend to put childbearing first.⁸³ Without employer assistance, “[e]gg freezing is likely to remain an elite practice, well beyond the reach of working class women who can’t afford to freeze their eggs, and who enjoy less workplace support for their family needs.”⁸⁴

Employer-paid egg freezing may also neutralize the “fertility penalty” – the loss of lifetime earnings as a result of taking time away from work to start a family early in one’s career.⁸⁵ Women may experience a greater loss of earnings than men because women take more time away from the workforce before and after childbearing.⁸⁶ Employer-paid egg freezing allows broader access to reproductive technologies that enable a delay in childbearing, and thereby reduce a woman’s time away from the workforce.⁸⁷ Thus, it levels the financial playing field and minimizes the “fertility penalty.”

3. Public Policy Supports Protecting Childbearing Capabilities

Employer-paid egg freezing may be a further step forward to protect childbearing

⁸² Carbone & Cahn, *supra* note 4, at 289, 306.

⁸³ Carbone & Cahn, *supra* note 4, at 297.

⁸⁴ Carbone & Cahn, *supra* note 4, at 289, 312.

⁸⁵ Gillian Lockwood, *Social Egg Freezing: The Prospect of Reproductive “Immortality” or a Dangerous Delusion?* 23 REPROD. BIOMEDICINE ONLINE 334, 337 (2011).

⁸⁶ See, e.g., Mohapatra, *supra* note 6, at 382; Marcia Inhorn, *Women, Consider Freezing Your Eggs*, CNN (April 9, 2013 7:56 AM), <http://www.cnn.com/2013/04/09/opinion/inhorn-egg-freezing/>.

⁸⁷ *Supra* note 86.

capabilities. Public policy and state laws have been designed to protect maternal capabilities since the early twentieth century.⁸⁸ Women can bear children using donor eggs and sperm, but “[men cannot] reproduce without an egg source and/or gestator.”⁸⁹ Further, society requires protecting women’s capability to bear children.⁹⁰ At a fundamental level, egg freezing and other advanced reproductive technologies enable the reproductive capacity of more women, and for a longer period of their lives.⁹¹ In today’s workplace, this means that women can have it all—a healthy family *and* a robust career.

Even the military is on the egg-freezing bandwagon. To help retain service members, the Pentagon recently announced an egg (and sperm) freezing pilot program.⁹² The program’s goals are to: (1) offer assurance to those injured during deployment that they will still be able to have children using advanced reproductive technologies; (2) retain women in their twenties and thirties; and (3) allow for continued overseas deployments and military career development.⁹³ “Women who reach ten years of service – what [Defense Secretary] Ashton Carter calls ‘their peak years for starting a family’ – have a retention rate that is thirty percent lower than their male

⁸⁸ See *Muller v. Oregon*, 208 U.S. 412, 420 (1908) (state may constitutionally limit the working hours of women because of the state’s strong interest promoting maternal capabilities); see also *West Coast Hotel v. Parrish*, 300 U.S. 379, 398-99 (1937) (state may regulate the minimum wage paid to female employees to promote female health, safety, and general welfare).

⁸⁹ Robertson, *supra* note 6, at 129.

⁹⁰ See Carbone & Cahn, *supra* note 4, at 311-13.

⁹¹ See Carbone & Cahn, *supra* note 4, at 300.

⁹² Schmidt, *supra* note 12.

⁹³ Schmidt, *supra* note 12.

counterparts.”⁹⁴ The five-year pilot program’s cost is estimated at \$150 million, and will be offered through the military’s health care plan.⁹⁵

B. Disadvantages

1. Egg Freezing Programs May Create Workplace Culture Issues

Employer-paid egg freezing may also create workplace culture issues by putting extra pressure on female employees to delay childbearing, possibly to their detriment.⁹⁶ This is especially true if egg freezing is perceived as a requirement, not an opportunity.⁹⁷ Specifically, executives and leaders in decision-making positions (the majority of which are men) may implicitly communicate that employees who delay childbearing by freezing eggs are more dedicated and ambitious, and have higher potential.⁹⁸ In an effort to be viewed more favorably, female workers may endeavor the difficult procedure, even if they had not planned to delay childbearing.⁹⁹

Moreover, employer paid egg-freezing can foster what legal ethics and health law professor Michele Goodwin refers to as the “double bind,” in which women have an “illusory

⁹⁴ Schmidt, *supra* note 12.

⁹⁵ Schmidt, *supra* note 12; *see also Combating Infertility During Military Service*, PATH2PARENTHOOD.ORG, <http://www.path2parenthood.org/library/handbooks-fact-sheets> (select Combating Infertility During Military Service download) (last visited Oct. 5, 2016).

⁹⁶ Carbone & Cahn, *supra* note 4, at 310; Robertson, *supra* note 6, at 120; Goodwin, *supra* note 18, at 53; Parsons, *supra* note 30.

⁹⁷ Robertson, *supra* note 6, at 120.

⁹⁸ *See, e.g.*, Robertson, *supra* note 6, at 120; Parsons, *supra* note 30.

⁹⁹ *See* Robertson, *supra* note 6, at 120.

choice between motherhood and career advancement.”¹⁰⁰ Social pressure to freeze eggs may make that choice even more problematic by creating interpersonal conflict or disruptive competition among female workers.¹⁰¹ Thus, the program could undermine the ultimate promise of employer-paid egg freezing’s objective of women “having it all” and promoting gender parity.¹⁰² Professor Goodwin cautions that “[egg-freezing] is not a replacement for equitable work policies and practices.”¹⁰³

Within an employer-paid egg freezing program, workers may also come to view their frozen eggs as a commodity, and view egg freezing as just a mere benefit transaction, such as education or parking space reimbursement.¹⁰⁴ A global reproductive market exists for donor eggs and sperm; and currently, because of the difficult and risky process of egg harvesting and retrieval, the demand for donor eggs far exceeds the supply.¹⁰⁵ Some workers may take advantage of an employer-paid egg freezing program, and freeze their eggs simply to try to “sell” them for profit on the open market.¹⁰⁶ Worse yet, the workplace may evolve into its own egg micro-market, in which younger more fertile workers broker with older less fertile workers to

¹⁰⁰ Goodwin, *supra* note 18, at 3.

¹⁰¹ See Goodwin, *supra* note 18, at 2-3.

¹⁰² Rosen, *supra* note 70.

¹⁰³ Goodwin, *supra* note 18, at 54.

¹⁰⁴ Robertson, *supra* note 6, at 121.

¹⁰⁵ Jocelyn Downie and Françoise Baylis, *Transnational Trade in Human Eggs: Law, Policy, and (In) Action in Canada*, 41 J. L., MED. & ETHICS 224, 224 (2013).

¹⁰⁶ Robertson, *supra* note 6, at 121.

openly buy and sell eggs.¹⁰⁷ This could involve negotiation of contracts, pricing, and the potential relinquishment of parental rights by the egg donor.¹⁰⁸ Employers could also become entangled in family disputes regarding the ownership, custody, and posthumous use of frozen eggs.¹⁰⁹ Workplace culture and productivity problems are likely to follow.

2. Health Risks and Success Rates Are Unknown

There is also a broad question of whether employers should be in the business of financing a medical procedure with unknown long-term health risks, questionable success rates,

¹⁰⁷ Browne Lewis, “*You Belong to Me*”: *Unscrambling The Legal Ramifications of Recognizing a Property Right in Frozen Human Eggs*, TENN. L. REV. 645, 652, 657 (2016).

¹⁰⁸ Lewis, *supra* note 107, at 652.

¹⁰⁹ *See, e.g., York v. Jones*, 717 F. Supp. 421, 422 (E.D. Va. 1989) (couple sues Virginia fertility clinic to transfer frozen embryo to California fertility clinic); *In re M.M.M.*, 428 S.W.3d 389, 392 (Tex. App. 2014) (father seeks relinquishment of maternal rights and full custody of twins conceived with donor eggs); *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008) (wife seeks to get pregnant using stored frozen sperm of dead husband); *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, n.7 (Ariz. 2005) (in dicta, frozen eggs have just as much potential to become persons as embryos); *In re C.K.G.*, 173 S.W.3d 714, 717-19 (Tenn. 2005) (divorcing couple disputes custody of triplets conceived with donor eggs); *In re Marriage of Witten*, 672 N.W.2d 768, 780-82 (Iowa 2003) (frozen embryo disposition agreements entered into at the time of in vitro fertilization are enforceable and binding); *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992) (divorcing couple contests disposition of seven frozen embryos); *see also* Lewis, *supra* note 107; Judy Lynn Woodall, *From Where I Sit—Who Gets the Eggs?*, 49-APR MD. B.J. 36, 38 (2016).

and little federal or state regulation.¹¹⁰ Important questions arise: What if clinical research ultimately shows that the stimulation drugs increase the risk of cancer? Who bears the psychological blame when an employee chooses to use the eggs later in life, but they fail? Imagine the disbelief and betrayal a homeowner might feel when, after paying for property insurance for years, the homeowner files a claim and learns that the policy was never valid. Similarly, the employer-paid, so-called baby or egg insurance programs offer no guarantees.¹¹¹

While initial studies indicate that in vitro fertilization and other infertility treatments do not affect child development,¹¹² there are few longitudinal studies to evaluate long-term effects of the ovarian stimulation medications on otherwise healthy women and their children.¹¹³ Initial studies indicate a correlation between egg stimulation drugs and forms of ovarian cancer.¹¹⁴ And because the science of egg freezing is relatively new, there is little data regarding rates of successful pregnancies and live births after long-term egg freezing.¹¹⁵ “Of the fifty percent of

¹¹⁰ See, e.g., Carbone & Cahn, *supra* note 4, at 289; Mohapatra, *supra* note 6, at 393; Practice Committees, *supra* note 7, at 41-42.

¹¹¹ See Robertson, *supra* note 6, at 115. “Until more programs become adept at vitrification and thawing [eggs], *caveat frigidaire*.”

¹¹² Practice Committees, *supra* note 7, at 40; *Infertility Treatments Don’t Appear to Affect Children’s Development*, NAT’L INSTS. OF HEALTH, <https://www.nih.gov/news-events/nih-research-matters/infertility-treatments-dont-appear-affect-childrens-development> (last visited Oct. 5, 2016).

¹¹³ Practice Committees, *supra* note 7, at 41.

¹¹⁴ Goodwin, *supra* note 18, at 27-28.

¹¹⁵ Practice Committees, *supra* note 7, at 41-42.

the U.S. advanced reproductive technology programs that report offering [egg freezing], over fifty percent of them have never thawed and inseminated frozen eggs and had live births thereafter.”¹¹⁶

The only major legislation intended to regulate the rapidly growing fertility clinic industry was passed in 1992, and required fertility clinics to report annual success rates to the Center for Disease Control.¹¹⁷ Regulation of the industry has not kept up with advances in reproductive technology, including egg freezing.¹¹⁸ Finally, when the regulatory committees lifted the “experimental” label from the egg freezing procedure, they noted that egg freezing is recommended for medical reasons such as imminent chemotherapy, but “[t]here are not yet sufficient data to recommend oocyte cryopreservation for the sole purpose of circumventing reproductive aging in healthy women.”¹¹⁹ Further, they stated, “[m]arketing this technology for the purpose of deferring childbearing may give women false hope and encourage women to delay childbearing” when there is no data to support this application.¹²⁰

III. The Slippery Slope: Legal Risk in Employer-Paid Egg Freezing

An employer offering egg freezing will inevitably gain personal information about

¹¹⁶ Robertson, *supra* note 6, at 115.

¹¹⁷ See Fertility Clinic Success Rate and Certification Act (FCSCA), 42 U.S.C.A. § 263(a) *et seq.* (requiring fertility clinics to report pregnancy success rates annually to the Center for Disease Control); *see also* Goodwin, *supra* note 18, at 32. There is no federal reporting requirement for the egg-freezing industry.

¹¹⁸ See Carbone & Cahn, *supra* note 4, at 289.

¹¹⁹ Practice Committees, *supra* note 7, at 42.

¹²⁰ Practice Committees, *supra* note 7, at 41.

employees that could affect employment decisions. Improper use of such information may give rise to legal claims against an employer. For example, potential legal risk exists where employer-paid egg freezing intersects with privacy and tort law,¹²¹ and under the Employee Retirement Income Security Act (ERISA).¹²² Moreover, discrimination claims may arise under the Pregnancy Discrimination Act, Americans with Disabilities Act, and Family and Medical

¹²¹ See, e.g., Genetic Information Nondiscrimination Act, 42 U.S.C.A. § 300gg-53 (West 2016) (prohibits health insurers from discriminating on the basis of genetic information); Health Insurance Portability and Accountability Act, 42 U.S.C.A. § 1320d-6 (West 2016) (prohibits wrongful disclosure of individually identifiable health information); and state privacy tort law, R. 2d Torts § 652B (West 2016) (employer commits tortious invasion of privacy when it intrudes in a highly offensive manner into some matter in which a person has a legitimate expectation of privacy). An in-depth analysis of these risks is outside the scope of this discussion.

¹²² See 29 U.S.C.A. § 1021 *et seq.*, (West 2016) (protects employee benefit rights and creates employer liability to meet summary plan description, reporting, fiduciary, and notice requirements related to group health plans). Employer-paid egg-freezing programs are arguably exempt practices because the payments come from general employer assets; however, a program may become part of an ERISA qualifying health or welfare plan if it is included in a group health plan. See *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (2nd Cir. 1982) (outlining the four factors considered when determining whether a welfare benefit structure is an ERISA plan); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19, 23 (1987) (adding a fifth factor for ERISA plan determination); Lee Polk, 1 ERISA PRACTICE AND LITIG. § 2:5 (April 2016). An in-depth analysis of these risks is outside the scope of this discussion.

Leave Act.¹²³ Because egg freezing is relatively new to the work environment, no egg freezing cases have yet reached the courts. However, some discrimination cases have arisen from the in vitro fertilization process, which includes egg harvesting.¹²⁴ A court considering a discrimination claim related to employer-paid egg freezing would likely use such cases as legal precedent.

A. Pregnancy Discrimination Act: Favoring Egg Freezing Over Pregnancy

Under Title VII, it is unlawful for an employer to discriminate based on race, color, religion, sex, or national origin.¹²⁵ The Pregnancy Discrimination Act (PDA) amended Title VII's anti-discrimination language to include sex discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."¹²⁶ The PDA uses a comparison framework

¹²³ See, Pregnancy Discrimination Act, 42 U.S.C. § 2000(e)(k) (West 2016); Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (West 2016); and Family and Medical Leave Act, 29 U.S.C.A. § 2612(a)(1)(A) to (D), § 2614(a)(1)(A) to (B) (West 2016).

¹²⁴ See, e.g., *Hall v. Nalco*, 534 F.3d 644, 645 (7th Cir. 2008) (secretary fired for taking time off for in vitro fertilization and embryo transfer); *Ingarra v. Ross Education, LLC.*, No. 13 C. 10882, 2014 WL 688185, at *1, *6 (E.D. Mich. Feb. 21, 2014) (dental instructor fired after employer learned of her attempts to conceive via in vitro fertilization); *Govori v. Goat Fifty*, No. 10 C. 8982 (DLC), 2011 WL 1197942, at *1, *4 (S.D.N.Y. March 30, 2011) (waitress fired after starting in vitro fertilization process).

¹²⁵ 42 U.S.C. A. § 2000e-2(a)(1) (West 2016).

¹²⁶ 42 U.S.C.A. § 2000(e)(k).

in which “courts look for ‘equal treatment’ between comparators.”¹²⁷ The PDA states that employers must treat pregnant women “[t]he same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work.”¹²⁸

Courts have generally agreed that the capacity to bear children affects only women,¹²⁹ and that “[a]dverse employment action based on childbearing capacity will always result in treatment of a person in a manner which, but for that person’s sex, would be different.”¹³⁰ Over the last two decades, plaintiffs have stated cognizable sex discrimination claims under the PDA,

¹²⁷ Maryn Oyoung, *Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities*, 44 MCGEORGE L. REV. 515, 518 (2013); *see also* *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (department store saleswoman’s claim that she was fired for absences related to severe morning sickness failed due to lack of comparator evidence).

¹²⁸ 42 U.S.C.A. § 2000(e)(k); *Young v. United Parcel Service*, 135 U.S. 1338, 1344-45 (2015).

¹²⁹ *See Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 187 (1991) (employer excluded only female workers capable of bearing children from jobs with lead exposure). *But see Saks v. Franklin Covey Co.* 316 F.3d 337, 343 (2nd Cir. 2003) (declined to follow *Johnson Controls*, holding that infertility is gender-neutral condition and thus, is not protected under Title VII); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-80 (8th Cir. 1996) (holding the same).

¹³⁰ Nichole Devries, *Conceiving Equality: Infertility-Related Illness Under the Pregnancy Discrimination Act*, 26 GA. ST. U. LAW. REV. 1361, 1378 (2010) (quoting the test for Title VII actions established in *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

based on infertility and in vitro fertilization.¹³¹ Thus, policies and adverse employment actions taken on account of infertility and in vitro fertilization can lead to valid Title VII sex discrimination claims.¹³²

Egg freezing imposes burdens on women not imposed on men, implicating the PDA. The U.S. Supreme Court recently addressed an employer policy that burdened pregnant workers more than non-pregnant ones.¹³³ In *Young*, an employer denied a pregnant driver's accommodation request to reduce her lifting requirement from seventy to twenty pounds.¹³⁴ The employer placed the pregnant driver on an unpaid leave of absence, but then accommodated non-pregnant drivers with on-the-job injuries, permanent disabilities, or failed Department of Transportation certifications.¹³⁵ The Court held that the pregnant employee provided sufficient evidence that (1) the employer accommodated non-pregnant workers while failing to accommodate pregnant workers; (2) the "employer policies imposed a significant burden on pregnant workers;" and (3) "the employer's legitimate non-discriminatory reasons were not sufficiently strong to justify the burden."¹³⁶ What courts consider a "significant burden" is yet to be determined.¹³⁷ In light of

¹³¹ See, e.g., *Johnson Controls*, 499 U.S. at 187; *Hall*, 534 F.3d at 644; *Ingarra* 2014 WL 688185, at *6; *Govori*, 2011 WL 1197942, at *4.

¹³² *Id.*

¹³³ *Young*, 135 U.S. at 1344.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1347.

¹³⁶ *Id.* at 1353-55.

¹³⁷ Brian McDermott, *Expert Q&A: Young v. UPS and Its Impact on Pregnancy Accommodation and Discrimination Claims*, WEST PRACTICAL LAW – LABOR AND EMP'T LAW (March 31, 2015).

Young, Brian McDermott of the employment law firm Ogletree Deakins recommends that an employer examine “any policies or programs that benefit non-pregnant workers but do not include pregnant workers.”¹³⁸

For example, consider a hypothetical scenario about Izzy Infertility, Polly Pregnant, and Ellie Egg-Freezing, all technical supervisors at Parity, Inc., a technology services company that recently started paying for social egg freezing. Izzy and her husband have been trying to conceive for several years, with no success with or without in vitro fertilization. She has been diagnosed with infertility, and has few options to bear children without advanced reproductive technologies. Polly is in her first trimester and experiences severe morning sickness. Ellie takes advantage of the company’s new egg freezing benefit, hoping she will be able to use her frozen eggs after she has developed her career.

Here, two scenarios implicate the PDA and could pose a risk of liability for Parity: (1) if Parity were to pay \$20,000 for Ellie’s egg freezing procedure, but not for Izzy’s infertility treatments, which (prior to in vitro fertilization) are procedurally identical to egg freezing; and (2) if Parity were to accommodate a different schedule for Ellie while she pursued the egg freezing procedure but did not for Polly when she experiences severe morning sickness. In both scenarios, Parity favors Ellie, a non-pregnant worker, over Izzy or Polly, pregnant workers or workers with pregnancy-related conditions.

Advocates of employer-paid egg freezing might argue that *employee*-paid egg freezing poses a similar legal risk under the PDA—that an employer is liable for PDA violations regardless of how egg freezing is funded. This is true; however, as discussed earlier in this article, employer-paid egg freezing may create additional pressures on employees, thereby

¹³⁸ McDermott, *supra* note 137.

adding conflict between egg freezing, non-egg freezing, and pregnant workers.

Proponents may also argue that the benefit is just one part of a broader benefit plan available to all female employees and spouses. Employees like Izzy might be able to use the benefit as part of her infertility treatments, or employees like Polly might be able to use the egg freezing benefit to postpone a second child. Also, it could be argued that other programs and benefits offset the burden on the infertile or pregnant worker, such as group health insurance, flex time, or telecommuting. These arguments succeed as long as the other benefits truly do equalize the burden.

B. Americans with Disabilities Act: Accommodating Temporary Disability

Under the Americans with Disabilities Act (ADA), as amended in 2008, employers must provide reasonable accommodation to an employee with a qualifying disability,¹³⁹ defined as “a physical or mental impairment that substantially limits one or more of the major activities of [an] individual; [or] a record of such an impairment; or being regarded as having such an impairment.”¹⁴⁰ To determine if a disability exists, courts consider whether (1) there is a physical or mental impairment; (2) there is a substantial limitation; and (3) a major life activity is limited.¹⁴¹ Congress intended that “disability” in the ADA be construed broadly.¹⁴² Under the ADA, a disabled plaintiff can establish claims of (1) disability discrimination in regard to terms

¹³⁹ 42 U.S.C.A. § 12112(b)(5)(A).

¹⁴⁰ 42 U.S.C.A. § 12102(2) (West 2016).

¹⁴¹ 42 U.S.C.A. § 12101(1) (West 2016).

¹⁴² 29 C.F.R. § 1630.2(h) to (j) (2016); *see also* Jonathan T. Hyman, *Infertility Is Fertile Ground for ADA Claims*, 26 No. 8 ADA COMPLIANCE GUIDE NEWSL., August 2015.

and conditions of employment,¹⁴³ or (2) the employer's failure to make reasonable accommodation.¹⁴⁴

Ordinary pregnancy is generally not considered a disability under federal law, unless accompanied by a pregnancy-related medical condition.¹⁴⁵ According to EEOC guidance on pregnancy-related issues, “[i]nfertility that is, or results from, an impairment may be found to substantially limit the major life activity of reproduction and thereby qualify as a disability.”¹⁴⁶ Further, after a recent settlement between a Hawaiian resort retailer and an employee harassed after seeking fertility treatments, the EEOC stated, “[w]orkers who undergo fertility treatments should be treated like any other employee with a disability—with equal and careful consideration

¹⁴³ 42 U.S.C.A. § 12112(b)(1).

¹⁴⁴ 42 U.S.C.A. § 12112(b)(5)(A).

¹⁴⁵ *Supra* note 142; *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd*, 340 F.3d 543 (8th Cir. 2003) (periodic morning sickness symptoms, headaches, and fatigue are not disabilities covered by the ADA because they are “part and parcel of a normal pregnancy”); *Tsetseranos v. Tech Prototype, Inc.*, 893 F. Supp. 109, 119 (D.N.H. 1995) (typical pregnancy is not a “physical or mental impairment”). However, in addition to state anti-discrimination laws protecting pregnant workers, the Pregnant Workers Fairness Act, S. 942, H.R. 1975, 113th Cong. (2013), proposes federal protections for pregnant workers similar to those under the ADA, including that employers must make reasonable accommodations for employees with physical limitations because of pregnancy, childbirth, or related medical conditions, unless they impose undue hardship on the employer.

¹⁴⁶ Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*. No. 915.003, 2015 WL 4162723, at *7 (June 25, 2015).

of reasonable accommodation requests.”¹⁴⁷

Even prior to the 2008 amendment broadening the construction of “disability,” courts held that infertility is a qualified disability under the ADA.¹⁴⁸ In *LaPorta v. Wal-Mart Stores*, a large discount retailer denied an alternate schedule and time off for fertility treatments as a reasonable accommodations for a female pharmacist attempting to get pregnant by in vitro fertilization.¹⁴⁹ The court held that because “[a] woman suffering from infertility has a diminished ability to become pregnant by natural means,” infertility meets the definition of a physiological disorder or condition that limits the major life activity of reproduction.¹⁵⁰

Also, because potential physical impairment from the egg freezing procedure is typically temporary, it is important to note the Fourth Circuit’s finding that a worker can be temporarily disabled.¹⁵¹ In *Summers v. Altarum Instrument Corporation.*, a government contractor severely injured both of his legs and was unable to walk for seven months.¹⁵² The Fourth Circuit held that “an impairment is not categorically excluded from being a disability simply because it is temporary,”¹⁵³ and “a sufficiently severe temporary impairment may constitute a disability.”¹⁵⁴ Thus, physical impairments such as ovarian torsion, or OHSS, resulting from egg harvesting

¹⁴⁷ Hyman, *supra* note 142.

¹⁴⁸ *La Porta*, 163 F. Supp. 2d at 763-66.

¹⁴⁹ 163 F. Supp. 2d at 761-63.

¹⁵⁰ *Id.* at 764, 766; 29 C.F.R. § 1630.2(h)(1).

¹⁵¹ 740 F.3d 325, 333 (4th Cir. 2014).

¹⁵² *Id.* at 327.

¹⁵³ *Id.* at 333.

¹⁵⁴ *Id.* at 327.

could qualify as disabilities.

To illustrate, consider again Izzy Infertility, Polly Pregnant, and Ellie Egg-Freezing from the earlier hypothetical. Both Izzy and Polly likely qualify as disabled under the ADA. Izzy is entitled to reasonable accommodation for her infertility treatments, including in vitro fertilization, and Polly is entitled to reasonable accommodation for her pregnancy-related illness. Ellie also may be disabled under the ADA. To elaborate, suppose the technical supervisor position requires lifting heavy technology equipment that weighs up to fifty pounds. When Ellie is one week into her egg stimulation injections, her daily ultrasounds reveal that she is harvesting thirty eggs. As a precautionary measure, Ellie's physician recommends that she not lift more than five pounds. Although her condition is temporary and the egg freezing procedure is elective, Ellie now has an impairment that substantially limits her ability to do her job with or without accommodation under the ADA. Ellie likely qualifies as disabled, and Parity would have to provide reasonable accommodation.

Proponents of employer-paid egg freezing might argue that the obligation to provide reasonable accommodation to disabled workers does not change when the employer offers egg freezing as a benefit, nor does it change when a worker pays for the procedure herself. In other words, with or without an egg-freezing program, an employer must provide reasonable accommodation to an employee with a qualifying disability. While this is true, the legal risk associated with ADA compliance still increases with the decision to offer egg freezing because the potential number of employees with qualifying disabilities increases. There are very few, if any, other employee benefits like egg freezing that literally increase the potential for temporary disabilities among workers, and thus, the risk of legal liability.

C. Family Medical Leave Act (FMLA): Taking Time Away from Work

Finally, employers that offer egg freezing as a benefit must also be prepared to provide job-protected leave to the egg freezing employee. Under the FMLA, employers must provide eligible employees with twelve weeks of unpaid job-protected leave for various triggering events, including (1) the birth or adoption of a child, (2) to care for one’s own serious health condition, or (3) to care for the serious health condition of a family member.¹⁵⁵ Under FMLA regulations, a serious health condition involving continuing treatment by a health care provider includes “[a] period of incapacity of more than three consecutive, full calendar days . . . that also involves treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.”¹⁵⁶ Absences from work do not have to be consecutive under FMLA; they may be intermittent when an employee needs time off for physician appointments or a scheduled surgical procedure.¹⁵⁷ It is unlawful for an employer to “interfere with, restrain, or deny the exercise of or the attempt to exercise, any [FMLA] right,”¹⁵⁸ or “discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [FMLA].”¹⁵⁹

Generally, elective procedures “are not considered serious health conditions unless continuing or inpatient care is required, or unless complications develop.”¹⁶⁰ However,

¹⁵⁵ 29 U.S.C.A. § 2612(a)(1)(A) to (D), § 2614(a)(1)(A) to (B).

¹⁵⁶ 29 C.F.R. § 825.115(a)(2) (2016).

¹⁵⁷ 29 C.F.R. § 825.120(a)(4).

¹⁵⁸ 29 U.S.C.A. § 2615(a)(1) (West 2016).

¹⁵⁹ 29 U.S.C.A. § 2615(a)(2).

¹⁶⁰ 29 C.F.R. § 825.113(d).

pregnancy and prenatal care *are* considered serious health conditions requiring continuing treatment.¹⁶¹ Infertility qualifies as a serious health condition when “the employee is incapacitated because of the condition or its treatment.”¹⁶² Because pregnancy, infertility, and egg freezing are so inextricably connected, employers that offer egg freezing will violate the FMLA if they explicitly or implicitly disallowing time-off for the procedure, or for care of a spouse having the procedure. Further, employer-paid egg freezing increases the administrative burden of the already burdensome FMLA compliance regime.

Let’s revisit hypothetical employees Izzy Infertility, Polly Pregnant, and Ellie Egg-Freezing at Parity, Inc. Suppose Ellie’s eggs have been retrieved and frozen, but she has developed mild symptoms of OHSS. Similar to the ADA issue, both Izzy’s infertility, and Polly’s pregnancy with severe morning sickness, likely would qualify for FMLA leave, as both are serious health conditions. Ellie also likely qualifies for FMLA leave. While a “normal” egg stimulation cycle and harvest may not be a serious health condition, any form of OHSS likely would be, and Parity would have to provide job-protected leave to Ellie while she cares for her own serious health condition.

The counterargument here is similar to the counterargument under ADA: The additional burden created by employer-paid egg freezing is not significant enough to increase substantially the FMLA legal risk. Further, while the prevalence of OHSS is unclear due to inconsistent reporting, only one in four women experience mild symptoms after egg retrieval, which may not require additional time away from work. The potential increase in administrative burden may

¹⁶¹ 29 C.F.R. § 825.115(b).

¹⁶² Freeland Cooper, Foreman LLP, *Employee Fired After Failed Fertility Treatment Gets Day in Court*, 18 No. 13 CAL. EMP. L. LETTER 9 (Oct. 13, 2008).

not be reason enough to forego employer-paid egg freezing. As sections II and III discuss, employers that offer egg freezing should carefully consider whether the overall advantages of egg-freezing programs outweigh the disadvantages, including additional administrative burdens and potential for legal liability.

IV. Advice for Employers: How Slippery Is the Slope for Employer-Paid Egg Freezing?

In the end, proving a discrimination claim on the basis of pregnancy, disability, or job-protected leave would be very difficult. Employer-paid egg freezing itself does not automatically trigger legal liability, but promoting the process may give rise to new factual circumstances in which discrimination claims may arise. Also, if the knowledge that a woman has chosen or declined to freeze her eggs influences promotion or other employment decisions, an employee may be able to establish a *prima facie* circumstantial case of discrimination. Legal risk does not result from offering an egg-freezing program, but by lacking a fully-vetted plan to communicate, implement, and administer the program.

One way to mitigate against such legal risk is to include the egg-freezing procedure as part of the employer's group health insurance policy, placing the administrative burden on a third party, but remaining mindful of potential health and welfare benefit plan liabilities.¹⁶³ Unlike education reimbursement programs, egg freezing requires management of private health information. Such programs are best administered by an independent entity that can objectively and confidentially manage eligibility, payment, and expense reimbursement. In fact, fifteen states "require insurers to either cover or offer coverage for infertility diagnosis and treatment,"

¹⁶³ *Supra* note 122.

some of which require the full cost of in vitro fertilization.¹⁶⁴ As advanced reproductive technologies become more mainstream, insurance companies are likely to increase coverage of at least some fertility procedures.

Conclusion

Should employers provide egg freezing as a benefit? Employer-paid egg freezing is probably one of the most empowering but risky benefits a company can offer. The onerous egg harvesting process burdens an egg-freezing woman with daily hormone injections, and puts her

¹⁶⁴ *State Laws Related to Insurance Coverage for Infertility Treatment*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2014), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx>; *State Infertility Insurance Laws*, AM. SOC'Y FOR REPROD. MED. (2016), <http://www.asrm.org/insurance.aspx>. The fifteen states are Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Texas and West Virginia. *See* ARK. CODE ANN. § 23-85-137 (West 2016), § 23-86-118; CAL. HEALTH & SAFETY CODE § 1374.55 (West 2016), CAL. INS. CODE § 10119.6 (West 2016); CONN. GEN. STAT. ANN. § 38a-509, 536 (West 2016); HAW. REV. STAT. § 431:10A-116.5, § 432.1-604 (West 2016); 215 ILL. COMP. STAT. ANN. § 5/356m (West 2016); LA. REV. STAT. ANN. § 22:1036 (2016); MD. INS. CODE ANN. § 15-810 (2016); MASS. GEN. LAWS ANN. ch. 175, § 47H, ch. 176A, § 8K, ch. 176B, § 4J, ch. 176G, § 4 (West 2016), 211 MASS. CODE REGS. 37.00 (2016); MONT. CODE ANN. § 33-22-1521, § 33-31-102 *et seq.* (West 2016); N.J. STAT. ANN. § 17:48-6x, § 17:48A-7w, § 17:48E-35.22, § 17B:27-46.1x (West 2016); N.Y. INS. LAW § 3216 (13), § 3221 (6), § 4303 (McKinney 2016); OHIO REV. CODE ANN. § 1751.01 (A)(1)(h) (West 2016); R.I. GEN. LAWS ANN. § 27-18-30, § 27-19-23, § 27-20-20, § 27-41-33 (West 2016); TEX. INS. CODE ANN. § 1366.001 *et seq.* (West 2016); W. VA. CODE ANN. § 33-25A-2 (West 2016).

at risk for serious health conditions. While employer-paid egg freezing advances gender parity in the workplace, levels the financial playing field, and embodies public policy of protecting maternal capabilities, it is clearly not the equivalent of other employee benefits, like paid maternity leave or education reimbursement. Workplace culture issues are created by (1) putting pressure on women to delay childbearing in favor of their career by freezing their eggs, and (2) the potential commoditization of reproduction in the workplace. These cultural issues, combined with the potential legal risks, and the fact that the long-term health risks and success rates of egg freezing are still generally unknown, should give employers pause before they make the decision to offer egg freezing as a benefit.

When properly communicated, implemented, and administered, employer-paid egg-freezing could (1) uproot gender inequalities in the workplace, and puts the United States on track to realize at least some of that \$4.3 trillion growth potential in annual gross domestic product, and (2) enable women to have both a family and a career—without the time constraints of human biology. On the other hand, it may become just another trendy employee benefit that workers rarely use. One fact is clear: Reproductive technologies, like egg freezing, are here to stay. Reproductive medicine will only advance, and its impact on the workplace will necessitate that employers thoughtfully consider the legal, social, and ethical implications.