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.\textsuperscript{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.”\textsuperscript{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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2025. 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. Until recently, women had to choose between career advancement and starting a family, resulting in women’s lower career and pay trajectories. However, in late 2012, reproductive technology advances afforded female workers a new way to have both a career and a family: egg freezing. While egg freezing was

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

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,


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


\(^{14}\) 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


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


eggs from the ravages of time until she is ready to use them.”\textsuperscript{19} Women have a finite number of eggs, determined at birth, but men produce sperm throughout their lifetime.\textsuperscript{20} That biology makes it easier for men to prioritize career development before starting a family, without undermining their reproductive capacity.\textsuperscript{21} Both sperm and egg quality decrease with age, but the number of women’s chromosomally normal eggs declines drastically at age thirty-five.\textsuperscript{22} Embryonic age-related chromosomal abnormalities are a primary cause of miscarriage.\textsuperscript{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.\textsuperscript{24} The live birth rate for women in their late thirties and early forties has more than doubled over the last thirty years.\textsuperscript{25} Some studies suggest this increase is correlated with technological advances in reproductive medicine, including egg freezing, in vitro

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\textsuperscript{19} Carbone & Cahn, \textit{supra} note 4, at 299.
\textsuperscript{20} See, \textit{e.g.}, Carbone & Cahn, \textit{supra} note 4, at 299; Robertson, \textit{supra} note 6, at 115.
\textsuperscript{21} Carbone & Cahn, \textit{supra} note 4, at 299.
\textsuperscript{22} See, \textit{e.g.}, Carbone & Cahn, \textit{supra} note 4, at 299; \textit{Age and Fertility, supra} note 15, at 4.
\textsuperscript{23} \textit{Age and Fertility, supra} note 15, at 5; Tennenhouse, \textit{supra} note 17.
\textsuperscript{24} \textit{Age and Fertility, supra} note 15, at 9; McHaney & Jacobson, \textit{supra} note 8.
\textsuperscript{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.
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fertilization, and frozen embryo transfer.\textsuperscript{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.\textsuperscript{27} In the early 2000s, Italian researchers discovered vitrification, a flash freezing method to prevent formation of frozen crystals within eggs.\textsuperscript{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.\textsuperscript{29} Since then, egg freezing has become a hot, albeit controversial, topic for women seeking a way to preserve fertility while developing a career.\textsuperscript{30} Within a year, the average age of women pursuing


\textsuperscript{27} Robertson, supra note 6, at 115.

\textsuperscript{28} Robertson, supra note 6, at 115.

\textsuperscript{29} Practice Committees, supra note 6, at 41.

\textsuperscript{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, and the number of egg-frozen cycles performed in the United States increased by almost thirty percent. Studies now estimate that two percent of babies born in the United States are conceived through advanced reproductive medicine.

**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. 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. Then, the woman injects egg


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.


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.
42 Exercise and Stress Reduction During Fertility Treatments, supra note 41.
which releases all eggs from the ovaries into the fallopian tubes,\textsuperscript{44} and a reproductive endocrinologist approximately thirty-five hours later retrieves the eggs with a long needle, where the woman is under general anesthesia.\textsuperscript{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.\textsuperscript{46} OHSS symptoms usually are mild; however, the condition can require hospitalization for kidney failure or blood clots.\textsuperscript{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.\textsuperscript{48}
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

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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.\textsuperscript{56} When a woman chooses to use her frozen eggs, they are warmed and then fertilized by sperm in vitro, using advanced reproductive technologies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{59} If a patient declines genetic testing, selected embryos are transferred to the uterus using a guided catheter.\textsuperscript{60} Remaining embryos may be frozen indefinitely for future embryo transfer, without comprising

\textsuperscript{56} Mohapatra, \textit{supra} note 6, at 386; \textit{ART: Step-by-Step Guide, supra} note 35.

\textsuperscript{57} Mohapatra, \textit{supra} note 6, at 386; Abney, \textit{supra} note 43, at 298.

\textsuperscript{58} \textit{ART: Step-by-Step Guide, supra} note 35.

\textsuperscript{59} \textit{Age and Fertility, supra} note 14, at 9; \textit{ART: Step-by-Step Guide, supra} note 35;

\textit{Preimplantation Genetic Testing, AM. SOC’Y FOR REPROD. MED.} (2014),

\textsuperscript{60} Mohapatra, \textit{supra} note 6, at 386; Abney, \textit{supra} note 43, at 298; \textit{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. 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. Successful embryo transfer and implantation progresses to a clinical pregnancy.

Approximately ninety percent of frozen eggs survive the thawing process, and statistically, at least eight eggs are required to achieve one clinical pregnancy. “The older [a woman’s age] at the time of egg freezing, the lower the likelihood [of] a live birth . . .”

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].


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


65 Rosenblum, supra note 8.

66 Egg Freezing Procedure Details, supra note 64.

67 Goodwin, supra note 18, at 29.
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


69 Robertson, supra note 6, at 118.

exit and re-enter the workforce to start or grow a family.\textsuperscript{71} When an employer assumes the cost of egg freezing, women may continue working until they are professionally and personally ready for children.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{76} Apple says egg

\textsuperscript{71} Rosen, \textit{supra} note 70.

\textsuperscript{72} Rosen, \textit{supra} note 70.


\textsuperscript{74} Bloomberg Interview, \textit{supra} note 11; Alter, \textit{supra} note 73.

\textsuperscript{75} Sydell, \textit{supra} note 9.

\textsuperscript{76} See, \textit{e.g.}, Carbone & Cahn, \textit{supra} note 4, at 300; Robertson, \textit{supra} note 6, at 118; Rosen, \textit{supra} note 70.
freezing enables its female workforce to “do the best work of their lives.” 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. The idea of preserved fertility offers “actual and symbolic freedom, security, and time.” 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.” 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 . . .” 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.


81 Richards, supra note 80.
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. 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.”

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. Women may experience a greater loss of earnings than men because women take more time away from the workforce before and after childbearing. 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. 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

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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.


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.\footnote{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).} Women can bear children using donor eggs and sperm, but “[men cannot] reproduce without an egg source and/or gestator.”\footnote{Robertson, supra note 6, at 129.} Further, society requires protecting women’s capability to bear children.\footnote{See Carbone & Cahn, supra note 4, at 311-13.} 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.\footnote{See Carbone & Cahn, supra note 4, at 300.} In today’s workplace, this means that women can have it all—a healthy family \textit{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.\footnote{Schmidt, supra note 12.} 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.\footnote{Schmidt, supra note 12.} “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...
The five-year pilot program’s cost is estimated at $150 million, and will be offered through the military’s health care plan.

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. This is especially true if egg freezing is perceived as a requirement, not an opportunity. 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. In an effort to be viewed more favorably, female workers may endeavor the difficult procedure, even if they had not planned to delay childbearing.

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.


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

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. 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. 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. 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.
106 Robertson, supra note 6, at 121.
openly buy and sell eggs.\textsuperscript{107} This could involve negotiation of contracts, pricing, and the potential relinquishment of parental rights by the egg donor.\textsuperscript{108} Employers could also become entangled in family disputes regarding the ownership, custody, and posthumous use of frozen eggs.\textsuperscript{109} Workplace culture and productivity problems are likely to follow.

\textbf{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, etc.\textsuperscript{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).

\textsuperscript{108} Lewis, supra note 107, at 652.

\textsuperscript{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 Kiever, 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.\textsuperscript{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.\textsuperscript{111}

While initial studies indicate that in vitro fertilization and other infertility treatments do not affect child development,\textsuperscript{112} there are few longitudinal studies to evaluate long-term effects of the ovarian stimulation medications on otherwise healthy women and their children.\textsuperscript{113} Initial studies indicate a correlation between egg stimulation drugs and forms of ovarian cancer.\textsuperscript{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.\textsuperscript{115} “Of the fifty percent of

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

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


113 Practice Committees, \textit{supra} note 7, at 41.


115 Practice Committees, \textit{supra} note 7, at 41-42.
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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.”\textsuperscript{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.\textsuperscript{117} Regulation of the industry has not kept up with advances in reproductive technology, including egg freezing.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{120}

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

An employer offering egg freezing will inevitably gain personal information about

\textsuperscript{116} Robertson, supra note 6, at 115.

\textsuperscript{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.

\textsuperscript{118} See Carbone & Cahn, supra note 4, at 289.

\textsuperscript{119} Practice Committees, supra note 7, at 42.

\textsuperscript{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, and under the Employee Retirement Income Security Act (ERISA). 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. 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. 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. 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.” The PDA uses a comparison framework

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in which “courts look for ‘equal treatment’ between comparators.”

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.”

Courts have generally agreed that the capacity to bear children affects only women, 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.” 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).


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).

based on infertility and in vitro fertilization.\textsuperscript{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.\textsuperscript{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.\textsuperscript{133} In \textit{Young}, an employer denied a pregnant driver’s accommodation request to reduce her lifting requirement from seventy to twenty pounds.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{136} What courts consider a “significant burden” is yet to be determined.\textsuperscript{137} In light of


\textsuperscript{132} \textit{Id}.

\textsuperscript{133} \textit{Young}, 135 U.S. at 1344.

\textsuperscript{134} \textit{Id}.

\textsuperscript{135} \textit{Id}. at 1347.

\textsuperscript{136} \textit{Id}. at 1353-55.

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.”

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

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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, 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.” 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. Congress intended that “disability” in the ADA be construed broadly. Under the ADA, a disabled plaintiff can establish claims of (1) disability discrimination in regard to terms

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140 42 U.S.C.A. § 12102(2) (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,\textsuperscript{143} or (2) the employer’s failure to make reasonable accommodation.\textsuperscript{144}

Ordinary pregnancy is generally not considered a disability under federal law, unless accompanied by a pregnancy-related medical condition.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{143} 42 U.S.C.A. § 12112(b)(1).

\textsuperscript{144} 42 U.S.C.A. § 12112(b)(5)(A).

\textsuperscript{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.

of reasonable accommodation requests.”

Even prior to the 2008 amendment broadening the construction of “disability,” courts held that infertility is a qualified disability under the ADA. 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. 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.

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. In *Summers v. Altarum Instrument Corporation*, a government contractor severely injured both of his legs and was unable to walk for seven months. The Fourth Circuit held that “an impairment is not categorically excluded from being a disability simply because it is temporary,” and “a sufficiently severe temporary impairment may constitute a disability.” Thus, physical impairments such as ovarian torsion, or OHSS, resulting from egg harvesting

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147 Hyman, *supra* note 142.


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.\footnote{29 U.S.C.A. § 2612(a)(1)(A) to (D), § 2614(a)(1)(A) to (B).} 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.”\footnote{29 C.F.R. § 825.115(a)(2) (2016).} 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.\footnote{29 C.F.R. § 825.120(a)(4).} It is unlawful for an employer to “interfere with, restrain, or deny the exercise of or the attempt to exercise, any [FMLA] right,”\footnote{29 U.S.C.A. § 2615(a)(1) (West 2016).} or “discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [FMLA].”\footnote{29 U.S.C.A. § 2615(a)(2).}

Generally, elective procedures “are not considered serious health conditions unless continuing or inpatient care is required, or unless complications develop.”\footnote{29 C.F.R. § 825.113(d).} However,
pregnancy and prenatal care are considered serious health conditions requiring continuing treatment.\footnote{29 C.F.R. § 825.115(b).} Infertility qualifies as a serious health condition when “the employee is incapacitated because of the condition or its treatment.”\footnote{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).} 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
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. 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. 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

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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—which 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.