Centricity Solutions

Quarter 1 2023

Newsletter

Fertility Benefits on the Rise Amid the Great Resignation

As part of their benefits packages for 2023, 40% of U.S. organizations offer fertility benefits, according to a new study by the International Foundation of Employee Benefit Plans. That is up from 30% of organizations who offered such benefits in 2020, said IFEBP, which has been tracking fertility and family-forming benefits for 7 years. The foundation said companies are offering such benefits for a variety of reasons, including attracting and retaining key talent, saving on health care costs, matching benefits to diversity, equity, and inclusion goals, and to support overall well-being of their workforce.

Healthcare Cost Savings for Employers

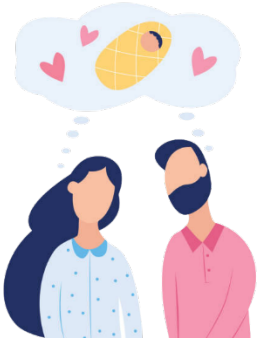
Family-forming and fertility care are known to be expensive. With economic change in the air, companies may wonder whether now is the best time to invest in something that could be costly. But fertility benefits can actually help manage and reduce healthcare costs. David Kaplan, a leader of Mercer Health Innovation, explains the downstream health savings of fertility benefits, noting, "The interest is not only being driven by talent and retention-related issues but also by the high cost for employers who, whether they offer infertility benefits or not, are still incurring much of the NICU and associated high-risk maternity-related expenses." It's also worth noting that across the board, employers that add fertility benefits do not see increases in costs: 97% of companies have not seen an increase in costs since they started offering fertility coverage, per a 2021 Mercer study.

Inclusive Support for all Employees

Infertility is a serious diagnosis that impacts one in eight heterosexual couples — about 6.7 million people — in the U.S. alone and 96 million worldwide. Misconceptions about who's affected and the support they need is still prevalent, especially in the workplace. While in vitro fertilization (IVF) is currently a popular offering that is important and a necessity for some, it's not the only solution to infertility. And since infertility has a limited definition that excludes single parents and same-sex couples, more than ever, fertility benefits are expanding beyond IVF. In fact, only 1 in 3 people who seek infertility services require treatment such as IVF. A fertility benefit impacts many employees, including LGBTQ+ individuals and couples. One survey found that 63% of LBGTQ+ millennials were considering expanding their families, most commonly through assisted reproductive technologies (ART), foster care, or adoption. In 2022, President Biden signed the Respect for Marriage Act, codifying same-sex and interracial marriage into federal law for the first time in U.S. history. Despite progress, marginalized people still face additional barriers to family forming and healthcare access.

Financial and Emotional Support for Employees

Fertility treatments can be incredibly expensive for families, taking a toll financially and emotionally. The average price of fertility treatment can vary depending on journey type but is often within the range of $5,000 – $75,000. Americans' savings have dropped significantly in the past year. According to the most recent Consumer Price Index (CPI), which measures the average change over time in prices paid, the All Items index increased 7.1% before seasonal adjustment. The economic burden of fertility care alone can be daunting for anyone. But it's more than just that — fertility treatments and family-forming journeys like adoption are taxing from a time aspect as well. Furthermore, employees face emotional burdens that fertility benefits can help guide employees through. Providing fertility benefits that include care navigation, financial support, and emotional support can all help make these journeys less stressful. Change is a constant in the economy. Supporting employees' fertility health and family-forming goals should be, too. By investing in fertility benefits, your company can reduce costs, maintain and expand your commitment to DEI, and win over top talent—even during uncertain times.



Your Centricity Benefits Partner is available to help you explore available benefits.

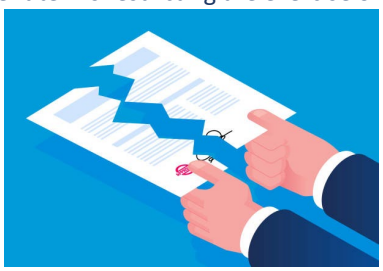
Carrot. (2023, January) Why fertility benefits should be on every employer's 2023 list. Retrieved from https://www.get-carrot.com/blog/why-fertility-benefits

Rippling Integrated Benefit Spotlight: *Highway Benefits*

Highway Benefits is a turnkey student loan repayment platform that allows employers to design a custom plan to contribute to their employees' student loans tax-free. This contribution helps employees pay off their loans faster, saving them financial stress and money. The time for this solution could not be better: employers can now provide up to $5,250 tax-free towards employees' student debt and student loan repayments will resume on July 1st, 2023. Highway Benefits' platform is designed to improve employee retention and reduce recruiting and turnover costs for the countless companies who are fighting to attract and retain top talent. This app Is now live in Rippling and there is no additional fee for connectivity. Please contact your Centricity HR partner if you would like more information.

NLRB Finds Confidentiality and Non-Disparagement Clauses in Severance Agreements Unlawful

On February 21, 2023, the National Labor Relations Board ("NLRB" or the "Board") issued a decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), regarding the enforceability of confidentiality and non-disparagement provisions in severance agreements for non-supervisory employees, irrespective of union status. The Board ruled that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") by offering a severance agreement to employees that includes confidentiality and non-disparagement terms restricting the exercise of the employees' NLRA rights. On March 22, 2023, NLRB General Counsel ("GC") Jennifer Abruzzo issued a non-binding memorandum expressing her position on the scope and application of the *McLaren Macomb* decision, including that it applies retroactively to severance agreements already in effect. In light of this ruling and the GC's memorandum, employers should carefully consider whether changes may be required to their severance agreements.



Impacted Severance Agreements

The Board's decision impacts severance agreements offered to both unionized and non-unionized employees who do not hold supervisory roles. Under the NLRA, "supervisors" are those employees who exercise authority over other workers, using "independent judgment." To "exercise authority" under the NLRA is, by way of example, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or direct other employees.

Brief Summary of the McLaren Macomb Case

During the COVID-19 pandemic, a Michigan hospital furloughed unionized employees and offered them confidential release agreements in exchange for a severance payment. Those agreements prohibited employees from (i) disclosing any part of the severance agreement to anyone other than a spouse or professional advisor, and (ii) making statements to other employees or the general public which could "disparage or harm the image of" the hospital. The union filed a complaint with the NLRB against the hospital alleging unfair labor practices. Following a hearing in June 2021, an administrative law judge ("ALJ") held that the hospital did not violate Section 8(a)(1) merely by offering the severance agreement (with its confidentiality and non-disparagement provisions) to the employees based on the NLRB's previous ruling in Baylor University Medical Center ("Baylor") and International Game Technology ("IGT"); however, the NLRB reversed the ALJ's decision and overturned Baylor and IGT. The Board held that both the confidentiality and non-disparagement provisions in the severance agreement unlawfully restricted the employees' rights under Section 7 of the NLRA. The Board ruled that an offer of severance in exchange for confidentiality and non-disparagement terms that would have the "reasonable tendency to restrain, coerce, or interfere" with Section 7 rights violates Section 8(a)(1) of the NLRA.

Takeaways

The decision reflects continuing efforts by the current Board not only to reverse recent Trump-era NLRB precedent but also move aggressively toward expanded union and employee protections. NLRB General Counsel Abruzzo has criticized the prior Board under President Trump and stated her intention to bring cases capable of reversing the Trump-era doctrinal "shifts [that] include[d] overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers."

With this decision, the Board has now prohibited offering severance agreements with broad confidentiality and non-disparagement provisions that may restrict non-supervisory employees' exercise of their NLRA rights. This prohibition applies to the act of offering the agreement itself, regardless of whether the employee ultimately accepts its terms. The motive of the employer or surrounding circumstances — which the *Baylor Medical* and *IGT* decisions found critical — do not impact the Board's analysis under *McLaren Macomb*, which examines the text of the agreement itself. The GC's memorandum makes clear her view that only narrowly tailored confidentiality and non-disparagement provisions are permitted under the NLRA. The GC also identifies other provisions that could potentially draw the Board's scrutiny (i.e. broad restrictive covenants, broad releases that extend beyond employment claims, and broad cooperation clauses). Nonetheless, the GC notes that generally unlawful provisions can be voided without voiding an entire agreement, regardless of whether there is a severability clause. The Board encourages employers to take affirmative steps to address any agreements presently out of compliance.

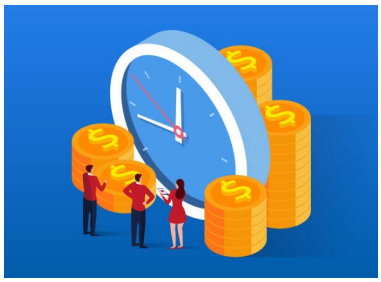
The *McLaren Macomb* holding may face court challenges either in this case or in subsequent cases. In the meantime, employers should consider whether broad non-disparagement and confidentiality provisions are necessary in severance agreements offered to non-supervisory employees. According to the GC, any disclaimer language should focus on "Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees and likely to be chilled by overbroad rules." Employers should consider including an express statement in the agreement that makes clear that nothing in the Agreement precludes employees from exercising Section 7 rights. Disclaimers of this nature would fit with many standard carveouts for other protected activity under state and federal law. Although GC Abruzzo takes the position in her recent memo that including disclaimer language in a severance agreement "would not necessarily cure overly broad provisions," she acknowledges that it nonetheless can be useful to "resolve ambiguity," and such carve-outs likely will strengthen employer arguments that the agreement does not violate the NLRA.

Gibson, Dunn & Crutcher LLP. (2023, March) NLRB Doubles Down on Restrictions on Confidentiality and Non-Disparagement Provisions. Retrieved from https://www.gibsondunn.com/nlrb-doubles-down-on-restrictions-on-confidentiality-and-non-disparagement-provisions-in-severance-agreements-with-board-weighing-in/

If Centricity originally set you up on Rippling and there's additional modules you'd like to add, please contact your Centricity team. As a Rippling wholesaler, Centricity can pass along our discounts which are normally 20-35%

Highly Compensated Employees Must Be Paid a Salary to Avoid Overtime

A recent United States Supreme Court decision, *Helix Energy Solutions Group, Inc. v. Hewitt,* held that to qualify for the highly compensated employee exemption to the overtime requirements under the Fair Labor Standards Act (FLSA), the employee must be paid a salary. Helix Energy employed plaintiff Michael Hewitt as a "toolpusher" on an oil rig. Despite its name, a toolpusher is not a manual worker, but rather, a supervisor position that is largely responsible for managerial and administrative tasks. As is common in the energy industry, Hewitt worked 28-day hitches, where for 28 straight days, he worked and lived



on the oil rig, taking daily shifts of up to 12 hours. On any given day in which he worked at least one minute, Helix Energy paid Hewitt a daily rate that ranged from $963 to $1,341 over the course of his employment. Hewitt worked for Helix Energy from 2015 to 2017 and earned more than $200,000 each year. In 2017, Helix Energy terminated Hewitt's employment for performance-related reasons. After his employment ended, Hewitt filed suit claiming that he was entitled to overtime under the FLSA. Helix Energy defended the claim, arguing that Hewitt was exempt from overtime.

The Supreme Court Decision

In a 6-3 decision authored by Justice Kagan, the Supreme Court agreed with Hewitt, holding that Helix Energy had not paid Hewitt on a salary basis and therefore he was entitled to overtime. The court reached its conclusion after comparing the application of two regulatory provisions, 29 CFR Sections 541.602(a) and 541.604(b). Each provision applies the well-known "salary basis" test to determine whether employees are exempt from the FLSA's overtime requirements under the aforementioned white-collar exemptions.

Practical Implications

Helix Energy is another reminder that under the FLSA form matters as much as substance. Even though Helix Energy paid Hewitt significant sums, because it failed to pay him a weekly salary, the Supreme the amount of money the employee receives, if the employee is not paid on a "salary basis" as that term is defined under the FLSA, the employee cannot satisfy the white-collar exemptions, including the HCE. After *Helix Energy*, in order to satisfy the white-collar exemptions, including in industries where day rates are common — such as construction, healthcare and energy — employers must ensure they pay a guaranteed minimum weekly salary to such employees for any week they work. In fact, for employers concerned about new liability for overtime pay, Justice Kagan offered a road map for compliance: (1) employers can adjust the employee's per-day rate to a weekly guarantee that satisfies the regulatory requirements of Section 604(b); or (2) employers can convert an employee's daily compensation to a weekly salary for any week the employee engages in work. Either way, employers who continue to classify as exempt employees paid on a daily rate should carefully review the rate, frequency, and method of calculating pay to avoid costly FLSA claims.

Grindlinger, G. (2023, February) Highly Compensated Employees Must Be Paid a Salary to Avoid Overtime. Retrieved from https://www.foxrothschild.com/publications/supreme-court-highly-compensated-employees-must-be-paid-a-salary-to-avoid-overtime
Opposite—D'Agostino, T. (2023, March) What did the EEOC sue most for in FY 2022. Retrieved from https://www.hrmorning.com/news/eeoc-sue-most-for-in-2022-and-why-does-it-matter/

Most Common EEOC Lawsuits in 2022 and Why it Matters

A new report released by the federal Equal Employment Opportunity Commission (EEOC) shows where the agency focused its litigation enforcement efforts for federal employment laws in fiscal year (FY) 2022. The report describes litigation enforcement activities and lists amounts the agency recovered under various federal statutes. The agency filed 91 merits suits in FY 2022, which include direct suits, interventions, and suits to enforce prior settlements. More than two-thirds (68.1%) of all suits filed included claims filed under Title VII, the report shows. Title VII is the federal law that bans discrimination based on race, color, religion, sex and national origin. Other suits included claims under the Americans with Disabilities Act (ADA) (nearly 30%), the Age Discrimination in Employment Act (7.7%) and the Equal Pay Act (6.6%). Some suits included claims under more than one statute. The EEOC focused many of its Title VII suits on sex discrimination, raising that allegation in nearly half of all the suits it filed. The 91 merits suits filed in FY 2022 is the lowest number of suits filed in any fiscal year between 2013 and 2022. The low number coincides with a precipitous drop in litigation support funding, which went from $3.72 million in FY 2021 to $2.60 million in FY 2022. Nearly all suits resolved in FY 2022 – slightly more than nine out of 10 – were settled via entry of a consent decree, the report says.

Types of suits filed by EEOC

Sex discrimination was easily the most commonly alleged basis for suits, appearing in 49.5% of all suits filed. Other bases for suits included:

- Retaliation (35.2%)
- Disability discrimination (29.7%)
- Race discrimination (18.7%)
- Equal pay violations (6.6%)
- Age discrimination (6.6%)
- National origin discrimination (6.6%); and
- Color discrimination (1.1%)

The most commonly alleged issue presented in the EEOC-filed suits was wrongful discharge, which was asserted in nearly 64% of suits. That was followed most closely by harassment (42.8%), discrimination in hiring (23.1%) and disability accommodation (16.5%). Less commonly asserted allegations related to terms and conditions of employment (15.4%), wages (9.9%), discipline (4.4%), assignment (3.3%), religious accommodation (3.3%), recordkeeping violations (2.2%) and prohibited medical inquiries or examinations (1.1%). In sex discrimination, religious discrimination, disability discrimination and retaliation cases, wrongful discharge was the most common assertion. In race discrimination and national origin cases, it was harassment. And in age discrimination cases, it was an alleged wrongful refusal to hire.

What to do now

If the past is prologue, Title VII will continue to be a major focus of the agency's enforcement efforts going forward. Since at least FY 2013, it has formed the basis for EEOC lawsuits more than any other federal statute. As to specific Title VII issues, these statistics show it is a good time for a renewed emphasis on processing all job terminations with careful regard to Title VII protected classes – and especially sex – and reviewing harassment policies to make sure that they are up to date.

RAMADAN 2023

Ramadan is the fourth pillar of Islam and the ninth month of the Islamic calendar. From March 22 to April 21 this year, all Muslims who are healthy and have reached puberty are required to abstain from eating, drinking, and smoking daily from dawn until sunset. The occasion also involves prayer, acts of charity and introspection. "Ramadan is much more than abstaining from food and drink," said Haroon Imtiaz, communications coordinator for the Islamic Center of North America. "It is a time of intense devotion and spiritual practice." Many employers remain uneducated on certain aspects of Ramadan. They may also not know how to cater to Muslim employees during this time. But learning more about the occasion and explicitly showing support to Muslim workers can make this group feel a sense of belonging. Here are five tips for employers to consider during Ramadan.

1. Encourage employees to be open about their religious observance

Employees who are fasting will usually attend work as normal but can be encouraged to tell their employer that they are fasting. This should be done in a sensitive manner – managers and colleagues should not pry as some staff will be uncomfortable sharing the details of their religious beliefs. However, employers should not assume that all employees want to be treated differently because they are fasting. Indeed, not all individuals observing Ramadan will actually be fasting – for example, there are exceptions for people with health conditions, or who are pregnant or breastfeeding. To strike a balance, employers could put a message on their intranet about the fasting period, with an invitation to employees to make their needs during Ramadan known. In addition, employers could consult with employee faith networks and external religious bodies before deciding whether to change any working practices.

2. Educate managers and colleagues about Ramadan

Employers can raise awareness of key religious events, including Ramadan, by having a calendar of the key religious days and festivals on their intranet. For example, publicizing the dates of Ramadan and explaining about fasting can enable employees to be sensitive to the needs of colleagues who may be observing the fast. This can also help managers to anticipate requests for annual leave.

3. Be flexible with working patterns

One of the most helpful things that an employer can do for employees observing Ramadan is to allow them to adjust their working patterns. Employers should remember that an employee may be getting up earlier than usual to have a meal before sunrise and staying up late for evening prayers. These factors, and the fact that the employee is not eating during daylight hours, can lead to fatigue and drops in concentration. Employers could put in place temporary arrangements during Ramadan to allow employees to:

- start work earlier than usual so that they can leave the workplace earlier; and
- be flexible with their lunchbreak, for example by shortening it or taking it earlier or later in the day.

However, employers should ensure that such temporary arrangements are not seen by others as allowing the employee to reduce their working hours.

4. Embrace the advantages of hybrid working

The pandemic has meant that many employers have introduced hybrid working for most or all of their staff. Employers that have moved to the hybrid working model can use this way of working to support employees who are observing Ramadan. For example, the employer could temporarily amend the ratio of time spent attending the workplace compared with time working remotely, allowing fasting employees to spend more time working at home during Ramadan.

5. Accommodate annual leave requests where possible

Employers should bear in mind that they may see an increase in holiday requests from Muslims during Ramadan, particularly during the festival to mark the end of Ramadan (Eid al-Fitr). The Easter break, combined with Ramadan, mean that employers may see an increase in the number of employees requesting time off for both religious and non-religious reasons in March and April. While there is no automatic right to time off for religious reasons, managers should be sensitive to the needs of employees who are observing religious events, including Ramadan. To reduce the risk of discrimination, managers should be encouraged to take a consistent approach to requests for time off and refuse requests only where they have a legitimate business reason. Managers should always fully explain the reason for a holiday request refusal to the employee in a considerate way.

Simpson, S. (2023, March) Ramadan in the workplace. Retrieved from https://www.personneltoday.com/hr/ramadan-workplace-top-tips-employers-3/

Did You Know?

Islam is not the only religion that involves fasting for a particular period every year or on certain occasions. Employers should be prepared to provide support to followers of other religions who are observing fasting. These religions include:

- Baha'i faith: Baha'is fast for a significant portion of March (a 19-day period)
- Christianity: Some Christians fast during Lent, on Ash Wednesday and Good Friday
- Hinduism: Some Hindus observe fasting during various religious festivals, such as Navaratri (in the autumn each year)
- Judaism: Some Jewish religious festivals involve fasting, the best known of which is Yom Kippur
- Mormonism: Church members are encouraged to fast on one Sunday each month.

Upcoming Reporting Requirements

California Pay Data Reporting—California employers of 100 or more employees and/or 100 or more workers hired through labor contractors must report pay and hours-worked data by establishment, job category, sex, race, and ethnicity to the Civil Rights Department (CRD) annually. ***2022 Pay Data Reports are due 5/10/2023.***

Health Care Security Ordinance Reporting— Employers covered under by the Health Care Security Ordinance and/or Fair Chance Ordinance are required to submit the Employer Annual Reporting Form to OLSE each year. ***The 2022 Annual Reporting Form (ARF) is due on May 1, 2023.***

Your Centricity HR partner will assist you with any applicable required reporting for your company. Please reach out if you have any questions about your reporting obligations.