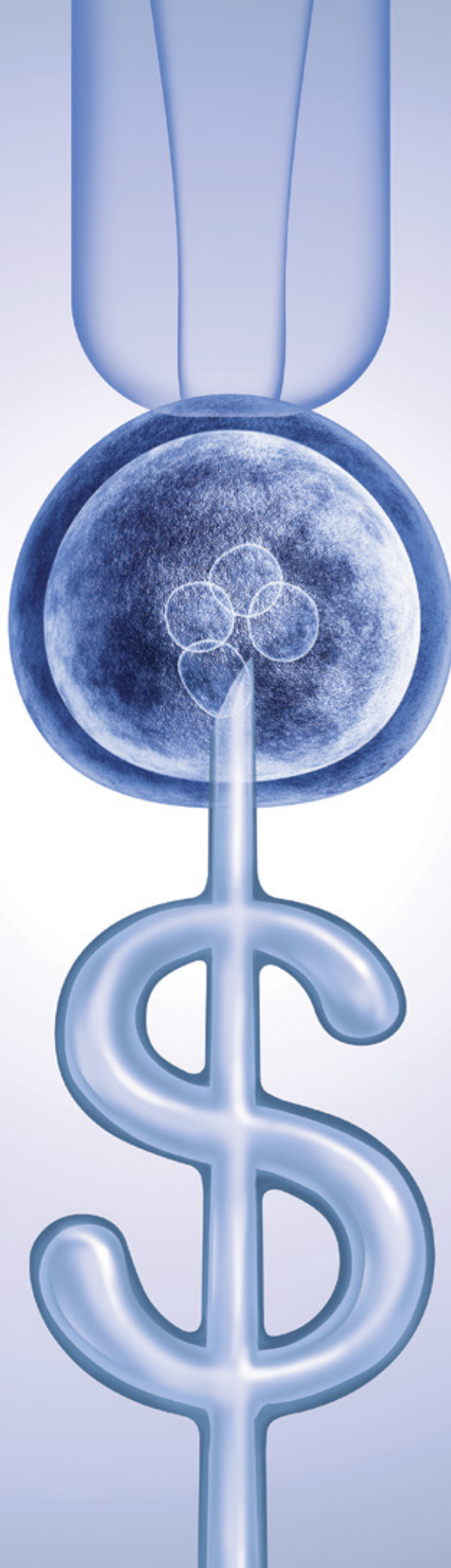

One cycle of IVF, including medications, may cost \$25,000 or more.

On average, individuals need three to six cycles of IVF to have one baby.

Minnesota does not require medical insurance plans to provide coverage for fertility insurance benefits.



Working with infertility and IVF

A primer for managers on supporting employees who experience reproductive issues

By ASHLEIGH LEITCH

Imagine your direct report blocks off time on your calendar for a private meeting. During the meeting, they inform you for the first time that they have been diagnosed with infertility and have decided to begin fertility treatments. What do you say? As their manager, what's your next move? What policies are in place to guide you and your direct report?

The purpose of this article is to provide practical advice for managers to support employees experiencing infertility or fertility treatments. From the standpoint of employers, this is not just humane policy. Issues with fertility or pregnancy loss implicate employees' legal rights in the workplace, and employers need to know how to comply with federal, state, and local laws relating to infertility. This article will suggest template infertility policies to promote a consistent and legally compliant approach to meeting the needs of employees and businesses. And it will conclude with suggestions for managing with emotional intelligence during what can be a very stressful and anxious time for employees.

Understanding infertility, pregnancy loss, and fertility treatments

The American Medical Association and the World Health Organization classify infertility as a complex disease in which a person is unable to get pregnant after one year of non-contraceptive, heterosexual sex.¹ It is a complex disease because many factors, known or unknown, may result in an infertility diagnosis. Both men and women may be diagnosed with infertility.²

Because of the stigma historically associated with infertility and pregnancy loss, many people remain unaware that these experiences are relatively common. Statistically, 10-15 percent of heterosexual couples in the U.S. experience infertility.³ Ten to 20 percent of known pregnancies end in miscarriage, which occurs when the pregnancy is lost before the 20th week.⁴ Each year, about 24,000 pregnan-

cies end in stillbirth, which occurs when the pregnancy is lost after the 20th week.⁵ The term "pregnancy loss" describes both miscarriage and stillbirth. Individuals may experience pregnancy loss without being diagnosed with infertility, and vice versa.

There are several types of fertility treatments, just as there are many reasons that employees may undergo treatments. The range of treatment options include intrauterine insemination (IUI) as well as assisted reproductive technologies like in vitro fertilization (IVF). Individuals may also choose IVF to preserve their fertility by freezing eggs or embryos. The Centers for Disease Control and Prevention (CDC) estimates that nearly 2 percent of all babies born in the U.S. each year are conceived through assisted reproductive technologies.⁶ This number is growing as more LGBTQ and single people use IVF to conceive. Although the technology has advanced over time, success rates vary significantly from individual to individual.

Managers should know that fertility treatments are a highly emotional, time-sensitive, and financially stressful matter that provides no guarantee of a baby.⁷ IVF treatments involve weeks of hormone injections at precise timing intervals, in addition to other medications and vitamin regimens. Individuals may experience heightened emotion due to these hormonal medications, in addition to grief after unsuccessful treatment cycles.

The time-sensitive nature of IVF also creates stress, especially when it conflicts with regular work schedules.⁸ In addition to the injections mentioned above, the typical IVF cycle entails regular—sometimes daily—appointments over a two-week period for blood draws and ultrasounds to measure hormone levels and follicular growth.⁹ The fertility clinic may schedule or reschedule these appointments with limited notice depending on the results of blood draws or ultrasounds. Furthermore, the timing of some events is inflexible. For example, delaying an embryo transfer by even one day may cause

the cycle to fail.¹⁰ Employees will likely need at least one day off work to undergo the egg retrieval under anesthetic.¹¹

Finally, IVF treatments are stressful in part because they are so expensive, and insurance typically provides limited (if any) coverage for fertility treatments. One cycle of IVF, including medications, may cost \$25,000 or more.¹² Studies estimate that, on average, individuals need three to six cycles of IVF to have one baby.¹³ Minnesota does not require medical insurance plans to provide coverage for fertility insurance benefits, though some states do.¹⁴ Because offering fertility insurance benefits may be a valuable tool for employee recruitment and retention, employers may be interested in expanding their fertility insurance benefits.¹⁵ For example, employers are encouraged to evaluate options for fertility benefits with their insurance brokers prior to open enrollment each year.

Employment laws related to infertility and fertility treatments

Depending on the employee's individual medical needs and treatments, the following types of laws may apply: leave of absence, disability, and anti-discrimination.

Leave of absence

Employees may need time away from work to receive medical care and treatment related to their fertility. Under the federal Family Medical Leave Act (FMLA), eligible employees of covered employers may take a job-protected, unpaid leave of absence for a serious health condition.¹⁶ Either the employee must have a serious health condition that leaves them unable to perform the essential functions of their job, or they must provide care for a family member who has such a serious health condition.¹⁷ Under these terms, FMLA may be available to individuals who wish to support and care for their partners after their partners have been diagnosed with infertility or are undergoing fertility treatments.



Absent an underlying medical condition, however, receiving an infertility diagnosis or undergoing fertility treatments may not qualify as a serious health condition. The following are examples of potentially serious health conditions: 1) surgery on reproductive organs to prepare for pregnancy, such as removing endometrial tumors or assisting with sperm flow;¹⁸ bed rest due to pregnancy complications;¹⁹ or depression or anxiety arising from infertility or pregnancy loss.²⁰ This is an individualized inquiry requiring supporting documentation from a health care provider.

If eligible, employees are entitled to up to 12 weeks of unpaid leave per year for medical care and parenting leave. (The downside to using this leave to cover fertility treatments is that, in the event the fertility treatments lead to childbirth in the same year, there is less time available for parental leave.) If ineligible for the FMLA, employees may use their PTO or earned sick and safety leave (ESST) to receive pay while away from work. The ESST ordinances in the cities of Minneapolis, Saint Paul, and Duluth provide paid-time-off benefits for eligible employees, and those benefits cover time away from work to receive medical care and treatment related to fertility.²¹

Disability

Federal and state laws prohibit employers from discriminating against employees because of their disabilities and require employers to provide reasonable accommodation to disabled employees.²² Not all employees experiencing infertility or undergoing fertility treatments have a disability. One example is LGBTQ employees who may be fertile but still require reproductive assistance to create their families. A second example is infertility caused by advanced age.

ADA coverage hinges upon the cause of the individual's infertility or their need for fertility treatments. A "disability" is an impairment that substantially limits a major life activity.²³ Reproduction is a major life activity.²⁴ If the employee has been diagnosed with an impairment limiting their reproduction, they have a disability and qualify for disability-related protections.

For example, a diagnosis of endometriosis may limit reproduction. Chemotherapy to treat testicular cancer may also limit reproduction. Both qualify as disabilities, thereby triggering anti-discrimination protection and the obligation to make reasonable accommodations.

An employee with a disability is entitled to a reasonable accommodation to enable them to perform their essential job duties, as long as it does not create an undue hardship for the employer.²⁵ Managers should consult the employee's job description to evaluate whether a particular job duty is "essential." Examples of reasonable accommodations may include a temporary leave of absence (even if not eligible under the FMLA), additional break time or modified work hours to accommodate hormone injections and medical appointments, the option to work remotely, and modified work duties to reduce stress.²⁶ Actions like these are unlikely to constitute an undue hardship for employers, especially if the accommodation is granted for a defined, temporary time period.

Anti-discrimination

Federal and state laws prohibiting discrimination may apply to employees experiencing infertility or fertility treatments. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, prohibits discrimination or retaliation against individuals on the basis of their sex.²⁷ The U.S. Supreme Court has held that Title VII prohibits employers from "discriminating against a woman because of her capacity to be-



come pregnant unless her reproductive potential prevents her from performing the duties of her job."²⁸ Some jurisdictions have interpreted this to apply to fertility treatments to become pregnant.²⁹

The Minnesota Human Rights Act (MHRA) prohibits discrimination or retaliation against individuals on the basis of sex, pregnancy, or disability, and requires employers to provide reasonable accommodation to employees with disabilities.

Managing with emotional intelligence

When your employee discloses their infertility diagnosis to you, it is best to handle that information like any other medical condition—with care, confidentiality, and respect for the employee's individual needs. React with empathy, and commit to looking into the organizational resources available to the employee. For starters, managers should consult with Human Resources and the—newly updated! (see sidebar)—employee handbook to provide information regarding available health insurance benefits and time away from work policies.

Managers should know that fertility treatments are a highly emotional, time-sensitive, and financially stressful matter that provides no guarantee of a baby.

Some other practical tips:

- Do a web search before you ask general questions to your employee. Undoubtedly, this article will not answer all your questions about infertility and IVF treatments. There are many useful resources online to inform yourself on general topics. If you have specific, job-related questions regarding the employee's treatment plan, go ahead with asking those questions respectfully—just as you would for any other medical condition or treatment.
- As a general rule, don't offer advice. The employee has made their decision based on advice from their professional medical providers. The one possible exception to this general rule is if you have personal experience with infertility or fertility treatments and have the kind of relationship with the employee in which you share personal information. Even then, make sure that the employee is comfortable with hearing your advice before you share.
- Ask the employee how you and the organization can support them. What kind of temporary flexible work arrangements or scheduling can you offer to the employee as a reasonable accommodation? What benefits are available to the employee? Gauge what kind of emotional support and privacy the employee wants. Some employees may welcome your regular check-ins while others may prefer more privacy. Ask what type of support would make the employee feel comfortable.
- If the employee's absence from work requires disclosure to other colleagues, ask for the employee's input on how to inform others. Some employees may wish to be open about their infertility or fertility treatment journey. Others may desire more privacy. As with all medical issues, only inform those who need to know, and give the employee discretion as to informing others.
- Do not immediately begin planning for the employee's pregnancy and parental leave. Fertility treatments have varying success rates. While it's natural to be optimistic and wish the best for your employee, it is best to cross that bridge when you get to it.
- Handle all medical information confidentially. If you receive medical documentation, put it in a separate, confidential section of their personnel file.

In conclusion, managing employees through their infertility and fertility treatments presents many challenges in the workplace. Understanding employees' legal rights to leave, reasonable accommodation, and other benefits set the baseline for complying with federal, state, and local laws. Beyond that baseline, successful managers will also recognize that these issues present important opportunities to build trust and create a supportive work environment for employees facing infertility and fertility treatments. ▲

UPDATING THE EMPLOYEE HANDBOOK

Given the prevalence of fertility issues, many employers are adding policies to their employee handbooks. Below are two template policies relating to infertility and treatment. Tailor these templates to reflect your organization's practices.

TEMPLATE FERTILITY POLICY

The purpose of this policy is to provide support to employees diagnosed with infertility or undergoing fertility treatment. The Company provides support in the form of leave, reasonable accommodations, and insurance benefits. For the purpose of this policy, a fertility treatment includes intrauterine insemination (IUI), in vitro fertilization (IVF), fertility preservation (such as egg freezing), or other similar assisted reproductive technologies. Human Resources may ask for supporting documentation of your infertility diagnosis or need for fertility treatments from your health care provider. Any medical documentation you provide will be handled confidentially.

Employees receive ___ days of [paid/unpaid] leave to receive medical care for their infertility diagnosis or to undergo fertility treatments. If eligible for FMLA leave, your fertility leave will run concurrently with your FMLA leave. If you need additional leave, you may use your PTO or ESST.

If you have a disability, the Company will provide reasonable accommodation to enable you to perform the essential functions of your position, unless such accommodation is an undue hardship for the Company. Please see the Reasonable Accommodations policy for more information. Depending on your circumstances, examples of reasonable accommodations may include: additional leave, a flexible work schedule, or a modified workload.

The Company provides the following fertility benefits to employees: [details on applicable policies, for example medical insurance or a short-term disability policy]. Additionally, you may access the Employee Assistance Program (EAP), which provides counseling services to cope with the emotion and stress that may arise from infertility or fertility treatments. Please see the insurance plan documents for additional details. If you have any questions about this policy, please contact Human Resources.

TEMPLATE BEREAVEMENT POLICY

The purpose of this policy is to provide support to grieving employees. Employees receive ___ days of [paid/unpaid] bereavement leave when they experience pregnancy loss, the death of their immediate relative, or the death of their partner's immediate relative. For the purpose of this policy, "pregnancy loss" is defined to include miscarriage and stillbirth, and an "immediate relative" is defined as a parent, grandparent, sibling, or child, or a person of equivalent familial significance to the employee. "Immediate relative" also includes a step-parent, a step-grandparent, step-sibling, and step-child. To request bereavement leave, contact Human Resources as soon as practicable. Employees may also use their PTO if they need additional leave.



ASHLEIGH LEITCH is an attorney at Best & Flanagan, LLP and focuses her practice on labor and employment law in Minnesota, Wisconsin, and North Dakota.

✉ ALEITCH@BESTLAW.COM

Because offering fertility insurance benefits may be a valuable tool for employee recruitment and retention, employers may be interested in expanding their fertility insurance benefits.

Notes

¹ Sara Berg, *AMA backs global health experts in calling infertility a disease*, AMA (6/13/2017), <https://www.ama-assn.org/delivering-care/public-health/ama-backs-global-health-experts-calling-infertility-disease>

² *Id.*

³ *Infertility*, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/infertility/symptoms-causes/syc-20354317> (last visited 2/21/2021).

⁴ *Miscarriage*, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298#:~:text=About%2010%20to%2020%20percent,doesn't%20realize%20she's%20pregnant> (last visited 2/21/2021).

⁵ *Id.*

⁶ *ART Success Rates*, Centers for Disease Control and Prevention, <https://www.cdc.gov/art/artdata/index.html> (last visited 2/21/2021).

⁷ Dr. Pragya Agarwal, *Infertility In The Workplace: Women Are Still Suffering In Silence*, FORBES (3/8/2020), available at <https://www.forbes.com/sites/pragyaagarwaleurope/2020/03/08/infertility-in-the-workplace-women-are-still-suffering-in-silence/?sh=293b1b682c30> (last visited 2/21/2021).

⁸ Serena G. Sohrab and Nada Basir, *Employers, It's Time to Talk about Infertility* Harvard Business Review (11/11/2020), available at <https://hbr.org/2020/11/employers-its-time-to-talk-about-infertility> (last visited 2/21/2021).

⁹ Lisa Rabasca Roepe, *Managing Workers Undergoing Fertility Treatments or Surrogacy* SHRM (4/28/2020), available at <https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/managers-and-fertility-treatments.aspx>

¹⁰ Katherine Goldstein, *My Boss Said, "I Understand What You're Going Through, but You Have a Job to Do,"* SLATE (1/30/2019), <https://slate.com/human-interest/2019/01/infertility-workplace-pregnancy-challenges-2019.html> (last visited 2/21/2021).

¹¹ Lisa Rabasca Roepe, *Managing Workers Undergoing Fertility Treatments or Surrogacy* SHRM (4/28/2020), available at <https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/managers-and-fertility-treatments.aspx>.

¹² Amy Klein, "IVF Is Expensive. Here's How to Bring Down the Cost," N.Y. TIMES (4/18/2020) <https://www.nytimes.com/article/ivf-treatment-costs-guide.html> (last visited 2/12/2021).

¹³ *Id.*

¹⁴ *State Laws Related to Insurance Coverage for Infertility Treatment*, National Conference of State Legislatures (6/12/2019) <https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx> (last visited 2/21/2021).

¹⁵ *Work Coverage Resource Hub – For Employers*, RESOLVE The National Infertility Association, <https://resolve.org/what-are-my-options/insurance-coverage/coverage-at-work/work-coverage-resource-hub-for-employers/> (last visited 2/23/2021).

¹⁶ *The Family Medical Leave Act of 1993*, 29 U.S.C. §§2601, *et seq.*; *see also*

Fact Sheet #28: The Family Medical Leave Act, U.S. Dept. of Labor, Wage and Hour Division (Revised 2012) <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf> (last visited 2/21/2021).

¹⁷ *Id.*

¹⁸ 29 C.F.R. §825.102.

¹⁹ 29 C.F.R. §825.102, subd. 2.

²⁰ 29 C.F.R. §825.113(d) (expressly stating that mental health conditions may qualify).

²¹ *Minneapolis Sick and Safe Time Ordinance* Ord. No. 2016-040, available at https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT2AD_CH40WORE_ARTIINGE_40.10TI; *St. Paul Earned Sick and Safety Time Ordinance* Sec. 233.01, available at https://library.municode.com/mn/st_paul/codes/code_of_ordinances?nodeId=PTIILECO_TITXXIIIIPUHESAWE_CH233PUHESAWE_S233.01STLEPUIN; *Duluth Ordinance* No. 10571, Section 29E-1, available at <https://duluthmn.gov/city-clerk/earned-sick-safe-time/ordinance-no-10571/>.

²² *Americans with Disabilities Act (ADA)*, 42 U.S.C. §§12112 (prohibiting discrimination); 12112(b)(5)(A) (requiring reasonable accommodation); *Minnesota Human Right Act ("MHRA")*, Minn. Stat. §363A.08, subd. 2 (prohibiting discrimination), Minn. Stat. §363A.08, subd. 6 (requiring reasonable accommodation).

²³ 42 U.S.C. §12102.

²⁴ *ADA Amendments Act of 2008*, 42 U.S.C.A. §12101 (stating that "reproductive functions" are a major life activity for purposes of the ADA); *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (holding that reproduction is a major life activity).

²⁵ 42 U.S.C. §12112(b)(5)(A).

²⁶ *LaPorta v. Wal-Mart Stores, Inc.*, 163 F.Supp.2d 758, 766 (W.D. Mich. 5/22/2001) (holding that infertility is a disability under the ADA and that time away from work for medical treatments is a reasonable accommodation).

²⁷ 42 U.S.C. §2000e--2(a)(1); *see also Enforcement Guidance on Pregnancy Discrimination and Related Issues*, U.S. Equal Employment Opportunity Commission (6/15/2015), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#_ftn26 (last visited 2/23/2021).

²⁸ *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 206 (1991).

²⁹ *Hall v. Nalco Co.*, 534 F.3d 644, 648-49 (7th Cir. 2008) (holding that the employer unlawfully discriminated against female employee for taking time off to undergo IVF because her employment termination was due to her sex-specific quality of childbearing capacity, not her sex-neutral condition of infertility).