

On Ice: The Slippery Slope of Employer-Paid Egg Freezing

Nicole M. Mattson*

Introduction

Gender inequality is a complex workplace issue.¹ Though women comprise half of today's workforce, they are still "underrepresented at every level of the [talent] pipeline," especially senior leadership and executive positions.² 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."³ Significant economic outcomes are at stake. Another recent study calculates that further advancement of gender parity could add an estimated \$4.3 trillion, or 10%, to the U.S. gross domestic product by 2025.⁴

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.⁵ One significant barrier to eliminating workplace gender disparity is the biological reality that, unlike men's, women's childbearing years are limited.⁶ Until recently, women had to choose between career advancement and starting a family, diminishing their career and pay trajectories.⁷

* J.D., University of Denver Sturm College of Law, December 2017; MBA, University of Denver Daniels College of Business, November 2006. Ms. Mattson is the winner of the American Bar Association Section of Labor and Employment Law and The College of Labor and Employment Lawyers 2015–2016 Annual Law Student Writing Competition. She gratefully acknowledges Professors Debra Austin and Rachel Arnow-Richman for their support and guidance with this article and throughout law school.

1. *Women in the Workplace*, MCKINSEY & CO. & LEANIN.ORG (Sept. 2016), <http://www.mckinsey.com/business-functions/organization/our-insights/women-in-the-workplace-2016?cid=mckwomen-eml-alt-mip-mck-oth-1609>.

2. *Id.* (alteration in original). Women comprise 46% of entry-level positions and 33% of director positions, but only 19% of C-suite positions. *Id.*

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

4. Kweilin Ellingrud et al., *The Power of Parity: Advancing Women's Equality in the United States*, MCKINSEY GLOBAL INST. (Apr. 2016), <http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>.

5. *See, e.g., id.*

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

7. *See id.* at 296–98; *see also Women in the Workplace*, *supra* notes 1 and 3.

Starting in late 2012, advances in reproductive technology afforded female workers a new way to have both a career and a family through egg freezing.⁸ While egg freezing was developed to preserve fertility for women undergoing cancer treatment,⁹ the procedure permits delayed childbearing for social reasons such as education, career development, and the desire to find the right partner.¹⁰

Employers quickly capitalized on egg freezing technology to promote workforce gender equality.¹¹ In 2014, Facebook and Apple started reimbursing employees up to \$20,000 for egg freezing.¹² 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.¹³ In 2015, Richard Branson, founder of Virgin Group, stated that he wanted to adopt the egg freezing idea for his conglomerate of diverse businesses.¹⁴ In early 2016, the Pentagon announced a pilot program for military personnel who want to freeze their eggs or sperm prior to deployment.¹⁵ In late 2016, the Department of Veterans Affairs announced it would compensate wounded veterans for in vitro fertilization costs.¹⁶ While alluring

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

9. Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, *Mature Oocyte Cryopreservation: A Guideline*, 99 FERTILITY & STERILITY 37, 41 (2013) [hereinafter Practice Committees].

10. See, e.g., Carbone & Cahn, *supra* note 6, at 300–01; Emma Rosenblum, *Later Baby: Will Freezing Your Eggs Free Your Career?* BLOOMBERG BUSINESSWEEK (Apr. 17, 2014, 8:11 PM), <http://www.bloomberg.com/news/articles/2014-04-17/new-egg-freezing-technology-eases-womens-career-family-angst>; Sarah McHaney & Rebecca Jacobson, *Seven Things Every Woman Should Know Before Freezing Her Eggs*, PBS NEWSHOUR (Dec. 10, 2014, 1:09 PM), <http://www.pbs.org/newshour/updates/freeze-eggs/>.

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

12. *Id.*

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

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

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

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

to young, ambitious professionals, employer-paid egg freezing programs precipitate several social, moral, and legal concerns.¹⁷

This Article explores whether the potential benefits of employer-paid egg freezing programs outweigh their risks, including potential employment discrimination claims.¹⁸ Part I defines the egg freezing process and key terms. Part II considers the advantages and disadvantages of egg freezing for workers. Part III identifies relevant legal protections under anti-discrimination and job-protected leave laws and explains how employer-paid egg freezing programs may trigger legal liability. Part IV offers practical advice for employers.

I. Freezing 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.¹⁹ "Women become less likely to become pregnant and more likely to have miscarriages [as they age] because egg quality [and quantity] decreases."²⁰ Miscarriage rates quadruple from 20% at age 35 to 80% at age 45.²¹ 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."²² To assess employer involvement in egg freezing, one needs to understand the detailed processes of egg harvesting and retrieval and in vitro fertilization. Although egg freezing has gained acceptance and understanding in recent years, it remains difficult and expensive for women who choose to freeze their eggs.²³

A. *The Reproductive Technology of Egg Freezing*

"Egg freezing promises, literally, to stop the biological clock, [and preserve] a woman's eggs from the ravages of time until she is ready to use them."²⁴ Women have a finite number of eggs, determined at birth,

17. See, e.g., Carbone & Cahn, *supra* note 6.

18. 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.

19. *Age and Fertility: A Guide for Patients*, AM. SOC'Y FOR REPROD. MED. 1, 4 (2012), https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/agefertility.pdf (alteration in original); *Elective Egg Freezing*, COLO. CTR. FOR REPROD. MED., <https://www.ccrnivf.com/services/elective-egg-freezing/> (last visited Oct. 24, 2016).

20. *Age and Fertility*, *supra* note 19, at 5–6 (alteration in original).

21. Dan J. Tennenhouse, *Miscarriage*, [Supp. to Binder 2] ATTORNEYS MEDICAL DESK-BOOK (West) § 24:35, at 533 (4th ed. 2015).

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

23. See, e.g., Jennifer Gerson Uffalussy, *The Cost of IVF: 4 Things I Learned While Battling Infertility*, FORBES (Feb. 6, 2014, 3:00 PM), <http://www.forbes.com/sites/learnvest/2014/02/06/the-cost-of-ivf-4-things-i-learned-while-battling-infertility/#152e3ecc2a79> ("On average, nationally, a 'fresh' IVF cycle costs \$12,000, before medications, which typically run another \$3,000 to \$5,000.")

24. Carbone & Cahn, *supra* note 6, at 299 (alteration in original).

but men produce sperm throughout their lifetime.²⁵ That makes it easier for men to prioritize career development before starting a family without undermining their reproductive capacity.²⁶ Both sperm and egg quality decrease with age, but the number of chromosomally normal eggs declines drastically at age thirty-five.²⁷ Embryonic age-related chromosomal abnormalities are a primary cause of miscarriage.²⁸

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.²⁹ The live birth rate for women in their late thirties and early forties has more than doubled over the last thirty years.³⁰ Some studies suggest this increase is correlated with technological advances in reproductive medicine, including egg freezing, in vitro fertilization, and frozen embryo transfer.³¹

Frozen sperm and embryos have been successfully used in reproductive medicine for decades, but, until recently, freezing technology was not as effective for more delicate and less resilient female eggs.³² In the early 2000s, Italian researchers discovered vitrification, a flash freezing method to prevent formation of frozen crystals within eggs.³³ In 2013, when the flash freezing technology showed clinical evidence of success, 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.³⁴ Since then, egg freezing has become a hot, albeit controversial, topic for women seeking to preserve fertility while developing a career.³⁵ Within a year, the average age of women pursu-

25. See, e.g., *id.*; Robertson, *supra* note 8, at 115.

26. Carbone & Cahn, *supra* note 6, at 299.

27. See, e.g., *id.*; *Age and Fertility*, *supra* note 19, at 4.

28. *Age and Fertility*, *supra* note 19, at 5; Tennenhouse, *supra* note 21.

29. *Age and Fertility*, *supra* note 19, at 9; McHaney & Jacobson, *supra* note 10.

30. *National Vital Statistics Report*, 64 CTR. 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.

31. See *Assisted Reproductive Technology: 2013 National Summary Report*, CDC NAT’L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, DIV. OF REPROD. HEALTH 1, 9, 49 (Oct. 2015), http://www.cdc.gov/art/pdf/2013report/art_2013_national_summary_report.pdf [hereinafter *Assisted Reproductive Technology*]. Women aged 35 and older comprised approximately 62% of the assisted reproductive technology cycles in 2013, the number of which increased 25% from 127,977 in 2004 to 160,554 in 2013. Live birth deliveries (including multiple infants) conceived using assisted reproductive technology increased 26% from 49,458 in 2004 to 66,706 in 2013.

32. Robertson, *supra* note 8, at 115.

33. *Id.*

34. Practice Committees, *supra* note 9, at 41.

35. See, e.g., Bennett, *supra* note 13; Rosenblum, *supra* note 10; but see Sabrina Parsons, *Female Tech CEO: Egg-Freezing ‘Benefit’ Sends the Wrong Message to*

ing egg freezing declined from 39 to 36,³⁶ and the number of egg freezing cycles performed in the United States increased by almost 30%.³⁷ Studies now estimate that 2% of babies born in the United States are conceived through advanced reproductive medicine.³⁸

B. The Egg Freezing Procedure

The process of egg freezing starts with a series of reproductive endocrinologist consultations, blood work, and gynecological procedures to confirm overall reproductive health and ovarian reserve.³⁹ 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.⁴⁰ Then, the woman injects egg stimulation hormones into her abdomen multiple times daily for approximately fourteen days and is tested through daily blood work and ultrasounds to confirm size and growth of eggs.⁴¹ “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.”⁴² A natural ovulation cycle typically produces one or two eggs,⁴³ but a single stimulation cycle produces, on average, 15 eggs,⁴⁴ within a range of 0 to 45.⁴⁵ This process risks ovarian torsion from the developing egg quantity and ovarian size.⁴⁶ This risk is mitigated by restricting physical activity for approximately two weeks during the harvest procedure.⁴⁷

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

36. *Assisted Reproductive Technology*, *supra* note 31, at 9; Rosenblum, *supra* note 10.

37. *Assisted Reproductive Technology*, *supra* note 31, at 50. The number of egg or embryo banking cycles increased from approximately 19,000 in 2012 to 27,500 in 2013.

38. See *Assisted Reproductive Technology*, *supra* note 31, at 3; *National Vital Statistics Report*, *supra* note 30, at 2. 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. *Assisted Reproductive Technology*, *supra* note 31, at 3.

39. See, e.g., *Elective Egg Freezing*, *supra* note 19; *Evaluation Before IVF, Prerequisite Testing*, SOC’Y FOR ASSISTED REPROD. TECH., http://www.sart.org/SART_Patient_Evaluation/ and <http://www.sart.org/Prerequisite/> (last visited Oct. 25, 2016).

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

41. Mohapatra, *supra* note 8, at 386; *ART: Step-by-Step Guide*, *supra* note 40.

42. *Elective Egg Freezing*, *supra* note 19.

43. *Age and Fertility*, *supra* note 19, at 3.

44. Mohapatra, *supra* note 8, at 386–87.

45. *How Many Eggs Should I Freeze?*, EGGBANXX, <https://www.eggbanxx.com/how-many-eggs-should-i-freeze/> (last visited Oct. 25, 2016).

46. *Exercise and Stress Reduction During Fertility Treatments*, NE. REPROD. MED., <http://www.nrmvt.com/exercise-and-stress-reduction-during-fertility-therapy-what-can-i-do/> (last visited Oct. 26, 2016).

47. *Id.*

The eggs are mature and ready to be retrieved when some follicles measure 15 to 20 millimeters diameter on daily ultrasounds.⁴⁸ A shot is administered to induce ovulation, which releases all eggs from the ovaries into the fallopian tubes,⁴⁹ and approximately thirty-five hours later, a reproductive endocrinologist retrieves the eggs with a long needle while the woman is under general anesthesia.⁵⁰ Within a week after egg retrieval, a patient may develop ovarian hyperstimulation syndrome (OHSS), causing the ovaries to swell with fluid and become painful due to the injectable ovary stimulation hormones.⁵¹ OHSS symptoms usually are mild, but the condition can require hospitalization for kidney failure or blood clots.⁵² The prevalence of OHSS is unclear due to inconsistent reporting, but estimates suggest that up to 25% of women experience mild OHSS symptoms and up to 5% suffer severe symptoms.⁵³

After the egg harvest, quality can be assessed only by visual appearance and size because there is currently no screening mechanism for chromosomal abnormalities at this stage.⁵⁴ Selected eggs are flash frozen immediately⁵⁵ or within twenty-four hours if the eggs are monitored for continued growth.⁵⁶ The eggs remain frozen until they are no longer needed, at which time unused eggs may be discarded.⁵⁷ The procedure's cost is between \$9,000 and \$20,000, plus \$2,000 to \$4,000 per cycle for stimulation medication, and a \$500 to \$1,000 an-

48. See, e.g., Theresa Abney, *Working Women Seeking Infertility Treatments: Does the ADA or Title VII Offer Any Protection?*, 58 DRAKE L. REV. 295, 298 (2009); Mohapatra, *supra* note 8, at 386; ART: *Step-by-Step Guide*, *supra* note 40; Richard Sherbahn, *Ovarian Stimulation IVF Protocols: Medications and Drugs for In Vitro Fertilization*, ADVANCED FERTILITY CTR. OF CHI., <http://www.advancedfertility.com/ivfstim.htm> (last visited Oct. 25, 2016).

49. See ART: *Step-by-Step Guide*, *supra* note 40.

50. Mohapatra, *supra* note 8, at 386; ART: *Step-by-Step Guide*, *supra* note 40 (includes diagram of egg retrieval procedure); Abney, *supra* note 48, at 298.

51. Mohapatra, *supra* note 8, at 385; *In Vitro Fertilization (IVF): What Are the Risks?*, AM. SOC'Y FOR REPROD. MED. (2015), http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/risksofivf.pdf; *Ovarian Hyperstimulation Syndrome*, SOC'Y FOR ASSISTED REPROD. TECH., http://www.sart.org/Ovarian_Hyperstimulation_Syndrome/ (last visited Oct. 25, 2016).

52. Mohapatra, *supra* note 8, at 385; *Ovarian Hyperstimulation Syndrome*, *supra* note 51.

53. Richard Scott Lucidi, *Ovarian Hyperstimulation Syndrome: Epidemiology*, MEDSCAPE, <http://emedicine.medscape.com/article/1343572-overview#a5> (last visited Oct. 25, 2016).

54. *Patient Information*, COLO. CTR. FOR REPROD. MED. (2013); *Egg Quality*, CTR. FOR HUMAN REPROD., <https://www.centerforhumanreprod.com/infertilityedu/causes/eggquality/determining/> (last visited Jan. 9, 2017) (physicians unable objectively to measure egg quality, but working to develop standardized scoring system).

55. Mohapatra, *supra* note 8, at 386.

56. *Patient Information*, *supra* note 54.

57. Robertson, *supra* note 8, at 116.

nual storage fee.⁵⁸ The entire egg freezing process takes approximately four to six weeks⁵⁹ and is rarely covered by insurance.⁶⁰

C. In Vitro Fertilization: Making Babies from Frozen Eggs

The process of stimulating, harvesting, and retrieving eggs is only the first step of in vitro fertilization and the embryo transfer process.⁶¹ When a woman chooses to use her frozen eggs, they are warmed and fertilized by sperm in vitro, using advanced reproductive technologies.⁶² 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.⁶³ After several days of the fertilized egg's successful cell growth, the resulting blastocysts may be biopsied for genetic testing and frozen for later implantation.⁶⁴

If a patient declines genetic testing, the selected embryo is transferred to the uterus using a guided catheter.⁶⁵ Remaining embryos may be frozen indefinitely for future embryo transfer without compromising quality.⁶⁶ 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.⁶⁷ Successful embryo transfer and implantation progresses to a clinical pregnancy.⁶⁸

58. See, e.g., Abney, *supra* note 48, at 299; Mohapatra, *supra* note 8, at 386; 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; less expensive medications and diagnostic testing may be covered by insurance.

59. Mohapatra, *supra* note 8, at 386; ART: *Step-by-Step Guide*, *supra* note 40.

60. Rosenblum, *supra* note 10; Wexler, *supra* note 58.

61. Mohapatra, *supra* note 8, at 386; ART: *Step-by-Step Guide*, *supra* note 40.

62. Abney, *supra* note 48, at 298; Mohapatra, *supra* note 8, at 386.

63. ART: *Step-by-Step Guide*, *supra* note 40.

64. *Age and Fertility*, *supra* note 19, at 9; ART: *Step-by-Step Guide*, *supra* note 40; *Preimplantation Genetic Testing*, AM. SOC'Y FOR REPROD. MED. (2014), http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/PGT_2014.pdf.

65. See ART: *Step-by-Step Guide*, *supra* note 40 (Society for Assisted Reproductive Technology sets strict guidelines for the number of embryos to transfer); see also Mohapatra, *supra* note 8, at 386; Abney, *supra* note 48, at 298.

66. ART: *Step-by-Step Guide*, *supra* note 40. *But see* Practice Committees, *supra* note 9, at 40 ("Limited data exist regarding the effect of duration of storage on oocyte cryopreservation survival and pregnancy."). Chromosomally abnormal embryos are typically discarded or used for clinical research. See Kira Peikoff, *In IVF, Questions About 'Mosaic' Embryos*, N.Y. TIMES, (Apr. 18, 2016), http://www.nytimes.com/2016/04/19/health/ivf-in-vitro-fertilization-pregnancy-abnormal-embryos-mosaic.html?_r=0.

67. See *Progesterone Supplementation During In Vitro Fertilization (IVF) Cycles*, AM. SOC'Y FOR REPROD. MED. (2011), http://www.reproductivefacts.org/FACTSHEET_Progesterone_Supplementation_During_IVF_Cycles/.

68. See Goodwin, *supra* note 22, at 29; ART: *Step-by-Step Guide*, *supra* note 40.

Approximately ninety percent of frozen eggs survive the thawing process.⁶⁹ On average, at least eight eggs are required to achieve one clinical pregnancy.⁷⁰ “The older [a woman’s age] at the time of egg freezing, the lower the likelihood [of] a live birth”⁷¹ “[M]ost women undergo several cycles before pregnancy occurs, or until they suspend treatments.”⁷² One complete egg freezing, in vitro fertilization, and embryo transfer cycle costs approximately \$50,000, but costs may increase depending on factors such as how long eggs are stored.⁷³

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

This egg freezing process has several advantages in the employment context. Employer-paid egg freezing advances gender parity in the workplace, indirectly facilitates leveling the financial playing field between men and women, and supports long-standing public policy protecting female childbearing capability. Despite its advantages, however, employer-paid egg freezing may detrimentally affect workplace culture, and the procedure’s long-term health risks and success rates are generally unknown.

A. Advantages

1. Egg Freezing Advances Workplace Gender Parity

A compelling argument for egg freezing is that “egg insurance” against future infertility [enables] equal participation in employment,⁷⁴ thereby advancing workplace gender parity.⁷⁵ Female fertility peaks at the same time women invest time and energy in education and career advancement.⁷⁶ Egg freezing allows women to decide freely when to exit and re-enter the workforce to start or grow a family.⁷⁷ When an employer assumes the cost of egg freezing, women may con-

69. *Elective Egg Freezing*, *supra* note 19; *Egg Freezing Results*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/egg-freezing/details/results/rsc-20169015> (last visited Oct. 25, 2016).

70. Rosenblum, *supra* note 10.

71. *Egg Freezing Results*, *supra* note 69 (alteration in original).

72. Goodwin, *supra* note 22, at 29.

73. *See supra* note 58 and accompanying text; *IVF Costs & Fertility Treatment Costs—Colorado*, COLO. CTR. FOR REPROD. MED., <https://www.ccrmivf.com/colorado/treatment-costs/> (last visited Oct. 25, 2016) (estimate assumes \$20,000 for egg-freezing medication and procedure and \$30,300 for in vitro fertilization and embryo transfer medications and procedures). Other factors affecting cost may include age, responsiveness to medications, and number of viable eggs.

74. Robertson, *supra* note 8, at 120 (alteration in original).

75. *Id.* at 118.

76. *See, e.g.*, Carbone & Cahn, *supra* note 6, at 296; Christine Rosen, *The Ethics of Egg Freezing*, WALL ST. J. (May 3, 2013, 7:20 PM), <http://www.wsj.com/articles/SB10001424127887323628004578459182762199520>; *see also* *Age and Fertility*, *supra* note 19, at 4 (“A woman’s best reproductive years are in her 20s.”).

77. *See* Rosen, *supra* note 76.

tinue working until they are professionally and personally ready for children.⁷⁸ As a result, women remain in the talent pipeline for senior leadership positions.

Employers also see egg freezing as a means to foster family-friendly workplaces. Facebook decided to pay for egg freezing for employees and their spouses in response to employee demand.⁷⁹ 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.”⁸⁰ Both Apple and Facebook include egg freezing in their overall family benefit options.⁸¹ Family-friendly benefits may improve employers’ ability to attract and retain workers who have or want children.

Egg freezing also promotes women’s empowerment.⁸² Apple says egg freezing enables its female workforce to “do the best work of their lives.”⁸³ Generally, egg freezing offers women the choice to develop a career before starting a family, and it gives a woman time to decide if she wants children.⁸⁴ Preserved fertility offers “actual and symbolic freedom, security, and time.”⁸⁵ One woman who froze her eggs said that her “future seemed full of possibility again,”⁸⁶ and “[b]y freezing, you’ve done something about it . . . and that can pay off in both your work and romantic lives.”⁸⁷ Egg freezing empowers women to extend their biological clocks while advancing their careers alongside male counterparts.

78. *See id.*

79. Sydell, *supra* note 11; Charlotte Alter, *Sheryl Sandberg Explains Why Facebook Covers Egg-Freezing*, TIME (Apr. 25, 2015, 10:49 AM), <http://time.com/3835233/sheryl-sandberg-explains-why-facebook-covers-egg-freezing/>.

80. Bloomberg Interview, *supra* note 14.

81. Sydell, *supra* note 11 (“Both companies have paid parental leave policies and on-site health care. Facebook also subsidizes day care costs.”). In North America, Facebook also offers adoption and surrogacy assistance. *Benefits*, FACEBOOK, <https://www.facebook.com/careers/benefits/> (last visited Oct. 25, 2016).

82. *See, e.g.*, Carbone & Cahn, *supra* note 6, at 302–04; Robertson, *supra* note 8, at 120; Rosen, *supra* note 76.

83. Sydell, *supra* note 11.

84. *See* Robertson, *supra* note 8, at 120; Mohapatra, *supra* note 8, at 389–90.

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

86. Sara Elizabeth Richards, *Why I Froze My Eggs (And You Should Too)*, WALL ST. J. (May 3, 2013 7:16 PM), <http://www.wsj.com/articles/SB10001424127887323628004578458882165244260>.

87. Rosenblum *supra* note 10 (quoting SARA ELIZABETH RICHARDS, MOTHERHOOD, RESCHEDULED: THE NEW FRONTIER OF EGG FREEZING AND THE WOMEN WHO TRIED IT (2013) (stories about women who decided to freeze their eggs)).

2. Employer-Subsidized Egg Freezing Levels the Financial Playing Field

Employer-paid egg freezing helps to level an uneven financial playing field. “[T]he cost [of egg freezing] is prohibitively high for most women”⁸⁸ By subsidizing the high cost of the procedure, employers make egg freezing available to women who otherwise may not be able to afford it.⁸⁹ Women with limited skills and economic resources tend to put childbearing first; women who freeze eggs tend to be middle-class and college-educated.⁹⁰ 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.”⁹¹

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.”⁹² Women may experience a greater loss of earnings than men because women take more time away from work before and after childbearing.⁹³ Employer-paid egg freezing provides women broader access to reproductive technologies that allow delaying childbearing and thereby reduces their time away from the workforce at early stages in their careers when uninterrupted employment may be critical to advancement.⁹⁴ Thus, it levels the financial playing field and minimizes the “fertility penalty.”

3. Employer-Paid Egg Freezing Furthers the Public Policy of Protecting Childbearing Capacity

Public policy and state laws have been designed to protect maternal capabilities since the early twentieth century.⁹⁵ Women can bear children using donor eggs and sperm, but “[men cannot] reproduce without an egg source and/or gestator.”⁹⁶ Further, society benefits from protecting women’s capability to bear children.⁹⁷ At a fundamental level, egg freezing and other advanced reproductive technologies

88. Richards, *supra* note 86 (alteration in original).

89. See Carbone & Cahn, *supra* note 6, at 306 (“Egg freezing is only available to women who can afford to pay and who can make the choice to wait to have children.”).

90. *Id.* at 297.

91. *Id.* at 289.

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

93. See Parsons, *supra* note 35 (women who have children are more likely than men to take extensive time off and are at a disadvantage for promotions and raises).

94. See Sydell, *supra* note 11 (“[C]overing the cost of egg-freezing as an elective procedure could help keep some good female employees.”).

95. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–99 (1937) (state may regulate minimum wage paid to female employees to promote female health, safety, and general welfare); *Muller v. Oregon*, 208 U.S. 412, 420 (1908) (state may constitutionally limit working hours of women because of strong interest promoting maternal capabilities).

96. Robertson, *supra* note 8, at 135 (alteration in original).

97. See e.g., Carbone & Cahn, *supra* note 6, at 311–13.

enable the reproductive capacity of more women and for a longer period of their lives.⁹⁸ In today's workplace, this means that women can have it all—a healthy family *and* a robust career.

A further indication that public policy makers seek to preserve childbearing capacity as a social good is shown by recent action of the U.S. Defense Department, which began offering egg freezing to military families to help retain service members in 2016.⁹⁹ The Pentagon sees it as a means 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.¹⁰⁰ “Women who reach 10 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 counterparts.”¹⁰¹ The five-year pilot program costs an estimated \$150 million and will be offered through the military's health plan.¹⁰²

B. Disadvantages

1. Egg Freezing Programs May Impair Workplace Culture

The availability of employer-paid egg freezing may create a workplace culture that pressures women to delay childbearing to their detriment.¹⁰³ This is especially true if women perceive egg freezing as a requirement to remain competitive at work.¹⁰⁴ Specifically, executives and leaders in decision-making positions (the majority of whom are men) may suggest implicitly that women who delay childbearing by freezing eggs are more dedicated and ambitious and worthier of advancement.¹⁰⁵ To be viewed favorably, female workers may undergo the difficult procedure even if they had not previously planned to delay childbearing.¹⁰⁶

Moreover, employer-paid egg freezing can foster what legal ethics and health law professor Michele Goodwin refers to as the “double

98. *See id.* at 300.

99. Schmidt, *supra* note 15. The Pentagon also offers sperm freezing. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*; *see generally* *Combating Infertility During Military Service*, PATH2PARENTHOOD, <http://www.path2parenthood.org/library/handbooks-fact-sheets> (select *Combating Infertility During Military Service* download) (last visited Oct. 5, 2016) (discussing fertility treatments before and after military service).

103. *See* Goodwin, *supra* note 22, at 53 (“Decisions to postpone pregnancy . . . are not made by women but instead are forced by male-dominated hierarchical work institutions.”); *see also* Carbone & Cahn, *supra* note 6, at 310 (women will feel pressure to comply with terms traditionally imposed on men); Parsons, *supra* note 35 (discussing potential issues with employers providing egg freezing); Robertson, *supra* note 8, at 122–23 (women may feel as though they must freeze their eggs).

104. Robertson, *supra* note 8, at 122–23.

105. *See, e.g., id.* at 122–23; Parsons, *supra* note 35.

106. *See* Robertson, *supra* note 8, at 122–23.

bind,” in which women “believe they must choose between the pursuit of a career and early motherhood.”¹⁰⁷ Social pressure to freeze eggs may complicate that choice by creating interpersonal conflict or disruptive competition among female workers.¹⁰⁸ Thus, an employer-paid egg freezing program could undermine its ultimate objective of promoting gender parity.¹⁰⁹ Professor Goodwin cautions that “[egg-freezing] is not a replacement for equitable work policies and practices.”¹¹⁰

Within an employer-paid egg freezing program, workers may also view their frozen eggs as commodities and view egg freezing as another employee benefit, such as education or parking reimbursement.¹¹¹ A global reproductive market exists for donor eggs and sperm; currently, because of the difficult and risky process of egg harvesting and retrieval, the demand for donor eggs far exceeds the supply.¹¹² Some workers may take advantage of an employer-paid egg freezing program and freeze their eggs simply to “sell” them for profit.¹¹³ Worse yet, the workplace may evolve into its own egg micro-market, in which younger, more fertile, workers openly broker with older, less fertile workers to buy and sell eggs.¹¹⁴ This could involve negotiation of contracts, pricing, and the potential relinquishment of parental rights by egg donors.¹¹⁵ Employers could become entangled in disputes over the ownership, custody, and posthumous use of frozen eggs such as those that have already arisen between couples.¹¹⁶ Workplace culture and productivity problems are likely to follow.

107. Goodwin, *supra* note 22, at 2.

108. *Cf.* Robertson, *supra* note 8, at 122–23 (discussing the pressures employer-paid egg freezing will put on women); Rosenblum, *supra* 10.

109. Rosen, *supra* note 76.

110. Goodwin, *supra* note 22, at 54 (alteration in original).

111. *See* Robertson, *supra* note 8, at 124–25 (“Although their goal at the time of freezing is to reserve their own fertility, they will have to think of their eggs as possible future commodities. . .”).

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

113. *See* Robertson, *supra* note 8, at 124–25.

114. *See* Browne Lewis, “You Belong to Me”: *Unscrambling the Legal Ramifications of Recognizing a Property Right in Frozen Human Eggs*, 83 TENN. L. REV. 645, 657–61 (2016) (discussing women selling their eggs).

115. *Cf. id.* at 652–56 (discussing issues related to contracting a woman to act as a surrogate).

116. *See, e.g.*, York v. Jones, 717 F. Supp. 421, 422 (E.D. Va. 1989) (couple sued Virginia fertility clinic to transfer frozen embryo to California fertility clinic); Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1258 (Ariz. 2005) (plaintiffs asserted a wrongful death claim against clinic after the alleged negligent destruction of frozen embryos); *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008) (wife sought to get pregnant using stored frozen sperm of dead husband); *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (frozen embryo disposition agreements entered into at the time of in vitro fertilization are enforceable and binding, subject to the right of either party to change their mind about disposition); *In re C.K.G.*, 173 S.W.3d 714, 717–19 (Tenn. 2005) (unmarried couple disputed custody of triplets conceived with donor eggs);

2. Health Risks and Success Rates Are Unknown

Employers may question the wisdom of financing a medical procedure with unknown long-term health risks, questionable success rates, and little federal or state regulation.¹¹⁷ Important questions arise. What if clinical research ultimately shows that the stimulation drugs increase cancer risk? Who bears the psychological blame if an employee chooses to use eggs later in life, but they fail? Imagine the disbelief and betrayal homeowners might feel when, after paying property insurance for years, they file a claim and learn the policy was never valid. Similarly, employer-paid so-called baby or egg insurance programs offer no guarantees.¹¹⁸

While initial studies suggest that *in vitro* fertilization and other infertility treatments do not affect child development,¹¹⁹ there are too few longitudinal studies to evaluate long-term effects of ovarian stimulation medications on otherwise healthy women and their children.¹²⁰ Some studies have shown a correlation between egg stimulation drugs and cancer in fertility patients and fetuses.¹²¹ The new science of egg freezing does not yet offer reliable data regarding rates of successful pregnancies and live births after long-term egg freezing.¹²² “[O]f the fifty percent of 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.”¹²³

The federal government has done little to address this lack of data. The only major legislation intended to regulate the fertility clinic industry is the Fertility Clinic Success Rate and Certification Act (FCSCA) of 1992, which requires fertility clinics to report annual suc-

Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992) (divorced couple contested disposition of seven frozen embryos); *In re M.M.M.*, 428 S.W.3d 389, 392 (Tex. App. 2014) (father sought relinquishment of maternal rights and full custody of twins conceived with donor eggs); see also Lewis, *supra* note 114 (discussing property rights issues in frozen eggs); Judy Lynn Woodall, *From Where I Sit—Who Gets the Eggs?*, 49 Md. B.J. 36 (2016) (discussing various cases involving frozen eggs and embryos).

117. See, e.g., Carbone & Cahn, *supra* note 6, at 289 (“[F]ew long-term studies have been able to assess [egg freezing’s] medical risks.”); Mohapatra, *supra* note 8, at 393 (“[E]gg freezing practices in the United States are subject to few direct restrictions.”); Practice Committees, *supra* note 9, at 41–42 (recognizing that, while trials thus far have had positive results, there are still unknowns related to egg freezing).

118. See Robertson, *supra* note 8, at 116 (“Until more programs become adept at vitrification and thawing [eggs], *caveat frigidaire*.”).

119. Practice Committees, *supra* note 9, at 40; *Infertility Treatments Don’t Appear to Affect Children’s Development*, NAT’L INSTS. OF HEALTH, <https://www.nih.gov/news-events/nih-research-matters/infertility-treatments-dont-appear-affect-childrens-development> (last visited Oct. 25, 2016).

120. Practice Committees, *supra* note 9, at 41.

121. Goodwin, *supra* note 22, at 27–28.

122. Practice Committees, *supra* note 9, at 40, 41–42.

123. Robertson, *supra* note 8, at 115 (alteration in original).

cess rates to the Centers for Disease Control.¹²⁴ Beyond the FCSCA, there is little federal regulation of reproductive technology, including egg freezing.¹²⁵ When 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 [is] not yet sufficient data to recommend oocyte cryopreservation for the sole purpose of circumventing reproductive aging in healthy women.”¹²⁶ 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 are no data to support this application.¹²⁷

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

Employers offering egg freezing to employees could face a number of legal risks. These employers will inevitably gain personal information about employees that could affect employment decisions. Improper use of such information may give rise to legal claims, including privacy and tort claims¹²⁸ and Employee Retirement Income Security Act (ERISA) claims,¹²⁹ against employers. Moreover, discrimination claims may arise under the Pregnancy Discrimination Act (PDA), Americans with Disabilities Act (ADA), and Family and Medical Leave Act (FMLA).¹³⁰ Because egg freezing is relatively new to the

124. See Fertility Clinic Success Rate and Certification Act (FCSCA), 42 U.S.C. §§ 263a–263a-6 (2012) (requiring fertility clinics to report pregnancy success rates annually to the Centers for Disease Control); see also Goodwin, *supra* note 22, at 32 (Congress passed the FCSCA to promote assisted reproductive technologies, not regulate them).

125. See Carbone & Cahn, *supra* note 6, at 289.

126. Practice Committees, *supra* note 9, at 42 (alteration in original).

127. *Id.* at 41.

128. See, e.g., Genetic Information Nondiscrimination Act, 42 U.S.C. § 300gg-53 (2012) (prohibits health insurers from discriminating on the basis of genetic information); Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-6 (2012) (prohibits wrongful disclosure of individually identifiable health information); and state privacy tort law, RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977) (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 Article.

129. See 29 U.S.C. § 1021 (2012) (protects employee benefit rights and creates employer liability for failure to meet requirements of 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 covered health or welfare plan if it is included in a group health plan; see generally *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12–14 (1987) (discussing establishment of a “plan” under ERISA); *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (outlining four factors considered to determine whether welfare benefit structure is ERISA plan); see generally LEE POLK, 1 ERISA PRACTICE AND LITIGATION § 2:5 (2013). An in-depth analysis of these risks is outside the scope of this discussion.

130. See PDA, 42 U.S.C. § 2000(e)(k) (2012); ADA, 42 U.S.C. § 12112(b)(5)(A) (2012); FMLA, 29 U.S.C. §§ 2612(a)(1)(A)–(D), 2614(a)(1)(A), (B) (2012).

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.¹³¹ A court considering a discrimination claim related to employer-paid egg freezing would likely consider such cases as persuasive legal authority.

A. *Pregnancy Discrimination Act: Favoring Egg Freezing over Pregnancy*

Employer-paid egg freezing poses a risk of liability under the PDA. Under Title VII, it is unlawful for an employer to discriminate based on race, color, religion, sex, or national origin.¹³² The 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 . . ." ¹³³ The PDA uses a comparison framework in which "[c]ourts look for 'equal treatment' based on an evaluation of whether the employee claiming discrimination was treated less favorably in comparison to another employee who is 'similarly situated.'" ¹³⁴ The PDA states that employers must treat pregnant women "the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." ¹³⁵

Courts have generally agreed that the capacity to bear children affects only women¹³⁶ and that an "[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."¹³⁷

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

132. 42 U.S.C. § 2000e-2(a)(1) (2012).

133. *Id.* § 2000(e)(k).

134. 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).

135. 42 U.S.C. § 2000(e)(k); see also *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1344–45 (2015) (citing the PDA and stating pregnant employee's discrimination claim required disparate treatment analysis).

136. See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (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, 348 (2d Cir. 2003) (distinguishing facts from *Johnson Controls* and holding infertility is a gender-neutral condition not protected by Title VII); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679–80 (8th Cir. 1996) (holding the same).

137. Nichole Devries, *Conceiving Equality: Infertility-Related Illness Under the Pregnancy Discrimination Act*, 26 GA. ST. U. LAW. REV. 1361, 1378 (2010) (quoting the

Over the last two decades, courts have found cognizable sex discrimination claims under the PDA based on infertility and in vitro fertilization.¹³⁸ Employer policies and adverse employment actions related to infertility and in vitro fertilization can create litigation risks.

Egg freezing imposes burdens on women not imposed on men, implicating the PDA. The U.S. Supreme Court in 2015 addressed an employer policy that burdened pregnant workers more than non-pregnant ones.¹³⁹ In *Young v. United Parcel Service*, the employer denied a pregnant driver's accommodation request to reduce her lifting requirement from seventy pounds to twenty pounds.¹⁴⁰ 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.¹⁴¹ The Court vacated and remanded the lower courts' granting of summary judgment for the employer, ruling that (1) the employee showed that the employer accommodated non-pregnant workers while failing to accommodate pregnant employees; and (2) the plaintiff's claim could reach a jury by providing evidence demonstrating that the employer's policies imposed a significant burden on pregnant workers, while "the employer's legitimate non-discriminatory reasons were not sufficiently strong to justify the burden."¹⁴²

What courts consider a "significant burden" is yet to be determined.¹⁴³ In light of *Young*, Brian McDermott of Ogletree Deakins recommends that employers examine "any policies or programs that benefit non-pregnant workers but do not include pregnant workers."¹⁴⁴

For example, consider a hypothetical scenario about Izzy, Polly, and Ellie. Each are technical supervisors at Parity, Inc., a technology services company that recently started paying for egg freezing. Izzy and her husband have been trying to conceive for several years with no success with and 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

test for Title VII actions established in *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

138. See, e.g., *Hall v. Nalco Co.*, 534 F.3d 644, 645 (7th Cir. 2008); *Ingarra v. Ross Educ., LLC*, No. 13-CV-10882, 2014 WL 688185, at *1, *6 (E.D. Mich. Feb. 21, 2014); *Govori v. Goat Fifty, LLC*, No. 10 Civ. 8982 (DLC), 2011 WL 1197942, at *1, *4 (S.D.N.Y. Mar. 30, 2011).

139. *Young*, 135 U.S. at 1344.

140. *Id.*

141. *Id.* at 1347.

142. *Id.* at 1354 (internal quotations omitted).

143. See Brian McDermott, *Expert Q&A: Young v. UPS and Its Impact on Pregnancy Accommodation and Discrimination Claims*, PRAC. L. LAB & EMP. (Mar. 31, 2015).

144. *Id.*

company's new egg freezing benefit, hoping to use her frozen eggs after she has developed her career.

Here, Parity could be liable under the PDA: (1) if Parity were to pay \$20,000 for Ellie's egg freezing procedure but not for Izzy's infertility treatments, which are procedurally identical to egg freezing prior to in vitro fertilization; and (2) if Parity were to accommodate a different schedule for Ellie while she pursues the egg freezing procedure but does 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 employers could still be liable for PDA violations even if employees pay for their own egg freezing because liability for PDA violations does not depend on how egg freezing is funded. While this is true, employer-paid egg freezing may create additional pressures on employees, thereby adding conflict among egg freezing, non-egg freezing, and pregnant workers.

Proponents may also contend that egg freezing 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, while employees like Polly might be able to use the egg freezing benefit to postpone a second child. Also, other programs and benefits such as group health insurance, flextime, or telecommuting arguably offset the burden on infertile or pregnant workers. These arguments are valid if these benefits ameliorate the type of disparate burdens of concern to the Supreme Court in *Young*.¹⁴⁵

*B. Americans with Disabilities Act: Accommodating
Temporary Disability*

Employers paying for egg freezing should also be aware of potential liability under the ADA. The ADA, as amended in 2008, requires employers to provide reasonable accommodation to employees with a qualifying disability,¹⁴⁶ 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."¹⁴⁷ To determine if a disability exists, courts consider whether there is (1) a physical or mental impairment, (2) a substantial limitation, and (3) whether a major life activity is limited.¹⁴⁸ Congress intended the ADA's definition of "disability" to be

145. *Young*, 135 U.S. at 1354.

146. ADA, 42 U.S.C. § 12112(b)(5)(A) (2012).

147. *Id.* § 12102(1) (alteration in original).

148. *Id.*

construed broadly.¹⁴⁹ Under the ADA, a disabled plaintiff can establish claims of (1) disability discrimination in regard to terms and conditions of employment¹⁵⁰ or (2) the employer's failure to make reasonable accommodation.¹⁵¹

Ordinary pregnancy is generally not considered a disability under federal law, unless accompanied by a pregnancy-related medical condition.¹⁵² The Equal Employment Opportunity Commission (EEOC) issued guidance on pregnancy-related issues that states, "infertility 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."¹⁵³ After a settlement between a Hawaiian resort retailer and an employee harassed after seeking fertility treatments, the EEOC recently stated that, "[W]orkers who undergo fertility treatments should be treated like any other employee with a disability—with equal and careful consideration of reasonable accommodation requests."¹⁵⁴

Even prior to the 2008 amendment broadening the definition of "disability," courts held that infertility is a qualified disability under the ADA. In *LaPorta v. Wal-Mart Stores, Inc.*,¹⁵⁵ the employer denied a female pharmacist an alternate schedule and time off for in vitro fertilization procedures.¹⁵⁶ 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 limiting a major life activity: reproduction.¹⁵⁷

149. 29 C.F.R. § 1630.2(k)(2) (2016); *see also* Jonathan T. Hyman, *Infertility Is Fertile Ground for ADA Claims*, 19:1 LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL. 6 (Sept. 2015).

150. *See* 42 U.S.C. § 12112(b)(1) (2016).

151. *Id.* § 12112(b)(5)(A).

152. Hyman, *supra* note 149, at 6; *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, 113th Cong. § 2 (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.

153. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*. No. 915.003, 2015 WL 4162723, at *6 n.35 (June 25, 2015).

154. Hyman, *supra* note 149, at 6.

155. 163 F. Supp. 2d 758 (W.D. Mich. 2001).

156. *Id.* at 761–63.

157. *Id.* at 764, 766; *see also* 29 C.F.R. § 1630.2(h)(1) (2016) (Physical impairment includes any "anatomical loss affecting one or more body systems, such as . . . [the] reproductive [system].").

Also, because any physical impairment caused by the egg freezing procedure is typically temporary, it is important to note that a worker can be temporarily disabled. In *Summers v. Altarum Institute Corporation*,¹⁵⁸ a government contractor severely injured both legs and was unable to walk for seven months.¹⁵⁹ The Fourth Circuit held that “an impairment is not categorically excluded from being a disability simply because it is temporary,”¹⁶⁰ and “a sufficiently severe temporary impairment may constitute a disability.”¹⁶¹ Thus, physical impairments such as ovarian torsion, or OHSS, resulting from egg harvesting could qualify as disabilities under the ADA.

To illustrate, consider again Izzy, Polly, and Ellie 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 pregnancy-related illness. Ellie may also have a disability 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 lift no 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 lift with or without accommodation under the ADA. Under these circumstances, Ellie likely would qualify as disabled, and Parity would have to provide a reasonable accommodation.

Proponents of employer-paid egg freezing might argue that an employer’s obligation to provide reasonable accommodation to disabled workers does not depend on whether the employer or employee pays for the procedure. In other words, an employer must provide reasonable accommodation to an employee with a qualifying disability, regardless of whether it provides an egg freezing program. While this is true, an employer’s legal risk associated with ADA compliance increases with the decision to offer egg freezing. More employees will likely take advantage of this procedure if the employer pays. As more employees freeze their eggs, an employer increases the odds of employees having ADA-recognized temporary disabilities because egg freezing can cause temporary physical impairments.¹⁶² Egg freezing is one of few, if any, employee benefits that increase the potential

158. 740 F.3d 325 (4th Cir. 2014).

159. *Id.* at 327, 330.

160. *Id.* at 333.

161. *Id.* at 327.

162. *See supra* section II(B)(2).

for temporary disabilities among workers, and thus, the risk of legal liability.

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

Finally, employers offering an egg freezing 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) the need to care for one's own serious health condition, or (3) the need to care for the serious health condition of a family member.¹⁶³ 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 . . . [t]reatment 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."¹⁶⁴ FMLA-protected absences from work may be intermittent, such as when an employee needs time off for physician appointments or a surgical procedure.¹⁶⁵ It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any [FMLA] right"¹⁶⁶ or "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]."¹⁶⁷

Generally, elective procedures "are not serious health conditions unless continuing or inpatient care is required or unless complications develop."¹⁶⁸ However, pregnancy and prenatal care *are* considered serious health conditions requiring continuing treatment.¹⁶⁹ For example, infertility would qualify as a serious health condition if "the employee is incapacitated because of the condition or its treatment."¹⁷⁰ Because pregnancy, infertility, and egg freezing are so inextricably connected, employers that offer egg freezing violate the FMLA if they explicitly or implicitly disallow time-off for the procedure or for care of a spouse undergoing the procedure.

Revisit hypothetical employees Izzy, Polly, and Ellie 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

163. FMLA, 29 U.S.C. §§ 2612(a)(1)(A)–(D), 2614(a)(1)(A), (B) (2012).

164. 29 C.F.R. § 825.115(a)(2) (2016).

165. *Id.* § 825.120(a)(4).

166. 29 U.S.C. § 2615(a)(1) (2012) (alteration in original).

167. *Id.* § 2615(a)(2) (alteration in original).

168. 29 C.F.R. § 825.113(d).

169. *Id.* § 825.115(b).

170. Freeland Cooper, *Employee Fired After Failed Fertility Treatment Gets Day in Court*, 18:13 CAL. EMP'T L. LTR. 9 (2008).

would qualify for FMLA leave because both are serious health conditions. Ellie's egg freezing will also qualify for FMLA leave under certain circumstances. For instance, 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 Ellie job-protected leave while she cares for her own serious health condition.

The counterargument here would be similar to the counterargument under the ADA: that any additional burden created by employer-paid egg freezing is not significant enough to increase FMLA exposure. Further, while the prevalence of OHSS is unclear due to inconsistent reporting, only one in four women experience mild symptoms after egg retrieval, so most will not require additional time away from work. The potential increase in administrative burden to achieve FMLA compliance may not be reason enough to forego employer-paid egg freezing. As Parts 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 the potential for legal liability.

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

Proving discrimination claims on the basis of employer-paid egg freezing and pregnancy, disability, or job-protected leave is difficult. Employer-paid egg freezing itself does not automatically trigger legal liability, but may give rise to new sources of discrimination claims. If knowledge that a woman elected or declined to freeze her eggs influences an employment decision, an employee may have a prima facie discrimination case. Legal risk does not result just from offering an egg freezing program, but rather from lacking a thoughtfully designed plan under which the program is communicated, implemented, and administered.

An employer can mitigate its risk by including the egg freezing procedure within its group health insurance policy, thereby placing the administrative burden on a third party. The employer must still be mindful of potential health and welfare benefit plan liabilities.¹⁷¹ Unlike education reimbursement programs, egg freezing requires management of private health information.¹⁷² Such programs are best administered by an independent entity that can objectively and confidentially manage eligibility, payment, and expense reimburse-

171. See Emp. Benefits Sec. Admin., U.S. Dept. of Lab., *Understanding Your Fiduciary Responsibilities Under A Group Health Plan* 3 (2015) (explaining potential for limiting liability for employers under a group health insurance policy).

172. See Paller, *supra* note 85, at 1597 ("[Egg freezing] patients face the risks of state-of-the-art technologies that require a greater disclosure of information and warnings than is provided under basic informed consent statutes.").

ment. In fact, fourteen states “require insurers to either cover or offer coverage for infertility diagnosis and treatment,” some of which require the full cost of in vitro fertilization.¹⁷³ As advanced reproductive technologies become more mainstream, insurance companies will likely 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. Women engaged in the onerous egg freezing process are burdened with daily hormone injections that put them at risk for serious health conditions. While employer-paid egg freezing advances workplace gender parity, levels the financial playing field, and furthers the public policy of protecting maternal capacity, it clearly differs from other employee benefits, such as paid maternity leave or education reimbursement. Workplace culture issues are created by (1) 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 make employers pause before deciding to offer an egg freezing benefit.

If employers properly communicate, implement, and administer the benefit, employer-paid egg freezing could ameliorate workplace gender inequalities and enable women to overcome biological constraints to have both a family and a career. On the other hand, it may become just another trendy employee benefit that workers rarely use. In any case, reproductive medicine will surely advance, and its impact on the workplace will require employers to consider its legal, social, and ethical implications thoughtfully.

173. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2014), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx>; see also *State Infertility Insurance Laws*, AM. SOC'Y FOR REPROD. MED., <http://www.asrm.org/insurance.aspx> (last visited Oct. 27, 2016). The fourteen states are Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Texas, and West Virginia. *Id.* Montana's requirement has since been repealed. 2015 Mont. Laws ch. 63 § 35(1) (2015).