Subsidized Egg Freezing in Employment: Autonomy, Coercion, or Discrimination?

Ann C. McGinley

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: http://scholars.law.unlv.edu/facpub

Part of the Family Law Commons, Health Law and Policy Commons, and the Labor and Employment Law Commons

Recommended Citation


http://scholars.law.unlv.edu/facpub/1027

This Article is brought to you by the Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.
SUBSIDIZED EGG FREEZING IN EMPLOYMENT: AUTONOMY, COERCION, OR DISCRIMINATION?

BY
ANN C. McGINLEY

PREFACE

Mike Zimmer was a generous colleague and friend. His hard work as a kind mentor nourished the scholars around him and encouraged us all to grow. Mike left an indelible imprint on all of us who knew him, both personally and professionally. Because of Mike we are better scholars and better colleagues. Mike’s life work of clear, cogent, smart scholarship and teaching has influenced the interpretation of employment discrimination law in vital ways and will continue to do so. This article raises policy, ethical, and legal issues created by the application of reproductive technologies to workplace settings. I hope Mike would have found this an interesting think piece on these issues. I know it would have been illuminative to talk to him about the issues I have raised in the article. I regret that I did not have that opportunity.

William S. Boyd Professor of Law, University of Nevada, Las Vegas, Boyd School of Law. J.D. 1982, University of Pennsylvania. This article is dedicated to the memory of Mike Zimmer, a truly remarkable friend and colleague whose work inspired us all. We miss you, Mike! Thank you to Charlie Sullivan and Tim Glynn of Seton Hall Law School, and Tristin Green of the University of San Francisco School of Law, the organizers of this symposium, and Theresa Rizzo of Seton Hall, who planned the event, and to Marcia McCormick for her hard work editing this article, as well as to Marty Malin, and the editors of the EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL, and to the other participants in this symposium: Jason Bent, Susan Bisom-Rapp, Bill Corbett, Tim Glynn, Tristin Green, Wendy Greene, Marty Malin, Margaret Moses, Paul Secunda, Joe Seiner, Joe Slater, Charlie Sullivan, Rebecca Hanner White, Michael Zimmer, and Dianne Zimmerman. Thank you to David McClure and the Wiener-Rogers Law Library for research for this article. Thank you to Jeff Stempel for reading and making comments on this article. This article is also dedicated to my colleague, Leslie Griffin, who is recovering from a brutal attack. Thank you, Leslie, for talking about this article with me and best wishes for a full recovery!
I. INTRODUCTION: EGG FREEZING SUBSIDIES AS REINFORCEMENT OF MASCULINE WORKPLACES

In 2014, Apple and Facebook announced that they would provide up to $20,000 for female employees to freeze their eggs as an employment benefit. Since that date, a number of other companies have followed.¹ These companies provide to some female employees and dependents of male employees financial support to freeze their eggs and store them professionally with the intention of preserving

---

the women’s ability to reproduce in the future. These employers say they are offering egg freezing benefits in order to compete for highly qualified female employees; employers note that it was women who requested the benefit.² Young women, employers say, are concerned because their chances of conceiving a child as they age diminishes, and young women believe that egg freezing is a means of preserving their fertility until they are ready to reproduce.³

Apple’s and Facebook’s announcements raised mixed reviews. Some applauded the decision because they believe that egg freezing may offer to women more control over their reproductive choices.⁴ Others argued that the new benefit sends the wrong message to women and that encouraging good parenting by giving better parental leave and child care policies would be more beneficial to families.⁵ Others were concerned that this “benefit” applies only to professional or managerial-class women, but may not be helpful to women in working class jobs.⁶

The differing initial responses only begin to demonstrate how complex the decision to offer egg freezing as an employment benefit is and should be. There are issues with egg freezing itself. Practical concerns include the effectiveness, cost, and safety of the procedure for women and their future offspring. Financial support by employers of egg freezing raises questions about the benefits versus the risks of egg freezing, the financial costs, and the potential health and social costs to the individual women freezing their eggs. Moreover, an employer’s subsidy of egg freezing implicates women’s and men’s reproductive decisions, and raises concerns about whether this employment “benefit” promotes autonomy of young workers or subtly, or not so subtly, coerces their reproductive choices.

Employers’ subsidies of egg freezing have even broader social implications. Subsidies raise issues about the distribution of benefits

---

⁵ See Sydell, supra note 2.
to different classes of employees and which types of benefits are better for women, men, and families of diverse classes. Benefits such as flexible work schedules, sick and vacation leaves, health care, and retirement benefits vary greatly depending on the class of the employees. Highly-paid workers are much more likely than lowly-paid workers to have access to flexible schedules, paid family, sick, or short-term disability leave, and healthcare and retirement benefits.  

On an even larger scale, studying egg freezing subsidies provides a lens into the “brave new world” of the modern corporation and the way it shapes society through workplace norms and expectations. Much of contemporary corporate America reinforces a gendered structure of society and the family that links masculinity to the breadwinner ideal. While egg freezing may be an attempt to attract women to high-level jobs, it does not break down these gendered structures. In fact, it reinforces the masculine worker ideal by encouraging all-consuming loyalty and work hours from its management employees and sending the message to women and men that in order to succeed, they must treat work as their primary obligation and arrange their personal and family responsibilities around work, even to the extent of changing their own biology.

A number of articles in the popular press and a few law review articles have addressed some of these issues regarding the advisability of egg freezing, but no article has addressed the policy, medical, legal, and gendered implications of the workplace structure that already exists and how it is reinforced by offering egg freezing benefits.  

In essence, because workplaces are the only places where many Americans spend time and engage in conversation with others of different races and classes, they have the opportunity and ability to create a marketplace of ideas and values that enhance equality in

---

8. See generally ALDOUS HUXLEY, BRAVE NEW WORLD (2013) (novel illustrating a future fictionalized society in which the World Controllers have achieved harmony through genetic engineering and behavioral conditioning).
Despite this potential, many workplaces have become even more divided along class and gender lines than in the past. Moreover, employers’ economic and social power over workers’ lives due to the 2008 recession and the slow recovery following it has increased significantly. Many believe that publicly held corporations’ primary duty is to their stockholders with little responsibility to their employees and to society in general, but others advocate for corporate social responsibility to society in general and to their employees. Given their power over their employees, employers need to accept their social responsibility to consider all of their employees’ needs as well as those of the public before deciding whether to offer this benefit or other benefits that may be harmful to society. Moreover, if they decide to offer egg freezing, employers should do so with the least risk to society, their businesses, and their employees. If done improperly, employers may create serious difficulties for society, themselves, and their employees, with possible violations of employment discrimination laws including the Pregnancy Discrimination Act (PDA), the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act (ERISA).

This article attempts to anticipate the issues that egg freezing as an employment benefit will raise for society, employees, and


13. The Pregnancy Discrimination Act (PDA) is an amendment to the definitions of Title VII of the 1964 Civil Rights Act, which makes it illegal to discriminate based on sex. 42 U.S.C. § 2000e-2(a) (2012). The PDA makes it illegal to discriminate on the basis of pregnancy. Id. § 2000e(k).


employers. Part II introduces the reader to egg freezing, the process, cost, effectiveness, medical issues, and business considerations. Part III discusses the ethical, policy, and legal issues raised by offering egg freezing as an employment benefit and discusses how the masculine workplace continues to thrive in corporate America to the detriment of women, men, and families. Part IV concludes that rather than using egg freezing or other similar measures to attract female management employees, workplaces should be transformed to respect women, men, family, and personal values. The goal should not be to encourage employees to postpone childbearing by engaging in extraordinary measures to change their hormones but to recognize that all human beings – both highly- and lowly-paid employees – have needs outside of the workplace. Thus, employers should offer work hours, financial and scheduling support of family leave, childcare subsidies, and sick, vacation, and healthcare benefits.

II. EGG FREEZING AS A MEDICAL AND SOCIAL PROCEDURE

A. Why Egg Freezing? Why Now?

Women are born with all the eggs that they will have throughout their lifetime. As they age, women’s eggs die, and women’s fertility decreases gradually until they reach menopause. One study shows that by the time women reach age thirty, they have lost 88 percent of their eggs. A woman’s fertility drops from 86 percent at the age of twenty, to 52 percent at age thirty-five, to 36 percent at age forty, and to 5 percent at age forty-five. Moreover, eggs of older women decline in quality: they yield fewer live births. This phenomenon contrasts with men’s reproductive system. Although we are now learning that sperm of older men is associated with a higher incidence of some disabilities in fetuses, men, even as they age, can produce new sperm that can fertilize women’s eggs. Women have been warned repeatedly of their “biological clocks,” the biological fact that

17. Id.
18. Id.
women have a fairly short window to reproduce before their ability to do so declines. The constraints caused by women’s “biological clocks” are particularly problematic today because they clash with many women’s lifestyles, education, work goals, and needs. Women are increasingly more educated than their mothers and marry and/or settle down and raise children at much older ages than in the past, if they do so at all.

This story of women, marriage, and childbearing is much determined, however, by class and race. Middle class women attend college and earn graduate and professional degrees at a rate equal to or higher than that of men. Unlike past generations when middle class women married in their early twenties, most middle class women today wait to establish themselves in their careers and to find life partners. There are many accounts of women in their thirties who decide to delay childbearing. Some of these women want desperately to bear children of their own genetic material; others are not ready to decide that they will never have children. Either way, these women

21. Anna Magee, How Much Time is Really Left on Your Biological Clock?, TELEGRAPH (Nov. 23, 2015 6:00 AM), <http://www.telegraph.co.uk/women/health/how-much-time-is-really-left-on-your-biological-clock/>. Men do suffer loss of fertility as they age, but more slowly than women do. See David B. Dunson et al., Increased Infertility with Age in Men and Women, 103 OBSTETRICS & GYNECOLOGY 51 (2004).


23. The terms “middle class” and “working class” can be extremely variable. One can define class by occupation, education, and/or income. See Jack Metzgar, Politics and the American Class Vernacular, in NEW WORKING-CLASS STUDIES 189 (John Russo & Sherry Lee Linkon eds., 2005). Throughout this essay, I generally use the term “middle class” to denote those who have earned at least a college degree, who are well-paid, and who are in managerial and professional jobs in the workplace, but, of course, there are individuals who I would define as “middle class” by their occupational and income levels, no matter their education. I generally define “working class” as those who have not attained the occupational, income, and educational levels that those in the middle class have reached, but there are college graduates whose occupational and income levels may qualify them for the working class. “Working class” is not limited by race or sex in my definition. It can include lowly-paid blue-collar jobs, but it also can include pink-collar and other service jobs that are not paid well. Often I use the term “middle class” to refer to a specific sub-section of the middle class who are highly-paid professionals or managerial employees.


26. See generally LEHMANN-HAUPT, supra note 22; RICHARDS, supra note 22.

27. See generally LEHMANN-HAUPT, supra note 22; RICHARDS, supra note 22.
almost uniformly describe their desire to find a life partner with whom to raise their children; moreover, many say that they need to establish themselves in their careers before becoming mothers.\textsuperscript{28}

But the timetables and lifestyles of middle class women do not mirror those of working class women, white and of color, straight and gay. Naomi Cahn and June Carbone have demonstrated that there is a large difference between the lives of “red” families and “blue” families.\textsuperscript{29} Whereas women (white and of color) from middle class backgrounds generally marry and have their children later, white women from working class backgrounds are foregoing marriage in increasing numbers just as their African American counterparts have done for years.\textsuperscript{30} Consequently, much of the discussion concerning egg freezing seems to be directed almost exclusively at middle class women, and businesses seem to ignore the effects that these employment policies may have on working class women, who may need other types of family benefits.\textsuperscript{31} Trina Jones demonstrates that low-wage workers suffer compared to highly-paid workers with significantly fewer benefits. While 22 percent of highly-paid workers have paid family leave, only 5 percent of low-paid workers do.\textsuperscript{32} Employers and commentators also seem to forget about gay men who may hope to take advantage of the employment benefits with a surrogate who may not be covered by the employer’s policies. All of these issues need clear focus before an employer embarks on a policy and before our society sanctions such policies.

\textbf{B. What is Egg Freezing?}

It is important to understand the difference between a woman’s egg and a human embryo that is produced by \textit{in vitro} fertilization (IVF). For IVF, a woman takes hormones (hyperstimulation) so she produces many eggs (oocytes) in one month, and the doctor surgically

\begin{thebibliography}{9}
\bibitem{28} See generally \textsc{Richards}, supra note 22; \textsc{Rebecca Traister}, \textsc{All the Single Ladies} (2016).
\bibitem{29} See generally \textsc{Naomi Cahn \& June Carbone}, \textit{Red Families v. Blue Families: Legal Polarization and the Creation of Culture} (2010).
\bibitem{31} See generally Carbone \& Cahn, supra note 9.
\bibitem{32} Jones, \textit{supra} note 7, at 8.
\end{thebibliography}
SUBSIDIZED EGG FREEZING

removes the eggs and adds either the woman’s partner’s or a donor’s sperm to the eggs to create fertilized human embryos outside of the womb. If the woman does not have good eggs, she can buy donor eggs (which are either fresh or previously frozen) and have them fertilized in vitro with the sperm. In either case, once the embryos are created and are checked to assure their health and viability, a few of the embryos are implanted in the woman’s womb, while the defective embryos are discarded and the remaining viable embryos are frozen for future use. Some religious and ethical organizations oppose freezing of human embryos because these extra frozen embryos often are ultimately discarded. The Catholic Church, for example, disapproves of IVF because the Church teaches that the embryo is a human person upon fertilization. In fact, in 2004, the Italian government banned freezing of human embryos for religious reasons, and because of this ban, Italian doctors were the first to experiment with freezing women’s unfertilized eggs, rather than human embryos. Unlike human embryos, unfertilized human eggs, if discarded, do not raise the same ethical or religious issues.

There is no fertilization or sperm involved at the time of egg freezing. A woman uses hormones to stimulate egg production just as she would in preparation for IVF, but the doctor removes the eggs and freezes them unfertilized. The eggs are stored in a special deep freeze, just as the extra human embryos are stored after IVF. Later on, if the woman chooses to use her frozen eggs, the eggs are thawed and fertilized with sperm of the woman’s partner or a sperm donor.

using IVF, and a few of the embryos are implanted in the woman’s uterus. Women who freeze their eggs cannot use them unless they undergo IVF to fertilize the eggs and have the embryos implanted. Moreover, they will be charged for storage fees for the unfertilized eggs, for thawing of the unfertilized eggs, for IVF, and, if there are extra human embryos left over, for freezing and storage of the human embryos resulting from IVF that the woman does not use immediately.38

Freezing of unfertilized eggs has been more difficult technically than freezing of human embryos. The eggs are more fragile, and, historically, fewer eggs than embryos have survived the freezing and thawing process.39 In the earlier days of egg freezing, doctors used a slow method of freezing and thawing unfertilized eggs, whose survival rate was low compared to that of embryos that are implanted in the woman’s womb after being frozen and thawed. Especially during slow freezing of unfertilized eggs, ice crystals formed and broke down the eggs.40 More recently, doctors have used a “flash freezing” or “vitrification” process to freeze and thaw eggs, which yields higher survival rates for the eggs than the earlier slow freezing method.41 Some studies show similar pregnancy and birth rates today of unfertilized frozen eggs and of fresh eggs that are fertilized through IVF.42

1. Egg Freezing for Medical Purposes

Egg freezing or “oocyte cryopreservation” began as a potential solution to a medical problem near the end of the last century. Young women with cancer who underwent radiation and/or chemotherapy, expressed concern because these treatments often leave women sterile. Some women in this position had eggs extracted and fertilized through IVF by their husband’s or partner’s sperm to form human

41. Id.
42. James A. Grifo & Nicole Noyes, Delivery Rate Using Cryopreserved Oocytes Is Comparable to Conventional In Vitro Fertilization Using Fresh Oocytes: Potential Fertility Preservation for Female Cancer Patients, 93 FERTILITY & STERILITY 391, 394-96 (2010). One study found that if a woman freezes fifty eggs at age thirty-two, she will have about a 28 percent chance of getting pregnant when using them. Rettner, supra note 40.
embryos that their doctors froze and later implanted into the woman's womb after she finished her cancer treatments. Some women, however, did not have male partners at the time of the cancer diagnosis, while others were uncomfortable because of religious or ethical reasons with creating human embryos, many of which would later be discarded. These women chose instead to freeze their unfertilized eggs before undergoing cancer treatment. According to one source, the first human birth recorded from a frozen embryo (a fertilized egg) occurred in 1984; the first human birth from a frozen unfertilized egg that was thawed and later fertilized occurred in 1986.

2. Social Egg Freezing

Years later, doctors began to offer “social egg freezing” or “fertility preservation” to healthy women who were not ready to have children but who were concerned that because of their “biological clocks” they might lose the opportunity to have children who were genetically related to them. It is an employer’s subsidy of this process with which this article is concerned.

3. Medical, Financial, and Social Concerns About Egg Freezing

a. Success Rates

The American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART) concluded in 2012 that there were few randomized controlled studies, but that those that existed demonstrated similar fertility and pregnancy rates between the use of fresh and frozen eggs in IVF procedures. Moreover, there was no evidence in the studies of increased risk of congenital anomalies of babies produced from frozen embryos obtained from cryopreserved oocytes compared to those appearing in the general U.S. population. But ASRM and SART concluded that there was little applicable data, especially

45. Id. at 37.
46. See Richards, supra note 22, at 4-10.
47. See Practice Committees, supra note 44, at 39.
48. Id. at 40.
because the women studied were ordinarily under thirty years of age, and the unfertilized eggs were not frozen for more than a few years. Therefore, it was unclear that the data that on fertilization and pregnancy rates were generalizable to egg donors who were approaching forty years old or older when they froze their eggs and stored them frozen for longer periods of time. It is the older women, however, who typically use social egg freezing and who have their eggs frozen for years. The concern, then, was the effect that increased age of the egg donor and increased time that the eggs are frozen would have on the viability and health of frozen eggs of women using social egg freezing.

Large observation studies in Italy suggest that implantation and pregnancy rates may be lower when using frozen eggs rather than fresh eggs or frozen embryos to attempt to produce a normal pregnancy. Moreover, some studies suggest, according to ASRM and SART, that the success rates in fertilization and pregnancy may be lower with eggs from women with advanced maternal age. There is, moreover, no question that the quality of women’s eggs decreases with age.

In January 2013, ASRM and SART published a report that recommended that egg freezing no longer be categorized “experimental,” but the report limited this recommendation to medical egg freezing. The report concluded that there was sufficient evidence of the safety and effectiveness of the egg freezing procedure, and it is one of few options available for post puberty females who suffer from cancer and genetic anomalies to preserve their fertilization as they undergo treatment. Therefore, these organizations recommended that medical egg freezing be considered not experimental for this population, when combined with counseling. ASRM and SART had a different take on social egg freezing, which they believed was not yet justified by the experiments, and they did not advocate the use of egg freezing to defer child bearing in a person not suffering from cancer or other condition that
threatened her fertility. The Report stated that the “safety, efficacy, cost-effectiveness, and emotional risks of elective oocyte preservation (egg freezing) are insufficient to recommend elective oocyte preservation.”

ASRM and SART identified concerns that elective oocyte preservation may give false hope to women who seek to delay childbearing and may encourage delay of childbearing. They also expressed a reservation that the success rates for women in their later reproductive years, who are those most interested in egg freezing, were not high. Specifically, according to the committees, the success rates of women over the age of thirty-eight appeared to be “significantly lower” than those of younger women.

b. Medical Concerns

While the process is relatively safe and no longer considered experimental, there are some health risks to women associated with egg freezing, most of which are the same as those associated with IVF. The most serious problem is the possibility of ovarian hyperstimulation syndrome (OHSS), which can occur when a woman’s body responds too aggressively to the hormones administered to create multiple eggs and can cause swelling and painful ovaries, vomiting, nausea, risk of kidney failure, and, very rarely, death. Estimates of the occurrence rate of OHSS vary. While the more serious effects of hormone stimulation are rare, up to 25 percent of patients undergoing hormone stimulation experience some complications of hyperstimulation. Approximately 1 to 2 percent of patients receiving hormone stimulation have severe complications of OHSS. Another potential problem is the possibility of developing cancerous tumors. There is disagreement about this risk, but some studies have suggested an increased risk of ovarian cancer in women who had undergone hormone stimulation.

56. Id.
57. Id.
58. Id.
59. Id.
61. Carbone & Cahn, supra note 9, at 305.
63. Mary Anne Rossing et al., Ovarian Tumors in a Cohort of Infertile Women, 331 N.
Some might argue that hyperstimulation syndrome and potential cancer risks are not of sufficient concern; in fact, women have been risking OHSS, and potentially cancer, for years when taking hormones in preparation for IVF. The difference, however, is that women who go through hormone stimulation to prepare for IVF have already determined that they are not able to conceive naturally. They have already tried many different ways to conceive and have failed. Women who engage in social egg freezing, in contrast, do so in an effort to prevent a potential future loss of fertility. And, in fact, many women, especially the younger ones, who engage in egg freezing, will likely not need to resort to using their eggs and IVF. They will get pregnant naturally. Under these conditions, a voluntary decision to delay one’s childbearing but to attempt to preserve one’s fertility is risky both to a woman’s ability to conceive and to her health. Whether enduring the health risks is advisable under these conditions is not clear. Moreover, a woman’s decision to freeze her eggs may be influenced at least in part by working conditions that are not necessary to the success of the business.

**c. Financial Costs**

Financial cost estimates of egg freezing include the costs of doctors’ visits, drugs, retrieval of eggs, freezing, storage, thawing of eggs, and IVF and implantation if the woman ultimately uses the eggs. Although the ASRM a few years ago removed egg freezing from the “experimental” category, most insurance companies still do not pay for most of the costs of egg freezing. The cost of one round of retrieval varies between approximately $7,000 and $12,000, with drugs costing an additional $3,000. But many women go through multiple retrieval processes because they hope to have between twenty and thirty frozen eggs to assure that at least some of them will be viable.

---


Additional costs include annual storage of the frozen eggs, which runs between $300 and $1,000.\textsuperscript{66} If the woman ultimately uses her frozen eggs, she will pay the added costs of thawing her eggs, IVF, and implantation of the human embryos into the woman’s womb. The costs, therefore, of egg freezing often exceeds $50,000, financial costs that may have been avoided by bearing children a few years earlier or adopting children. Of course, women who delay childbearing may also save more money and reach a level in their careers before having children that allows them ultimately to earn more during their working years. Research demonstrates that women who wait until their late thirties or early forties to have their children earn about $7,500 more per year than their female counterparts who have their children sooner. Women in management who have young children in their forties earn up to $15,000 more than their counterparts who bear children earlier.\textsuperscript{67}

As an employment benefit, Apple, Facebook, and Intel set a maximum lifetime level of $20,000 for egg freezing.\textsuperscript{68} While this might not be a high amount, if used by all the women in the workplace, the costs could potentially rise significantly, and could affect salaries and the other benefits that an employer is willing to subsidize, benefits currently available to low-paid working women and men that would allow for better child and family care overall.

d. Social and Ethical Concerns: Marketing of Hope?

Despite ASRM and SART’s warnings, social egg freezing has gone mainstream for middle class women for the purpose of delaying childbearing. Since 2004, Christy Jones, Founder and CEO of Extend Fertility, operates a business whose purpose is to educate the public about egg freezing, educate women who are interested in egg freezing, and work with clinics to arrange women’s egg freezing procedures.\textsuperscript{69} Although many in the medical establishment find this business commodity approach distasteful, and many infertility specialists who perform IVF continue to discourage social egg


\textsuperscript{67}. \textit{See} Webber, \textit{ supra} note 4.

\textsuperscript{68}. \textit{Id}.

freezing because of their concern with the lack of data regarding the effectiveness of the process, young and middle aged women have responded with interest and have attended the marketing events held by individual infertility practices and by EggBanxx, a company that arranges financing for egg freezing.70

One major concern is the “commodity” or marketing approach that industry takes, which is similar to the way that plastic surgeons market Botox.71 Some believe that medicine should not be a commodity and that the business of egg freezing is just that: a money making business that is somewhat distasteful. The marketing events used by Extend Fertility and other organizations in the business are modeled more on “sales” and the promotion of egg freezing has the air of a party where champagne and other alcoholic drinks are served.72 Some report that the information shared with those who attend these “parties” is frightening to women who are already bombarded with social messages that they “can’t have it all,” and that they should seriously consider having their babies during their young fertile period.73 These companies, then, offer a way out for women who are vulnerable (after adding to the vulnerability themselves) because the women targeted are not quite ready to have children but are worried that they will never have children of their own genetic material. Some see this approach as coercive and unfair to women and actually as creating a potential incentive to delay childbearing until it is too late for women to conceive naturally.74 The percentages of women who successfully freeze eggs and ultimately have children as a result of this process is still unclear because not enough time has passed and there is insufficient data to consider the success rates of older women who have frozen eggs for the purpose of preserving their fertility.75 Some working in the field are concerned that egg


73. See Johnston & Zoll, supra note 71.


75. See Rosenblum, supra note 64 (noting that there is evidence of approximately 2,000 live births from the procedure but that the information is old and that doctors estimate that there have been about 5,000 live births from the procedure).
freezing may offer a false hope to many women who would otherwise be able to have babies if they did so earlier.76

On the other hand, many women find these objections condescending, sexist, and contrary to the ideal of women’s autonomy. They argue that egg freezing gives them the freedom to make their own reproductive choices and that they can understand and weigh the risks in their decisions.77 Many describe a deep sense of relief once they have frozen their eggs because they have done something to preserve their chances of having a baby of their own genetic material.78 This sense of relief gives women freedom to seek life partners without putting pressure on potential partners or on their relationships.79 There are numerous accounts of women in their late thirties who are not ready to have babies who decide ultimately to freeze their eggs to give themselves the possibility of more time.80 Whether this is a good result or not may depend on the perspective of the reader, but when an employer is involved in influencing a woman’s choice by subsidizing egg freezing in order to delay childbirth, and by implicitly encouraging employees not to engage currently in childbearing, important public policy issues arise. In essence, employers’ decisions to subsidize egg freezing serve not only as a financial incentive, but also signal to ambitious female employees that they should seriously consider delaying childbirth if they hope to achieve success in the employer’s workplace.

The accounts about women who delay childbirth raise the question of why women wait until their late thirties or even their mid-forties and fifties before giving birth. Women report that they wait to get to a more secure position in their careers; it also appears that many women who find egg freezing liberating do so because they hope to have children with a man with whom they will share the experience and with whom they will have a long-term relationship.81 This hope, which many middle class women continue to harbor, seems to have lost its lustre for working class white and black

76 See Practice Committees, supra note 44, at 41.
78 See e.g., RICHARDS, supra note 22, at 212.
79 See e.g., LEHMANN-HAUPT, supra note 22, at 228.
80 See generally, LEHMANN-HAUPT, supra note 22; RICHARDS, supra note 22.
81 See generally LEHMANN-HAUPT, supra note 22; RICHARDS, supra note 22. Of course, this may also be true for lesbians who are waiting for a woman with whom to share their lives, but I haven’t seen any accounts about lesbians who are waiting for “Ms. Right” to have children.
women. 82 Working class women tend to have babies without waiting to get married. 83 It is ironic that middle class women are the only ones who appear to continue to hold onto the dream of having a traditional nuclear family.

Professors Naomi Cahn and June Carbone explain, however, that these are not mere quick or frivolous decisions made by women, no matter their class affiliation. 84 In fact, women make economic decisions that take their class and employment situations into account. A middle class woman, Carbone and Cahn found, “must complete her education, hold a job, and avoid having [children] until she meets the right partner.” 85 Most men in this class seek women in the same class with the same values, education, and similar career experience. Many expect to mate with women who can share the economic burdens. 86 This is a change from earlier years when men in the professions or business generally married women with lower educational levels, less work ambition for themselves, and less ability to earn high salaries than their spouses.

At the same time that middle class women delay having children because they are working on their careers and searching for “Mr. Right,” their male contemporaries go through what sociologist Michael Kimmel describes as a new life stage – “Guyland.” 87 In this life stage – “Guyland,” middle class heterosexual young men from their mid-teens to age thirty or so live a relatively carefree life that often does not include interest in a serious romantic relationship. The primary loyalty is to the “guys” – male friends. It is, therefore, not unrealistic in this age range for women to conclude that there are no available men with whom to begin a long-term relationship. And, many middle-class men are not interested in serious relationships with women before the men reach age thirty or later. Therefore, women in their twenties and early thirties who search for a relationship in their own age group will likely find many men their age who are either too juvenile or merely uninterested in relationships. 88 Unfortunately for women, the pressure of a “ticking

82. See Carbone & Cahn, supra note 9, at 293-95.
83. See id. at 292.
84. See id. at 290-99.
85. Id. at 295.
86. Id. at 291.
88. Unlike in earlier days, the age gap between men and women in middle class marriages is small. See Carbone & Cahn, supra note 9, at 293. Many online sites claim that women don't
biological clock” exists for them and often not for their male counterparts.

This situation, along with the current expectation of young men that their life partners will earn significant salaries that are similar to their own encourages young women to work hard to develop their careers and to delay childbearing. This is not a bad thing, but these women are placed in a bind that may encourage them to delay a bit too long. Egg freezing is an apparent easy fix to this bind, but it is not necessarily the best solution for most middle class women. Pressures imposed, however, on these women come both from their interest in a traditional nuclear family and the from their employers’ sometimes unrealistic expectations that their employees should work long and hard hours that would make caring for a family very difficult.

The stakes are different for working class women. While college educated women are more likely to wait for financial and job security to have children and to plan their childbearing around their careers, working class women tend to give childbearing priority, both temporally and in importance. This is likely true because working class women work in environments that often require or encourage new mothers to move in and out of jobs. Carbone and Cahn report that while almost two-thirds of mothers with a college degree get some paid maternity leave, only about one-fifth of women without a high school degree receives any paid maternity leave. Perhaps even more shocking, Carbone and Cahn note that women lacking a high school education are four times more likely than those with a college degree to be fired either during their pregnancies or within twelve weeks of giving birth to their first child. Working class women generally take less time achieving their educational and career goals so they are ready earlier to have children. And, many of them conclude that the paucity of available men as lifetime partners should not destroy their ambitions or decision to have a family.

91. Carbone & Cahn, supra note 9, at 297.  
92. Carbone & Cahn, supra note 9, at 297.
e. Risk – Benefit Analysis

The question becomes, therefore, whether the risks of egg freezing outweigh its benefits. The risks, in addition to hyperstimulation syndrome, include the financial costs of the procedures, storage of eggs, thawing and future IVF, and the effect of creating false hopes: the possibility that women will put off attempting to get pregnant and rely too heavily on their frozen eggs for future pregnancies. The primary benefit that women who have undergone egg freezing report is the peace of mind that they have taken an important step to prevent a future loss of fertility.93 This benefit, in turn, women report, leads to their ability to relax in their personal relationships with potential partners. Some report that this new attitude may allow women to develop more satisfying long-term relationships because it relieves the pressure that is ordinarily caused by the “ticking biological clock.”94

III. EGG FREEZING AS AN EMPLOYMENT BENEFIT

A. Policy Considerations

1. Potential Coercion in Masculine Workplaces

Egg freezing as an employment benefit raises important policy concerns. First, there is a serious issue about whether paying for egg freezing constitutes a benefit for employees or whether it actually is a coercive means of assuring that female employees postpone childbearing. Even if employers do not intend to coerce or even encourage employees to freeze their eggs and to postpone childbearing, the very existence of egg freezing as a benefit creates the potential that supervisors and other employees will interpret the policy as coercive when combined with the employer’s behavior. This is true because of the power differential between an employer and its employees and the knowledge on women’s part that they must establish their careers before having children or they may not succeed.

It is important to understand that a large problem is the front-loaded nature of how professional and business careers develop. The first few years of a person’s career are extremely important to and

93. See Richards, supra note 22, at 241-44.
94. Id.
influential on the person’s success in his or her entire career. Front-loading did not conflict with family interests in the past when men alone competed in these jobs and professions, especially if they had women to run their homes and care for their children. But because child bearing is a relatively short window that occurs at about the same time as front-loading of career expectations, there is today a serious conflict for women, and to a lesser extent, for men who wish to be involved with their families. Thus, front loading or a probationary period is a gendered workplace structure that places excessive burdens on employees to work extremely hard and to succeed quickly in the first few years of their career. These burdens disparately affect women who hope to become mothers and, to a lesser extent, men who need or desire to be more active fathers than men have been traditionally in the past.

The possibility of coercion or perceived coercion may be particularly salient in high-driving workplaces similar to those that presently offer egg freezing as a benefit. In many of the high tech workplaces, there exists a hyper masculine environment that sees working long hours, and availability on demand of employees outside of the long working hours as a cultural and business necessity.\footnote{See, e.g., Jodi Kantor & David Streitfeld, Inside Amazon: Wrestling Big Ideas in a Bruising Workplace, N.Y. TIMES (Aug. 15, 2015), <http://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html?_r=1>; Deanna Fei, Amazon Isn’t the Problem: We Are, TIME (Aug. 27, 2015), <http://time.com/ 4011139/ amazon-mothers-workplace/> (describing a workplace that considers an employee’s illness a “burden.”).} Childbearing and childrearing are incompatible in a workplace that makes these demands regularly and also imposes even more demands on employees with little warning. These workplaces are built on the historical gendered model – one that assumes that the worker has a wife at home who does not work and who takes care of all of the worker’s needs outside of work.\footnote{See Ann C. McGinley, Masculinity at Work: Employment Discrimination Through a Different Lens 19-20 (2016); Joan C. Williams, Reshaping the Work Family Debate: Why Men and Class Matter (2010).} While this traditional arrangement has broken down significantly, these types of workplaces have not adapted to the reality that men and women in workplaces have lives and responsibilities outside of work. In fact, many of these workplaces consider family responsibilities intrusive upon work.\footnote{McGinley, supra note 96, at 19-22; Fei, supra note 95.}

Even today where it is common to find young people of both sexes building careers, many men and some women continue to define their identities as workers. This identity goes beyond the old
fashioned notion that men should be the breadwinner and women the caregiver, but the effect is similar. The high tech workplace is still a masculine world, a place where only the most masculine, in a white-collar sense of the term, will survive and thrive. For women who are pre-childbearing, there is an opportunity to thrive, but once women decide to have children, it is very difficult to compete with the men and women who have few outside responsibilities and with the men who have partners who are the primary caregivers in the family.

In these workplaces that encourage long hours and loyalty to work there is a pervasive masculine environment that harms most women and those men who do not conform to the firm’s definition of how men should behave. Work becomes an identity. And, that identity is a masculine one. Egg freezing is offered as an option that levels the playing field between men and women who are in the probationary years of their careers. But offering egg freezing as a benefit ignores the structural problems in the workplaces themselves and places the burdens on women to undergo invasive procedures that would likely not be necessary otherwise.

One problem with egg freezing as an employment benefit is that it sees work as the central, most important identity of life and relegates childbearing and childrearing to positions of secondary importance that can be postponed in order to accommodate work. This is an almost singularly American phenomenon. We, as Americans, are used to dividing the world between private and public spheres, and we place almost no responsibility on employers to subsidize or support our private realms. But with the public sphere – our work lives – growing in expectations and time expended, this

98. Men of different classes perform their masculinity in different ways. By “white-collar” masculinity, I refer to the form of masculinity that white-collar male workers are expected to, and do, perform in the workplace. This version of masculinity emphasizes the breadwinner role in the family, intense competition, and hard work. White-collar male workers’ identities are derived in large part from the work they do. White-collar masculinity includes performances of authoritarianism, paternalism, entrepreneurialism, informalism, and careerism. See McGinley, supra note 96, at 29-31 (citing David L. Collinson & Jeff Hearn, Naming Men as Men: Implications for Work, Organization, and Management, 1 GENDER, WORK, & ORG. 2, 2-22 (1994)).

99. For descriptions of a high tech workplace where employees work constantly and under stressful conditions, see Kantor & Streitfeld, supra note 95; Fei, supra note 95.

100. McGinley, supra note 96, at 160-61, 169-70.

101. See Jones supra note 7, at 6 (explaining that in Europe women generally receive between fourteen and twenty weeks of paid maternity leave, and both parents have additional paid and unpaid parental leave, which, combined, amounts to about one year of paid leave; the U.S. does not guarantee any paid family leave; Australia is the only other developed democracy that does not guarantee any paid family leave).
division is particularly problematic. In European countries where parental leave and childcare are subsidized, workers experience a much more balanced existence. Their working hours are shorter, the government offers more benefits, and employers grant more vacation time.\textsuperscript{102}

Of course, U.S. workers, especially those in the professions and other high powered jobs, need to maintain flexibility when working on certain projects, cases, and patients, but postponing one’s life outside of work for years in order to comply with an artificial work schedule – especially for women whose outside lives may depend on their biological processes – is seriously problematic. It is equally problematic if an employee already has a family and is encouraged to ignore the family on a regular basis because of work.

To the extent that egg freezing as an employment benefit discourages employers from seriously reconsidering their traditional gendered models of staffing and workload expectations, it avoids the profoundly important public policy discussion of how workplaces are structurally gendered and how workplaces should change. These discussions could lead to more equitable public policies such as paid family leave and subsidized childcare, as well as structural workplace changes that many businesses could and should adapt. Changes to staffing methods, expectations of employees, and overall means by which businesses serve their customers and clients could eliminate the pressure placed on workers to ignore their family and other personal obligations. If implemented, these changes would allow businesses to operate in ways that are more family-friendly. As Professors Cahn and Carbone state, with egg freezing, “[w]omen may gain greater access to the executive suite, but with even greater pressures to do so only by complying with the same terms traditionally imposed on men.”\textsuperscript{103}

Rather than change the workplace, egg freezing as an employment benefit encourages the employees, especially women, to change their own biology. But, ironically, even when a woman adapts to the workplace by putting off childbearing, the problem is merely postponed to another time in the woman’s career. Although in the short-term egg freezing may be beneficial to some women, in that it

\textsuperscript{102} \textit{Id.} (noting that the U.S. has the largest gap in happiness between parents and non-parents of the developed countries and that this gap can be explained by lack of family-friendly policies).

\textsuperscript{103} See Carbone & Cahn, \textit{supra} note 9, at 310.
postpones the childbearing decision and allows them to move up in their careers, it ultimately places extreme pressure on at least some women to sacrifice their lives and their health in order to fulfill the punishing schedule that some workplaces require of their employees. Reconfiguring the workplace rather than using egg freezing benefits to change individual employees is a much more effective and gender-neutral way to deal with these problems long-term. Women should not have to undergo the expense, the hormone treatments, the medical risks, the extraction of the eggs, and IVF in order to succeed in business.

2. Varying Perspectives Based on Class and Race

Generally, egg freezing is a technology used almost exclusively by privileged white women. This is partially because egg freezing is not ordinarily covered by insurance and those who freeze their eggs must have financial resources to pay for the procedures and the freezing and storage. Additionally, egg freezing has been advertised to and directed almost exclusively at middle class white women. Stereotypes of black women as hypersexual may discourage middle class black women from engaging in the procedure.

Carbone and Cahn explain that egg freezing has less appeal for working class women because employers are more likely to force working class women out of the workplace when they are pregnant or soon after they give birth, and working class women are more likely to cycle in and out of low paying jobs in different workplaces as a result of this pattern. Almost half of pregnancies in the U.S. (most in working class families) are unintended due in part to poor support for family planning and greater inequality. Planned pregnancies occurring later in life are associated with those who are well-educated and wealthier in the U.S. Therefore, egg freezing does not appeal to working class women, many of whom may already have children by the age that middle class women contemplate freezing their eggs. Carbone and Cahn state, “women in an inflexible and low-paying job are probably less likely to see the advantages of postponing

---

105. Id.
106. See Carbone & Cahn, supra note 9, at 297.
107. See id. at 304.
108. See id. at 301-02.
childbearing.” A serious policy concern about offering egg freezing as an employment benefit is that the U.S. is one of the only developed countries in the world without mandatory paid parental leave. In a 2011 study on the availability of parental leave, only three countries out of 190 surveyed have no paid parental leave: Papua New Guinea, Swaziland, and the United States. There is also seriously deficient financial support for public childcare for working class families in the U.S. While there is some financial support for the working poor, working class families often must rely on family members for childcare, with parents and grandparents trading off and working at different times. In fact, only eighteen percent of those children who are eligible for government-sponsored early childhood education may enroll, given the budget constraints of the program and the lack of slots. Even when children are admitted, few of the childcare facilities are open during the non-traditional hours that many low-income parents work, and, often, the care is sub-par.

For years, progressive organizations and politicians have argued that U.S. law should require paid parental leave and improved subsidized child care for families. The failure to have these benefits is a particular problem for working class families, given that women in middle class jobs are much more likely to have paid parental leave and the ability to afford good childcare. Meaningful parental and family leave and adequate child care for working class families are even more difficult, as many of the jobs working class women hold pay extremely low wages and do not have set schedules. Certainly, egg freezing is an issue that is far from these working class women’s priorities.

Employers who put significant resources into egg freezing may

109. Id. at 302.
110. CAROLINE FREDERICKSON, UNDER THE BUS: HOW WORKING WOMEN ARE BEING RUN OVER 160-61 (2015); see also Jones, supra note 7, at 6. (Australia is the only other developed country without paid parental leave).
111. FREDERICKSON, supra note 110, at 171.
112. Id. at 171-72.
113. Id. at 173-75.
115. Carbone & Cahn, supra note 9, at 297.
116. See DAN CLAWSON & NAOMI GERSTEL, UNEQUAL: GENDER, CLASS, AND FAMILY IN EMPLOYMENT SCHEDULES 83-85 (2014); WILLIAMS, supra note 96, at 41-45 (2010); McGinley & McClure, supra note 11.
exacerbate the severe inequalities that already exist and are growing between middle and working class women without addressing the underlying economic problems at work. A decision to pay for egg freezing may distract employers from supporting the very important family issues appropriate for all female and male workers: paid parental leave and quality, subsidized childcare, as well as health insurance and sick and vacation leave.

The masculine American workplace structure not only creates gendered results but it also establishes class and to some extent racial results. Masculine workplaces that emphasize that professional women workers should delay childbirth and that subsidize a woman’s decision to delay childbirth may actually widen the rift between middle class and working class women because, without improving upon the conditions of the working class women who suffer firings and low salaries as a result of childbirth and child care responsibilities, they reinforce the status of middle class female employees who delay having children and open an even wider gulf among women of different classes.

The class divide between working and middle class workers has grown significantly since 1973, and supporting egg freezing as an employment benefit may divide the country even further between the wealthy and the working class; some fear that middle class women and men will not support law reform proposals for paid leaves and subsidized child care because many management and professional workers already have paid parental leave benefits in their jobs and many can afford more expensive child care. Moreover, if employers spend significant money on support for egg freezing, they may have less interest in offering superior family leave and child care benefits that would benefit all families, not only highly paid female and male employees. Besides the employers’ unwillingness voluntarily to offer improved childcare and parental leave benefits to their employees, employers may also fail to support legislation that would require paid parental leave and government sponsored child and senior care that would benefit their working class employees. These fears may not be well founded in the situation of all companies considering or offering egg freezing, because some of the companies that offer egg freezing...
freezing apparently provide good parental leave and childcare support benefits to all employees. But the concern is that women will be even more divided along class lines than they already are: those in the middle class will use egg freezing and enjoy their own special benefits of paid parental leave and will have less of an incentive to support programs that soften the day-to-day lives of workers who may not have the same benefits or who see no advantage in postponing their childbearing years. Without the support of middle class women, it may, as a practical matter, be more difficult to make the important social changes that need to occur for most women of all classes.

B. Legal Issues Confronting Employers

As noted above, an employer’s decision to offer egg freezing as an employment benefit raises profound policy questions concerning the responsibilities workers have to work and family and society’s role in supporting modern families; it also creates questions about how employers should support families, which families to support, and how that support may affect other families. There is a serious question of whether egg freezing for social (and not medical) purposes is a societal good. Bringing employers into the mix raises these concerns to an even higher level. One question is whether employers, given their coercive power over employees, should place their thumbs on the scale to encourage delayed childbearing by offering these benefits and what the ultimate effect of employers’ exercise of their power will be. It appears that there will likely be even more inequality between middle class and working class families and between men and women. Another question is whether as a practical matter, employers will be able to dodge the legal bullets that may come their way if they offer egg freezing as a benefit.

Although a thorough discussion of legal challenges is beyond the scope of this article, a number of employment statutes come into focus when we consider egg freezing as employment benefit. The

---


122. For example, Trina Jones makes the case for a federal statute requiring that employers pay a minimum amount of benefits to all employees. See Jones, supra note 7, at 26. It may be that egg freezing benefits would lead to less solidarity on this important issue of minimum benefits for all women and men.
Pregnancy Discrimination Act\textsuperscript{123} and the sex discrimination ban of Title VII of the Civil Rights Act of 1964 (PDA, Title VII), the Religious Freedom Restoration Act,\textsuperscript{124} the Family and Medical Leave Act (FMLA)\textsuperscript{125} and the Employee Retirement Income Security Act (ERISA),\textsuperscript{126} all federal statutes, come into play in a number of the possible scenarios created by employer subsidization of egg freezing. Many state non-discrimination statutes and common law doctrines may also raise questions in the employment context. Issues range from whether the statutes prohibit discrimination based on pregnancy, infertility, and other medical conditions relating to egg freezing and IVF, to whether employees have legal rights to take leave for egg freezing, IVF, or egg freezing-related illnesses. This article does not answer all of these questions, but it focuses on the legal issues of coverage and access to egg freezing benefits as well as insurance coverage and adverse employment actions resulting from an employee’s use of IVF and other infertility treatments.

1. Coverage of and Access to Egg Freezing

If, in spite of the policy arguments made above, an employer decides to offer egg freezing as an employment benefit, there are a number of issues that it must consider to assure that employees, male and female, have access to egg freezing as an employment benefit. It seems clear that an employer must offer the benefit to both male and female employees if it hopes to avoid claims of sex-based discriminatory treatment.\textsuperscript{127} That is, female partners or wives of male employees who are covered by the male employees’ health care policy provided at the workplace should have equal access to egg freezing so that the male employees are treated equally to female employees.

Another issue would arise if a male employee asked the employer to cover the costs of freezing and storing his sperm because he hopes to have children one day and he is about to undergo an operation to remove his testicles due to testicular cancer. If the employer’s insurance refuses to cover the procedure and storage, but

\textsuperscript{125} 29 U.S.C. §§ 2601-54 (2012).
\textsuperscript{127} See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 675 (1983) (holding that a health insurance plan that covered pregnancy-related costs for female employees, but not for the spouses of male employees, violated Title VII and the PDA).
covers egg freezing for female employees, the male employee would likely have a good cause of action under Title VII. The same result would occur for female employees who seek to freeze their eggs for medical reasons.

An even thornier question would be presented by a gay male employee who asks the company to pay for freezing of his thirty-four year old sister’s eggs because he eventually wants to use them to produce a child with his husband’s sperm. If the sister is not a dependent on the gay male employee’s health insurance, the insurance company would likely deny the claim. However, such denial may illegally discriminate against the gay male employee because of his sex under Title VII.128 While the defendant would argue that sexual orientation discrimination is not prohibited by Title VII’s prohibition against sex discrimination and many courts would agree, other courts and the EEOC have taken the position that discrimination based on sexual orientation is sex discrimination prohibited by Title VII.129 Moreover, as a matter of policy, fairness, and equal treatment, especially given the constitutional right to marry,130 it would be unseemly and perhaps create strife in the workplace if an employer denied such benefits to the gay male employee while granting similar benefits to straight male, lesbian, and straight female employees.

An employer contemplating granting egg freezing benefits must also be aware that its subsidy of egg freezing benefits might be costly. To the extent the anti-discrimination and other laws are interpreted to require broad coverage of egg freezing and a significant portion of the workplace takes advantage of these benefits, an employer may choose not to cover other benefits that have wider appeal and greater societal benefits. These could include on-site daycare, childcare subsidies, paid leave and subsidies to care for aging parents or ill spouses, or better health insurance coverage that includes, for

128. The EEOC has made coverage of sexual orientation and gender identity under Title VII as a top priority. See Fact Sheet: Recent EEOC Litigation Regarding Title VII and LGBT-Related Discrimination, EEOC (updated July 8, 2016), <https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm>; see also EEOC v. Scott Med. Health Ctr., No. 16-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016) (denying defendant’s motion to dismiss and concluding that discrimination based on sexual orientation is sex discrimination under Title VII); Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015) (EEOC determination that discrimination based on sexual orientation is violative of Title VII).


example, 100 percent coverage for chemotherapy or other expensive treatments.

2. Sex- or Pregnancy- Based Differential Treatment

Title VII of the 1964 Civil Rights Act makes it illegal to discriminate against women or men because of their sex in the workplace. The PDA is an amendment to Title VII that makes it illegal to discriminate against a woman based on pregnancy or “pregnancy-related conditions” and requires employers to treat employees the same as other non-pregnant employees who are similar in their ability or inability to work. There should be little debate that an employer who offers egg freezing cannot discriminate against a pregnant employee because of her choice to become pregnant rather than to freeze her eggs and put off childbearing. If an employer chooses, however, to offer egg freezing as a benefit, it may inadvertently place itself in jeopardy of litigation for discrimination based on pregnancy. If employer policies and supervisor behavior encourage or pressure employees to freeze their eggs or treat more favorably employees who choose egg freezing over pregnancy, employers may be liable for pregnancy discrimination under Title VII. There is a particular risk of litigation if the supervisors make stereotyping remarks that are followed by an adverse employment action against a new mother or a pregnant woman.

There may also be some concern if the employer offers subsidies for egg freezing but does not offer benefits for IVF and other infertility treatments. The U.S. Patient Protection and Affordable Care Act (ACA) does not require employers to cover treatments for infertility, and although there are statutes in approximately fifteen states that require employers to cover infertility treatments, if an employer has a self-insured plan that offers employee benefits, ERISA will preempt the state statutes requiring coverage of infertility treatments. This would mean that an employer would not violate ERISA if it refused to cover infertility treatments such as IVF.

132. Id. § 2000e(k); see also, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).
in a self-insured plan; neither would any state mandate be enforceable against the employers.

That said, by creating incentives for employees to delay childbearing by offering egg freezing as a benefit, an employer that does not cover infertility treatments such as IVF may risk lawsuits alleging a violation of the PDA. In such a case, an employer might be liable for discriminating against those female employees who are trying to become pregnant in the near future. Such discrimination could conceivably be based on “pregnancy-related conditions.” It seems, therefore, that any employer that decides to offer egg freezing as an employment benefit should also offer coverage of other non-experimental fertility treatments such as IVF. And, because a woman who freezes her eggs may have to resort to IVF if she delays her childbearing until she is unable to get pregnant naturally, it would behoove the employer to offer IVF coverage as well.

An employee who chooses egg freezing and later uses IVF to become pregnant with her frozen eggs must also be treated equitably. There is, however, a conflict in the circuits as to whether discrimination based on an individual’s use of surgical procedures such as IVF violates the PDA. The better-analyzed case, Hall v Nalco, held that firing an employee for engaging in IFV is discrimination based on childbearing capacity, which violates the PDA.

An employee who chooses egg freezing and later uses IVF to become pregnant with her frozen eggs must also be treated equitably. There is, however, a conflict in the circuits as to whether discrimination based on an individual’s use of surgical procedures such as IVF violates the PDA. The better-analyzed case, Hall v Nalco, held that firing an employee for engaging in IFV is discrimination based on childbearing capacity, which violates the PDA.

135. Courts have found that it does not violate the PDA or other provisions of Title VII that prohibit sex discrimination to refuse to offer health insurance benefits for fertility treatments, but at least one court has held that it is illegal sex discrimination to fire an employee for undergoing IVF treatments. See Saks v. Franklin Covey, 316 F.3d 337, 346-48 (2d Cir. 2003) (refusing to require coverage of IVF); Krael v. Iowa Methodist Ctr., 95 F.3d 674, 679-80 (8th Cir. 1996) (refusing to require coverage of artificial insemination). But see Hall v. Nalco, 534 F.3d 664, 684-49 (7th Cir. 2008) (concluding that firing the plaintiff because she underwent IVF was illegal sex discrimination because of her childbearing capacity). The cases relating to IVF and other fertility treatments may be important to a woman who undergoes egg freezing because a woman who delays childbirth and relies on egg freezing must use IVF if she hopes to get pregnant with her frozen eggs later on. Furthermore, the rationale in Hall v. Nalco that sees discrimination based on childbearing capacity as violating Title VII should also apply to an employer’s refusal to pay for IVF or artificial insemination that a female employee undergoes. There is a possibility, however, that the employer would object to covering IVF if it has a religious objection to the process. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782-83 (2014), held that a closely held corporation had the right to refuse to cover contraception that violated the owner’s religious beliefs as protected by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §§ 2000bb-2000bb-4 (2012). Thus, if an owner has a religious reason for refusing to cover IVF, it would likely have an exemption under federal law. There are many state statutes that mirror and even go beyond the federal RFRA, and, therefore, some employers would be able to use these statutes as well as protection for their refusal to pay for IVF. See LESLIE C. GRIFFIN, LAW AND RELIGION: CASES AND MATERIALS ch. 5 (4th ed. 2017).

136. 534 F.3d at 644.
3. Family Leave Under the Family and Medical Leave Act

The FMLA may also offer protection to employees undergoing egg freezing, IVF, or other similar procedures if hyperstimulation causes a “serious health condition.” If the employer and employee are covered by the FMLA, the woman undergoing IVF will likely be able to take unpaid time off (or if her employer provides paid sick leave and she still has sick days, paid time off) under the FMLA,\(^{137}\) which allows for twelve weeks of unpaid leave for an illness of the worker or to care for one’s family member. The one problem with the FMLA is that not every woman will be covered by the Act. She has to have worked for 1250 hours for the business within the past twelve months and her employer must have fifty or more employees within a seventy-five mile range.\(^{138}\) And, even if the woman passes this threshold, if the leave is unpaid in her workplace, it may be financially infeasible for a woman to take much time off.

IV. CONCLUSION: REFORMING THE WORKPLACE INSTEAD OF WORKERS

Although many women supported the 2014 Apple and Facebook announcements that the companies planned to subsidize egg freezing for interested female employees, there are serious policy and legal concerns surrounding these decisions, especially if adopted by a larger percentage of companies in the future. Employers’ subsidies of egg freezing for female workers, while likely intended to create more egalitarian workforces, actually lead to greater gender inequality.

---

138. Id. § 2611(2)(a); 29 C.F.R. § 825.110 (2016). Under the FMLA, most employees who meet the twelve months and 1250 hours and who work for a covered employer are protected, but there is a small category of employees whose jobs are not protected by the FMLA. There is an exemption for restoring “certain highly compensated employees” (also referred to as “key employees”) to their position of employment (or equivalent position) under 29 U.S.C. § 2614(a) if the following conditions apply:
   (A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; (B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and (C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.
29 U.S.C. § 2614(b). A “highly compensated employee” is defined as “a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.” Id. § 2614(b)(2); 29 C.F.R. § 825.217; E. Gary Spitko, Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements, 43 U.C. DAVIS L. REV. 591, 638-40 (2009); Jennifer J. Chen, Denial of Reinstatement to “Key Employee” Under § 104(b) of Family and Medical Leave Act, 29 U.S.C.A. § 2614(b), 84 A.L.R. Fed. 2d 163 (2014).
Expecting female employees to freeze their eggs rather than to give birth at a time when they can do so naturally places pressure on women to alter their bodies chemically and surgically in order to fit into the workplace ideal. This ideal harkens back to the old-fashioned concept of man as breadwinner and places work over employees’ personal and private lives. It leads to an increased masculinization of workplaces that already expect undue loyalty and sacrifice in terms of time and effort from their employees, both men and women. In an era when young men and women hope to take equal shared responsibility for their families and to have fulfilling personal lives outside of work, egg freezing subsidies give employees the wrong message and may lead to coercion, perceived or real, and discrimination in the workplace.

Moreover, because egg freezing benefits are more attractive to highly paid employees than to those who are not, these subsidies will likely create less support for the programs needed by working class women and men. Employers should investigate the policies and practices that will move their workplaces to more equal, democratic spaces and grant to their employees enhanced salaries, family and parental leave, childcare subsidies, vacation time, and health care benefits. The true test of these benefits should be whether there is shared support for and use of the benefits among all employees.

In sum, female employees should not have to change their bodies or abandon their personal and family lives in order to keep up with male employees. Male employees should not have to work like automatons and ignore their families in order to succeed. The old breadwinner model was oppressive to men, who bore the exclusive financial burden of the family, and to women, who were given no options to do fulfilling work outside the home. New workplaces should generally not have a gender-identity: masculine ideals should not govern how the workers should be treated or perform their jobs. These ideals are outdated remnants of times when men and women worked in different spheres. Granting egg freezing as an employment benefit will take us backwards to a time where workplaces were explicitly unequal. Today, the workplace that can attract women and men to work will consider employees as persons who have lives outside of work.

This essay does not attempt to make a policy prescription for the masculine workplace. And, certainly, denying egg freezing benefits alone will not make workplaces more equal as to class and gender of
the workers, but I hope to begin a dialogue about the public policy effects of the decisions that employers make, often in an effort to create more equality at work. I urge others to consider working conditions in U.S. workplaces and the expectations and norms under which workers travail today and to make proposals for policy changes that will benefit all workers and their families. I suspect Mike Zimmer would have agreed.139