



Published: March 11, 2024

New Attention on IVF Benefits

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On February 16, 2024, the Alabama Supreme Court (“the Court”), the highest court in the state, ruled that the destruction of human embryos created through in vitro fertilization (“IVF”) violates the state’s Wrongful Death of a Minor Act (“the Act”). The Court determined that there is no exception to the Act based on an embryo’s location within or outside of a biological uterus. This has sparked a national discussion around IVF, which may impact employers offering fertility benefits.

While many fertility clinics in Alabama initially stopped IVF services, a recent legislative change may allow some IVF service providers to resume services. However, as discussed below, the legislative fix may not be enough to resume full services for all providers in the state.

Background

The plaintiffs in this case had embryos created through IVF being stored at a fertility clinic operated by the Center for Reproductive Medicine, P.C. (“the Center”). The embryos were artificially gestated and placed into a “cryogenic nursery.” A cryogenic nursery is a facility designed to keep extrauterine embryos alive at a fixed state of development, which is done by keeping them at an extremely low temperature.

In December 2020, a patient in the local hospital where the Center is located entered the cryogenic nursery and removed several embryos resulting in their destruction.

Lawsuit

The plaintiffs allege that the Center was obligated to keep the cryogenic nursery secured and monitored at all times and brought two lawsuits against the Center and the Hospital. Two sets of parents filed the first suit jointly, and the third set of parents filed the second suit. The suits claimed (1) wrongful death under the Act, and (2) common-law negligence claims if the court ruled an embryo was not a child.

The trial court granted the defendants’ motions to dismiss on the basis that the IVF embryos involved in the case did not meet the definition of a person or a child, and therefore could not give rise to a wrongful death claim. The Alabama Supreme Court overturned the dismissal finding that embryos created through IVF should be considered children, the Act can apply when embryos are destroyed, and the plaintiffs may continue with their lawsuit. Based on this finding, the Court ruled that the negligence claims were moot.

Why is this Important?

The most immediate impact of the Court's decision is that many fertility clinics in Alabama have halted their IVF services as they attempt to address the impact of this decision on their IVF practices. In particular, these clinics are concerned with the civil and potential criminal liability that their entities, physicians, and patients may face as a result of the Court's determination that the Act applies to IVF embryos.

On March 6, 2024, the governor signed into law a bill to restore access to IVF treatment in the state. The bill has a retroactive effect and provides for civil and criminal immunity for "death or damage" to an embryo as part of IVF services. However, some practitioners have expressed concern that the legislation may be ambiguous and does not go far enough to protect access to IVF. Some providers may not resume services until issues are further resolved.

Additionally, defendants in the lawsuit filed an application with the Court to rehear the case. Rehearing is not common and the Court may decide to deny the application.

Implications for Benefits

Many employers offer fertility benefits, including IVF, as part of a comprehensive benefits package. Some state insurance laws require coverage for certain fertility benefits. While there appear to be some immediate concerns for IVF providers and facilities in Alabama, at this time it is unclear how the Court's decision will impact employee benefits programs.

This case has ignited a national discussion around IVF with state and federal governments, considering legislation to protect IVF providers from liability. We are in a "wait and see" period as outcomes could range from additional protection for IVF providers in some states, with other states considering further regulation that may limit accessibility to IVF.

Employer Action

Employers offering fertility benefits within Alabama may want to discuss with their carriers or fertility services vendor to confirm the current state of fertility benefit availability. Some IVF providers may begin to resume services as a result of the state's legislative action. Employers may consider adding or enhancing travel benefits to allow employees continued access to fertility benefits if unavailable in the employee's state of residence.

As for employees residing outside Alabama, it's possible that other state governments (or courts) could take similar action with respect to IVF. As such, employers outside of Alabama should monitor developments at their state level. This issue is rapidly changing across the country as federal and state governments evaluate next steps. We will continue to monitor this topic to keep you informed as this issue develops.