

## ELECTIVE FERTILITY BENEFITS

Please find below our explanation regarding Carrot's position that elective fertility benefits are not a group health plan under ERISA.

Taxable fertility care (including elective egg freezing) is not an ERISA-covered benefit. There is no legal basis for treating any Carrot benefits other than infertility-related care as subject to ERISA. Only plans providing the following types of benefits, when provided to an employer's employees, meet the definition of an ERISA-covered employee welfare plan: medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services (or benefits described in 29 USC § 186(c) that are provided under a Taft-Hartley plan). (See ERISA § 3(1)) Clearly, Carrot benefits do not fit into any of these categories, with the exception of benefits for "medical care" within the meaning of ERISA. Merely including provisions that relate to other, non-ERISA covered benefits in the Carrot HRA Plan document would not make those benefits subject to ERISA.

The only Carrot benefits that meet the ERISA definition of an employee welfare benefit plan are infertility care expenses (i.e. fertility care in the case of a diagnosis of infertility), because those benefits are for "medical care" within the meaning of ERISA Section 733(a)(2). The definition of "medical care" under ERISA Section 733(a)(2), which is used to determine whether an employee welfare benefit plan is a "group health plan" for purposes of ERISA, is identical to the definition of "medical care" in Code section 213(d)(1). Under IRS guidance regarding the definition of "medical care" in Code section 213(d), only fertility-related care that is incurred to overcome a taxpayer's inability to have children is considered to be "medical care." (See 2021 IRS Publication 502, p. 7) To date, the IRS has not recognized elective fertility care, including elective egg freezing, as "medical care" within the meaning of Code section 213(d).

Because amounts that employees are reimbursed for taxable, elective fertility care are not expenses for "medical care" within the meaning of Code section 213(d), those benefits do not meet the identical definition of "medical care" under ERISA. If elective fertility care benefits were considered to be for "medical care" within the meaning of ERISA, reimbursements for that care would not be taxable; instead, amounts reimbursed for such fertility care would be

excludable under Code sections 105 and 106. Further, treating taxable fertility care benefits as providing “medical care” within the meaning of ERISA would result in the benefits being provided under a “group health plan” within the meaning of ERISA. (See ERISA § 733(a)) Accordingly, it would be inconsistent to treat taxable fertility care as “medical care”, i.e. provided under an ERISA group health plan, but not treat those benefits as subject to COBRA or the claims and appeals procedures applicable to group health plans under 29 CFR § 2560.503-1.

Finally, Carrot has received informal guidance from a Senior Counsel at the IRS regarding the Carrot benefits program. The IRS Senior Counsel opined that only fertility-related benefits provided in the case of a diagnosis of infertility are nontaxable as “medical care” within the meaning of Code section 213(d), and that taxable fertility expenses are not considered to be provided under a “group health plan” for purposes of ACA compliance.