

A Call to Arms: The Department of Defense's Egg Freezing Benefit Summons Increased Reporting Regulations

GLORIA Y. LIU*

"I don't want this egg freezing thing to add more fuel to the fire in terms of criticisms toward women's reproductive choices."

-Annie, Captain in the U.S. Air Force¹

"Cryopreservation is just good insurance."

-Ellen Smith, U.S. Army²

INTRODUCTION

Facebook and Apple offer it.³ Some investment banks offer it.⁴ Some law firms offer it.⁵ The Department of Defense ("DOD") now offers it.⁶ Oocyte cryopreservation, better known as egg freezing, is a benefit that is not only offered

Copyright © 2017 by Gloria Liu

* J.D., Duke University School of Law, May 2018; B.S. in Accounting and Finance, Drexel University, June 2014, *summa cum laude*. Special thanks to Professor Trina Jones for assistance in brainstorming topics and guidance with questions. The author would also like to thank Professor Sarah Baker and her "Scholarly Writing" classmates for their thoughtful and greatly appreciated insight and comments.

1. Natalie Lampert, *New Fertility Options for Female Soldiers*, THE ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/health/archive/2016/02/fertility-women-soldiers/471537/>.

2. Anna Medaris Miller, *Military Fertility: It's Complicated*, U.S. NEWS (Jan. 28, 2016, 3:42 PM), <http://health.usnews.com/health-news/health-wellness/articles/2016-01-28/military-fertility-its-complicated>.

3. Danielle Friedman, *Perk Up: Facebook and Apple Now Pay for Women to Freeze Eggs*, NBC (Oct. 14, 2014, 2:56 PM), <http://www.nbcnews.com/news/us-news/perk-facebook-apple-now-pay-women-freeze-eggs-n225011>.

4. Citigroup and JP Morgan Chase, two large investment banking institutions, provide coverage for preventative freezing. Microsoft also includes certain preventative coverage, and Google began the coverage option in 2015. See Jessica Bennett, *Company-Paid Egg Freezing Will Be the Great Equalizer*, TIME (updated Oct. 16, 2014 11:25 AM), <http://time.com/3509930/company-paid-egg-freezing-will-be-the-great-equalizer/>.

5. See Glenn Cohen, *Will Your Law Firm (or Other Employer) Pay for Your Egg Freezing? Should It?* (*Online Abortion and Reproductive Technology Symposium*), HARVARD LAW BILL OF HEALTH (April 21, 2013), <http://blogs.harvard.edu/billofhealth/2013/04/21/will-your-law-firm-or-other-employer-pay-for-your-egg-freezing-should-it-online-abortion-and-reproductive-technology-symposium/> ("At least one participant at the . . . bricks-in-mortar symposium reported to me that they knew of one Am Law 100 firm that will cover egg freezing for its lawyers.").

6. Michael S. Schmidt, *Pentagon to Offer Plan to Store Eggs and Sperm to Retain Young Troops*, N.Y. TIMES (Feb. 3, 2016), https://www.nytimes.com/2016/02/04/us/politics/pentagon-to-offer-plan-to-store-eggs-and-sperm-to-retain-young-troops.html?_r=1.

by private employers but now also offered by the government.⁷

Oocyte cryopreservation is a scientific method of freezing cells and tissues at sub-zero temperatures to stop all biologic activity and preserve the cells and tissues for future use.⁸ It was originally offered as a method to preserve fertility in female cancer patients by freezing eggs that would likely be destroyed through chemotherapy.⁹ The use of egg freezing expanded from the cancer patient niche into a much broader market in 2012 once the American Society of Reproductive Medicine (“ASRM”), a self-regulated professional medical society,¹⁰ no longer deemed the procedure to be “experimental.”¹¹ Two years later, Apple and Facebook jumped at the opportunity to publicly offer coverage of egg freezing in their health insurance plans to promote a female-friendly work environment.¹² Simultaneously, certain investment banking companies and law firms also implemented egg freezing policies in their employer-provided health plans.¹³

In January of 2016, Secretary of Defense Ashton B. Carter announced that the Pentagon would begin offering egg freezing coverage to active duty troops through a pilot program.¹⁴ The DOD expanded upon the “perks arms race”¹⁵ companies like Facebook and Apple launched in Silicon Valley to recruit and maintain employees. Like private sector companies, the DOD incorporated the employer-provided egg freezing benefit (“the benefit”) to recruit and retain more females in the military.¹⁶ The DOD had one different incentive to offer egg freezing as a benefit. 15.8% of female veterans who served in Operation Enduring Freedom or Operation Iraqi Freedom reported that they had experienced infertility.¹⁷

7. See *id.*

8. Practice Comm. Am. Soc’y of Reprod. Med. (“ASRM”) & the Soc’y for Assisted Reprod. Tech. (“SART”), *Mature Oocyte Cryopreservation: A Guideline*, 99 FERTILITY & STERILITY 37, 37 (2013), available at [http://www.fertstert.org/article/S0015-0282\(12\)02247-9/pdf](http://www.fertstert.org/article/S0015-0282(12)02247-9/pdf) [hereinafter Practice Committees].

9. Megan Garber, *Facebook and Apple Will Pay for Employees to Freeze Their Eggs*, THE ATLANTIC (Oct. 14, 2014), <https://www.theatlantic.com/technology/archive/2014/10/facebook-and-apple-will-pay-for-employees-to-freeze-their-eggs/381409/>.

10. Danielle A. Vera, *R-Egg-Ulation: A Call for Greater Regulation of the Big Business of Human Egg Harvesting*, 23 MICH. J. GENDER & L. 391, 411 (2016).

11. See Garber, *supra* note 9.

12. See Friedman, *supra* note 3.

13. See Bennett, *supra* note 4; Cohen, *supra* note 5.

14. See Schmidt, *supra* note 6. The Department of Defense also included a sperm freezing benefit in its initiatives for male military members. This Note will only focus on the egg freezing benefit offered for military women.

15. Christina Farr, *Silicon Valley Takes Benefits “Arms Race” to Health Care*, REUTERS (Oct. 2, 2014, 1:16 PM), <http://www.reuters.com/article/us-tech-benefits-idUSKCN0HR12F20141002>.

16. See *Defense Secretary Ashton Carter Remarks on the Military* (C-SPAN broadcast Nov. 18, 2015), available at <https://www.c-span.org/video/?400916-1/defense-secretary-ashton-carter-remarks-military> [hereinafter C-SPAN Broadcast]; see also Kime, *infra* note 82.

17. *Infertility in Iraq and Afghanistan Veterans*, U.S. DEP’T OF VETERANS AFFAIRS (July 22, 2016), <http://www.publichealth.va.gov/epidemiology/studies/new-generation/infertility.asp>. The report also included statistics on how 13.8% of male veterans experienced infertility. Although male infertility is an important topic, this Note will only focus on women and the egg freezing procedure.

Since only 8% of women in the general population report experiencing infertility,¹⁸ the DOD recognized the stark difference in risk for the fertility of military women compared to non-military women.

Operating within this unique environment, the DOD incorporated egg freezing as a benefit for military women in an initiatives program. The DOD may have intended the benefit to be an isolated decision that would not affect other companies or industries. Nevertheless, as one of the largest employers in the world,¹⁹ the DOD validated the private sector trend by offering the benefit to all active duty females in the military through a government program. The DOD's acceptance and endorsement of the procedure as it increases in mainstream popularity will lead to inevitable consequences—an increased trend and growth in other employers incorporating the benefit.²⁰

As egg freezing expands in the United States, both the benefits and harms of the procedure must be evaluated by employers. Employers frame egg freezing as a benefit, but potential health and policy risks accompany the procedure. Although harms exist, the DOD's expansion of the benefit through a government program will likely result in more companies following suit. The DOD's promotion of the benefit calls for increased regulation in the assisted reproductive technology (“ART”) field. Women's reproductive freedom and health may be inadequately protected because the current federal regulatory system governing egg freezing is virtually nonexistent. This Note will propose a change in current regulations by amending the reporting requirements for egg freezing. This Note will specifically propose adopting portions of the United Kingdom's regulations to mandate fertility clinics to provide data on egg freezing. The data should be included in a separate, easily comprehensible section within the national annual reports on the success rates of fertility clinics.

Part I of this Note will provide background on the process and cost of egg freezing and how the technology has changed and is still changing. Part I will then outline how the benefit has expanded among different employers, industries, and sectors, specifically highlighting the egg freezing policies of Facebook, Apple, and the DOD. Doctors saw a steady increase in the number of cancer-free women undergoing the egg freezing procedure after ASRM's announcement and the implementation of Facebook and Apple's policies.²¹

18. The general infertility population percentage has a range of up to 20%, depending on which definition of fertility is used. *See id.*

19. Niall McCarthy, *The World's Biggest Employers [Infographic]*, FORBES (June 23, 2015, 8:20 AM), <http://www.forbes.com/sites/niallmccarthy/2015/06/23/the-worlds-biggest-employers-infographic/#5d95197051d0>.

20. *See generally Cryopreservation Systems Market - Trends and Forecasts by Technavio*, YAHOO FINANCE (Apr. 21, 2017), <http://finance.yahoo.com/news/cryopreservation-systems-market-trends-forecasts-200300590.html>. The global cryopreservation systems market is expected to trend towards increased growth within the next few years. Technavio, a leading market research company with global coverage, released their latest report on the global cryopreservation systems market in April 2017. The report expects the global cryopreservation systems market to grow steadily at a compound annual growth rate (“CAGR”) of 13% by 2021. The report covers data from different companies within different industries.

21. *See* Garber, *supra* note 9.

This Note will emphasize the first government application of the procedure in a health plan in response to creative private sector benefits.

Part II will delve into a summary of the benefits, potential health harms, and policy risks of implementing the egg freezing benefit for women who decide to undergo the procedure. The importance of examining the benefits and harms of the procedure grows because the government's approval of the benefit could result in a wider acceptance of egg freezing as an advantage for women. The benefit has empowered women take control of their "biological fertility clock."²² On the other hand, the procedure may still cause potential physical and emotional health risks.²³ There is currently a lack of data to confirm the procedure is completely safe.²⁴ Furthermore, the benefit has been negatively portrayed as a policy that will only encourage women to delay motherhood to work longer and harder for their employers in the present.²⁵

Acknowledging the harms and policy risks of the benefit, Part III will then evaluate the protections in place for women when the benefit continues to inevitably expand. Part III will analyze the current regulatory framework surrounding the ART field. The ART field is known as the "Wild West," due to its lack of direct regulation.²⁶ In 1992, Congress passed the Fertility Clinic Success Rate and Certification Act ("FCSCA"), the only federal ART law in the United States.²⁷ Egg freezing is a very small segment within a sprawling, disordered ART regulatory framework and had not been directly regulated under the FCSCA until 2015.²⁸ Egg freezing is also governed by a piecemeal legal scheme within the ART framework that includes aspects related to tort law,²⁹ contract law, family law, inheritance law, and state regulations.³⁰ Part III will evaluate the issues related to the current federal ART regulatory scheme and how these problems will continue to affect egg freezing and the fertility clinics that offer the procedure.³¹

Part IV will then propose solutions to the current regulatory problems surrounding ART and egg freezing. The DOD's benefit calls for a regulatory

22. Jennifer Ludden, *Egg-freezing Puts The Biological Clock On Hold*, NPR (May 31, 2011, 12:01 AM), <http://www.npr.org/2011/05/31/136363039/egg-freezing-puts-the-biological-clock-on-hold>.

23. See *infra* Part II.B for discussion on physical and emotional harms of egg freezing.

24. See Practice Committees, *supra* note 8, at 41–42.

25. A large portion of women who freeze their eggs are single. These women encounter the same situation that all single women face in the workplace. See Jacoby, *infra* note 99 and accompanying text; Trina Jones, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253, 1266 (2014) (citing several articles and stories referencing how single workers often have more pressure to work and travel longer and harder in comparison to their married-with-kids counter-parts).

26. Judith Daar, *Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?*, 23 COLUM. J. GENDER & L. 257, 258 (2012).

27. 42 U.S.C. § 263a-1 (2012).

28. Reporting of Pregnancy Success Rates From Assisted Reproductive Technology (ART) Programs, 80 Fed. Reg. 51,811, 51,816 (Aug. 26, 2015) [hereinafter ART Fed Reg] (changing the definition of ART to include oocyte cryopreservation, in addition to embryo cryopreservation, which places egg freezing under the act).

29. See Alicia J. Paller, *A Chilling Experience: An Analysis of the Legal and Ethical Issues Surrounding Egg Freezing, and A Contractual Solution*, 99 MINN. L. REV. 1571, 1614 n.130 (2015).

30. See *id.* at 1585–86.

31. See Daar, *supra* note 26, at 260.

solution in the United States to inform potential consumers about the procedure. By understanding the United Kingdom’s approach to reporting on egg freezing, changes can be made to regulatory reporting requirements in the United States that will further the policy goals of the FCSCA—informing the public and protecting women and their future children.³² Finally, this Note will conclude with general remarks.

I. BACKGROUND

In the United States, there is no governmental body that regulates ART or egg freezing. The ASRM is a self-regulatory professional medical society that guides industry practices and procedures for reproductive medicine, including egg freezing.³³ Egg freezing was originally created for young female patients undergoing chemotherapy.³⁴ In 2008, the ASRM labeled the egg freezing procedure as “experimental.”³⁵ It then lifted the “experimental” label in 2012.³⁶ ASRM qualified the lifting of its label with a warning of a lack of “data on safety, efficacy, cost-effectiveness, and emotional risks” associated with egg freezing.³⁷ ASRM also warned against the widespread use of egg freezing because it may “give women false hope and encourage women to delay childbearing.”³⁸

Unsurprisingly, even with the qualification, lifting the “experimental” label led to a surge in cancer-free women electing to freeze their eggs.³⁹ The egg freezing procedure is a relatively new technology that is still evolving. This section will discuss the background of the procedure and provide detail on the specific benefit plans currently in place.

A. The Egg Freezing Procedure

The egg freezing process begins with a patient undergoing a hormone self-injection method similar to the *in vitro* fertilization (“IVF”) process.⁴⁰ The patient

32. See Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 54 n.195 (2005) (“FCSCA serves as the primary legislative response to assisted reproductive technology; Congress has been otherwise virtually silent on the issue.”).

33. See Vera, *supra* note 10.

34. See Kate Johnson, *Egg Freezing “Invaluable Option” for Cancer Patients*, MEDSCAPE (Oct. 31, 2014), <http://www.medscape.com/viewarticle/834180>.

35. See Charlotte Schubert, *Egg Freezing Enters Clinical Mainstream*, SCIENTIFIC AMERICAN (Oct. 23, 2012), <https://www.scientificamerican.com/article/egg-freezing-enters-clinical-mainstream/>.

36. See Bennett, *supra* note 4.

37. See Practice Committees, *supra* note 8, at 41.

38. *Id.*

39. See Laura Donnelly, *Number of Women Freezing Their Eggs Triples in Just Five Years*, TELEGRAPH (Mar. 23, 2016, 1:00 PM), <http://www.telegraph.co.uk/news/2016/03/23/number-of-women-freezing-their-eggs-triples-in-just-five-years/> (detailing how the ASRM press release likely played a substantial role in the increase in popularity of egg freezing since it publicized, for the first time, promising statistics about the recent success of vitrification); see also Paller, *supra* note 29, at 1585.

40. During the IVF process, a woman will first use an ovulation predictor kit to determine when she is ovulating. Once the doctor detects ovulation, the woman will be instructed to take certain fertility drugs by mouth. The first official day of the treatment cycle is the day the woman gets her

must also submit to a series of demanding blood tests and ultrasounds conducted over a period of several weeks.⁴¹ The hormone injections hyperstimulate a patient's ovaries to produce more eggs, since a female's natural cycle only releases one egg per month.⁴² An exceptional number of eggs produced in response to the hormones and stimulation process would be about six eggs, depending on the woman's age.⁴³ When the woman's eggs reach the appropriate size and number after the hormonal stimulation, a reproductive endocrinologist will use a needle to perform a transvaginal oocyte retrieval⁴⁴ to extract the eggs from the woman's ovaries while she is sedated.⁴⁵ The oocyte retrieval is classified as an invasive surgical procedure.⁴⁶

Following retrieval, the eggs are then immediately frozen using either the slow-freeze method or a flash-freeze method called vitrification.⁴⁷ The slow-freeze method was the original option for patients undergoing the egg freezing procedure.⁴⁸ Although this method works to freeze sperm and embryos, it is less successful for eggs.⁴⁹ Since eggs contain more water compared to sperm or embryos, the slow-freeze method produces many ice crystals during cryopreservation, which frequently results in damaged and unusable eggs when thawed.⁵⁰

period. The doctor will then perform blood work and a transvaginal ultrasound. If these tests turn out normal, the woman will begin injecting ovarian stimulation drugs. After learning how to self-inject the drugs at a clinic, a woman will typically inject herself anywhere from one to four shots a day in the stomach area. At a certain point, a woman's eggs will mature, which will signal that they can be retrieved. *See generally* Rachel Gurevich, *What to Expect Along the Path to Conceiving With IVF*, VERYWELL (Oct. 6, 2016), <https://www.verywell.com/understanding-ivf-treatment-step-by-step-1960200>.

41. Pamela Mahoney Tsigdinos, *The Sobering Facts About Egg Freezing That Nobody's Talking About*, WIRED (Oct. 24, 2014, 3:55 PM), <https://www.wired.com/2014/10/egg-freezing-risks/>.

42. *Id.*

43. *Id.*

44. Once a woman is ready for the procedure, she is given anesthesia. Using ultrasound guidance, the doctor inserts a needle through the vaginal wall and into the ovarian follicle. Outside the body, the other end of the needle attaches to a special suction device. After entering the follicle, the doctor gently applies suction to pull out follicular fluid containing eggs. Several follicles are targeted during one session. *See generally* *Transvaginal Oocyte Retrieval*, U.S. FERTILITY NETWORK, <http://usfertilitynetwork.com/services/in-vitro-fertilization/transvaginal-oocyte-retrieval/> (last visited May 3, 2017).

45. Joan Paley Galst, Ph.D., *What's a Young Woman to Do? The Pros and Cons of Social Egg-freezing*, FAMILY BUILDING GUIDE—2012, available at <http://www.bluetoad.com/article/What%E2%80%99s+Young+Woman+To+Do%3F+The+Pros+And+Cons+Of+Social+Egg+Freezing/930688/0/article.html> (last visited May 3, 2017).

46. *See* Tsigdinos, *supra* note 41.

47. *Egg Freezing FAQ's*, USC FERTILITY, <http://uscfertility.org/egg-freezing-faqs/> (last visited March 27, 2017).

48. Rachel Gurevich, *Vitrification of Eggs, Embryos, and Sperm How Does Vitrification Work + When It's Used + Egg Freezing to Extend Fertility*, VERYWELL (Feb. 16, 2016), <https://www.verywell.com/egg-freezing-and-vitrification-1960186>.

49. *Id.*

50. *Id.*

Vitrification is a modern flash-freeze method, which is so called because during the process the eggs transition to a vitreous, or “glass-like,” state.⁵¹ The retrieved eggs are placed in liquid nitrogen, which is potentially toxic to the egg and requires special care during the procedure.⁵² The liquid nitrogen solution instantaneously freezes the egg with minimal ice crystals.⁵³ The egg is then held in a tiny straw and stored in a freezer until thawed.⁵⁴

Months or years after the eggs of a patient have been frozen, a woman may decide to use her eggs to become pregnant. The woman will then have to undergo the IVF process which involves her frozen eggs being thawed, fertilized, and transferred to her uterus as embryos.⁵⁵ In the IVF process, a woman must again self-inject hormones and undergo blood tests and ultrasounds.⁵⁶ A 2016 ASRM study found that the chances of having at least one baby from eight frozen eggs through IVF was 41% in women who were younger than thirty-five when they froze their eggs.⁵⁷ The percentage decreases to 20% in women who were thirty-five or older when they froze their eggs.⁵⁸

Although IVF after egg freezing is an option, another study released in January of 2017 found that few women who freeze their eggs actually use them.⁵⁹ Of the 100 women surveyed in the study who had elected to freeze their eggs for non-medical reasons between 1999 and 2014, only 6% of the women had used their frozen eggs at the time of the survey.⁶⁰ Only 3% had given birth using the frozen eggs.⁶¹ The average age of the women was thirty-seven years old at the time they froze their eggs and forty years old at the time they completed the survey.⁶²

51. Rachel Gurevich, *Vitrification for Egg, Sperm, and Embryo Freezing*, VERYWELL (Oct. 3, 2017), <https://www.verywell.com/egg-freezing-and-vitrification-1960186>.

52. *Id.*

53. *Id.*

54. *Id.*

55. Joanna Mazewski, *Boutique Egg Freezing Clinics Are the Latest Trend for Those Looking to Delay Parenthood*, BABBLE (Feb. 2017), <https://www.babble.com/pregnancy/delaying-parenthood-boutique-egg-freezing-clinic/> (last visited October 22, 2017); *see also* Angelina Chapin, *Egg Freezing for Millennials: The Latest Start-up Trend*, N.Y. MAG. (Feb. 28, 2017, 11:17 AM), <http://nymag.com/thecut/2017/02/egg-freezing-clinics-for-millennials-a-new-start-up-trend.html>.

56. *See* Gurevich, *supra* note 40.

57. Rachael Rettner, *Most Women Who Freeze Their Eggs Never End Up Using Them*, HUFFINGTON POST (Jan. 23, 2017, 12:42 PM), http://www.huffingtonpost.com/entry/most-women-who-freeze-their-eggs-never-end-up-using-them_us_5886384de4b0e3a7356a7db5 (noting the study was conducted on women in Australia).

58. *Id.*

59. It is important to note that many women in the new study had only recently frozen their eggs—nearly half the women said they had frozen their eggs within the last two years, and this may, in part, explain why so few women reported using their eggs. The data is limited because only so many years have passed since the procedure was deemed non-experimental. *See id.*

60. Karin Hammarberg et al., *Reproductive Experiences of Women Who Cryopreserved Oocytes for Non-Medical Reasons*, 32 HUMAN REPROD. 575, 575 (Jan. 6, 2017), available at <https://academic.oup.com/humrep/article-abstract/32/3/575/2859463/Reproductive-experiences-of-women-who?papetoc>.

61. *Id.*

62. The survey results do not necessarily demonstrate a “low usage rate of frozen eggs.” It is quite possible many of the women surveyed simply have not reached the point of unfreezing their eggs

“When asked why they had [not] yet used their frozen eggs, most of the women said that they did [not] want to be a single parent, or that they wanted to try to conceive naturally.”⁶³

Women who accept the possible risks associated with egg freezing and undergo the procedure are actively choosing against thawing their frozen eggs to conceive naturally. The low usage rate of the frozen eggs emphasizes how women perceive the procedure as an immediate fertility insurance benefit. At the same time, these women may fail to recognize that they are giving up the opportunity to conceive naturally without ever having undergone a medical fertility procedure. Additionally, the focus on the immediate insurance benefit of egg freezing overshadows the future risk of lower success rates for viable births with frozen eggs and potential health risks of the procedure.

Given the low success rates of egg freezing and low usage rate of frozen eggs, the decision to undergo the process is not easy, especially considering the cost.⁶⁴ The egg freezing procedure typically costs between \$9,000 and \$20,000 per cycle.⁶⁵ The total costs fall within such a wide range because each woman experiences a varied level of risk and success rate associated with producing more eggs. Women are likely required to undergo “several cycles to have the suggested number of eggs frozen to optimize the chance of success.”⁶⁶ Additional costs include \$2,000 to \$4,000 per cycle for hormone injection drugs and \$500 or more per year for storage fees.⁶⁷ The cost estimate for egg freezing does not include the cost of IVF, which is required when a woman decides to use her frozen eggs. The cost of IVF ranges from \$8,000 to \$15,000 per cycle, with the national average costing around \$12,400.⁶⁸ Altogether, the process of freezing eggs, storing, and implanting the eggs through IVF has been estimated to cost more than \$40,000.⁶⁹

There is no requirement that health insurance covers the high cost of egg freezing.⁷⁰ Only a limited number of insurance plans in certain states cover the

yet. *See id.*

63. *See Rettner, supra* note 57.

64. The cost of egg freezing creates a large financial disparity that could discriminatorily affect different classes of women, which has been discussed in prior scholarship. The new government implementation of egg freezing could further affect class discrimination among women potentially undergoing the procedure, but this Note will not analyze this issue. *See* June Carbone & Naomi Cahn, *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*, 8 FIU L. REV. 287, 296 (2013) (“[E]gg freezing [can] perpetuat[e] non-supportive workplaces for middle class women. The lure of egg freezing for some women and its utter irrelevance for others is based on the economic realities of the workplace for men and women, along with cultural expectations surrounding men, women, marriage, and childbearing.”).

65. *See* Seema Mohapatra, *Using Egg Freezing to Extend the Biological Clock: Fertility Insurance or False Hope?*, 8 HARV. L. & POL’Y REV. 381, 386–87 (2014). *How Much Does Egg Freezing Cost?*, EGGSURANCE, <http://eggsurance.com/how-much-does-egg-freezing-cost/> (last visited Mar. 27, 2017).

66. Galst, *supra* note 45.

67. *See, e.g.,* Mohapatra, *supra* note 65 at 386.

68. *How Much Does IVF Cost?*, COSTHELPER, <http://health.costhelper.com/in-vitro-fertilization.html> (last visited Mar. 27, 2017).

69. Mohapatra, *supra* note 65, at 387.

70. “America’s Health Insurance Plans hasn’t surveyed insurers specifically about egg-freezing coverage, says Susan Pisano, a spokesperson for the trade group. However, she said her understanding

high cost of IVF.⁷¹ Therefore, the egg freezing benefit is a creative solution for companies to recruit and retain female employees by covering the costs of one possible ART procedure for women in the workplace.

B. Current Employee Benefit Plans

Facebook and Apple were the first companies in Silicon Valley to offer payment for employees to freeze their eggs for non-medical reasons.⁷² Facebook's policy began in October 2014 under the company's surrogacy benefit.⁷³ Facebook's benefit covers costs up to \$20,000 and would also cover employees' spouses.⁷⁴ Apple's policy began in January of 2015 under the company's fertility benefit.⁷⁵ Similarly, Apple's benefit covers costs up to \$20,000 and employees' spouses.⁷⁶

After conducting an interview with Rachel Lo, a former Engineering Program Manager on Hardware Product Design at Apple, she believed Apple's fertility benefit only covered egg freezing and did not cover IVF.⁷⁷ Rachel did not believe there were any other conditional requirements for employees to use Apple's fertility benefit, but she was also not aware of anyone who had taken advantage of the benefit during the time she was at the company from 2014 to 2016.⁷⁸

is that many plans cover egg freezing when there's a diagnosed fertility problem or when an individual is at risk for infertility because of treatments like radiation therapy or chemotherapy. Coverage for non-medical reasons is much less common, Pisano says." Michelle Andrews, *Few Employers Cover Egg Freezing For Women With Cancer*, NPR (Dec. 16, 2014, 8:22 AM), <http://www.npr.org/sections/health-shots/2014/12/16/371009911/few-employers-cover-egg-freezing-for-women-with-cancer>.

71. Only fifteen states require insurance coverage for either infertility diagnosis or treatment. Thirteen of those states have laws that require insurers to cover infertility treatment. The states that have such coverage are Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Texas, and West Virginia. See *State Laws Related to Insurance Coverage for Infertility Treatment*, NCSL (June 1, 2014), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx>.

72. See Friedman, *supra* note 3.

73. *Id.*

74. Kelly Phillips Erb, *Apple Seeds Perk Wars, Adds Egg Freezing As Employee Benefit*, FORBES (Oct. 17, 2014), <https://www.forbes.com/sites/kellyphillipserb/2014/10/17/apple-seeds-perk-wars-adds-egg-freezing-as-employee-benefit/#5e6a3e3e174d>.

75. *Id.*

76. *Id.*

77. Telephone Interview with Rachel Lo, Engineering Program Manager on Hardware Product Design, Apple, Inc. (Apr. 11, 2017).

78. *Id.*

The egg freezing benefit may have seemed like just another weapon in the “perks arm race” of Silicon Valley, but the benefit did not stop with Facebook and Apple.⁷⁹ In December of 2015, Secretary of Defense Ashton B. Carter announced that the new year would bring an end to restrictions on women in the U.S. military serving in combat positions.⁸⁰ The move opened as many as 220,000 jobs previously unavailable to female soldiers.⁸¹

With the expansion of jobs to females in the military, Carter shortly followed with another announcement in January of 2016. The Pentagon would begin offering egg freezing coverage to active duty troops through a \$150 million pilot program.⁸² When announcing the benefit, Carter emphasized that “for women who are midgrade officers and enlisted personnel, [the] benefit [would] demonstrate that [the DOD] understand[s] the demands upon them and want[s] to help them balance commitments to force and family.”⁸³ Carter further stressed: “We are not Google. We are not Wal-Mart. We’re war fighters, [. . .] But that doesn’t mean we should not be challenging ourselves just like the private sector. To modernize our workplace and workforce, to retain and attract the top talent we need, so that our force can remain the best for future generations.”⁸⁴

The benefit would be part of a series of measures incorporated into the DOD’s Force of the Future Initiative, instituted with the main incentive to recruit and maintain female employees.⁸⁵ The specific egg freezing benefit would “be offered to any service member who request[ed] it[,] as well as troops anticipating a deployment.”⁸⁶ “[T]he two-year pilot program [would] cover the cost of freezing

79. See Farr, *supra* note 15.

80. Andrew Tilghman, *All Combat Jobs Open to Women in the Military*, MILITARY TIMES (Dec. 3, 2015), <http://www.militarytimes.com/story/military/pentagon/2015/12/03/carter-telling-military-open-all-combat-jobs-women/76720656/>.

81. Prior to the end of 2015, women were precluded in some areas of the military, such as Army Rangers and Green Berets, Navy SEALs, Marine Corps infantry, and Air Force para-jumpers. Women were also precluded from driving tanks, firing mortars, operating machine gunnery, firing support reconnaissance, and leading infantry soldiers into combat. With Carter’s announcement, these positions and activities opened to women. See *id.*

82. See, e.g., Charlotte Alter, *Pentagon Offers Egg-Freezing, But What If Women Are Drafted?*, TIME (Feb. 4, 2016), <http://time.com/4207779/egg-freezing-pentagon-army-draft-women/> (updated Feb. 5, 2016, 12:19 PM); Patricia Kime, *Military’s New Fertility Benefit Will Let Troops Freeze Their Sperm and Eggs*, MILITARY TIMES (Jan. 29, 2016), <http://www.militarytimes.com/story/military/benefits/health-care/2016/01/29/militarys-new-fertility-benefit-let-troops-freeze-their-sperm-and-eggs/79511918/>; Lampert, *supra* note 1.

83. See Schmidt, *supra* note 6.

84. Marisa Taylor, *US Military to Cover Costs of Egg and Sperm Freezing*, ALJAZEERA AMERICA (Feb. 5, 2016, 4:45 PM), <http://america.aljazeera.com/articles/2016/2/5/military-to-cover-cost-of-egg-and-sperm-freezing.html>.

85. See U.S. DEP’T OF DEF., *Fact Sheet: Building the Second Link to the Force of the Future Strengthening Comprehensive Family Benefits*, (2015) available at http://www.af.mil/Portals/1/documents/Fact_Sheet_Tranche_2_FOTF_FINAL.pdf (last visited May 3, 2017). The Force of the Future Initiative also included other family-friendly workplace benefits: increased maternity leave from six to twelve weeks; increased paternity leave from ten to fourteen days; extended day-care hours; expanded adoption leave; and lactation rooms to be installed at more than 3,600 bases.

86. See Kime, *supra* note 82.

eggs through Tricare[.]” the military’s civilian health benefits program.⁸⁷ Tricare does not cover IVF or artificial insemination, which would be an added cost for military women who decide to use their frozen eggs.⁸⁸ Once the two-year “test program is complete, the DOD will assess its impact, including cost and recruiting and retention benefits[.]”⁸⁹ With this information, the DOD will decide whether to “renew the program or [to] allow service members to pay out[-]of[-]pocket for continued storage” of their eggs.⁹⁰

When deciding which benefits to add to the initiative, the DOD mainly referenced workplace data and studies from the private sector.⁹¹ Carter even referenced Sheryl Sandberg in his announcement.⁹² The DOD also took several surveys of women working in different areas of the military.⁹³ The surveys indicated the egg freezing benefit was a common interest among military women.⁹⁴ The direct comparison with private sector benefits and use of similar data show the DOD is acknowledging the private sector is moving in the right direction. By offering similar benefits, like egg freezing, the DOD is affirming private employers’ actions.

By incorporating the benefit in a government program, there will be future consequences. The DOD’s affirmation of the benefit expands egg freezing outside the private technology sector into the health plan of one of the largest employers in the world. Before more companies begin to follow in the DOD’s footsteps, employers must analyze the harms and risks of the procedure in addition to the benefits.

II. EGG FREEZING POLICY OVERVIEW

As the popularity of egg freezing increases among women, private companies and government entities that begin to implement the benefit must analyze the advantages and disadvantages of the procedure. This section will summarize the benefits of egg freezing in the daily lives of women, as well as in the workplace. This section will then highlight the physical and emotional harms women who freeze their eggs may experience and examine the specific harms that could result in the workplace if an egg freezing policy is implemented.

A. Benefits of Egg Freezing

Egg freezing has steadily gained momentum in the market. The technology provides several benefits for women, including reproductive flexibility and workplace balance in the present and potentially in the future.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See C-SPAN Broadcast, *supra* note 16.

92. *Id.*

93. *Id.*

94. *Id.*

In 2004, Extend Fertility was the first U.S. company that expanded egg freezing beyond a method to preserve reproductive potential.⁹⁵ Extend Fertility began advertising egg freezing as a lifestyle choice.⁹⁶ The company emphasized how the technology would extend a woman's average fertility window,⁹⁷ acting as a form of insurance.⁹⁸ By potentially expanding her fertility window, a woman can literally buy more time within her personal life and career—whether it is to become financially secure and stable enough to raise children or to find the perfect partner.

For example, a woman who has found a partner and is steadily gaining success in her career may be a “Clock-Watcher.”⁹⁹ She still may not have decided whether she wants children in her life. The woman may be paralyzed by indecision of how a child will affect her current life and career.¹⁰⁰ At the same time, the woman recognizes that her fertility window will expire at a certain point.¹⁰¹ Her biological clock may continue to tick and function to “shift her psychological motivations and actual behaviors to facilitate utilizing remaining fertility.”¹⁰² Consequently, a woman could decide to freeze her eggs.

On the other hand, a woman may still be looking for a partner or have recently undergone a breakup and feels the societal pressure to freeze her eggs to “check the box.”¹⁰³ The women undergoing the procedure for this reason are steadily increasing in percentage.¹⁰⁴ By making an active reproductive decision to freeze her eggs, a woman feels empowered.¹⁰⁵ Based on a recent study, a majority of women share their egg freezing decision with friends and family.¹⁰⁶ By sharing her actions, a woman who takes control of her fertility and freezes her eggs may

95. Jennifer Ludden, *Nudging Young Women To Think About Fertility*, NPR (May 31, 2011), <http://www.npr.org/2011/05/31/136401095/nudging-young-women-to-think-about-fertility>.

96. *Id.*

97. *Id.*

98. See Ludden, *The Biological Clock*, *supra* note 22.

99. Corrie Pikul, *The Clock-Watcher*, ELLE (Feb. 7, 2011), <http://www.elle.com/life-love/sex-relationships/advice/a13076/clock-watcher-baby-lust/>; see also Sarah Jacoby, *This Is What Makes Bachelorette Kaitlyn Bristowe's Fertility Decision Unusual*, REFINERY29 (Mar. 22, 2017, 3:50 PM), <http://www.refinery29.com/2017/03/146540/freezing-eggs-fertility-relationships-kaitlyn-bristowe>. Freezing eggs while in a committed relationship is less common: “[L]ess than five percent [of women freezing their eggs] are . . . engaged, married, or in very committed relationships.”

100. *Id.*

101. *Id.*

102. *Id.*

103. Sarah Elizabeth Richards, *The Agony of the Undecided: Does Egg Freezing Help Women Know if They Want Kids?*, HUFFINGTON POST (Aug. 8, 2013, 4:39 PM), http://www.huffingtonpost.com/sarah-elizabeth-richards/does-egg-freezing-help-women-know-if-they-want-kids_b_3727885.html.

104. See Lara Naaman, *Now That Everyone's Freezing Their Eggs . . . Should You?*, GLAMOUR (Mar. 20, 2013, 5:00 AM), <http://www.glamour.com/health-fitness/2013/03/now-that-everyones-freezing-their-eggs-should-you>.

105. Brooke Hodes-Wertz et al., *What Do Reproductive-Age Women who Undergo Oocyte Cryopreservation Think about the Process as a Means to Preserve Fertility?*, 100 FERTILITY & STERILITY 1343, 1345 (2013), available at [http://www.fertstert.org/article/S0015-0282\(13\)00980-1/pdf](http://www.fertstert.org/article/S0015-0282(13)00980-1/pdf).

106. Lisa Schuman et al., *Women Pursuing Non-Medical Oocyte Cryopreservation Share Information About Their Treatment With Family and Friends*, 97 FERTILITY & STERILITY S12, S12, S13 (2012), available at [http://www.fertstert.org/article/S0015-0282\(12\)00052-0/pdf](http://www.fertstert.org/article/S0015-0282(12)00052-0/pdf).

feel less cultural pressure to have children early and more relaxed about the future.¹⁰⁷ These emotional benefits for a woman who decides to freeze her eggs may eclipse the low potential success rates of a live birth from the procedure.

Employers have capitalized on this sense of empowerment by offering to pay for the cost of egg freezing through health insurance to recruit and maintain female employees. Facebook and Apple not only implemented the benefit to promote reproductive choice but also claimed the benefit would help equalize women in the workplace.¹⁰⁸ The egg freezing benefit would finally allow women to have it all—a career, marriage, and a family—at whatever time women wanted.¹⁰⁹

The DOD further validated the advantages of egg freezing by incorporating the benefit into a government program. Although women surveyed in the military were supportive of the egg freezing benefit, there are still risks and harms to all women who undergo the procedure. These risks and harms must be evaluated in conjunction with the benefits before an employer implements an egg freezing policy.

B. Physical and Emotional Harms of Egg Freezing

Although egg freezing has some advantages for women, it also poses considerable risks to a woman's physical and mental health. Since the ASRM only recently lifted the "experimental" label on egg freezing in 2012 with qualifications,¹¹⁰ there is a lack of long-term data on fertility success rates and health information tracking women who inject hormones and undergo egg retrieval.¹¹¹ Since the women who originally undertook the procedure were cancer patients, the data is even sparser when evaluating the risks for women who are healthy and decide to freeze their eggs for non-medical reasons.¹¹²

First, there are few studies that have been conducted that consider the long-term effects and consequences on a woman's physical health after freezing her eggs.¹¹³ A woman who decides to freeze her eggs will potentially have to undergo hormone injections for ovarian stimulation twice—once to retrieve the eggs and once to use the thawed eggs for IVF. A major risk of injecting hormones to increase the stimulation of egg production in the ovaries is the development of Ovarian Hyperstimulation Syndrome ("OHSS"), which in extreme cases can be life-threatening.¹¹⁴ Approximately one-quarter of women who undergo ovarian stimulation will exhibit OHSS, with symptoms that may range from mild nausea

107. *Id.*

108. See Bennett, *supra* note 4.

109. Anne-Marie Slaughter, *Why Women Still Can't Have It All*, THE ATLANTIC (June 13, 2012, 10:15 AM), <https://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/> ("I recommend establishing yourself in your career first but still trying to have kids before you are 35—or else freeze your eggs . . .").

110. See Garber, *supra* note 9.

111. See Tsigdinos, *supra* note 41.

112. *Id.*

113. See Practice Committees, *supra* note 8, at 40.

114. Mayo Clinic Staff, *Ovarian Hyperstimulation Syndrome*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/ovarian-hyperstimulation-syndrome-ohss/home/ovc-20263580> (last updated Aug. 3, 2017).

to blood clots and kidney failure.¹¹⁵ There have also been studies that ovarian stimulation may increase the risk of ovarian cancer, especially for borderline ovarian tumors.¹¹⁶ Patients choosing to undergo egg freezing, an invasive surgical procedure, also face the general risks and symptoms involved when having surgery.¹¹⁷

From beginning to end, the physical harms accompanying egg freezing are immense. The risks include developing OHSS after retrieving and implanting the eggs, as well as developing other general symptoms from undergoing two invasive surgical procedures while sedated.¹¹⁸

Second, the lack of information on egg freezing could create a false hope for women who expect to become pregnant later in life. The benefit could undermine the employer targeted efforts to create a family-friendly work environment.¹¹⁹ The longer a woman waits to freeze her eggs, the less likely the eggs will result in a live birth. For example, a twenty-five year old woman has about a 12.4% chance of two frozen eggs leading to a live birth.¹²⁰ The percentage decreases to 5.4% for a woman who is thirty-eight years old and 4.1% for a woman who is forty-two years old.¹²¹ A recent meta-analysis showed that to have a roughly comparable live birth success rate using fresh eggs, a woman must thaw six viable eggs frozen at the age of twenty-five.¹²² Considering the average age of non-medical egg freezing customers in the U.S. is around thirty-seven years old,¹²³ these statistics become more disheartening.¹²⁴

115. See, e.g., Dorothy E. Roberts, *The Social Context of Oncofertility*, 61 DEPAUL L. REV. 777, 788–89 (2012); Richard Scott Lucidi, *Ovarian Hyperstimulation Syndrome*, MEDSCAPE (Feb. 18, 2016), <http://emedicine.medscape.com/article/1343572-overview-a5>.

116. See F.E. Van Leewuen et al., *Risk of Borderline and Invasive Ovarian Tumours after Ovarian Stimulation for In Vitro Fertilization in a Large Dutch Cohort*, 26 HUM. REPROD. 3456, 3456 (2011).

117. Jennifer Whitlock, *Understanding the Risks Involved When Having Surgery*, VERYWELL (June 23, 2016), <https://www.verywell.com/understanding-the-risks-involved-when-having-surgery-3156959>.

118. See *id.*; Mayo Clinic Staff, *supra* note 114.

119. See Carbone & Cahn, *supra* note 64, at 300.

120. Aylin Pelin Cil, Heejung Bang & Kutluk Oktay, *Age-Specific Probability of Live Birth with Oocyte Cryopreservation: An Individual Patient Data Meta-Analysis*, 100 FERTILITY AND STERILITY 492, 497 (2013), available at [http://www.fertstert.org/article/S0015-0282\(13\)00519-0/pdf](http://www.fertstert.org/article/S0015-0282(13)00519-0/pdf).

121. *Id.*

122. The success rate of six viable, thawed eggs of women who froze their eggs at the age of twenty-five is 31.3%. See Vanessa Gruben, *Freezing as Freedom? A Regulatory Approach to Elective Egg Freezing and Women's Reproductive Autonomy*, 54 ALBERTA L. REV. 753, 756 (2017) (discussing egg freezing regulation in Ontario, Canada and how it should be amended to protect more women undergoing the procedure).

123. Ali L. Nicolette, *Empty Benefits: Employer-Sponsored Oocyte Cryopreservation and Potential for Employment Discrimination*, 27 HASTINGS WOMEN'S L.J. 341, 348 (2016).

124. SART NATIONAL SUMMARY REPORT (2014), available at https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0#help (last visited May 3, 2017) (reporting “the treatment burden to the patient (the number of cycles) as well as the best outcome (delivery of a healthy child) by tracking outcomes over time for an individual, accounting for both fresh and frozen embryo transfers”) [hereinafter 2014 SART Report]; see also Caroline Praderio, *There's a Dark Side to Egg Freezing that No One is Talking About*, INSIDER.COM (Mar. 22, 2017, 4:49 PM), <http://www.thisinsider.com/egg-freezing-failure-risks-2017-3>.

In a 2016 study published by Shady Grove, the nation's largest fertility center, of 1,283 thawed eggs, only fifty-one resulted in viable pregnancies.¹²⁵ Although freezing more eggs at a woman's reproductive age¹²⁶ may increase the likelihood of success, the costs of freezing and storing more eggs over a longer period of time make this option financially impossible for some women.¹²⁷ As a result, the extensive advertising of egg freezing benefits could instill a false hope that creates an emotional toll on a woman's mental health when reconciling expectations and actual results after undergoing a physically demanding medical procedure.¹²⁸

C. Workplace Harms of Egg Freezing

Women and employers must scrutinize the effects of egg freezing even more carefully within the workplace context. Initially, the egg freezing benefit appears to be exactly that—a benefit. Nevertheless, that benefit may ultimately result in adverse effects within the workplace.

The egg freezing policy could pressure women to delay motherhood. The pressure could create a perverse incentive for employers to keep women working.¹²⁹ A woman who wants to appear more favorably to her superiors may decide to freeze her eggs to show her dedication to her job. Her actions may disadvantage other women who still decide to become pregnant mid-career while the egg freezing policy is available in the workplace. The employer may be more accommodating to a woman if she freezes her eggs, because the woman may work longer, without disruption, for the employer in the future. In comparison, the employer may be less accommodating to a woman while she is pregnant and likely to go on maternity leave.

125. Fifty-one viable pregnancies out of 1,283 thawed frozen eggs is about a 4% success rate. See PR Rocket, *Reproductive Endocrinologist, Shruti Malik, M.D. from Shady Grove Fertility Opens Up about Egg Freezing, from a Personal and Professional Point of View*, PRESS RELEASE ROCKET (Mar. 21, 2017), <http://www.pressreleaserocket.net/reproductive-endocrinologist-shruti-malik-m-d-from-shady-grove-fertility-opens-up-about-egg-freezing-from-a-personal-and-professional-point-of-view/> (last visited May 3, 2017).

126. The medical definition of a woman's reproductive age are the years of life between menarche and menopause. The WHO defines this age range from 15 to 44 years old, with the adult reproductive age being 20 to 59 years old. Women's Health, WORLD HEALTH ORGANIZATION (Sept. 2013), <http://www.who.int/mediacentre/factsheets/fs334/en/> (last visited May 3, 2017).

127. See Carbone & Cahn, *supra* note 64, at 289.

128. See e.g., Amy Norton, *Failed IVF Attempt Tied to Depression, Anxiety*, REUTERS (Jun. 27, 2012, 12:55 PM), <http://mobile.reuters.com/article/idUSBRE85Q19120120627?irpc=932>; Rachael Rettner, *Fertility Treatments May Put Women at Risk for PTSD Symptoms, Study Suggests*, NBC (Aug. 8, 2012, 12:16 PM), http://vitals.nbcnews.com/_news/2012/08/08/13184349-fertility-treatments-may-put-women-at-risk-for-ptsd-symptoms-study-suggests?lite (highlighting studies that have shown individuals coping with fertility failures are as distressed as cancer patients, with many suffering from depression and post-traumatic stress disorder).

129. See Jones, *supra* note 25, at 1266; Nicole Mattson, *On Ice: The Slippery Slope of Employer-Paid Egg Freezing* 20 (forthcoming), available at <http://www.laborandemploymentcollege.org/images/pdfs/October2016newsletter/Employer-PaidEggFreezing.pdf>.

After a longer period of time, the women may both experience consequential effects—the woman who decided to freeze her eggs may receive more promotions at a faster rate compared to the woman who decided to become pregnant.

The Pregnancy Discrimination Act (“PDA”) states that employers must treat pregnant women “[t]he same for all employment related purposes . . . as other persons not so affected but similar in their ability to work.”¹³⁰ In *Young v. United Parcel Service*, the Supreme Court held that the employer had accommodated non-pregnant workers while failing to accommodate pregnant workers, which posed a significant burden on the pregnant workers.¹³¹ Women who are affected by the egg freezing benefit could likely pursue a similar claim if the right factual situation arises.¹³² Women may also pursue a disparate impact claim, if in the long term, a pattern develops for employers who offer the benefit: women who freeze their eggs advance further and quicker compared to women who become pregnant.¹³³ There is currently a lack of detailed studies and statistics available to support a successful legal suit.¹³⁴ As time passes, more detailed studies, data, and statistics will be compiled, especially if more employers begin providing the benefit.¹³⁵

The DOD’s initiative to implement egg freezing in the first government employer application of the benefit signals a larger acceptance of the procedure as an expansion of women’s reproductive choice.¹³⁶ Consequently, more employers may begin offering the egg freezing benefit. Acknowledging the harms and policy risks of the benefit, this Note evaluates the regulatory protections in place for women and solutions to current regulatory problems as the benefit continues to grow.

130. 42 U.S.C. § 2000(e)(k) (2012).

131. *Young v. United Parcel Service*, 135 S.Ct. 1338, 1353–55 (2015).

132. See Mattson, *supra* note 129, at 27–28 (providing an example where an employer may be willing to accommodate a woman’s egg freezing schedule adjustments but unwilling to accommodate a woman experiencing severe morning sickness due to pregnancy).

133. Disparate impact occurs when an employer utilizes a “neutral” test, rule, policy, or selection criterion that impacts adversely on a protected group. See LABOR AND EMPLOYMENT LAW, Ch. 51, § 51.06 (2017).

134. “If interpreted as tacit encouragement to pursue cryopreservation, or as a warning that child-rearing could jeopardize opportunities for advancement, the policy would expose these companies to risk for alleged discrimination [. . .] Though disparate impact claims are generally more difficult to argue, requiring statistics, data and number crunching to substantiate claims, the news from Facebook and Apple also comes at a time of [. . .] heightened scrutiny around pregnancy-related discrimination.” Christina L. Lewis, *Retaining Talent With Cryopreservation Benefit Is Risky*, HINCKLEY ALLEN (Nov. 5, 2014), <http://www.hinckleyallen.com/publications/retaining-talent-with-cryopreservation-benefit-is-risky/>.

135. See e.g., Donnelly, *supra* note 39; HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY, FERTILITY TREATMENT 2014 TRENDS AND FIGURES 29 (2016), available at http://www.hfea.gov.uk/docs/HFEA_Fertility_treatment_Trends_and_figures_2014.pdf (last visited May 3, 2017) (“Since 2001, fewer than [sixty] babies have been born to patients storing and thawing their own eggs. This is a low number considering the attention egg freezing receives, but this is a new, emerging treatment area which we will continue to monitor.”) [hereinafter 2014 HFEA Report].

136. See McCarthy, *supra* note 19 and accompanying text.

III. THE EGG FREEZING REGULATORY FRAMEWORK

In the United States, there is currently a lack of uniform regulation governing egg freezing. This section will begin with a hypothetical scenario facing a female military member who decides to take advantage of the DOD's new benefit. This is followed by a summary of the current regulatory framework and the specific problems surrounding ART and egg freezing requirements in the United States.

A. Ellen's Dilemma

Ellen Smith, an active member of the U.S. army,¹³⁷ has decided to take advantage of the new DOD egg freezing benefit. She does not know exactly where to begin. She does not even know where egg freezing is offered near her. Tricare, the military's health insurance provider, can probably offer Ellen a list of fertility clinics where the benefit is covered. Ellen will likely obtain more information about the success rates of live births after freezing her eggs from the clinics she visits. Ellen may eventually have the success rate statistics for each clinic covered by Tricare, but she also wants to know what other information is publicly available. How will Ellen know the fertility clinics Tricare covers have the highest success rates? How can Ellen compare the clinics' statistics to the national standards? What are the national standards for egg freezing success rates?

If Ellen were undergoing IVF, she could answer these questions.¹³⁸ IVF national reports provide the percentage of live births for fresh embryos and frozen embryos categorized by the age of the woman.¹³⁹ The report begins with a table summarizing all the fertility clinic data collected in the United States.¹⁴⁰ The report then breaks down the statistics by each fertility clinic based on location in the United States.¹⁴¹ Each fertility clinic's percentage of live birth success rates are detailed in a separate table within the national report.¹⁴²

These national reports lack similar transparency for egg freezing.¹⁴³ There is limited data on egg freezing success rates compiled in one location or within one report.¹⁴⁴ There is also a disarray of information about which fertility clinics offer

137. See Miller, *supra* note 2 (providing more detail about Ellen's role in the military and story).

138. "[The] lack of transparency [for egg freezing] contrasts sharply with that for in vitro fertilization, for which the results of all cycles must be reported to the US Centers for Disease Control and Prevention in Atlanta, Georgia, either directly or through the Society for Assisted Reproductive Technology (SART), a sister organization to the ASRM. 'We don't have the same transparency for egg freezing,' says Widra, chair of the SART practice committee." See Alison Motluk, *Growth of Egg Freezing Blurs "Experimental" Label*, NATURE (Aug. 23, 2011), <http://www.nature.com/news/2011/110823/full/476382a.html>.

139. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T. OF HEALTH AND HUMAN SERVS., 2014 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 1-20 (2016), available at <ftp://ftp.cdc.gov/pub/Publications/art/ART-2014-Clinic-Report-Full.pdf> (last visited May 3, 2017) [hereinafter 2014 CDC REPORT].

140. *Id.* at 21.

141. *Id.* 23-514.

142. *Id.*

143. See Motluk, *supra* note 138.

144. See *id.*

egg freezing and the success rates of each fertility clinic.¹⁴⁵ The lack of information about egg freezing creates information asymmetry for consumers and potential patients like Ellen.¹⁴⁶ Without the national standards to compare, Ellen will lack the knowledge to make an informed decision about whether and where she should undergo her egg freezing procedure.

B. The Current Regulatory Framework for ART and Egg Freezing

There is currently no uniform and coherent regulatory framework specifically governing egg freezing in the United States. Instead, egg freezing falls underneath the umbrella of ART.¹⁴⁷ There is limited federal regulation of ART in the United States, which has resulted in the industry being labeled “The Wild West.”¹⁴⁸ The most recognized and significant federal ART law in the United States is the FCSCA.¹⁴⁹

When passing the FCSCA, the Senate Committee on Labor and Human Resources concentrated on how “[m]edical advancements in the field of assisted reproductive technologies have significantly improved the likelihood of overcoming some infertility problems.”¹⁵⁰ After several well-publicized instances where fertility doctors “misrepresented professional credentials, engaged in questionable advertising, and misused reproductive technology,” the act was pushed through Congress.¹⁵¹

The FSCA does not regulate reproductive technologies. It merely encourages the Centers for Disease Control (“CDC”) to collect data on the success of reproductive technologies in the United States.¹⁵² The CDC, under the Department of Health and Human Services, has served as the federal government’s primary arm for data collection on ART, clinics, and birthrates since 1992.¹⁵³ The CDC collaborates with the Society for Assisted Reproductive Technology (SART) and the ASRM to annually measure the success of ART procedures.¹⁵⁴

Both SART and ASRM are self-regulated entities.¹⁵⁵ SART was formed in 1987 as an affiliated society in response to the rapid development of ART technology in the United States and around the world.¹⁵⁶ In conjunction with the CDC’s

145. *See id.*

146. *See id.*

147. *See* ART Fed Reg, *supra* note 28.

148. *See* Daar, *supra* note 26, at 258.

149. *See supra* note 27.

150. The Committee also found that the extent of the issue of infertility was found to affect one in six couples (about five million families) who sought infertility services at an expense of over one billion dollars in 1990. *See* S. Rep. No. 102–452, at 2 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 2564, 2565.

151. 137 Cong. Rec. E4145–02 (1991) (statement of Rep. Wyden).

152. *See* Goodwin, *supra* note 32, at 32.

153. *Id.*

154. *Id.* at 32–33.

155. Valarie K. Blake, Michelle L. McGowan, & Aaron D. Levine, *Conflicts of Interest and Effective Oversight of Assisted Reproduction Using Donated Oocytes*, 43 J.L. MED. & ETHICS 410, 412 (2015).

156. James P. Toner, M.D., Ph.D. et al, *Society for Assisted Reproductive Technology and Assisted Reproductive Technology in the United States: a 2016 Update*, 106 FERTILITY & STERILITY 541, 541 (2016), available at <http://ac.els-cdn.com/S0015028216612931/1-s2.0-S0015028216612931->

reporting, SART also publishes success rates of SART clinic members on a voluntary basis within a national summary report.¹⁵⁷

ASRM, a non-profit organization, is composed of physicians, technicians, nurses, researchers, and other professionals.¹⁵⁸ These individuals conduct research, publish reports, sponsor educational outreach programs, and draft policy guidelines.¹⁵⁹ ASRM collaborates with the CDC and SART by endorsing or disapproving various reproductive technologies and setting corresponding guidelines.¹⁶⁰ ASRM's policies and guidelines are entirely voluntary.¹⁶¹

Besides the FCSCA's legislative response to ART, Congress has been practically silent on the issue.¹⁶² As a result, the United States has consistently been in "catch-up mode," rather than in "shaping mode" regarding ART laws compared to many other countries around the world.¹⁶³ The slow movement in change and lack of uniformity within the regulations is exemplified in the egg freezing procedure. The original definition of ART within the FCSCA only included procedures involving both the egg and sperm.¹⁶⁴ Thus, egg freezing was initially not regulated under the FCSCA. Egg freezing was instead governed by a piecemeal legal scheme that combined "precedent set by frozen embryo disputes (that addresses disposition), statutes related to family law and inheritance (that define parentage), and basic contract law principles (which govern clinic-patient disputes and provide gap-fillers in the absence of other applicable legal terms)."¹⁶⁵

The legal scheme surrounding egg freezing will change slightly in the future, because the definition of ART within the FCSCA was amended in 2015 to include egg freezing.¹⁶⁶ Fertility clinics that offer egg freezing will now have to provide

main.pdf?_tid=2a8755c0-3038-11e7-9fcb-

00000aab0f6c&acdnat=1493840524_974401eaf79dca17db8eca6363737b51; *Society for Assisted Reproductive Technology*, SART, <http://www.sart.org> (last visited May 3, 2017).

157. The data released by the SART and CDC is different due to the voluntary membership of SART. Clinics reporting to the CDC are not also required to become members and report to the SART. Compare 2014 SART Report, *supra* note 124, with 2014 CDC Report, *supra* note 139.

158. *Vision of ASRM*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, <http://www.reproductivefacts.org/about-asrm/vision-of-asrm/> (last visited May 3, 2017).

159. *Id.*

160. See, e.g., *New Report by American Society for Reproductive Medicine Claims Egg Freezing No Longer Experimental—But is it?*, CTR. FOR HUMAN REPROD. (Dec. 19, 2012), <https://www.centerforhumanreprod.com/fertility/new-report-by-american-society-for-reproductive-medicine-claims-egg-freezing-no-longer-experimental-but-is-it/> (last visited May 3, 2017) (reporting when ASRM changed the endorsement for the procedure of egg freezing from experimental to non-experimental).

161. Alexander N. Hecht, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227, 253 (2001).

162. See Goodwin, *supra* note 32, at 32.

163. NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 2 (2009).

164. The original definition of ART only encompassed procedures and technologies that would involve fresh and frozen embryos. See Mohapatra, *supra* note 65, at 393 (detailing how there is no "real teeth in the law" and if egg freezing continued to gain popularity, it would be worth considering expanding the FCSCA to include reporting of egg freezing success rates).

165. See Paller, *supra* note 29, at 1585.

166. See ART Fed Reg, *supra* note 28.

the CDC with clinic specific data on the procedure, but this is not a mandatory requirement under the FCSCA. Even with the change in definition, the regulations covering egg freezing will still encompass the same issues that have plagued the FCSCA's limited effect on ART.

C. Problems with the Current Regulatory Framework of ART

The current regulatory framework surrounding ART has two main issues. First, there is a lack of national standards that create a threshold of quality that fertility programs must meet to operate. The lack of uniformity and specificity in the regulations for ART influence how the CDC and SART report on fertility clinic success rates.

The FCSCA provides a regulatory framework for ART in the United States, but it is general and lacks real power.¹⁶⁷ The FCSCA created a framework that only requires voluntary submission to guidelines and encouraged reporting of success rates.¹⁶⁸ Among fertility clinics, the "gate-keeping methods" used to screen potential clients vary widely.¹⁶⁹ Furthermore, there is no uniform standard or menu of services. Clinics vary as to the "techniques offered, the quality of treatment, size of staff, resources for women, and costs."¹⁷⁰ For example, one clinic may offer a variety of different fertility treatments from IVF to egg freezing.¹⁷¹ Another fertility network may connect patients with specialized doctors to perform the specific treatment the patient is seeking.¹⁷²

The lack of uniformity and complexity is compounded by the CDC and SART, which create national summary reports. The reports do not show the success rates for each individual program or treatment, but rather tally and summarize the data from different fertility clinics into one public report. Additionally, the CDC statistics and SART statistics likely differ because certain clinics may not be SART members, but still report to the CDC.¹⁷³ The CDC report includes clinic specific success rates, but the SART report combines all clinics into one national summary.¹⁷⁴ Because the summarized information is calculated based on cycles, the national reports are typically released two years behind, given the time needed to determine pregnancies conceived.¹⁷⁵ Finally, both the CDC and

167. See Mohapatra, *supra* note 65, at 393.

168. See generally Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 643-44 (1997).

169. Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283, 2288 (2007).

170. See Goodwin, *supra* note 32, at 44-45.

171. Compare *Infertility Treatments*, SHER FERTILITY, <http://haveababy.com/infertility-treatments> (last visited May 3, 2017) (offering a full range of infertility diagnosis and testing as well as infertility treatment service), with *About Us*, HCA MIDWEST HEALTH, <http://mymidwestphysician.com/about/index.dot> (last visited May 3, 2017) (providing a network of experienced, multi-specialty physicians located throughout the greater Kansas City metropolitan area). Both clinics reported data and have success rate statistics available in the 2014 CDC Report.

172. *Id.*

173. See 2014 CDC Report, *supra* note 139, at 7.

174. Compare 2014 CDC Report, *supra* note 139, at 23-514, with 2014 SART Report, *supra* note 124.

175. See 2014 SART Report, *supra* note 124; 2014 CDC Report, *supra* note 139, at 11.

SART reports mainly focus on ART involving embryos,¹⁷⁶ and the clinics within the reports are not given rankings by the CDC or SART.¹⁷⁷ Therefore, the complexity of the data can result in patients misinterpreting and inappropriately comparing one clinic to another.¹⁷⁸

Second, there is a lack of serious financial or other sanctions for the ART programs that do not report success rates. The FCSCA uses the CDC to collect data related to ART, but the reporting of the data is completely voluntary.¹⁷⁹ Moreover, the CDC is not a regulatory body and does not have the authority to sanction non-reporters.¹⁸⁰ If a fertility clinic decides not to report success rates to the CDC, then there is no monetary penalty.¹⁸¹ Instead, noncompliant clinics are placed on a list of non-reporters published by the CDC in an appendix within the annual report.¹⁸² The current report assumes consumers will fully inform themselves about non-reporters.¹⁸³ The nearly nonexistent punishment for non-reporters could potentially endanger consumers that would not be deterred from seeking services, especially within locations with limited ART options.

Ultimately, both issues within the current ART regulatory framework will have a direct impact on how egg freezing will be regulated in the future after its recent incorporation into the FCSCA ART definition.

IV. SOLUTION: EGG FREEZING REGULATION

The incorporation of the egg freezing benefit by the DOD in a government program calls for a solution to the current regulatory problems surrounding the ART field. This section will emphasize why an increase in regulations for egg freezing is needed now and will propose a regulatory solution to require reporting on egg freezing in the United States following a similar approach to the United Kingdom's.

A. Increased Regulations for Egg Freezing Is Needed Now

Although there are many broad issues surrounding the current regulatory framework of ART, this Note argues for specific changes in the regulatory reporting requirements relating to egg freezing. Broad federal regulation of ART

176. Categories within the CDC national report include "Fresh Embryos from Nondonor Eggs," "Frozen Embryos from Nondonor Eggs," and "Donor Eggs." Categories within the SART national report include "Outcome Per Egg Retrieval Cycle," "Subsequent Outcome (Frozen Cycles)," and "Final Live Birth Per New Patient," all of which combine data for fresh and frozen eggs and embryos. *See id.*

177. *Id.*

178. *See* David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 39 FAM. L.Q. 727, 731 (2005).

179. In 2000, the society developed guidelines and standards to which its members are expected, but not forced, to comply. In 1991, the director of the CDC reported that 90% of clinics were voluntarily reporting their conception success rates. Without an independent audit mechanism, the accuracy of this statement cannot be verified. *See* Hecht, *supra* note 161, at 253.

180. *See* Adamson, *supra* note 178, at 731.

181. *See* Mohapatra, *supra* note 65, at 393.

182. *Id.*; 2014 CDC Report, *supra* note 139, at 574–76.

183. *Id.*

could improve outcomes for both women and their future children,¹⁸⁴ but national regulations have historically been difficult to effectuate because the topic of fertility and women's health is so polarizing.¹⁸⁵ Nevertheless, ART regulation cannot be disregarded because there is a fear of failure in bringing provocative reproductive women's policy issues to the table.

Egg freezing is a particularly good area within ART to begin. The increasing popularity and percentage of women undergoing the procedure clearly shows a need for more refinement and reform within the regulations. With the DOD's recent decision to include egg freezing as an employee benefit for military women,¹⁸⁶ the regulations surrounding egg freezing must be addressed now. The DOD's initiative is the first government implementation of the egg freezing benefit,¹⁸⁷ broadening the potential patient pool undergoing the procedure. What was formerly only an option within the Silicon Valley private sector has now become an option for employees of one of the largest employers in the world.¹⁸⁸ The DOD set a precedent for more employers to follow. Increasing access to the benefit will lead to more women potentially facing the risks of the procedure. These women must be better informed when deciding whether to capitalize on the benefit or not.

Furthermore, the first clinic to only offer egg freezing, called Extend Fertility, opened in Manhattan in 2016.¹⁸⁹ Dr. Joshua U. Klein opened his egg-freezing-only clinic in direct response to seeing uncomfortable millennials seeking to freeze their eggs sitting in fertility waiting rooms next to women who were older and struggling with infertility.¹⁹⁰ He also found that removing the egg freezing process from the fertility clinic's diagnostic services cut the price of the procedure down to just \$5,000 for a starter egg freezing package.¹⁹¹ With Dr. Klein setting the precedent, more egg-freezing-only centers will likely open in the future.

The recent implementation of the benefit by the DOD, establishment of egg-freezing-only clinics, and general increase in women undergoing the procedure merit further review of policies that will specifically regulate egg freezing.

184. Catherine A. Clements, *What About the Children? A Call for Regulation of Assisted Reproductive Technology*, 84 IND. L.J. 331, 338 (2009) (recognizing Clements argues for regulation of ART to improve outcomes for both prospective mothers and their future children using a different rationale in comparison to this Note).

185. See Daar, *Federalizing Embryo Transfers*, *supra* note 26, at 260.

186. See Schmidt, *supra* note 6.

187. See McCarthy, *supra* note 19 and accompanying text.

188. *Id.*

189. Nicole L. Pesce, *Oh Baby: First Egg Freezing-Only Clinic Opens in Manhattan with \$5,000 Deal*, N.Y. DAILY NEWS (Aug. 10, 2016, 10:56 AM), <http://www.nydailynews.com/life-style/health/egg-freezing-only-clinic-opens-nyc-5-000-deal-article-1.2745758>.

190. *Id.*

191. *Id.*

B. Suggested Change in Reporting Requirements for Egg Freezing

The FCSCA should be amended to include language adopting mandatory reporting requirements for egg freezing.¹⁹² The process of changing the language in the statute to institute mandatory reporting requirements would be simple.¹⁹³ The current statute uses voluntary language to describe the reporting requirements for clinics.¹⁹⁴ The legal responsibilities of fertility clinics should be clear and concrete, even in a field that is evolving rapidly with new technologies. Therefore, the language of the statute should be amended to require mandatory reporting of fertility clinic data for all procedures offered that meet the definition of ART under the FCSCA.

The current law provides that “each assisted reproductive technology (as defined in section 7) program shall annually report to the Secretary through the Centers for Disease Control.”¹⁹⁵ The amendment could be effectuated by changing the word “shall” to “must.” The new mandatory language under the FCSCA would require fertility clinics that offer egg freezing to report data to the CDC. The mandatory reporting requirement would enable the second step to the regulatory reporting solution.

The federal regulation should also require reporting to be outlined in an easily understandable format to the public. The change should be effectuated directly by the CDC and SART, which create the annual national success rate reports. The current CDC and SART annual reports are not formatted to show direct figures regarding egg freezing success rates for clinics. The current reports either focus on frozen embryos or combine the total data for frozen embryos and frozen eggs.¹⁹⁶ The combined data makes the information difficult for readers to parse out and understand.¹⁹⁷ Furthermore, there is no specific information on each fertility clinic’s success rates for egg freezing.¹⁹⁸

With the amendment in reporting requirements, the new report would provide data on the success rates of women who freeze their eggs for personal, non-medical reasons. Incorporating a mandatory egg freezing reporting requirement can help guarantee information will be available for future patients. The CDC, SART, and ASRM have a responsibility to provide enough information to patients.¹⁹⁹ The current state of reporting requirements fails to provide patients with sufficient knowledge to make informed decisions about fertility care.²⁰⁰ With the new requirements, Ellen may no longer have a dilemma.²⁰¹

192. See Daar, *Federalizing Embryo Transfer*, *supra* note 26, at 287–88.

193. *Id.*

194. *Id.*

195. Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102–493, 106 Stat. 3146 (1992).

196. See 2014 SART Report, *supra* note 124; 2014 CDC Report, *supra* note 139, at 21.

197. See Daar, *Regulating Reproductive Technologies*, *supra* note 168, at 643.

198. *Id.*

199. See Hecht, *supra* note 161, at 253.

200. See Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL’Y 1, 3 (2011).

201. See *supra* Part III.A for background on Ellen’s dilemma.

The United States has a direct comparison of how it should go about requiring the reported data on egg freezing through the United Kingdom's example.²⁰² The United Kingdom is one of the more advanced countries in the world for creating structure and authority surrounding ART regulations.²⁰³ In 1990, the Human Fertilisation and Embryology Authority ("HFEA") was enacted in the United Kingdom, which established an independent statutory licensing authority that regulates treatment using eggs, sperm, and embryos.²⁰⁴ The HFEA uniquely requires research on fertilization and embryos to complement treatment services for infertility.²⁰⁵ The development of new reproductive technologies comes about through the process of change in medicine which involves both research and patient care.²⁰⁶ The HFEA emphasizes that all dimensions of the process must be present for the result to be human and humane.²⁰⁷ Therefore, the HFEA requires frequent updates and reporting on forthcoming technologies as a way to inform the providers, as well as protect the patients and consumers of the services.

The HFEA Fertility Treatment 2014 Trends and Figures report exemplifies this philosophy by publishing the first set of figures on the emerging area of egg freezing and thawing within a separate section of their annual report.²⁰⁸ The report provides statistics on how many patients are storing their eggs,²⁰⁹ why women are freezing their eggs,²¹⁰ how many patients are thawing their eggs,²¹¹ how many clinics perform this treatment,²¹² how long the eggs are frozen for,²¹³ and the live birth rates of the eggs that are thawed.²¹⁴ The most updated trends and figures in this report establish that there has been a substantial increase in the number of patients freezing their eggs.²¹⁵ Of these patients who froze their eggs since 2001,

202. Gruben emphasizes the HFEA's mandate to collect egg freezing information from clinics and disclose it to the public. Gruben similarly calls for Canadian law, specifically in Ontario, to adopt this portion of the United Kingdom's HFEA regulation regarding ART. See Gruben, *supra* note 122, at 766-69.

203. See Robert L. Stenger, *The Law and Assisted Reproduction in the United Kingdom and United States*, 9 J.L. & HEALTH 135, 159 (1995).

204. See *What We Do*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY (Jul. 25, 2013), <http://www.hfea.gov.uk/133.html> (last visited May 3, 2017).

205. See Stenger, *supra* note 203, at 145.

206. *Id.*

207. *Id.*

208. "This year we have published figures on the emerging area of egg freezing for the first time. Freezing techniques are relatively new, and were very rare only five or six years ago. Interest from patients and the media has grown considerably in recent years, however, and we felt it was time to provide more clarity. The data is revealing: despite the number of IVF cycles increasing rapidly in the last ten years, fewer than 150 cycles per year actually involve thawed eggs, and success rates remain low." 2014 HFEA Report, *supra* note 135, at 2.

209. *Id.* at 24.

210. *Id.* at 25.

211. *Id.* at 26.

212. *Id.* at 27.

213. *Id.*

214. *Id.* at 28.

215. *Id.* at 29.

fewer than sixty babies have been born.²¹⁶ Although this data is strictly from United Kingdom clinics, the trends and patterns provide meaningful insight about the procedure for patients in the United States.

The United Kingdom has laid a foundation for separate reporting on the egg freezing procedure, a growing area of ART. This Note does not petition for a complete transplant of United Kingdom ART regulation into the United States' framework. Instead, the CDC and SART should mandatorily report on egg freezing following a similar approach to the United Kingdom's. Egg freezing is now in its commercial infancy.²¹⁷ Because egg freezing involves women who may be giving up their opportunity to have a child without medical intervention, it is particularly important that women are aware of how many successful births a clinic has had with frozen eggs.²¹⁸ Details, such as the age of the women when they froze their eggs, how long the eggs were frozen, and the age of the women into which the eggs were implanted, could help female consumers compare clinics.²¹⁹ Regulation enforcing this specific approach to reporting emphasizes how important it is for clinics to track this information over several years to uncover trends and analyze the procedure.²²⁰ Furthermore, requiring egg freezing information to be formatted in a comparable manner to the United Kingdom's report will provide important decision-making information to future consumers.²²¹

The DOD's new egg freezing policy creates an impetus for the United States to change its regulations to mandate similar reporting of egg freezing to the United Kingdom. Given the increased coverage and potential for women to undergo the egg freezing procedure, women should be fully informed of all the risks they may face. If mandatory reporting of egg freezing in a separate section of annual reports is required, then consumers can more easily obtain necessary information. Implementing the new reporting requirements on egg freezing will provide a stepping stone as ART develops and increased future regulations are needed.

CONCLUSION

The DOD's recent expansion of the employer-provided egg freezing benefit into the government, which had previously only been a well-known part of Facebook and Apple's health insurance coverage, calls for increased regulation in the ART field. Employers are incorporating the egg freezing benefit into health care plans because egg freezing may offer women more reproductive choices. By providing the benefit, employers hope to recruit and retain more women throughout their careers. There are many potential emotional, physical, and workplace harms to women if the egg freezing benefit is offered. Employers must consider and acknowledge these risks before implementing the benefit into their health insurance plans.

216. *Id.*

217. *See* Tsigdinos, *supra* note 41.

218. *See* Mohapatra, *supra* note 65, at 393.

219. *Id.*

220. *Id.*

221. *Id.*

As the popularity of egg freezing increases, more employers may follow the DOD's precedent and begin providing the egg freezing benefit. The current state of regulations for egg freezing is disordered and incomplete. By expanding the FCSCA definition of ART to include egg freezing, egg freezing reporting now falls under federal regulation. The United Kingdom has begun to separately report egg freezing figures through their independent ART regulatory body. The federal reporting requirements in the United States should be amended to require reporting similar to the United Kingdom's approach. The CDC and SART should report separate figures and trends regarding egg freezing treatment offered by fertility clinics. These changes would better inform potential consumers of the risks of the procedure and protect future women and their children.