As employers are expanding their fertility, surrogacy, and family planning benefits, the tax treatment of such benefits continues to be a challenge for employers and their employees by both increasing the cost of these benefits and creating administrative hurdles. In a private letter ruling, the IRS maintains its position that the majority of the medical costs and fees incurred by a same-sex couple seeking to have a child through gestational surrogacy are not deductible “medical expenses” under Section 213 of the Internal Revenue Code. On January 12, 2021, the IRS issued
Private Letter Ruling 202114001 (the “Ruling”) in response to a male couple’s request for a ruling that would allow a deduction for costs and fees related to:

- medical expenses directly attributable to one or both spouses,
- egg retrieval,
- sperm donation,
- sperm freezing,
- in vitro fertilization (“IVF”),
- childbirth expenses attributable to the surrogate,
- medical insurance for the surrogate,
- legal and agency fees related to the surrogacy, and
- any other medical expenses arising from the surrogacy.

As we previously reported, the critical question is whether the expense was incurred to affect the body of the taxpayer, taxpayer’s spouse, or taxpayer’s dependent. The Ruling similarly explains that “[e]xpenses involving egg donation, IVF procedures, and gestational surrogacy incurred for third parties are not incurred for treatment of disease nor are they for the purpose of affecting any structure or function of taxpayers’ bodies.” Accordingly, where a same-sex couple seeks to have a child through gestational surrogacy, payments related to egg retrieval, IVF, childbirth expenses attributable to the surrogate, medical insurance for the surrogate, legal and agency fees related to the surrogacy, and other costs or fees arising from the surrogacy are not deductible under Code Section 213. In contrast, payments related to sperm donation and sperm freezing—which, in this context, are directly attributable to the taxpayers—are considered to meet the definition of “medical care” in Code Section 213 as narrowly construed by the IRS.

The Ruling is consistent with cumulative case law on the matter, including the Eleventh Circuit Court of Appeals’s decision in Morrissey v. U.S., 226 F. Supp. 3d 1338 (M.D. Fla. 2016), aff’d, 871 F.3d 1260 (11th Cir. 2017), wherein the Court found that expenses related to IVF, egg donation, and gestational surrogacy incurred by a gay man in an unsuccessful attempt to have a child with his partner do not constitute “medical care” because the procedures did not affect the structure or function of his body.

Despite the rise in company-offered fertility, surrogacy, and family planning benefits, employers should note that the tax-savings advantages of such benefits do not apply equally to all employees. While a private letter ruling may not be relied on as precedent by other taxpayers, the narrow definition of “medical care” in this latest Ruling makes clear that the IRS requires an employee-taxpayer to show that the expenses qualify as “medical care” for the participant or his or her spouse or dependent. Therefore, it continues to be difficult for an employer to provide fertility, surrogacy, and family planning benefits on a tax-favored basis.