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Opportunities In Fertility Services – Regulatory Considerations For Surrogacy Agencies

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Surrogacy has become an increasingly popular fertility service that enjoys positive regulatory environments across much of the country. Individuals interested in surrogacy have become more diverse in recent years, as American reproductive culture evolves and as clinicians and consumers become increasingly familiar with assisted reproductive practices. The emergence and growth of experienced surrogacy agencies with strong domain expertise and interpersonal capabilities not only reduces barriers for intended parents (IPs), surrogates and clinicians, but also provides opportunities for investors to enter and expand into this space.

This is the second of a two-part series in the fertility space. Herein, we address the growing demand and consumer-sensitive market for surrogacy services in the U.S., the supportive political and legal landscape American surrogacy agencies enjoy in comparison to providers in international markets, and the increasing numbers of large companies and employers adopting surrogacy as part of their family-building benefit.



I. Surrogacy – A Burgeoning Market

The current U.S. addressable market for surrogacy services is approximately \$3 billion and is expected to grow 22% annually through 2027, driven by increasing demand for assisted reproductive practices, a maturing legal environment supporting surrogacy, growing acceptance of and access to surrogacy among intended parents (IPs) who are not experiencing medical infertility, and expanding surrogacy benefits among large employer groups.

Marwood analysis indicates that the potential demand for surrogacy services is significantly growing as the potential pool of IP candidates is expected to grow by 34% annually through 2027, most saliently among the LGBTQ+ population.

II. Agency Selection & Consumer Tastes

By definition, surrogacy is the process of someone giving birth for someone else. There are two types of surrogacy: traditional surrogacy, in which the pregnant carrier is also the biological parent of the child, and gestational, in which a “gestational carrier” helps an IP, who is unable to carry a child, become a parent. IPs tend to prefer gestational surrogacy, as there is no genetic relationship between the carrier and the child. Surrogacy arrangements are also differentiated on the basis of compensation, whereby commercial surrogacy, in contrast to altruistic surrogacy, involves the payment of fees to a carrier who goes through with a pregnancy on behalf of the IP.

Surrogacy agencies are well-suited to grow in the compensated gestational surrogacy space, as IPs overwhelmingly choose agencies over “DIY” management of surrogacy, seeking to maximize success in matching and in clinical outcomes. IPs who have used surrogacy agencies are highly satisfied with their experience and most report they will likely use the same agency if they envision having more children, offering an opportunity to standout agencies.

Since most aspects of the surrogacy process are not covered by insurance, cost does remain a concern among IPs when selecting an agency but is not the sole determining factor. On average, the most expensive costs are agency fees/surrogate base compensation, and average costs for surrogacy range between \$160K – \$195K and is only expected to grow over the next five years. Marwood research indicates that while clinicians believe cost is the determining factor for IPs when selecting a surrogacy agency, IPs are more concerned about the quality of surrogates presented and the length of the matching process in agency selection.

Surrogacy is a complicated process that usually involves a series of connected steps and decisions, which places surrogacy agencies in an advantageous position to provide IPs with the guidance and support needed throughout their surrogacy journey.

III. Medical Tourism - Tailwinds From Comparative International Regulatory Environment

The U.S. presents an attractive environment for investment in the surrogacy sector due to a lack of availability of such services across much of Europe. Indeed, surrogacy laws in the European Union (EU) are more restrictive than in the U.S. – commercial surrogacy is prohibited in nearly every EU country, while altruistic surrogacy is allowed in a minority of countries. Whilst there may be slight change within some European countries concerning altruistic surrogacy, there is virtually no movement towards allowing commercial surrogacy [Figure 1].

A minority of EU countries have not clearly regulated this sector, creating a legal vacuum where altruistic surrogacy may be carried out in some limited circumstances as it is not expressly forbidden. Even in these countries, commercial surrogacy is usually expressly forbidden. From a regulatory perspective, countries that continue to impose a ban on commercial surrogacy or limit altruistic surrogacy coverage to select populations (e.g., married heterosexual couples) will present the greatest and highest levels of demand for American surrogacy agencies.

The widespread prohibition of commercial surrogacy across the EU and consumer preferences toward high-quality surrogacy agencies in the U.S. are key factors in driving demand among European IPs to seek surrogacy abroad in countries with comparatively relaxed regulations.

IV. Federal Policy Vacuum

There is no singular, national policy on surrogacy services in the U.S., apart from some limited egg donation regulations promulgated by the FDA. These rules touch upon egg donor eligibility and required screening for communicable diseases and other risk factors, but stop short of regulating how the industry treats donors.

There is little prospect for legislation to regulate surrogacy services on a national level, as any legislative effort looking at reproductive rights is likely to lead to more politically fraught discussions beyond these issues, further limiting the prospects for legislation. Ultimately, Congress appears comfortable allowing states to be

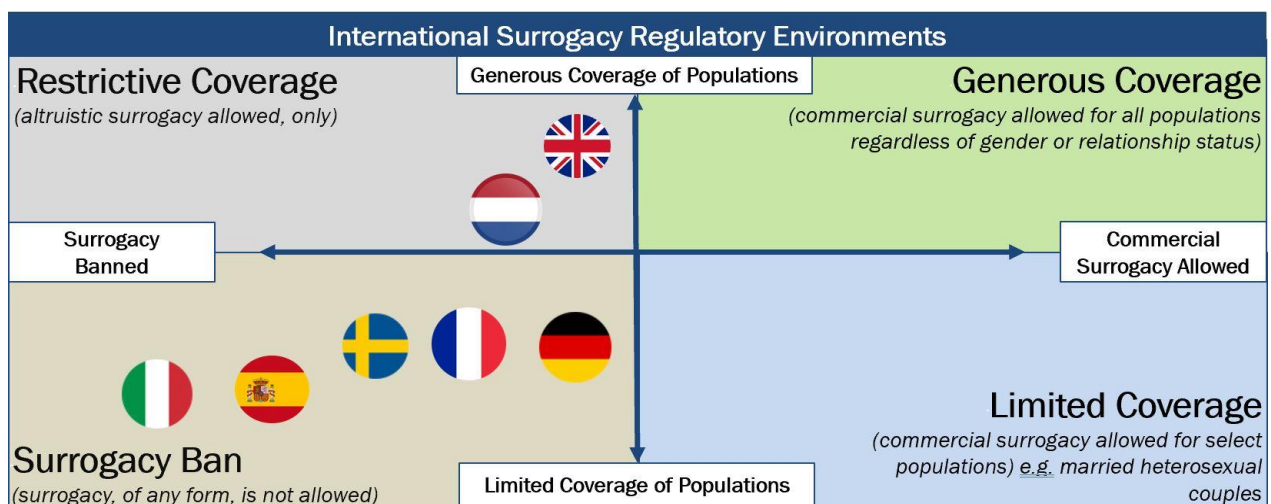


Figure 1: International Surrogacy Regulatory Environments: The vast majority of countries in the European Union prohibit or restrict coverage of surrogacy services

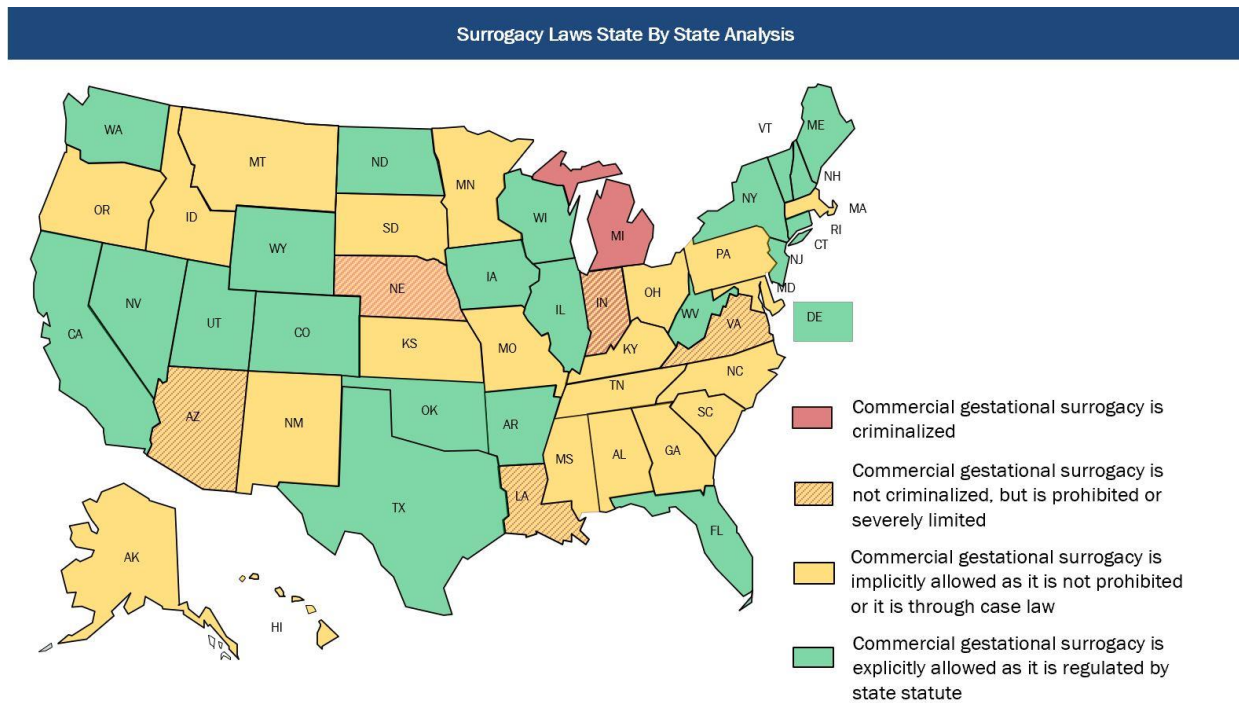


Figure 2: Surrogacy Laws Across the U.S.: 44 states allow commercial gestational surrogacy agreements either explicitly through regulation, or an implicit lack of prohibition

the primary regulators of surrogacy services.

IV. State Regulatory Environments

In light of a lack of federal ruling on surrogacy contracts and arrangements, some states have taken efforts to pass specific laws regulating the surrogacy space. 22 states explicitly allow surrogacy (some within pre-defined limits) as they have established regulations around the practice. Another 22 implicitly allow for surrogacy, either because they do not specifically prohibit it, or because courts and judges in these states have granted pre-birth orders (establishing parenthood for the IPs prior to the birth of the child), creating a legal precedent for the practice. Commercial surrogacy is still severely limited or prohibited in 6 states, including Michigan which continues to criminalize it [Figure 2].

States allowing for surrogacy may establish limits around surrogate compensation or who is eligible to be an IP and be granted a pre-birth order. While the vast majority (39) of states do not have any statutory limits on compensation, those that do may limit it only to certain pre-defined medical expenses and ancillary costs. A few states (5) limit who can be an IP, while in about half of states the process to be considered an IP may be more difficult for non-genetically related, unmarried, single or same-sex individuals.

While there isn't expected to be a massive shift in surrogacy rules in states, when states do make changes, they are generally positive for the industry and designed to expand availability of the practice. In recent years, states have legalized commercial surrogacy (New York in 2021), established more defined rules to clear up ambiguity, and ensured protections for unmarried or

LGBTQ IPs. States are generally not considering legislation that would make the regulatory or legal environment more restrictive.

V. Commercial & Employer Perspectives On Surrogacy

Commercial health plan and employer coverage of surrogacy services is limited, and while there may be some slight expansion in coverage among large employer groups, commercial health plan coverage will remain limited. Commercial health plans will typically offer fertility benefit coverage for services performed to the beneficiary (e.g., infertility testing, medications, IUI, IVF, etc.), but procedures and services associated with surrogacy (e.g., matching process, legal fees, and carrier/surrogate fees) are not covered. Plans do not expect to cover surrogacy services over the next three years as these services are viewed as non-medically necessary and high-cost.

In 2021, ~46% of employers offered some level of financial support for adoption and nearly one in ten (~9%) employers covered surrogacy benefits, according to a RESOLVE (the National Infertility Association) survey. Over the past five years, there has been an increased focus on fertility benefits, including surrogacy, across large employers, largely driven by hiring challenges, improvements in treatment protocols, shifts in workforce demographics, a sharper focus on inclusivity, and a broader definition of what constitutes health and well-being.

When offering coverage for surrogacy, most employers impose some form of financial limit on employees to best

manage overall costs and spend levels associated with the services. Most commonly, surrogacy financial coverage is bundled into “family building” benefits, which can total ~\$20K-\$100K, depending on employer and geography; if employers establish a specific surrogacy benefit, the financial cap varies between ~\$5K-\$80K. On average, most employers set a reimbursement limit per child with a median of \$10K and set a lifetime limit with a median of \$20K.

Over the next few years, the surrogacy benefit is likely to grow incrementally in popularity and utilization among employer groups. Some employers expect to begin covering surrogacy and/or donor services due to shifts to more holistic views on family planning among employees and an interest in expanding family-friendly benefits to attract and retain talent. Employee-benefit stakeholders note that smaller companies will continue to expand surrogacy benefits to remain competitive with the larger technology/banking service companies that have already implemented these benefits.

VI. Conclusions

As the political and legal environment for surrogacy in the U.S. matures, demand for surrogacy services is expected to continue on a growth trajectory. Investors must be mindful of consumer sensitivities in navigating the surrogacy process as well as state regulatory policy that shape allowable commercial practices in this space.

Marwood’s services span federal and state regulatory and legislative considerations and payor/benefit manager dynamics from a Medicare, Medicaid and commercial

perspective. In addition, Marwood's analysis covers strategic considerations including market sizing, growth outlook, referral source views, competitive landscape, and compliance.

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