

COVID-19 Considerations: Termination and Furlough Issues

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As we move through these difficult times, we are now confronted by the harsh reality that a number of employers have to start, or already have begun, the process of placing large numbers of their employees on furlough or terminating employment altogether.

Employers moving through this process must work with their legal counsel to navigate the myriad issues raised by furloughs or layoffs. It is imperative that the eligibility and rehire provisions of every employee welfare benefit plan, as well as any layoff or severance policy the employer may have, be reviewed. The following discussion is meant as a general overview and cannot replace the guidance of legal counsel.

The framework for the analysis of the compliance issues raised will depend on whether the employer is furloughing employees, a situation where the employer/employee relationship is not severed, and layoffs, where the employment relationship is terminated.

Layoff

Layoffs are generally the more straightforward analysis because they can be treated like other employment termination situations. There is a COBRA triggering event for the health benefits (medical, dental, vision, health FSA, etc.) upon termination for those covered under one of the component benefit plans. Employers can choose but are not required to subsidize COBRA for terminated employees. Some employers are taking this action when they anticipate or desire to rehire the terminated employees when business returns to normal. Another consideration for rehired employees is whether they will be required to complete a new waiting period if they are rehired beyond 13 weeks. Employers could choose to waive the waiting period for rehired employees but will need to amend their plan to do so and will want to get carrier approval for fully-insured plans or stop-loss approval for self-insured plans.

Furlough

Furloughs are more difficult. Employees placed on furlough may not maintain benefit eligibility depending on how eligibility is addressed in the underlying plan documents. The two main issues encountered are how to treat employees that remain eligible for coverage due to a stability period and how to treat employees that would lose eligibility under the plan due to the furlough when the employer wants to maintain benefit eligibility.

Employers that utilize a look back measurement period to determine eligibility for segments of its workforce are likely to have employees in a stability period. Employees in a stability period, by the terms of the plan, remain eligible for coverage as full-time employees even if they are on furlough. Employees in a stability period must be offered affordable coverage to avoid exposure under the Employer Mandate. Employees are responsible for paying their share of the premiums and can have

their coverage terminated for nonpayment of premiums. An employer can choose but is not required to subsidize a greater portion of the premium for employees in a stability period.

Furloughed employees that aren't in a stability period, either because the employer does not use the look back measurement method or because the employee is in a classification that is not measured to determine eligibility, will generally lose eligibility under the terms of the plan due to a reduction of hours unless the plan contemplates continued eligibility during a furlough. The loss of eligibility is acceptable to some employers, in which case the analysis for terminated employees will apply (e.g. offers of COBRA and whether to subsidize COBRA). However, some employers wish to maintain eligibility for employees on furlough even though they would normally lose eligibility under the terms of the plan. The employer-plan-sponsor will need to amend the plan to allow for the continued eligibility and will want to get carrier approval for fully-insured plans or stop-loss approval for self-insured plans.

Generally, furloughed employees that aren't in a stability period will not prompt the same affordability concerns as employees in a stability period because they are not considered full-time employees under the Employer Mandate. Employers have more flexibility in these situations to decide how much, if any, of the premiums they want to subsidize for these employees.

Premium Payment During Leave:

If eligibility for health care benefits is maintained during a furlough, the employer can collect the employee's share of premium to maintain the coverage during a paid or unpaid leave of absence. If the employee fails to pay the required premium, coverage can be terminated for non-payment.

Premiums may be collected (as determined by the employer's policy) in one of the following manners:

- **Catch up** (the employer's current practice). Some employers choose to keep employees on leave enrolled in their benefits until they return to active work, and then recoup those payments at the time the employees return to work. If there is a fairly large premium payment due at the time the employees return to work following the leave, it may be necessary for the employer to take deductions over several payroll periods. In some cases, state wage and hour laws will limit the amount that can be deducted from pay (thus the cap may be necessary). The plan sponsor should check with their legal advisor (labor and employment attorney). The main problem with the catch-up option identified by employers is that if the employee never returns to work, then it may be difficult or impossible for the employer to recover the employee's share of premiums paid by the employer during the leave.
- **Pre-pay** (if the leave is scheduled in advance, and the employee remains eligible for benefits during the leave, the employer may collect the employee's share of premium for the rest of the plan year from the employee's pre-tax earnings before the start of the leave. However, if the leave is anticipated to span more than one plan year, then the employer cannot collect the premiums for the latter part of the leave since this would violate the cafeteria plan regulations prohibiting deferred compensation.

- **Pay-as-you-go.** During the leave, the employer may require the employee to pay the employee's portion of the premiums to maintain coverage. Such payments would generally be on an after-tax basis, by remitting payment to the employer, and the employer could require payment no more frequently than regular deduction frequencies for employees during periods of active work. Most employers collect premiums from employees on leave of absence on a monthly basis.

In cases where there is paid leave, the employer may collect those premiums through salary reductions under the cafeteria plan. However, for periods of unpaid leave, where the "pay as you go" method for collection is utilized, the employee would remit those amounts to the employer on a post-tax basis.

Treatment of Elections on Return to Active Employment:

If the employer permits employees to revoke their elections during leave of absence, then the employer may require that employees who are on non-FMLA leave to resume participation on return to active work. They could, instead, stipulate that if the employee has revoked an election during the leave of absence, the employee may not reenter the plan until the start of the next plan year. Alternately, they can permit employees with a break in service that is at least 31 days with the option to revoke their previous election and make a new one on return to active status. However, if the employee has a status change event that would permit a mid-year election change, the employer would generally permit the employee to make a corresponding change in election for the remainder of the plan year.

Failure to Return to Active Employment and COBRA:

If the employee stayed enrolled in the employer's health care benefits during the leave, a COBRA qualifying event will occur when employment is terminated.

However, if an employee remained eligible for coverage but did not maintain coverage by paying the applicable premium during the leave, the employee's non-payment of premiums would result in a loss of coverage, which does not constitute a COBRA qualifying event.

Impact of Leave on FSA Elections:

If furloughed employees lose their eligibility for flexible spending accounts at the start of the leave, then in some cases health FSA participants will need to be offered COBRA continuation coverage. Employees with available account balances that exceed the COBRA premium for the remainder of the plan year would be able to elect COBRA coverage in order to utilize those dollars for expenses incurred after the date they have lost eligibility for health FSA coverage. COBRA is not offered to those employees who have already "used up" their accumulated account balances prior to the qualifying event. If coverage is terminated and COBRA is offered, the employer would not be able to recoup any amounts already reimbursed to employees prior to the date the furlough starts, but previous reimbursements may be offset by forfeitures by employees who don't elect available COBRA coverage.

If the employer chooses not to make employees on furlough lose eligibility for the health FSA, employers generally have three options as concerns leaves of absence and continued cafeteria plan contributions. To be clear, however, employers are generally prohibited from reducing their employees' elections to reflect their reduced contributions—

the *employees* generally control that decision. That said, an employer may (a) allow an employee going on unpaid leave to either revoke or continue health coverage (including health FSA coverage); or (b) require that health coverage continue but allow the employee to discontinue contributions. If the employer continues coverage during an unpaid leave, the employer may recover the employee's share of the premiums when the employee returns to work.

The analysis, above, regarding premium payment during leave also applies to the health FSA.

With respect to a non-returning employee who maintained existing elections during the leave of absence, the employee might be entitled to an offer of COBRA if the available benefit remaining in the health FSA exceeds the amount of the COBRA premium for the rest of the plan year.

Health Savings Accounts:

If the employee remains covered by an HSA-compatible high deductible health plan during the leave, the employee is able to contribute to his or her HSA account. However, for periods of unpaid leave, there would be no pay from which salary reductions may be taken.

The employee may in that case suspend HSA contributions for this period, and resume contributions when he returns to active employment, or he can make after-tax contributions to his HSA account directly and deduct those contributions when the employee files his tax return for the calendar year. Note, contributions to HSAs can be made up until the tax filing deadline for the calendar year (generally, April 15 of the year following the year for which the contribution is being made).

Since there are no restrictions on HSA elections under the cafeteria plan status change rules, the employee could increase his election on return to active employment for the remainder of the calendar year.

Other Benefits:

Eligibility for disability and life benefits for both employees that are and are not in a stability period may be impacted due to the furlough. This is an evolving issue and the respective carriers should be consulted about how they interpret the eligibility terms of the plan and whether they are making exceptions at this time.

Warn Act Implications:

One final consideration is whether or not the [WARN Act](#) applies to the furloughs or layoffs. This is an issue that the employer must work through with their legal counsel. For many employers it is questionable whether the Act applies in the present situation if the reductions in workforce were unforeseeable. Also, if the reduction is anticipated to last fewer than 6 months, it may not apply. The Act is generally enforced through class action or individual lawsuits, so employers can't rely too much on regulatory relief guidance or the agencies exercising their discretion. Again, it is imperative that employers discuss the applicability of the Act to their actions with their legal counsel.

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