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COVID-19 and Employee Termination and Benefits Consideration



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As much of the country is locked-down due to coronavirus 19 (COVID-19), employers have concerns regarding their employee benefit programs. This may stem from a reduction in hours and, unfortunately, from terminating, furloughing, or laying-off employees – at least temporarily. The following are considerations for employers when addressing employees' benefits during a layoff or other temporary separation from employment.

Plan Documents and Termination vs. Furlough vs. Lay-Off

Termination, furlough, and lay-off are not defined terms under ERISA or the Affordable Care Act. A furlough is generally considered to be a mandatory leave with limited or no pay, with the expectation that employees return to work once regular business resumes. A termination and a lay-off are more similar, but an employee who is temporarily laid off will likely be asked to return to work. The problem from an employee benefits perspective is that plan documents do not *usually* differentiate between an employee who is terminated versus one who is laid off versus one who is furloughed. For benefits purposes, eligibility is generally described as an active full-time employee or an employee who works at least a minimum number of hours per week (e.g., 30). If an employee is under protected leave—such as FMLA—benefits continue during leave. This means that any employee who is not meeting the hours requirement or is not actively at work (work from home is considered actively at work) based on being terminated, furloughed, or laid off—even temporarily—will generally have their benefits terminated and receive an offering of COBRA, state continuation, or no offer of continuation depending on the employer's size and state in which they are located.

It is important to review the plan documents from the carrier to determine whether it's relevant whether leave is paid or unpaid, and to determine how long benefits may continue during a furlough or layoff. It is also important to determine if the carrier will allow coverage to continue as long as premiums continue to be paid, during a public health emergency. For a self-funded/self-insured plan, the employer should look at its own summary plan description, plan document, and the stop-loss policy to determine if there how coverage is affected during a furlough or layoff.

A reduction in hours, which includes a temporary lay-off and furlough, is considered a COBRA qualifying event if it results in a loss of coverage. If an employer has fewer than 20 employees, state continuation law ("mini-COBRA") may apply. The IRS COBRA regulations provide that a reduction in hours for a qualifying employee occurs when there is a decrease in hours an employee is required to work or actually works and is not accompanied by an immediate termination of employment. If a group health plan eligibility depends on number of hours worked in a given period—such as 30 hours per week—and the employee is not working or has not worked those hours, it is considered a reduction in hours.

If there is no difference in the plan documents for furloughed, laid-off, or terminated employees and the carrier will not grant a concession, then a reduction in hours or no longer working is a qualifying event and employees should be terminated from the group health plan. *We understand this can be hardship and difficult decision to make during a public health emergency.*

Also keep in mind that loss of coverage opens a HIPAA special enrollment period for an employee to enroll in a spouse's plan, if one is available.

COBRA Offering and Assistance

If an employee is eligible for COBRA, an employer must follow COBRA requirements including sending election notices and allowing grace periods. One concern for employers is whether employees will be able to afford COBRA while not working during a public health emergency. An employer does have options in regard to offering COBRA payment assistance to employees.

COBRA sets the premium limit at 102% of the cost of coverage; however, an employer is not required to charge the full 102%. An employer can set a COBRA rate to reflect the amount an active employee pays for benefits and the employer can continue to pay their portion. Employers should consider applicable nondiscrimination requirements when deciding whether to change the contribution for all COBRA participants or just those who have a reduction in hours due to a public health emergency. One caveat is, of course, that the payments made by the employee during

unpaid leave will be paid post-tax. This may also pose an issue for employees that may not be able to afford their portion of a premium while not receiving a paycheck.

As mentioned, an employer may subsidize all or a portion of the COBRA premium while employees are laid off or on furlough. An employer could also set up a repayment plan, where employees repay an employer for a portion of the COBRA premium when they return to work. Employers may wish to have employees agree to repayment terms and a schedule before providing subsidized COBRA. Employers should consult with benefits counsel when drafting a repayment agreement.

Applicable Large Employer and Stability Periods

Another situation is when an employee is in a stability period as full-time, meaning they should be treated as full-time for purposes of the ACA's employer shared responsibility provision (ESRP) and continue to be offered health coverage even if they are not working full-time. Under the "look-back" measurement method, an employee that worked full-time hours during the measurement period generally must be treated as full-time for their entire stability period unless they are terminated. An employer may design its plan to terminate coverage (and offer COBRA) to employees who are in a stability period but have experienced a recent reduction in hours. If an employer chooses to terminate health benefits for an employee in a stability period (but the employee is still employed), the employer may be exposed to the "affordability" penalty if an employee receives a premium tax credit for Marketplace coverage (as COBRA coverage is unlikely to be "affordable" in these situations). One way to help with potential exposure is to subsidize COBRA, to make sure that the offering still meets affordability under the ACA.

Return to Work and Reinstatement of Benefits

For group health plans, the ACA requires that benefits be reinstated, if the employee was enrolled prior to leave, and the unpaid leave did not extend for more than 13 consecutive weeks (26 for educational institutions). If an employee was not enrolled in benefits at the time they left (i.e., because they previously waived an offer of coverage), they are not required under the ACA to be reinstated on benefits. If an employee was in a waiting period, then their time on the waiting period is usually added to whatever remains upon their return. For example, assume an employer's waiting period is first of the month following 60 days. An employee is temporarily laid off on day 31, due to COVID-19. Upon return to work, 30 days are credited towards the waiting period and the employee should be able to enroll the first of the month following 30 days (because he served 30 days previously). The facts and circumstances, along with terms of the plan should be reviewed to confirm how waiting periods and reinstatement works in specific situations. If leave extends for a longer duration, the waiting period may reset.

Non-COBRA Eligible Benefits

For benefits that are not COBRA eligible, such as disability and life insurance, an employer should discuss options with its carrier and broker. A carrier may allow temporary continuation of coverage for employees that are furloughed, laid-off, terminated, or not meeting hour requirements for eligibility if the premiums continue to be paid.

Public Health Emergency as Qualifying Event to Enroll

Carriers should be contacted to determine if they will allow the public health emergency to be considered a qualifying event to allow employees to enroll on a plan. Some carriers are allowing this. New state regulations and emergency declarations should also be reviewed, to determine if fully insured plans are required to allow enrollment or if the Marketplace Exchange is allowing a special enrollment onto an individual plan during this time. If an employer has a self-funded plan, it should review its own plan documents if it is considering amending to allow a special enrollment to occur during public health emergencies. The employer should ensure their stop-loss carrier agrees, and they should also consider any potential section 125 issues (employee contributions may need to be after-tax for the remainder of the plan year, if mid-year enrollment is not pursuant to a change in status event). Note that section 125 permits employees to make a new election to participate upon a return from unpaid leave that lasts more than 30 days.

Employees Paying Premiums

If an employer has terminated, furloughed, or laid-off employees but has allowed them to continue benefits, the employer needs to determine if and how they want employees on unpaid leave to pay for their premium contribution. An employer can require a weekly or monthly check to be sent in for any benefit offering—including medical, dental, vision, disability, life, etc., as long as coverage continues. It also includes voluntary products that an employee wants to continue. Pay-as-you-go should be offered as an option to employees, although an employer could also set-up a repayment plan with employees where the employer subsidizes the entire premium and the employee repays a portion on return to work. Counsel should be consulted to help write a repayment agreement and employers should ensure that employees understand what it entails.

Closed Business- What Now?

Some employers are having to close down their entire businesses and no longer operate at all. When a business closes, benefits also end. This is for businesses that are completely closed—not just temporarily. Without any active employees, the insurance carriers may not be willing to maintain coverage. There may be options for employees to convert certain policies into an individual policy, and carriers should be contacted to help make this determination. If conversion is possible, this should be communicated to former employees, so they are aware of their choice. If COBRA and state continuation does not have to be offered because the group health plan has ceased altogether, an unavailability of COBRA notice should be provided. For those who are experiencing this, a business closing its doors and employees—as well as owners—no longer working (and losing coverage) is a qualifying event to enroll for individual coverage or other employer sponsored coverage (such as if an employee's spouse has employer coverage). If the business reopens, it can start a new group health plan as well as other benefits.

What Employers Should Do

If an employer has questions, they should ask their broker and carrier to see what options are available to continue to maintain employees' or former employees' benefits, as well as if they want to terminate coverage. During a public health crisis, there are options to help elevate concerns with benefit offerings. There may also be tax credit and financial assistance available for some employers at the state level, as well as potentially the federal level.

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