

Benefit Eligibility Considerations in a COVID-19 Environment

Considering the current coronavirus disease 2019 (“COVID-19”) global pandemic, many employers are facing the difficult decision of reducing hours, furloughing, or laying off employees. Various issues in benefit programs should be reviewed and addressed.

PLAN ELIGIBILITY RULES

Most benefit programs (e.g., health plans and group term life insurance) require employees to maintain a certain number of hours (e.g., 30 hours a week). The hours of service required to maintain benefit plan eligibility should be described in the Summary Plan Description (“SPD”).

Generally, when an employee does not maintain the requisite hours of service, a loss of benefit coverage results.

In some instances, plans and policies may include language that allows an employee to continue benefits as an active employee even when the employee is not meeting eligibility criteria on a short-term basis (e.g., layoff or unpaid non-FMLA leave). Such continuation may be mandated by state law or through designed plan terms.

Question: Can I just leave my employees on the plan as active even though they aren’t meeting the hours requirement?

Answer: Not advisable. Group health plan coverage terminates when the plan documents indicate. Employers should follow the terms of their written plan document. There are ERISA fiduciary problems when plan sponsors do not follow the written plan terms. Further, carriers (including stop loss) may not cover claims incurred by individuals who were not otherwise satisfying the eligibility rules of the plan.

Employer action items

- Review the termination terms of each component benefit program (e.g., medical, dental, life insurance) to understand when there is a loss of coverage as a result of a reduction in hours or layoff.

Employers looking to provide more generous coverage terms should discuss options with carriers (including stop loss) and seek approval for any changes.

FMLA

Employees on Family and Medical Leave Act (“FMLA”) leave have no greater employment rights than other employees merely because FMLA leave has been taken. Consequently, there is nothing to prevent an employer from laying off or discharging an employee during an FMLA leave, as is implicitly recognized in examples contained in the FMLA regulations (for example, layoff due to work slow-downs or elimination of the employee's position), so long as the layoff/termination is for reasons other than for the employee having taken the leave. The employer's responsibility of continuing the FMLA leave, maintaining group health plan benefits, and restoring the employee to his position ceases at the time the employee is laid off/terminated (assuming the employer has no continuing obligations under a collective bargaining agreement or otherwise). An employer would have the burden of proving that an employee would not otherwise have been employed.

FFCRA

Paid sick and family leave with continued health benefits under the Families First Coronavirus Response Act (“FFCRA”) (applicable to employers with less than 500 employees) are generally not available. In order to

trigger FFCRA leave, the employee must be unable to work due to one of the qualifying reasons *when the employer has work available for the employee to perform*. In most situations contemplated in this summary, the employer does not have work available for the employee to perform.

PREMIUM PAYMENT WHILE ON LEAVE

If benefits continue and the employee is on paid leave, the employer may collect those premiums through salary reductions under the cafeteria plan.

If benefits continue, but the employee is not receiving a paycheck, employers may wish to use one or more methods allowed by the FMLA (pre-pay, pay-as-you-go, or catch-up). 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. If the employee fails to pay the required premium, coverage can be terminated for nonpayment.

Although HSA funds cannot generally be used to pay for health insurance premiums, there are two relevant exceptions for:

- COBRA premiums; and
- premiums while the individual is receiving unemployment compensation.

Employer action items

- ❑ Determine how to collect the employee's share of premiums in the event the employee is not receiving a paycheck. This may be outlined in a cafeteria plan document or other employer policies.

ELECTION CHANGES

Status change with no loss of eligibility (including health FSA)

If an employee has a reduction in hours, but maintains eligibility under the plan, he or she should not be given the opportunity to drop or change a pre-tax salary reduction election to discontinue benefits. There must be both a status change such as a commencement of an unpaid leave of absence and the status change must affect eligibility under an employer plan (except for group term life insurance, dismemberment, or disability coverage). However, benefits can be discontinued for nonpayment of premiums when an employee is on an unpaid leave.

Rehired employees

An individual rehired within 30 days can only make a new election if there has been an intervening event that would permit an election change.

When more than 30 days have elapsed between an employee's termination and rehire, the cafeteria plan (by design) can either allow a new election, require that the old election be reinstated, or keep the participant out of the plan until the next plan year.

Employer action items

- ❑ Ensure cafeteria plan election change rules are followed.
- ❑ If rehiring employees, review the terms of the cafeteria plan and component benefit programs to understand coverage option and pre-tax salary reduction elections upon re-hire.

CARRIER RELIEF

Many insurers are offering extended benefit eligibility (e.g., through June 30, 2020) regardless of whether the employee is currently working.

When there is no customer-wide extension, employers may want to request extended benefit eligibility for their employees or former employees from the insurers.

Some insurers are also offering relief in the form of:

- Extensions of time to remit premiums;
- Relaxation of the rules regarding re-entrance when there is a significant decrease in enrollment;
- Waiver of waiting periods upon rehire; and
- Offers of special enrollment periods to employees who had previously waived coverage.

Employer action items

- Understand the specific policies applicable to any carriers providing group health and welfare benefits.
- If offering a self-funded health plan, such extension may not be automatic. Understand and execute any opt-in (or opt-out) requirements. Further, consider potential cost implications and secure stop loss approval before deciding to adopt benefit enhancement.

COBRA

Employers with at least 20 employees offering health plan coverage are required to offer COBRA continuation of coverage when there is a loss of coverage as a result of a termination of employment or a reduction in hours. COBRA applies to the following health plan benefits offered by an employer:

- Medical plans (fully insured and self-funded)
- Dental plans
- Vision plans
- Many EAPs
- Telehealth
- Many onsite clinics
- Health reimbursement arrangements (“HRAs”)
- Health FSAs, only if the account is underspent (i.e., more contributions made than reimbursements issued) and only through the end of the plan year.

In most cases, the qualifying event (i.e., the reduction of hours) occurs and coverage terminates as of the last day of the month in which the qualifying event occurred. However, some plans may terminate coverage at the time of the qualifying event.

When the qualifying event is a termination of employment or a reduction in hours, COBRA extends for 18 months. Some state insurance rules may lengthen this period. Employers should extend COBRA to all qualified beneficiaries (e.g., the employee, spouse and children) who had health plan coverage on the day before the qualifying event.

There are notification obligations, payment and timing rules that are beyond the scope of this discussion but should be reviewed. Discuss with your COBRA administrator.

COBRA does not apply when an employee loses health coverage due to non-payment of premium.

Question: Can we pay for COBRA for individuals we have to lay off?

Answer: Generally, yes, an employer may subsidize some (or all) of the premium associated with COBRA coverage. However, there are some important things to consider:

- If the health plan is self-insured and the premium payment favors highly compensated individuals, there is a potential discrimination issue in which case the payment of COBRA premiums should be treated as taxable income to those highly compensated individuals.¹
- At the time of the loss of coverage due to the reduction in hours or termination of employment, the individual has the opportunity to enroll in other coverage such as a spouse's group plan or the Marketplace or other individual policy. If the individual decides to take COBRA coverage because it is subsidized for 3 months, for example, at the end of the 3 months (when the premium is entirely paid by the employee) there may not be an opportunity to drop the COBRA and access coverage in another plan option. While the individual can choose not to pay COBRA premium (thus resulting in the early termination of COBRA coverage), there may not be a special enrollment opportunity for other types of coverage.²

Employer action items

- Ensure COBRA is offered consistent with the terms of the benefit plans.
- Determine whether to offer subsidized COBRA coverage and understand potential implications.
- Consider other options (e.g., a taxable cash payment not conditioned on buying COBRA or other coverage).
- Determine if any state COBRA laws apply (for example, fully insured plans written out of California extend the 18-month COBRA period for an additional 18 months).
- Review benefits not subject to COBRA, for example life insurance, to determine whether there are continuation or conversion requirements. Review SPDs and discuss with carriers.

ACA FULL-TIME EMPLOYEES

For purposes of the Employer Mandate, applicable large employers (employers with at least 50 employees) must identify their ACA full-time employees ("ACA FTEs") using either the monthly measurement method or look-back measurement method. In general, an individual who has at least 130 hours of service³ in a month, as determined under one of these measurement methods, is considered an ACA FTE. Status as an ACA FTE (or not an ACA FTE) is important, not only for understanding potential penalty exposure, but also for purposes of completing annual reporting on Forms 1094-C and 1095-C.

There are special rules that come into play when employees are terminated and then rehired as well as when hours are reduced, and the employer uses the look-back measurement method.

Termination & Rehire

Monthly & Look-back Measurement Methods

An employee who terminated employment and was subsequently rehired may be considered a new employee if the employee has no hours of service with the employer (including any commonly owned entities) for a period of

¹ For this purpose, highly compensated individual is defined under Code section 105(h)(5) and means an individual who is:

- one of the five highest-paid officers;
- a shareholder who owns (applying the attribution rules of Code Section 318) more than 10% of the value of the stock of the employer; or
- among the highest-paid 25% of all employees (other than employees who are excludable – as defined below).

² However, according to the federal Marketplace website, losing the employer's subsidy for COBRA coverage may be a special enrollment opportunity for Marketplace coverage. See <https://www.healthcare.gov/unemployed/cobra-coverage/>

³ **Hours of service** include:

- each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and
- each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (as defined in 29 CFR Section 2530.200b-2(a)).

Importantly, with respect to a period where the employee is paid (or entitled to payment) but is not performing duties, the hours of service are counted without limitation. However, *educational employers* may cap hours of service during an *employment break* (permissible cap of 501 hours).

at least 13⁴ consecutive weeks.⁵ If the employee is treated as a new employee, then, upon rehire, the employer would not be subject to a penalty for the first three months of employment for the rehired ACA FTE, so long as affordable and minimum value coverage is offered at the end of the 3-month period.

For purposes of the look-back measurement method, if, under these rehire rules, the employee is a new variable hour, seasonal or part-time employee, the employer may impose a new initial measurement period to determine ACA FTE status.

Under the monthly measurement method, if the employee is not a new hire under these rules, then the employee is treated as a continuing employee. The employer must offer coverage to an ACA FTE who is a continuing employee by the later of:

- first day that the employee is credited with an hour of service, or,
- the first day of the calendar month following resumption of service.⁶

Under the look-back measurement method, a continuing employee retains the status he or she had with respect to the applicable stability period. This status is reinstated upon the employee's resumption of services (under the timeframes described above).⁷

Failure to offer a continuing ACA FTE coverage within this timeframe could result in a penalty.

Reduction in Hours

A reduction in hours will affect ACA FTE determinations differently depending on which measurement method is used.

Monthly Measurement Method

Under the monthly measurement method, ACA FTEs are determined by counting the employee's hours of service for each calendar month. If the employee averages at least 30 hours of service a week or 130 hours of service a month, the employee is an FTE for that month. For example, an employee's ACA FTE status for the month of January is determined based on the hours worked in January, determined at the end of the month.

Look-back Measurement Method

Under the look-back measurement method, employees identified in the Standard Measurement Period as ACA FTEs earn that status for a subsequent Stability Period regardless of what happens to their hours in the Stability Period, so long as the employee remains the employee of the employer. If an employee has a reduction in hours in the Stability Period (usually during the plan year) it does not affect his/her status as an ACA FTE.

Some employers have aligned their plan eligibility terms to the look-back measurement method and ACA FTE status. It is important to understand how such changes affect coverage in health benefits.

Question: Can I waive the waiting period when the employees return to full-time work?

Answer: It depends. Any SPD provisions that are present should be followed. Most SPDs are silent as to how the waiting period applies to those returning to work after a break in which case the employer should adopt a rule and apply it uniformly, with carrier approval.

⁴ Educational organizations must use **26 consecutive weeks**, as opposed to 13 weeks, under the termination/rehire rules

⁵ A special rule provides is available to shorten 13 weeks to 4 weeks in limited circumstances.

⁶ This is considered as soon as administratively practical under the regulations.

⁷ However, if a continuing employee returns during a stability period where the employee was an ACA FTE, but previously declined an offer of coverage with respect to that stability, the employer will be treated as having made an offer of coverage and is not required to make a new offer coverage.

Employer action items

- ❑ Identify and track ACA FTEs for purposes of the Employer Mandate and related reporting.
- ❑ If considering termination of employment, layoffs, or reduction in hours, be mindful that it will likely affect and complicate 2020 ACA reporting. Retain good records.
- ❑ Understand whether you have synced health plan eligibility rules to mirror the ACA look-back measurement method and the implications for coverage when identified ACA FTEs hours reduce in the stability period.