



Navigating Employee Health and Welfare Benefits Issues in the COVID-19 Era

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As employers across the country grapple with how the COVID-19 pandemic is impacting their businesses, many now face the reality of addressing employee benefits issues for their employees who are unable to work because of workplace policies regarding social distancing, government quarantines, mass-gathering bans, school closures, and travel restrictions.

One important consideration for employers is how using paid or unpaid leaves of absence, implementing furloughs, or conducting layoffs will impact coverage under an employer's health and welfare benefits.

This Alert is intended to be a high-level overview of the key employee benefits issues that employers will need to address as part of the employment practices they employ in response to the COVID-19 pandemic. While the discussion that follows applies generally to all health and welfare benefit plans offered by an employer, specific attention is given the health insurance coverage.

There are many issues that arise in connection with benefits continuation during periods of leave or furlough and employers should work with their legal counsel to review the eligibility and rehire provisions of each employee welfare benefit plan, the relevant provisions of any insurance policies (including stop-loss policies for self-insured health insurance plans), and any layoff or severance policy.

See our recent Employment Practice client alert, [What Employers Need to Know About the Families First Coronavirus Response Act](#), for an overview of the various employment law changes under federal and state law in response to the COVID-19 pandemic and recent IRS and DOL relief efforts.

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Strategy 1: Bridging the gap with a leave of absence.

The Families First Coronavirus Response Act (the “*FFCRA*”), signed into law by President Trump on March 18, 2020, requires employers with fewer than 500 employees to provide “public health emergency leave” under a new provision of the Family and Medical Leave Act (“*FMLA*”) and paid sick leave in certain circumstances related to COVID-19. The FFCRA does not address whether or how benefits must be continued during such leaves, so current FMLA requirements will apply to the FMLA leave, and the employer’s benefit plan rules will apply to the paid sick leave.

Health coverage. Under FMLA (and similar state laws), employers must maintain group health coverage for employees (whether the leave is paid or unpaid) in the same manner as if they were still actively employed. Furthermore, the employees cannot be required to pay more than the active-employee share of the premiums for such coverage. Once FMLA leave expires, employees can continue unpaid leave in accordance with employer policies and may be able continue health coverage (provided the insurance policies and welfare benefits plans allow this). Alternatively, once FMLA leave ends, and if the employee cannot return to work, he or she may have a loss of health coverage due to the reduction in hours, which is a COBRA qualifying event that could allow the employee to continue insurance coverage under COBRA.

One of the main issues an employer will have to address when an employee continues coverage under its health and welfare plans during a paid or unpaid leave of absence is how to collect premiums and when to terminate coverage for non-payment of premiums.

Options include:

1. Electing to reduce or waive the employee portion altogether so that the employer pays 100% of the premiums;
2. Arranging to have employees pay the employee portion by check or other means outside of the payroll process using after tax dollars;
3. Allowing employees to make up the employee portion after the leave has concluded; or
4. Requiring employees to enter into payroll reduction agreements in advance to recover premium payments made by the employer on their behalf during the leave through payroll deductions when the employees return to work.

Healthcare FSA and HSA benefits. Health FSA coverage continues during a paid leave of absence (FMLA or non-FMLA). During a non-paid FMLA leave, the employee can either revoke coverage or continue coverage but be allowed to discontinue contributions during the leave

(with the employer allowed to recover the employee's share of the contributions when he or she returns to work)

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 but, for periods of unpaid leave, there would be no pay from which salary deductions may be taken. In this case, the employee could either suspend HSA contributions for this period or make after-tax contributions to his or her HSA account directly and deduct those contributions on his or her tax return.

Dependent Care FSA. If an employee participates in a dependent care FSA, a shutdown in a school and other child-care facility could trigger a mid-year election change for the employee which would allow the employee to change his or her contributions to the dependent care FSA even if the employee is not on a leave of absence. Alternatively, a leave of absence could trigger a mid-year election change.

Disability and Life insurance benefits. Employers should review their insurance policies and/or consult with their insurance carriers about the eligibility provisions of the plan. Many plans provide for continuation of coverage for some period of time in the event of a layoff or a leave of absence.

Strategy 2: Furloughs and Layoffs

The range of employee benefits compliance issues raised by these strategies will depend on whether the employer is furloughing employees (the employer/employee relationship is not terminated) or laying off employees (where the employment relationship is terminated).

Furloughs. An employee who is furloughed may not necessarily have his or her health coverage under an employer's group health plan terminated. The terms of the plan document or insurance policy (for fully insured plans) will govern whether health coverage continues. A furlough is generally not a COBRA qualifying event, unless it results in a loss of group health coverage under the terms of the applicable plan. If the furlough results in a loss of health coverage, affected employees would be eligible to continue health coverage under COBRA. If the furlough does not result in the loss of group health coverage, employee benefits issues will be analyzed under the framework for an unpaid leave of absence described above.

Blue Cross NC and United Healthcare have announced that they will provide health plan coverage for covered employees and dependents as long as (i) employers consider them to be active employees during periods of temporary layoffs and/or reduction in hours and (ii) the premiums are paid in a timely manner. Other insurers will probably

adopt a similar approach but an employer should check with its own insurer. Blue Cross NC has indicated that it will review the policy on April 30th and other insurers will probably do the same.

Layoffs. Layoffs are generally treated like other employment terminations. Accordingly, a layoff would be a COBRA triggering event for the health benefits (medical, dental, vision, health FSA, etc.) for those employees covered under the employer's benefit plans. The employer must issue COBRA notices and allow affected individuals to elect COBRA continuation coverage. Additionally, employers can choose, but are not required, to subsidize COBRA premiums for terminated employees.

If you have any questions, feel free to call (919-781-4000) or e-mail your Wyrick Robbins contact or **Kyle Still** (kstill@wyrick.com) or **San Parikh** (sparikh@wyrick.com) of our Employment and Employee Benefits & Executive Compensation practice groups.

NOTICE: This Alert provides merely an overview and summary information regarding the relevant employee benefits considerations in the COVID-19 era and is not written advice directed at the particular facts and circumstances of any person or company. Please note that not all potential details and nuances regarding these requirements and changes to law have been addressed, and this Alert does not involve analysis of specific facts concerning any specific company or reach any conclusion regarding employee benefits issues for any specific individual or company. If you are interested in the subject of this Alert, we encourage you to contact us or your legal counsel to discuss the potential application to your situation.

[\[1\]](#) Note to draft: Link to the EPG COVID-19 FAQs here.