

Benefits Guidance in the Time of COVID-19: Continuing Employer Group Health Coverage During Temporary Layoffs or Furloughs

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During this global health emergency, many employers are facing the necessity of curtailing operations and imposing temporary layoffs or furloughs with their workforce. As a critical consideration, employers have been asking whether and to what extent they may permit group health care coverage to continue during a period of temporary layoff or furlough.

The following questions and answers provide some general guidelines and legal issues to consider in deciding whether to extend group health coverage during a temporary layoff or furlough.

What do we mean by temporary layoffs or furloughs? We refer to temporary layoffs or furloughs as unpaid, temporary leaves of absence, where there has been a communication that the leave is temporary and not a permanent termination of employment.

Are employees who are laid-off or furloughed entitled to continuation of their health coverage? Employees who are laid-off or furloughed while on FMLA leave will be entitled to the FMLA's health coverage continuation requirements and employees who are laid-off or furloughed while on paid-time-off will be subject to the employer policies and procedures applicable to health coverage; typically, employees will be entitled to coverage during the period they are on paid time off.

Are employers subject to federal COBRA required to provide employees with COBRA elections in the event of a temporary layoff or furlough? Yes, if the temporary layoff or furlough results in both a reduction in hours and a loss of healthcare coverage, which is a COBRA qualifying event. If the group health plan permits laid-off or furloughed employees to continue participation in the group health plan for a period of time (as discussed below), there should be no COBRA qualifying event because the loss of coverage has not yet occurred. If, after a period of time during the leave or furlough, active coverage is no longer extended to the laid-off or furloughed worker, the COBRA qualifying event should occur at that future point in time if the loss of coverage still results from the reduction in hours.

May employers continue active group health care coverage for laid-off or furloughed employees? Generally, yes, if the terms of the group health plan permit such continuation. If the

terms of the plan do not permit coverage to continue during a temporary layoff or furlough, the plan could be amended to do so; however, to the extent the plan is insured (or self-insured and contains insured aspects or a stop-loss policy), it will be important to ensure that the applicable third-party insurer and/or third party administrator agrees to the extension of coverage. Service contracts should be reviewed and updated for this purpose.

May the employer subsidize the employee premium during the temporary layoff or furlough?

Yes, the employer may pay the cost of the employee premium on the employee's behalf. Care should be given to cafeteria plan rules and nondiscrimination requirements in subsidizing the premiums to ensure tax favorable treatment.

May the employer charge employees the cost of the employee premiums during the period of temporary layoff or furlough?

Yes. Similar to common approaches used during FMLA leave, if active group health plan coverage is continued for the employee, the employer could allow the employee to prepay, bill the employees directly for employee premiums (pay as you go), or cover the premiums and recoup the amount paid when the employee returns from the temporary layoff or furlough. The FMLA generally requires that the options provided for FMLA leave be at least as favorable as the options under non-FMLA leave so coordination with FMLA will be important. Furthermore, appropriate documentation and administrative procedures will need to be put in place.

May an employer allow an employee to fund health flexible savings accounts (“FSAs”) during the temporary layoff or furlough?

Yes, under the approaches described above for employee premiums under a FMLA leave, including consideration of cafeteria plan and nondiscrimination requirements. If health FSAs are not continued during the temporary layoff or furlough, expenses incurred during that period of layoff or furlough may not be covered. (Please note legislative and regulatory proposals are being put forward to expand flexibility of health FSAs during this national emergency.)

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