Benefits Compliance and COVID-19: Return to Work Frequently Asked Questions
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As employers continue to navigate the COVID-19 public health crisis and its impact on business operations, they must consider benefits compliance matters as employees return to work. To that end, below are frequently asked questions specific to benefits administration as employees begin to return to work.

1. *If employees lost eligibility for group health plan coverage as a result of a furlough, when must their health coverage be effective upon return to work?*

There are two ACA rules that come into play with this type of potential return to work situation.

First, group medical plans are prohibited from applying a waiting period that exceeds 90 calendar days (which is to say, an eligible employee must be able to elect coverage that becomes effective within 90 calendar days).

Under the ACA's waiting period rule, a former employee who is rehired may be treated as newly eligible for coverage upon rehire (and subject to the plan's eligibility criteria and waiting period requirement), subject to several conditions, as explained below. Additionally, if eligibility for coverage depends on being employed in an eligible job classification, a waiting period can be imposed when an employee moves from an ineligible job classification to an eligible job classification. So, if the furloughed status resulted in the employee being ineligible for coverage under the plan terms, resuming work may return the employee to an eligible job classification.

However, the imposition of the waiting period must be "reasonable under the circumstances" and "not a subterfuge to avoid compliance." These terms are not defined, so the situation would need to be reviewed in terms of factors such as the expectation of the parties and the employer's motives.

Additionally, there are the ACA shared responsibility provisions for a large employer to consider.

With respect to new hires, there is a limited non-assessment period of three calendar months in which an ALE will not be liable for shared responsibility penalties for not offering coverage to full-time employees.

As applied to a furlough situation, if an employee stops working for the ALE and then returns, it is necessary to determine whether the employee is considered to be a continuing employee or a terminated and rehired (aka “new”) employee upon return.

Generally, an employee will be considered to have terminated employment if the employee has a period of 13 consecutive weeks in which they are not credited with an hour of service. (For an educational organization, this period would be 26 consecutive weeks.) In such case, the employee would be considered a new employee upon return.

If deemed a new employee, the limited non-assessment period can be applied, and the group health plan coverage would need to be effective by the first of the month following three full calendar months of employment.

By contrast, if the employee was credited with service hours during the 13 week timeframe, then the returning employee would be classified as a continuing employee and their previous eligibility status would continue. In this situation, the required effective date of the coverage offered would be the first day that the employee is credited with an hour of service or as soon as administratively practicable (generally interpreted to be the first day of the following month). So, for a continuing employee who returns to work on May 15, the coverage offered should be effective no later than June 1.

Accordingly, the credited hours of service (if any) for each affected employee prior to the return date should be reviewed. Failure to offer coverage in the required timeframe could subject the employer to shared responsibility penalties if the employees sought marketplace coverage and received a tax credit.

Finally, let’s say an employee is determined to be terminated and rehired so that a limited non-assessment period could be applied with respect to the coverage offer. Although the non-assessment period is three full calendar months, the ACA’s prohibition against waiting periods that exceed 90 days still applies. The coverage date would still need to be coordinated with the 90 calendar day waiting period requirement. So, the employee returning on May 15 would need to be offered coverage that would be effective by August 13 to meet the waiting period rule, even if the limited non assessment period rule would only require a September 1, 2020, effective date. So, the employer always needs to coordinate the two dates with any new hire or rehire.

2. Upon return to work, are employees' elections reinstated or can employees make new elections?

Under Section 125, if employees return to work within 30 days, they are reinstated to the same coverage (with no chance to change elections). However, if employees return to work after 30 days, the plan (by design) can 1) allow a new election, 2) require that the old election be reinstated or 3) keep the participant out of the plan until the next plan year. Practically speaking, the third option is not ideal for ALEs subject to the employer mandate when dealing with medical coverage. As mentioned above, for ALEs: if an employee returns after 13 weeks (26 weeks for educational institutions), they can be treated as a new hire subject to a new waiting period.

3. How should an employer handle any missed premium payments?

If an employee continued to be eligible under the plan, how the employer handles any missed premium payments depends on its leave policies and what was communicated to employees. Generally, employers mirror the rules for FMLA premium payment during leave. If the employer required that employees pay premiums post-tax during the furlough period by personal check (or money order, credit card or electronic payment), the payments likely would have been due per pay period or per month while on furlough. Importantly, employers should follow any procedures for nonpayment of premium as outlined in any policies or employee communications.

Alternatively, the employer could permit the employee to pay for premiums upon return. In this instance, the employer should follow any guidance in its leave policies and plan documents (often collecting premiums via a special catch-up salary reduction, reallocating across remaining pay periods, or collecting payment on a post-tax basis).

4. How is health FSA coverage impacted upon participants return to work?

The answer depends upon whether the employees lost eligibility for the health FSA when they were furloughed, and the length of the furlough.

If employees lost eligibility for FSA coverage, COBRA should be offered for any employee with an underspent balance. If employees wanted coverage during the furlough period, they would have had to elect and pay for COBRA. Then, if they return to work in less than 30 days since the date they were furloughed, the employees would be reinstated to their previous elections, including the health FSA. If the break in service is more than 30 days, then they would be treated like new hires, with an opportunity to enroll in the health FSA if they choose.

If the employer did not wish for their employees to lose eligibility while on furlough, the limited guidance available (including the federal government's own cafeteria plan) suggests three possible approaches, listed below. Each approach may impact benefits compliance upon return to work, as mentioned.

1. The employer could suspend the FSA, with no employee contributions and no FSA coverage during the furlough. Upon return, there would be no employee salary contribution collection in arrears. The employee is not responsible for salary contributions during the furlough, but the employee cannot be reimbursed for FSA claims incurred during the furlough period. The employee's total annual FSA benefit either remains the same (with the employer picking up the difference) or reduced by the missed furlough amount.
2. The employer could suspend employee FSA contributions but continue FSA coverage through the furlough. Upon return to work, the employees would pay back the contributions they skipped while on furlough, paying a new, recalculated contribution amount over the remaining pay periods. Employees can incur health FSA expenses during the furlough, and the employee's FSA benefit amount remains the same. The employer risks not collecting in arrears if the employee does not return to work.
3. The employer could pay for the employees' contributions and continue coverage during the furlough. However, this third option comes with some additional issues. The employer should be careful to make contributions that do not cause the FSA to lose its excepted benefit status (i.e., employer contributions should not exceed $500 or an amount that matches the employee's contribution).

Under recently released IRS guidance for 2020, the employer also has the option to amend its plan to allow employees to change or revoke a prior FSA election prospectively.

5. Are there benefits compliance considerations when determining which employees to bring back to work?

While this is largely an employment law issue, employers should keep in mind nondiscrimination rules impacting benefits administration, such as under HIPAA and Sections 105(h) and 125. For example, employers will want to ensure they are not making employment or plan decisions based on health claims, health status, claims history or similar. Further, employers should make sure their plan design does not somehow favor more highly compensated individuals.

In addition, employers should also be aware of other laws prohibiting discrimination in employment including ADA, ADEA, and Title VII.

6. How are hours counted for furloughed employees during their leave?

Generally, employees on furlough are on unpaid leaves of absence. Employees on an unpaid leave of absence are credited with zero hours during leave. (Now, there is an exception for special leave, but this is likely not applicable during furlough.) Depending on the length of furlough, future offers of coverage could be impacted for employers using the lookback measurement method for purposes of compliance with the ACA's employer mandate.

As background, regarding paid leave – any hour an employee is paid or entitled to payment – those hours will count as hours of service. While this includes hours while an employee is taking emergency paid sick leave (EPSL), keep in mind furloughed employees are not eligible for EPSL under the FFCRA (see discussion below).

7. Is ACA reporting impacted for the months in which employees are furloughed?

Reporting an offer of coverage is generally not impacted for furloughed employees who remain eligible for coverage. If the offer of coverage remained during the furlough, reporting codes for Line 14 (Offer of Coverage) and Line 16 (Section 4980H Safe Harbor and Other Relief) should be the same as prior to the furlough. However, if employee contributions changed during the months of furlough, the amount reported in Line 15 (Employee Required Contribution) should to be adjusted accordingly.

If employees lost eligibility during furlough and were offered COBRA coverage due to the reduction in hours, the employer still reports offers of coverage in this instance. This is because if COBRA is offered due to a reduction in hours (rather than termination), COBRA is reported as an offer of coverage. However, the amount indicated in Line 15 will need to be adjusted accordingly (since the amount will likely increase with COBRA coverage).

Note that when COBRA coverage is offered due to termination of employment, an employer should use code 1H (no offer of coverage) on Line 14 for any month that the former employee was offered COBRA. For those same months, the employer should use code 2A (employee not employed during the month) on Line 16 for each month in which the individual is not an employee regardless of whether the former employee enrolled in the COBRA continuation coverage. (Self-funded plans will need to also report COBRA coverage of any former employee, or employee's family member, on Part III of Form 1095-C.)

Importantly, if employees placed on furlough or leave (and not terminated) are not offered affordable coverage under the employer's group health plan during the furlough or leave period (during a stability period in which they measured full time), there could be risk for Penalty B under the ACA's employer mandate (which is triggered if an employee obtains coverage from the exchange and receives a subsidy).

8. Are furloughed employees who return to work eligible for paid leave under the FFCRA?

While employees are on furlough, they are ineligible for paid leave under the FFCRA — both emergency paid sick leave (EPSL) and expanded FMLA (EFMLA). This is due to the FFCRA eligibility requirement that, in order to qualify for the leave, the employee would be able to work but for the fact that one of the qualifying reasons under the statute applied. By definition, a furloughed employee would not be able to work regardless of whether there was a qualifying reason or not.

However, upon return to work, an employee is immediately eligible for EPSL (if one of the qualifying reason applies). To determine the rate of pay for EPSL in this instance, any inactive leave periods (such as a period of furlough) would be disregarded. For EFMLA, employees may also be immediately eligible if they worked at least 30 days in the 60 days prior to the furlough (or if they work 30 days prior to the request of leave).

9. Does section 6001 of the FFCRA require health plans to cover COVID-19 testing for surveillance or employment purposes?

No. Section 6001 requires health plans to cover COVID-19 testing when such testing is done for diagnostic purposes in accordance with DOL guidelines. Testing for other purposes, such as determining whether an employee can return to work, is beyond the scope of section 6001 of the FFCRA.

10. May an employer require antibody testing before permitting employees to re-enter the workplace?

No, because antibody tests do not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries of current employees. Antibody tests are different from tests that help diagnose active cases of COVID-19, which are permissible.

11. Must an employer maintain information gathered from COVID-19 tests taken of employees, such as employee temperature checks, separately from other information it maintains of its employees?

Yes. This information is confidential medical information and the ADA requires that it be stored separately from an employee's personnel file, in order to limit access to it. However, an employer may store all medical information related to COVID-19 in existing medical files it maintains on employees, if applicable. This includes an employee's statement that he has the disease or suspects he has the disease, the employer's notes or other documentation from questioning an employee about symptoms, and records of temperatures taken of the employee before entering the workplace. Note that this does not prohibit the employer from disclosing that information to a public health agency, nor does it prohibit a temp/staffing agency or contractor from notifying an employer if it learns an employee is positive.

12. Are employers required to post required compliance posters, such as those for FMLA and FFCRA, electronically if their employees are working from home or otherwise working remotely?

It will depend upon on the notice/poster requirements for that particular regulation. If it's a standard poster requirement, there's not likely a strict requirement to distribute directly to employees (since it would otherwise just be posted in the break room). For instance, the FFCRA notice requirement mandates that notice should be posted somewhere conspicuous on the employer's premises, although employers can send it to employees via email or on an internal or external website. Employers could distribute them to employees or could post on the intranet (like an employee portal), even if it is not strictly required. If it's a notice that is required to go directly to employees (like the exchange notice, etc.), then it should be sent to employees (either via postal mail or via email (if DOL electronic disclosure rules are followed)).

13. Can former employee's furlough be extended, and thereby delay their return to work, in order to avoid providing FFCRA leave?

No. Employers may not discriminate or retaliate against employees (or prospective employees) for requesting or taking leave under the FFCRA. For instance, if an employee's need to care for his child qualifies for FFCRA leave, he has a right to take that leave until he has used all of it. A request for leave cannot influence an employment decision (e.g., deciding which employees to recall from furlough).