

## Coronavirus (COVID-19) – Benefit Eligibility during Sick Leave, Furloughs and Terminations

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Many employers are faced with a significant number of employee leaves of absence and employment terminations related to COVID-19. While questions regarding how employers determine whether leaves, furloughs or lay-offs are appropriate, including the handling of wages, would be better addressed by HR or employment law counsel, we can help provide some clarity around how to handle benefit eligibility. We expect additional guidance and clarification from federal and state government agencies over the next several weeks, perhaps providing some exceptions and requirements in regard to benefit eligibility; however, there are some general guidelines which already exist that we can follow in the meantime.

### Sick Leave

For those employees who request leave due to their own COVID-19-related illness, quarantine or isolation, or to care for a sick family member or other individual affected by COVID-19, it is necessary to consider whether federally-protected leave applies.

When an employee requests a leave of absence for such situations, private employers with <500 employees and public entities of all sizes are required to provide up to 2 weeks (up to 80 hours) of Paid Sick Leave under the Families First Coronavirus Response Act (FFCRA). An employee could also qualify for this paid leave if the employee cannot work because the employee needs to care for a child due to Coronavirus-related school or daycare closure.

Beyond what is required under the FFCRA as Paid Sick Leave, employees may also qualify for protected leave under the Family Medical Leave Act (FMLA). All public entities and private employers with 50 or more employees are required to offer up to 12 weeks of protected leave for an employee's serious health condition or for an employee to care for a family member with a serious health condition. Employees who request leave for qualifying reasons are eligible for FMLA-protected leave if they: (i) work for a covered employer; (ii) have worked for the employer for at least 12 months as of the date the FMLA leave is to start; (iii) have at least 1,250 hours of service for the employer during the previous 12-month period; and (iv) work at a location where the employer employs at least 50 employees within 75 miles of that worksite. FMLA-protected leave is generally not required to be paid, but the employer must continue to offer group health plan benefits under the same terms as if the employee was actively at work, including the same employer and employee contributions for as long as the employee is eligible for FMLA-protected leave. For more detailed information discussing employers subject to FMLA and FMLA requirements, see DOL's Guide for Employers found here – <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>.

For those employees who do not qualify for FMLA-protected leave, it's also necessary to consider any state leave requirements and any leave policies the employer offers (if any). In many cases, benefit eligibility may be lost upon leave (or at the end of the month in which leave is taken) unless the employer has a leave policy which allows for an extension of benefit eligibility. If the employee is no longer considered eligible and there isn't a leave policy extending benefit eligibility, coverage should be terminated and COBRA offered. Remember that a reduction in

hours that causes a loss of eligibility is a COBRA qualifying event for an employee even if employment is not terminated.

## Furlough

Employers may be forced by government order, public health considerations, or economic circumstances to furlough employees for a period of time due to COVID-19. Typically, furloughed employees remain employed, but have reduced hours or are placed on a temporary leave of absence. Such employees are NOT eligible for the Paid Sick Leave or Expanded FMLA set forth in the FFCRA.

If employment is not terminated, but there is a reduction in hours/leave of absence, it's necessary to consider plan eligibility rules and any applicable leave policies in order to properly administer benefits.

- If an employer is using the **look-back measurement method**, employees may remain eligible for benefits, at least for the duration of the current stability period. The general rule is that those who averaged full-time hours in the previous measurement period are considered eligible for the corresponding stability period, even during a reduction in hours, unless employment is terminated.
- If an employer is using the **monthly measurement method**, employees are unlikely to meet plan eligibility requirements during a period of reduced hours.
- An employer may have a **leave of absence policy** for specified circumstances which extends benefit eligibility for a period of time. An employer might also adopt such a policy specifically related to COVID-19. If choosing to adopt such a policy, the safest approach would be to make it available to all similarly situated individuals. In addition, any such policy should be carefully coordinated with the carrier or stop-loss vendor to ensure claims coverage during the leave of absence. Without their blessing, the carrier could refuse to provide coverage and leave the employer liable for medical expenses incurred.

While on furlough, if employees no longer meet the plan eligibility rules and there isn't a leave policy in place which extends benefit eligibility, coverage should be terminated and applicable COBRA or state continuation coverage should be offered.

## Termination/Lay-Off

Employers may have to make the tough decision to lay-off employees due to circumstances created by the COVID-19. A lay-off is considered a termination of employment, although potentially short-term under these circumstances. If employment is terminated, the former employees will not qualify for the Paid Sick Leave or Expanded FMLA set forth in the FFCRA and typically will no longer be eligible for benefits, in which case those covered when the lay-off occurs should have coverage terminated and be offered COBRA or state continuation as applicable.

As mentioned above for furloughs, there may be some flexibility to extend benefit eligibility beyond employment for a short period of time under these circumstances. However, any efforts to extend benefit eligibility to former employees should be coordinated with the carrier or stop-loss vendor to ensure claims coverage, and the recommendation would be to offer such extended benefit eligibility to all similarly situated individuals to avoid potential discrimination issues.

## Premium Contributions

Whether active coverage continues to be available, or federal/state continuation coverage is offered following a termination of active coverage, the employer could choose to adjust employer contributions or subsidize the premiums for a period of time.

- Some employers may choose to reduce or stop employer contributions.
  - If the employees no longer meet plan eligibility requirements, the employer doesn't have any obligation to help pay for benefit premiums.
  - However, if the employees are still eligible for active coverage, applicable large employers should consider §4980H(b) affordability requirements for full-time employees to avoid potential penalties.
  - In addition, employers offering fully-insured coverage should consider any carrier requirements regarding employer contributions.

- Other employers may choose to increase employer contributions or fully cover the cost of coverage, which is certainly permitted.

If employees remain enrolled in active coverage and employee contributions cannot be collected via payroll, the employer will need to determine a method of collecting the employee contributions. The employer could choose to require employees to pay in after-tax during the time of reduced hours or a leave of absence; alternatively, the employer could cover the cost and allow employees to make catch-up contributions (pre-tax, if through a cafeteria plan) upon return to work.

We recommend that employers adjust premium contributions in the same fashion for all similarly situated individuals and also carefully communicate any employee responsibilities and applicable time frames.

### **§125 (Cafeteria) Plan Election Changes**

A termination of benefit eligibility clearly permits a mid-year election change for any pre-tax elections made through an employer's cafeteria plan. In addition, a change in the cost of coverage initiated by the employer will also generally permit a corresponding change in pre-tax elections, including dropping coverage completely when the cost increases significantly.

On the other hand, when there is a reduction in pay, but benefit eligibility and the cost of coverage are unchanged, the rules do not permit a mid-year change in pre-tax elections. That being the case, if employers choose to be a little more flexible under these unique circumstances by allowing election changes that are not specifically allowed under §125 rules, it seems extremely unlikely that the IRS would take any significant enforcement action.

### **Public Exchange Coverage & Subsidy Eligibility**

Employees who lose eligibility for group medical coverage, or for whom coverage becomes unaffordable due to a decrease in employer contributions, will likely qualify for a special enrollment through their local public Exchange. If they are not eligible for minimum value, affordable coverage offered through an employer and have household income of 100-400% of the federal poverty level, they may also qualify for a tax subsidy to assist with paying for coverage purchased through the public Exchange. This might be a more attractive coverage option than continuation coverage requiring the employee to pay up to 102% of the monthly premium cost.