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Employee Benefits Update

March 2020

The Impact of the COVID-19 Pandemic on Your Employee Benefit Plans: Part 2

Has it really only been a week?

Since our first COVID-19 Employee Benefits Update, President Trump has signed into law the Families First Coronavirus Response Act (the "FFCRA"); Congress is deliberating an economic stimulus and aid bill that will impact employee benefit plans; and many of you have called with questions about how the COVID-19 pandemic is affecting your workforce and your benefit plans.

Our Firm has published a terrific "User's Guide" to the FFCRA, but we thought it would be helpful for our clients to also address some benefits-related issues in this Employee Benefits Update.

MEDICAL PLAN ISSUES

Q1. Does my group health plan have to cover the cost of COVID-19 diagnostic testing?

- Yes. Under the FFCRA, all group health plans—regardless of employer size, whether they are fully-insured or self-funded, or whether they are high-deductible plans or traditional plans—must cover the full cost of COVID-19 diagnostic testing. The testing cannot be subject to copays, coinsurance, deductibles, or pre-authorization requirements. In addition, group health plans must cover the full cost of items and services provided to a participant during a health care visit *(i.e.*, office visit, telehealth visit, urgent care center visit, or emergency room visit) that results in covered COVID-19 testing, but only to the extent that the items or services relate to an evaluation to determine whether the test is needed, or to furnishing or administering the test.
- This requirement does not apply to retiree-only plans and HIPAA-excepted benefit plans.
- This change will need to be reflected in a written amendment to your group health plan document, and in a Summary of Material Modifications or updated Summary Plan Description.

Q2. If I am an employer with fewer than 500 employees, and one of my employees qualifies for Paid Sick Time ("PST") under the new Emergency Paid Sick Leave Act ("EPSLA") that was part of the FFCRA, do I need to continue to provide the employee with coverage under our group medical plan?

Yes. This is authorized paid sick leave, so you should continue to provide them with coverage under your group medical plan, and deduct their share of premiums (if any) from their pay, consistent with how you handle any other paid sick leave or paid time off.

Q3. If I am an employer with fewer than 500 employees, and one of my employees qualifies for paid emergency family medical leave under the new Emergency Family Medical Leave Act ("EFMLA") that was part of the FFCRA, do I need to provide the employee with coverage under our group medical plan?

Yes. As with the regular FMLA, an EFMLA-covered employee is entitled to remain an active participant in your group health plan for the duration of their EFMLA leave. In addition, the employee's payment of their share of any premiums for continued group health plan coverage during EFMLA leave should be treated the same way you handle any other type of FMLA leave (*i.e.*, prepayment; pay-as-you-go, with the employee directly sending in the premiums from home; or recouping the premiums from the employee when they return to work).

Q4. If I furlough employees or put them on a temporary leave of absence (not covered by FMLA or EFMLA), do I need to issue COBRA notices, or can I elect to continue their health insurance coverage during the leave of absence or furlough?

There is both a technical answer and a practical answer to this question.

From a *technical* perspective, you need to check the eligibility and coverage terms of your medical plan documents. Some (but not all) medical plan documents already provide for continued coverage during temporary, approved leaves of absence, in which case your furloughed employees can continue to be covered without any issues. However, in many other situations, even if you are not formally terminating the employee's employment, they may still be experiencing a reduction in hours such that they no longer meet the stated eligibility requirements for coverage under the terms of your group health insurance policy or plan document.

- If an employee loses eligibility under the terms of your policy or plan document because of a reduction in hours, COBRA would normally apply, meaning that the employee and all of the employee's enrolled dependents will be able to elect continuation coverage, in accordance with standard COBRA rules and procedures.
- ***However,*** if you wanted to provide the employee with continued coverage under your group health plan during the period of leave or furlough, and your plan documents do not already provide for this, you can do so by amending your health plan documents.
  - If you have a fully-insured plan, you will need to work with the insurance company that issued your health insurance policy, in order to amend the eligibility terms to allow for continued coverage for an employee who has a temporary cessation of employment or reduction in hours.

- If you have a self-funded plan, you have the ability to control the terms of your plan, so amending your plan to clarify the continued eligibility of employees on leave or furlough should not be too difficult. You will need to work with your third-party administrator/claims administrator to amend the eligibility terms of your health plan documents, and you should also confirm any changes with your stop-loss insurance carrier.
- In developing this amendment, consider whether you want to limit the scope of the amendment just to leaves or furloughs due to the COVID-19 emergency, rather than having the reason for the leave or furlough be open-ended.
- You will also need to consider how you will collect the employee's share of premiums for this continued coverage. For instance, you could have the employee prepay their premiums; pay their share of premiums from home as they go along through their leave or furlough (which can present logistical challenges); or have the employer pay the full amount of premium and then recover the employee share once the employee returns to work (which exposes the employer to some economic risk if the employee does not return to employment).
- If you decide to pay the full cost of premiums for some of the employees on leave or furlough, but you do not do that for other active employees, you should discuss with your third-party administrator the impact that this might have (if any) on the IRS nondiscrimination testing that applies to premium payments and medical plans, especially given the reality that many of the employees on leave or furlough will be non-highly compensated employees and those tests are designed to flush out special benefits provided in favor of highly compensated individuals, not the other way around.

- Lastly, in determining whether the employees you furlough or place on leave will be eligible for COBRA coverage, or whether you will amend your plans to permit continued coverage during the furlough or leave, you should take into consideration how these employees will be counted for purposes of your ACA compliance. For example, if you use a one-year look-back measurement period and your plan year serves as your stability period, an employee who is furloughed or put on a leave of absence during this plan year, but whose health plan coverage is terminated because of a reduction in hours, may still be considered as a "full-time employee" who was not offered affordable coverage under your group health plan during the period of leave or furlough, which could have implications for your ACA reporting and potential employer shared responsibility penalties.[1]

From a *practical* perspective, if you have a fully-insured plan, you should know that in recent days, several insurance companies have pre-emptively announced that they intend to waive eligibility and hours conditions for employees on leave or furlough, at least for a period of time. If you are with a carrier that has made such an announcement, you do

[1] A full discussion of the employer shared responsibility requirements under the ACA, how employers establish look-back measurement periods and stability periods, and how employers fulfill their reporting obligations and assess potential penalties, is beyond the scope of this Employee Benefits Update. For more information about these requirements, please refer to several of our prior Employee Benefits Updates (March 2014 and February 2015).

not need to amend your plan documents, but you should keep copies of all of their communications in your records. If your carrier has not taken this approach, but if you anticipate that the leave or furlough is going to last only a few weeks or a couple of months (and recognizing that none of us can discern how long all of this is going to last), you could make the business decision to just continue covering the furloughed workers on your fully-insured medical plans, without making any adjustment to your plan document. While there is some modest risk that your insurer could come back at some point and assert that these employees should not have been on the plan during the period of leave or furlough (except through COBRA), assuming that the employees resume active employment with the company in the near future, it would seem that this risk would be quite low.

Q5. Should I continue making employer contributions to employees' Health Savings Accounts ("HSAs") while they are on a leave of absence or furlough?

If you are continuing an employee's coverage under your high deductible group health plan during a furlough or a leave of absence (whether due to FMLA, EFMLA or otherwise)—rather than having them go on COBRA—and your policies and open enrollment materials communicated that you would make HSA contributions as long as your employee met the conditions you established in your policies, then we recommend that you continue to make those employer contributions to your employees' HSAs while they are on a leave of absence or furlough, even though the IRS has not squarely addressed this question.

Q6. Can I expand the terms of my group health plan to cover telemedicine, without cost sharing, since that has become a popular alternative during this pandemic?

If you decide that you want to change the terms of your group health plan to cover telemedicine without cost sharing, such as deductibles, copayments, or coinsurance, you first need to check with your insurance carrier (if you sponsor a fully-insured plan), or with your claims administrator and stop loss carrier (if you sponsor a self-insured plan).

If you sponsor a traditional medical plan that is not a high deductible health plan, and you decide to implement this benefit change, you will need to work with your insurance carrier or claims administrator, as the case may be, to prepare a formal written plan amendment, along with a Summary of Material Modifications or an updated Summary Plan Description.

However, if you sponsor a high-deductible health plan, we do <u>not</u> recommend making this change at this time. Unless the IRS issues guidance permitting waivers of cost sharing requirements for telemedicine services, such a change could cause your plan to cease to be a qualifying high deductible health plan, which in turn could jeopardize the ability of you, and your employees, to contribute to any HSAs.

CAFETERIA PLAN ISSUES

Q7. If I sponsor a dependent care assistance plan, can employees change their benefit elections since schools and childcare centers are closed?

Yes. If an employee no longer has childcare expenses because their children are home due to the widespread closure of schools and childcare centers, they have experienced a "significant reduction in coverage", which would permit them to reduce, or discontinue, elections under your dependent care assistance plan, as long as your plan documents permit this.

DISABILITY AND LIFE INSURANCE PLAN ISSUES

Q8. During the COVID-19 pandemic, which employees can qualify for benefits under my short-term disability plan?

Regardless of whether your short-term disability plan is an ERISA-covered plan or a salary continuation payroll practice that is exempt from ERISA, your employees will need to have experienced an illness or disability to qualify for benefits. This likely means they will need to have received a diagnosis of COVID-19 personally; merely staying at home to self-isolate is not likely to be sufficient to qualify for short-term disability (or long-term disability) benefits.

Q9. If I put any employees on a temporary leave of absence or furlough, will their group life, accidental death and dismemberment ("AD&D"), and disability insurance benefits be terminated automatically, or can I continue their coverage, without interruption, during the period of leave or furlough?

As with medical coverage, addressed in Q4. above, this will depend on the terms of your insurance policies and plan documents.

With the exception of some short-term disability benefits that are self-insured, virtually all life, AD&D and long-term disability benefits are fully-insured with a third-party insurance company. Therefore, you will need to check the terms of your plan documents to determine if an employee on a temporary leave of absence or furlough will lose their eligibility for coverage because they will no longer be actively working, and if there are any conversion or portability rights for an employee to continue the coverage on their own. However, as with fully-insured medical plans (described above in Q4.), you should know that in recent days, several insurance companies have pre-emptively announced that they intend to waive eligibility and hours conditions for employees on leave or furlough, for at least a period of time. If you are with a carrier that has made such an announcement, you do not need to amend your plan documents, but you should keep copies of all of their communications in your records.

If your employees on leave or furlough will lose coverage under your life, AD&D and/or disability benefit plans, without an amending changing your policy's eligibility conditions, then we recommend that you work with the carriers to make sure they provide written notice to the employees of any right that they might have to convert or port their

policy to individual coverage in a timely way, since many insurance policies provide only a limited window of time (typically 30 days) to do this.

On the other hand, if you want to continue coverage under your life, AD&D, and/or disability insurance programs for employees on leave or furlough, and your insurance carrier has not already informed you that they are going to waive any eligibility conditions during the pandemic, you will need to work with your insurance carrier to adopt a formal written amendment to your plan documents, along with a Summary of Material Modifications or updated Summary Plan Description.

RETIREMENT PLAN ISSUES

Q9. If finances are tight, may our company, in order to save money, reduce or eliminate company contributions to our 401(k) or 403(b) retirement plan?

The answer to this question depends on the type of plan you have, the written terms of that plan, and IRS regulations.

- If your retirement plan has a fully discretionary contribution—where the amount and timing of company contributions (if any) depends each year on company action—then you should be able to reduce or eliminate company contributions to that plan. Depending on your plan governance structure, and prior communications made to employees about the contributions that they might expect for the year, you may need updated resolutions by your Board of Directors or Compensation Committee, and updated employee communications, but you may not need a formal amendment to your plan document.
- If your retirement plan specifies a fixed matching or nonelective contribution (but is not a "safe harbor" plan, as described below), you should review the plan's terms about the eligibility conditions for receiving those company contributions, to make sure any changes to your contributions do not impermissibly reduce the right to those benefits for employees who have already satisfied those eligibility conditions. However, you could consider making changes to your plan's contribution levels going forward, provided that you make a formal written amendment to your plan documents and also issue a Summary of Material Modifications or updated Summary Plan Description to your employees.
- If your retirement plan is a "safe harbor" plan, there are specific compliance considerations—and advance notice obligations—that apply if you are interested in implementing a reduction to your safe harbor contributions in the middle of your plan's fiscal year. For example, if you can demonstrate that your company is operating at an economic loss, or if your annual safe harbor notice for 2020 reserved your right to modify or suspend the safe harbor contributions, then you can amend your plan to change your contributions, provided that you (i) amend your plan document; (ii) give your employees at least 30 days' advance notice of the change so they can modify their own contribution elections; (iii) fully fund the safe harbor contributions that were due before the amendment was adopted; and (iv) perform ADP/ACP testing for the entire 2020 plan year.

Q10. Has the IRS changed its rules about retirement plan hardship withdrawals for employees who may be facing financial strain during the COVID-19 pandemic?

Not at this time. Currently, if a 401(k) plan or 403(b) plan permits hardship distributions, such distributions can typically only be made if they are for certain qualifying medical expenses, funeral expenses, amounts needed to prevent foreclosure or eviction, funeral expenses, etc., which cannot be satisfied from any other sources.

The IRS has not issued any guidance relaxing these rules to the extent that a participant experiences some financial strain as a result of the COVID-19 pandemic, but does not otherwise qualify for a hardship distributions. It is possible, however, that in the near future, the IRS or Congress may relax the conditions for hardship withdrawals, or consider the COVID-19 pandemic to be a "disaster", permitting withdrawals without being subjected to the 10% early distribution tax that would normally apply if the employee were under age 59-1/2.

Q11. Can my employees borrow from their accounts in our company's qualified retirement plan?

Yes, if your retirement plan has this feature. However, any plan loan made from your company's qualified retirement plan has to meet certain IRS conditions, as well as the terms of your plan and any stand-alone loan policy that you may have adopted. For example, many loan policies restrict loans to actively-working employees who are being paid, because the loans are repaid through payroll deduction. Therefore, if you are putting an employee on an unpaid leave of absence or temporary furlough, they may not be able to obtain a loan, unless you modify the terms of your plan documents or loan policies, and develop special strategies to suspend loan repayments during the leave of absence or furlough, or support the employee's repayment of the borrowed funds while they are on leave or furlough.

Q12. If I am laying off a lot of my employees, do I have to worry about a partial plan termination?

Yes, this is something of which you should be aware. The IRS presumes that your qualified plan has undergone a "partial termination" if the turnover rate of your plan participants is at least 20%. Therefore, if you are laying off a significant number of your employees who participate in your plan, your plan may be experiencing a "partial termination", which would require you to fully vest the benefits of the affected individuals and report the partial termination on the plan's Form 5500. It is also important to keep in mind that a "partial termination" is not limited to a one-time event, but can also occur as a result of a series of layoffs spread out over time.

PAYROLL TAX CREDIT ISSUES

Q13. Can you explain how the payroll tax credit for PST and EMFLA leave works?

Our Firm's User Guide to the FFCRA details how the payroll tax credit will work for amounts that you pay for PST and EFMLA leave, subject to the dollar caps imposed by the FFCRA.

In addition to these amounts, the payroll tax credit is increased by the amount of "qualified health expenses", which appears to mean the employer's share of health premiums associated with the PST or EFMLA paid to affected employees, for the period of their PST or EFMLA leave. Future guidance, which should be issued in the next several weeks, will likely clarify which expenses constitute "qualified health expenses".

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We will continue to monitor the fast-moving developments and government guidance relating to the COVID-19 pandemic that impacts your employee benefit plans. Please stay healthy, and contact any member of our Employee Benefits and Executive Compensation Group, below, should you have any questions.

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