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Coronavirus Alert

Part III on the Coronavirus and its Impact on Employers: FAQs on Benefit Plan Implications of Furloughs and Lay Offs

Introduction

As companies continue to struggle with how to respond to the Novel Coronavirus 2019 (COVID-19) outbreak, many employers have come to a point where they need to consider employee terminations, layoffs and/or furloughs. This third set of FAQs from Alliant's National Employee Benefits Practice focuses on Compliance related issues to help employers understand their legal duties and obligations as layoffs and furloughs become a reality. Given the rapidly evolving nature of this situation, we will continue to provide periodic updates on these issues.

Frequently Asked Questions (FAQs)

Q: What is the difference between termination, layoff, and furlough?

A: *Termination*: A termination marks the end of an employee's employment. Terminations can happen for any number of reasons, including lack of work, poor performance, misconduct, or a company closing.

Layoff: A layoff is a termination of employment for a period of time due to lack of work and a separation from payroll. Layoffs can be temporary or permanent. Temporary layoffs are most common when an employer is addressing slowdowns or closures that are expected to be relatively short term. Permanent layoffs are most common when a company is closing and does not expect to rehire the employee or if a slowdown is expected to be long term.

Furlough: A furlough is a temporary, leave of absence that continues employment but reduces scheduled hours or requires a period of unpaid leave. An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Implementing a furlough could be an option for employers seeking to retain talent and reduce the cost of separation.

It is important to note that these terms are not defined under ERISA or the Affordable Care Act (ACA). Many employers use "layoff" and "furlough" interchangeably – which makes a difference when addressing how benefits eligibility is handled.

Note that group health plan determinations will largely be based on whether the employment relationship continues to exist, or whether it has been terminated—temporarily or permanently—regardless of what term the employer uses.

Q: Do we need to offer COBRA if we are anticipating a workforce reduction?

A. Terminations of employment, with rare exceptions, are COBRA-qualifying events, meaning COBRA must be offered as soon as there's a loss of coverage. Termination of employment or reduction in hours resulting in a loss of coverage provides 18 months of COBRA coverage, but a number of state insurance laws provide

continuation of coverage for an additional 18 months through the insurance carrier, e.g., CalCOBRA. Contact your carrier, TPA, and/or COBRA vendor to confirm. Alliant also has a 50-state chart on mini-COBRA laws.

Q: Can an employer pay for their employees' COBRA due to the circumstances around COVID-19?

A: Many employers are making efforts to minimize the impact of the COVID-19 pandemic by offering employer-paid COBRA for a period of time. Employer payments for medical coverage (including COBRA) for a current or former employee can be tax favored as long as the employee is not in direct receipt of the funds. However, providing a former employee with a single lump sum payment that is taxable to the employee is the recommended approach. Part of that payment can be used for COBRA or to pay for coverage on another health plan, which may be preferable than keeping COBRA risk on the employer plan. Subsidizing COBRA on a tax favored basis for self-funded plans raises potential non-discrimination issues under 105(h). With an insured plan an employer can pay a carrier directly for a portion of COBRA coverage on a tax favored basis, but this minimal tax advantage may not be worth the potential downstream complications. Specifically, subsidizing a limited period of COBRA can foreclose other enrollment opportunities. Under HIPAA, to have a special enrollment right due to loss of other coverage, COBRA once elected must be exhausted. Thus, a few months of a COBRA subsidy may entice an employee not to enroll in a spouse's plan or exchange plan when they initially lose coverage and they may not be able to enroll later when the period of subsidized coverage ends.

Q: Instead of offering COBRA, can we keep our furloughed employees on the benefit plan?

A: An employer should first review its group health plan eligibility provisions and its existing employer leave policies. If the existing plan provisions and employer leave policies do not provide for coverage during unpaid leaves, employers interested in this option should first secure carrier/stop-loss carrier approval, make a corresponding plan amendment, notify employees of the new eligibility provisions in writing and notify all vendors. How an employer/plan sponsor amends a plan depends on the organization's overall governance rules, but must always be in writing and adopted in accordance with those governance rules. Where employers extend coverage during unpaid and otherwise unprotected leaves, they should proactively determine whether they will continue to contribute to the premium during these leaves and how they will collect the employee's portion of the premium.

Q: What about those employees still in their ACA stability period? Aren't employers required to keep them on the plan?

A: Under the Affordable Care Act (ACA) applicable large employers (ALEs) must offer affordable, minimum value coverage for full-time employees in order to eliminate penalty risk. Employers that use the lookback measurement method will generally have full-time employees in a stability period, meaning the employees maintain their full-time status for the entire stability period regardless of how many hours actually worked. When these employees have a reduction in hours, they are unlikely to lose eligibility. However, there is an exception that does allow employers to break an employee out of their stability period status as a result of an employment status change. An employer can only use this exception if:

- The employee was hired as FT and covered within three months of employment (*not placed in an Initial Measurement Period on hire*)
- The employee actually averages <130 hours per month for *three full months* after the status change

If these conditions are met the employer can take employee out of a stability period, i.e., drop coverage, effective *1st day of 4th month* after change and after averaging <130 hours per month for three full months.

In addition, remember that a reduction in hours to below 30 per week is a Section 125 or Cafeteria Plan status change event, even if the change in status does not impact plan eligibility, as long as the employee and other dependents who lose coverage intend to enroll in other MEC (an employee can drop coverage to enroll in Exchange or other MEC plan). This means that employees can choose to drop benefits even where eligibility is not impacted and the employer's offer of coverage will still count for pay or play purposes.

Q: If an employee has been furloughed with no pay but remains eligible for coverage, how should premiums be paid?

A: There's no direct guidance on this point, but best practice is to allow employees to pay as they go, which means the employee would pay for coverage by sending post-tax payments to the employer. Note that an employer can terminate coverage for failure to pay premiums and that loss of coverage would not be a COBRA qualifying event.

Q. Can an employee whose hours were reduced following the COVID-19 outbreak drop their health plan coverage?

A. Yes, where a reduction in hours causes an employee to lose health plan eligibility he or she can drop coverage due to a change in employment status. Also, as noted above, employees can also drop coverage following a reduction in hours to below 30 hours per week – even if eligibility isn't affected – if the employee intends to enroll in other minimum essential coverage. Employers may rely on an employee's reasonable representation about enrolling in other coverage in administering this change. Notably, this latter election change event does not apply to health FSA coverage, which generally cannot be changed solely due to a reduction in hours where eligibility is not impacted. This issue is discussed in greater detail below.

Q: Can employees choose to change their Dependent Care FSA election during a furlough?

A. Yes, the election change rules around DCAPs are relatively flexible, and can generally accommodate changes that are necessary to reflect changes in the care of the child (for example, a family member agreeing to watch the child for free because a child-care facility is closed). The plan document must allow this change, but almost all of them permit this change.

Q: What happens to a furloughed employee's Health FSA?

A: As noted above, the rule allowing an employee to drop coverage if they have a reduction in hours but no eligibility change does not apply to health FSAs. In that situation, an employee will stop making contributions to the health FSA and will not be eligible to reimburse expenses during that time. When a furloughed employee returns to work, the employer can allow the employee to make catch up contributions to reach their original annual election amount or continue to make their standard monthly salary reduction, which will result in contributions that are less than the annual election amount.

Note that the standard COBRA rules for health FSAs (limited COBRA obligation where an account is underspent) apply to employees who are terminated or laid off.

Q: When employees are furloughed are they still eligible for short-term or long-term disability (STD/LTD) benefits?

A: Generally, STD and LTD contracts contain actively at work provisions which require that eligible employees be actively at work immediately prior to eligibility for benefits under those plans. Given the current crisis, certain carriers are modifying those standard provisions to allow individuals to remain otherwise eligible for a certain period of time as long as premiums are paid during that time. This is an insurance carrier based

decision, not a compliance requirement. This would not apply to someone who is laid off with no expected return to employment.

Q: What is the WARN Act? Does it only apply on the Federal level?

A: The Federal Worker Adjustment and Retraining Notification Act (WARN Act) requires employers to provide 60-days advance notice of mass layoffs and plant closings to affected workers and their families. It generally applies to employers with 100 or more full time employees. Although an employer can provide full compensation and benefits for 60-days in lieu of providing notice this costly and complex alternative can be difficult to administer. Importantly, there are two key exceptions to the notice required under the WARN act that likely apply in the face of the COVID-19 crisis. First, when a company experiences a "sudden and dramatic" downturn in its business, it may qualify for the Unforeseen Economic Circumstances Exception. The conditions that caused a sudden and dramatic downturn in business must not have been "reasonably foreseeable" at the time that 60-day notice would have been required to protected employees affected by a notice-triggering action working under covered employers. Next, when a plant closing or mass layoff is the direct result of a natural the employer may be excused from providing 60 days' advance notice to employees if it is forced to terminate those employees. Although this exception was intended to apply in the event of a hurricane, earthquake, drought, storm, flood, tidal wave, etc., it seems to also encompass a global pandemic. In any event employers should provide notice as soon as reasonably possible to employees.

There are also a number of states that have “mini-WARN” acts so employers should consult their employment law advisor to better understand their obligations under these states laws. That said, we know that at least one state—California—has suspended the notice requirements under the state provisions, To utilize this suspension, employers that have employed at least 75 employees in the last 12 months must: (1) provide written notices in the form normally required under CA WARN; (2) give as much notice as is practicable and, at the time of notice, briefly explain the reason for the shortened notice period; (3) consistent with the similar federal WARN UBC defense, order the mass layoff, relocation, or termination due to “COVID-19-related ‘business circumstances that were not reasonably foreseeable as of the time that notice would have been required;’” and (4) include in the notice the following statement: If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019. The California Labor and Workforce Development Agency is expected to provide further guidance on this order. We anticipate other states to follow suit.