Benefit Considerations in Light of Employee Terminations/Layoffs

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Due to the COVID-19 pandemic, many employers are being forced to terminate, lay-off and/or reduce hours for employees. While this brings up a host of employment law issues that should be discussed with counsel, it also brings up various issues related to employers' benefit programs. Below is an overview of benefit-related issues that require attention.

Plan Eligibility

Most benefit programs require employees to be actively at work and/or to maintain a certain number of hours in order to be eligible for coverage. The terms of eligibility should be set forth in the plan's Summary Plan Description ("SPD"). If an employee does not maintain the required number of hours to be eligible for benefits, or is not actively at work, generally, a loss of benefits coverage results unless the employee is under protected leave, such as the Family Medical Leave Act. In some cases, plans and policies may include language that allows an employee to continue benefits as an active employee even when the employee is not meeting eligibility criteria on a short-term basis, such as during a layoff or unpaid non-FMLA leave. This type of continuation may be mandated by state law or through designed plan terms.

It is not advisable for an employer to simply leave an employee on its benefit plan if the employee is not actively at work or not meeting the hours requirement. The terms of the plan document govern the benefit plan and employers must follow these written terms to avoid ERISA fiduciary liability. It is also important to note that insurance carriers, including stop-loss carriers, may not cover claims incurred by individuals who were not satisfying the eligibility rules of the plan.

Employers should carefully review the termination provisions for each benefit program sponsored to understand when there is a loss of coverage as a result of a reduction in hours or layoff. Employers may also reach out to carriers to discuss and get approval for more generous coverage if appropriate.

COBRA

Employers that offer health plan coverage who have at least 20 employees are required to offer COBRA continuation coverage when there is a loss of coverage as a result of a termination of employment or a reduction in hours. COBRA applies to both fully and self-insured medical plans, dental plans, vision plans, EAPs, telehealth, many onsite

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clinics, health reimbursement arrangements (HRAs)and health flexible spending arrangements (FSAs) where the account is underspent (more contributions are made than reimbursements issued). Most of the time, the qualifying event (i.e., termination or reduction of hours) occurs and coverage will terminate at the end of the month in which the qualifying event occurred. Sometimes, plans may terminate coverage at the time of the qualifying event. If the qualifying event is termination of employment or reduction in hours, COBRA coverage extends for 18 months. States may have continuation coverage laws that lengthen this period of coverage (e.g., California and New York). COBRA coverage must be extended to all qualified beneficiaries (i.e., employee, spouse, children) who had health plan coverage on the day before the qualifying event. Employers should take note of notification obligations, payment and timing rules for COBRA.

Employers are permitted to charge a premium of 102% of the cost of coverage for COBRA, however they may charge less at their discretion. Employers should be careful, however, not to discriminate in setting the premiums. Employers can even subsidize some or all of the premium associated with COBRA coverage and may want to consult a benefits attorney to help set up a repayment plan with employees upon return to work. Employers should be careful where premium payments favor highly compensated individuals with a self-insured plan, as there could be potential discrimination issues which would cause the payment of the COBRA premiums to be treated as taxable income to those highly compensated individuals. Additionally, it is important to note that an individual has the opportunity to enroll in other coverage upon a loss of coverage such as a spouse's group plan or the Marketplace or other individual coverage. If the employer subsidizes the COBRA coverage for an employee for a few months, at the end of those months, there is some confusion as to whether the employee would have an opportunity to drop the COBRA coverage and enroll in another plan. While healthcare.gov appears to provide for an employee to be eligible for a special enrollment period in this situation, existing regulations do not support this. The employee could, of course, choose not to pay COBRA premiums at that time, which would terminate the COBRA coverage, but it will not result in a special enrollment event for the employee.

Premium Payments

If employees continue to stay on an employer's benefits plan while not actively at work, collecting premiums can be difficult. If an employee fails to pay, coverage can be terminated. There are several ways an employee may pay premiums while on a leave. Employers should review their SPDs and Employee Handbooks for policies and procedures. Generally speaking, employers can allow employees to catch up on their premium payments once they return to work, but state laws should be reviewed for limits of what can be deducted from pay. Of course, if the employee never returns to work, it may be difficult for the employer to recoup payments. Employers can also have employees pre-pay premiums before the start of the leave, but employers must be careful not to collect for too long of a period because they could violate the cafeteria plan regulations that prohibit deferred compensation. Finally, employers can require employees to pay their portion of premiums during their leave. In this case, these payments would be on an after-tax basis. If an employee is on paid leave, employers can collect premium amounts as they usually do through payroll deductions.

Full-Time Employees under the ACA

Applicable Large Employers, ALEs, (at least 50 employees) must identify their full-time employees (FTEs) for purposes of the Employer Mandate using either the monthly measurement method or look-back measurement method. Generally speaking, an individual with at least 130 hours of service in a month is considered an FTE. Whether an individual is considered an FTE or not is important for both penalty exposure and annual Forms 1094-C and 1095-C reporting. When an employer uses the look-back measurement method and employees are terminated and rehired, or when their hours are reduced, special rules come into play.

Termination and Rehire

When an employee is terminated and later rehired, the employee may be considered a new employee if the employee did not have any hours of service with the employer (including any commonly owned entities) for a period of at least 13 consecutive week (26 consecutive weeks for educational organizations). If the employee is treated as a new employee, upon rehire, the employer would not be subject to a penalty for the first three months of employment for the rehired FTE as long as affordable and minimum value coverage is offered at the end of the 3-month period.

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If an employer is using the look-back measurement method and, under these rehire rules, the employee is a new variable hour, seasonal or part-time employee, the employer may impose a new initial measurement period to determine FTE status. If an employer is using the monthly measurement method and the employee is not a new hire under these rules, the employee is treated as a continuing employee. The employer has to offer coverage to an FTE who is a continuing employee by the later of the first day the employee is credited with an hour or service, or the first day of the calendar month following resumption of service. With the look-back measurement method, a continuing employee retains the status s/he had with respect to the applicable stability period. This status is reinstated upon the employee's resumption of services under the timeframes described above. Failure to offer a continuing FTE coverage within this timeframe could result in a penalty.

Reduction in Hours

A reduction in hours will affect FTE determinations differently depending on which measurement method an employer uses. Using the monthly measurement method, FTEs are determined by counting the employee's hours of service for each calendar month. If the employee averages at least 30 hours of service per week or 130 hours of service per month, the employee is an FTE for that month. Using the look-back measurement method, employees identified in the Standard Measurement Period as FTEs earn that status for a subsequent Stability Period regardless of what happens to their hours in the Stability Period as long as the employee remains the employee of the employer. If an employee has a reduction in hours in the Stability Period (usually during the plan year), it does not affect his or her status as an FTE.

When terminating employees, laying them off or reducing their hours, employers should keep good records and be aware of how it will affect their 2020 ACA reporting. Employers should also review SPD provisions regarding waiting periods when making decisions whether to waive those waiting periods when employees return to work.

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