PRITCHARD & JERDEN™

COVID-19

Benefit Related FAQ

If we reduce an employee's pay due to economic conditions related to COVID-19, but their hours and work status do not change, can we allow them to make changes to their benefit elections?

Assuming employee elections are made on a pre-tax basis though an employer's §125 (Cafeteria) plan, elections are generally irrevocable for the plan year unless the employee experiences a recognized event under the §125 election change rules. A reduction in pay without a change in employment status and corresponding change in benefit eligibility is not one these recognized events, so technically the employer should typically not allow such a change in election. However, we believe that the COVID-19 crisis presents unique and unprecedented challenges to employers and employees. We would be very surprised if the IRS would choose to enforce this rule if an employer decided to make an exception and allow election changes during this difficult time.

Will time off related to COVID-19 be covered by short-term disability (STD) plans?

If the employee is suffering from a medical condition related to COVID-19, an STD plan would pay benefits in the same manner as employee suffering from any other similar medical condition such as the flu. It is less likely that an STD plan would pay benefits to an employee who chooses to self-quarantine due to potential exposure to COVID-19 but is not experiencing any medical symptoms, but the particular benefits would be subject to the terms of the plan.

We need further clarification on how STD benefits coordinate with the Paid Sick Leave required under the recently passed Families First Coronavirus Response Act. It seems likely that employers would be required to pay employees at their regular rate for the first two weeks, during which time additional STD benefits/payments are unlikely to be available.

Whether STD benefits run concurrently with the Paid Sick Leave or start following exhaustion of the Sick Paid Leave will likely depend upon the specific state or carrier policy. There is likely to be further clarification on this item as well as many other things in agency guidance over the next several weeks and months.

What if we get information about individuals receiving treatment for Coronavirus from the group health plan, what do we need to do to comply with HIPAA privacy and security requirements?

If the information comes from the employer's health plan records (e.g., on a claims report), then it is PHI and it is subject to protections under HIPAA. Employers, as plan sponsors, may only use or disclose this information for purposes of plan administration or as otherwise permitted or required by law. Sharing such information with other employees would not be permitted. However, the employer could potentially use or disclose PHI for certain public health activities. For example:

- An employer could disclose PHI to a state public health agency as needed to report all prior and prospective cases of participants exposed to, or suspected or confirmed to have, COVID-19.
- An employer could also disclose PHI if it believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Note that this exception only permits a disclosure to a person (or persons) who are reasonably able to prevent or lessen the threat (e.g., a public health department). This allowance defers to the covered entity's "professional judgment."
- In addition, HIPAA permits disclosures of PHI to persons at risk of contracting or spreading a disease as necessary to prevent or control the spread of the disease or otherwise carry out public health investigations **if otherwise authorized by applicable law.** So in this case, the employer would need to have some independent legal authority to make this type of disclosure.

If an employer has to reduce hours or put employees on a temporary leave of absence due to economic conditions or a lack of work related to COVID-19, are the employees still eligible for benefits? What if employment is terminated?

For employees who are furloughed, but still employed, the answer depends upon the plan eligibility rules and whether there are any leave of absence policies which extend benefit eligibility. If the employees no longer meet plan eligibility requirements or qualify for a leave of absence which extends benefit eligibility, coverage may need to be terminated and COBRA offered unless the employer coordinates a benefit extension with the carrier or stop-loss vendor.

For employees who are laid off (employment is terminated), even if it is expected to be temporary, the former employees will no longer meet the plan eligibility requirements, and therefore coverage may need to be terminated and COBRA offered. As mentioned above for a furlough, the employer could extend benefit eligibility temporarily beyond employment if the carrier or stop-loss vendor is willing to cooperate. These items are discussed in more detail in our issue brief found here.

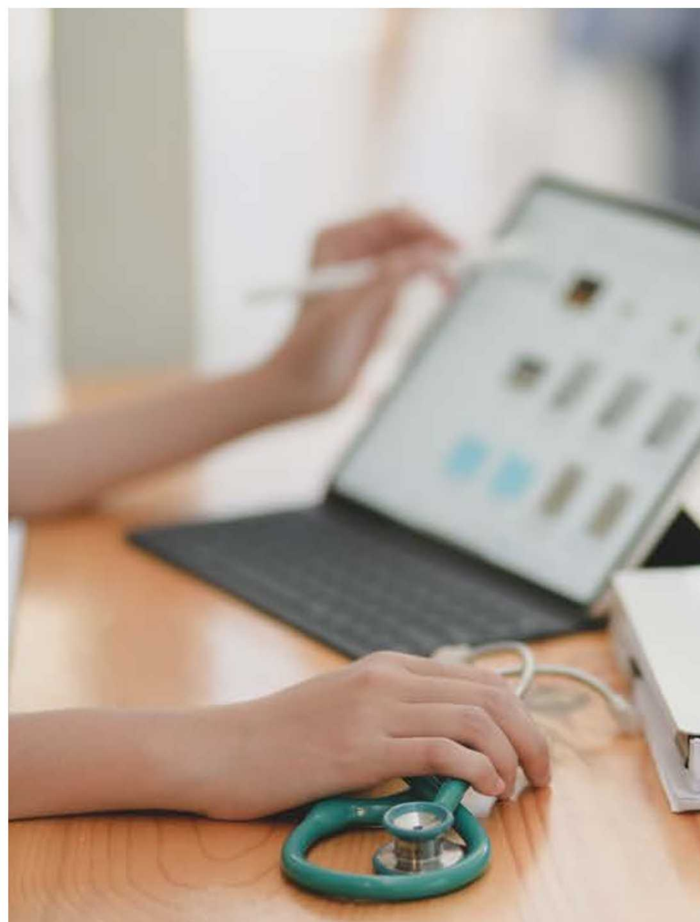
For an applicable large employer who uses the look-back measurement method to determine full-time status, will a break in service due to furlough or temporary lay-off impact full-time status for the next plan year?

§4980H rules do not require any hours of service to be counted when the employee is not being paid unless there is a break in service due to FMLA, USERRA or jury duty. In other words, if the time is unpaid, the break in service could negatively impact full-time status (i.e. it would reduce total number of hours over the measurement period) unless we get additional guidance over the next couple months requiring employers to impute hours or exclude these breaks in service from the measurement period during the public health emergency we're currently experiencing.

Which group health plans have to provide coverage for COVID-19 diagnostic testing with no cost-sharing?

All group health plans, but not excepted benefits, are required to provide coverage for diagnostic testing related to COVID-19 at no cost to plan participants. This includes both fully-insured AND self-funded group health plans; and applies to group health plans offered by employers of any size (not just those with fewer than 500 employees).

In addition to the federal mandate to provide coverage for diagnostic testing, there are a few states that have mandated coverage for treatment beyond testing as well. Coverage beyond diagnostic testing will vary by state and by carrier.



Does the Expanded FMLA provision extend already existing FMLA-protected leave from 12 to 24 weeks?

No, the expanded FMLA provided in the Families First Coronavirus Response Act does not extend FMLA coverage already available (generally 12 weeks). It adds an additional qualifying reason that FMLA may be available (i.e. away from work to care for a child due to school or daycare closure), and also requires that the employee be paid for a portion of the FMLA leave. This extended FMLA is applicable to private employers with fewer than 500 employees and all public entities.

If an employee qualifies for FMLA due to a serious health condition or is caring for another family member with a serious health condition, the standard FMLA-protected leave would be available for up to 12 weeks (and is not required to be paid). However, the first two weeks may be paid under the paid sick leave provision of the new legislation, if applicable.

If an employee qualifies for FMLA due to being out to care for a child because of a school or daycare closure related to Coronavirus, FMLA-protected leave is available for up to 12 weeks and must be paid leave after the first 10 days. In addition, the first two weeks must be paid under the paid sick leave provision of the new legislation.

Can employers subsidize COBRA premiums for those who lose coverage due to a furlough or lay-off related to COVID-19?

Yes, but the safest approach is to subsidize coverage in the same fashion for all similarly situated individuals, especially if the plan is self-funded and subject to §105(h) nondiscrimination rules, which generally restrict the extent to which employers can favor highly compensated individuals on a tax-favored basis.

If the employer plans to subsidize COBRA premiums only temporarily (e.g. 2-3 months), that should be clearly communicated to employees in case the situation continues beyond that time frame. Also keep in mind that termination of employer contributions toward COBRA coverage may not trigger a special enrollment right for other group health plan coverage or individual coverage through public Exchange (although public Exchanges have become more flexible on this).

The new Paid Sick Leave and Expanded FMLA requirements apply to private employers with fewer than 500 employees and public entities of all sizes. How do we count employees for private employers?

We don't have clarity on this yet. We're assuming the employee count may be based on the rules that apply today when determining 50 or more for FMLA purposes, which is different than Section 414 controlled group rules. The current legislation simply says "fewer than 500 employees" without any further explanation. The agencies are required to provide further guidance within the next two weeks, so it seems likely this particular provision will be one of the items addressed and clarified sooner rather than later. See pg. 11 of the DOL's FMLA Guide for Employers for more details about how separate entities are required to be combined under the existing rules here.

This information was provided by Benefit Comply. While every effort has been taken in compiling this information to ensure that its contents are totally accurate, neither the publisher nor the author can accept liability for any inaccuracies or changed circumstances of any information herein or for the consequences of any reliance placed upon it. This publication is distributed on the understanding that the publisher is not engaged in rendering legal, accounting or other professional advice or services. Readers should always seek professional advice before entering into any commitments.