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Employer Guidance: Effect of Lay Offs and Furloughs on Employee Health Benefits

With the country in a state of uncertainty due to the global COVID-19 pandemic, employers are seeking guidance regarding the impact on employee health care benefits. One issue currently perplexing employers is what happens to an employee's health care benefits in the event the employee is laid off or furloughed.

Furlough or Layoff?

A furloughed employee is typically still considered an employee of the organization, with an expectation that the employee will eventually be returned to his or her position. During a furlough, an employer should specifically advise its employees not to do anything work-related. This is especially so with exempt employees, who are entitled to their entire weekly salary in any week in which they perform any work for their employer. A layoff, on the other hand, usually implies a permanent separation, and laid off workers are no longer considered an employee of the organization.

Layoff

When a worker is laid off, and thus effectively separated from employment, the worker is no longer eligible to participate in their former employer's group health care benefits, as the worker is no longer considered an employee of the organization. If the employer has 20 or more employees, a layoff is a qualifying event that would entitle employees to purchase continuation of health care coverage for themselves and their dependents under the federal Consolidated Omnibus Budget Reconciliation Act ("COBRA") for a period of up to 18 months, subject to limited extensions. For employers with less than 20 employees, many states have "mini" COBRA statutes that govern an employee's ability to purchase continuation of health care benefits after a layoff. For example, New Jersey's "mini-COBRA," like the federal COBRA, permits laid off employees of an employer with less than 20 employees to purchase continued coverage for themselves and their dependents. Pennsylvania's "mini-COBRA" statute is much more limited, and allows laid off employees of an employer with 2 – 19 employees to purchase continuation of health care coverage for themselves and their dependents for up to only 9 months, with no extensions.

Furlough

Many times, an employer will furlough employees with the intent to keep them on the employer's group health care plan. However, this will not always be the case, as the terms of the insurance policy will dictate continuation coverage. Most insurance policies require employees to be actively at work and working a certain number of hours in order to retain eligibility for benefits under the group policy. If an employee is furloughed and not working for a certain period of time, the employee may not meet the eligibility requirements of the policy, and thus, continuation of benefits under the group health care policy may not be possible. For this reason, it is important to carefully review plan documents to determine carrier requirements for eligibility. Some health insurance carriers are temporarily relaxing their requirements, and allowing benefit continuation for employees who are furloughed as a result of COVID-19, as long as monthly premium payments continue. .

Policy Amendment

If furloughed employees are ineligible for coverage, the employer may have the option of amending the policy with the provider to ensure that furloughed employees remain eligible for group health care benefits. It is imperative that the employer obtain approval to amend the terms of the policy from each insurer, as well as any third-party insurer or third-party administrator, to prevent any issues that may arise.

Premiums

If employees retain their group health care benefits during a furlough, the employer is permitted to collect premiums from the employees during the furlough period. Similar to approaches used for employees on leave under the Family Medical Leave Act ("FMLA"), employers may choose among: (1) having the furloughed employees prepay the premiums; (2) billing the furloughed employees directly for the premiums; or (3) covering the premiums and seeking reimbursement from the employees when they return from the furlough. Of course, any such policy must be implemented uniformly to all furloughed employees. Additionally, because the FMLA requires that options available to employees regarding FMLA leave be at least as favorable as non-FMLA options, employers should coordinate with its FMLA policy to ensure that the policy for payment of premiums for furloughed employees is not more favorable.

Employers are also permitted to pay the costs of the insurance premiums on behalf of furloughed employees during the furlough period. However, employers need to take precautions to ensure that any policies for doing so do not violate any anti-discrimination laws or applicable cafeteria plan rules.

If furloughed employees are ineligible for benefits under the group health care plan, or the employer chooses not to continue health care benefits throughout the duration of the furlough, the reduction in hours (to zero), combined with the loss of health care coverage, would be a COBRA-qualifying event, making the furloughed employees eligible to purchase continuation of health care benefits through COBRA (or a state's "mini-COBRA" statute,). If an employer chooses not to offer health care benefits throughout the duration of the furlough, the employer must be mindful of potential financial penalties under the Affordable Care Act ("ACA"), coverage is not offered to 95% of full-time employees. Additionally, coverage offered, whether through the group health care plan or COBRA, must remain affordable to avoid ACA penalties.

There are other unique issues arising from furloughed employees that affect their right to continued benefits under the employer's group health care policy. For example, an employee furloughed during FMLA leave will be entitled to the FMLA's health coverage continuation provisions. Further, if an employee is furloughed while he or she is taking paid time off, the employer's policies and procedures regarding health coverage will apply. In this situation, the employee would likely be entitled to retain coverage during this period.

What Should an Employer Do?

With the unforeseen circumstances brought about by the COVID-19 pandemic, employers are being forced to make difficult, unexpected decisions. While an employer may believe furloughing employees is the best hedge against the loss of income for employees associated with loss of work, the employer needs to be cognizant that the terms of the insurance policy and/or approval of the carrier take precedence over an employer's good intentions. Otherwise, the employer may be left with providing promises to employees that it cannot keep, which could further damage morale during such a fragile time for the entire workforce.

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