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For: **Plan Advisors**
Subject: How employers should handle benefit elections for employees on leaves of absence

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From employers, this question is common: "*What do we do with an employee who is out on leave for an extended period of time due to medical reasons, a worker's compensation claim, or other reason*?" This memo is an attempt to summarize best practices and advice based on our experience and compliance analysis.

> **NOTE regarding 2020 coronavirus period**: This memo has been reviewed to ensure that current scenarios are addressed. In addition to standard practices of termination of employment and leaves of absence, employers are using "layoff" or "furlough" to describe current actions. Those terms may have significance for employment status, but for purposes of benefits eligibility, every situation – other than a temporary absence from work handled with paid or unpaid time off – should be handled as a termination or as a leave of absence.

Ideally, for any leave of absence scenario, the employer addresses on the front end of the leave with the employee (in writing) the terms of the leave, how benefit elections will be handled during the leave, and details regarding payment of any applicable insurance premiums during or after the leave. This communication should be consistent with the employer's leave of absence policy, FMLA (*if applicable*), and other considerations as listed below. Unfortunately, reality is that the employer is often not aware of the need for leave until after the start of the leave period, and that starts a process where the employer is playing "catch up" in the leave process. In the worst-case scenario, all coverages are continued for the employee, paid in full by the employer, and when the employee fails to return to work within a period of time the employer is left in a position where it does not recoup premiums paid for the employee. Another challenging issue is when to terminate the coverage if the employee fails to return timely from leave, which is addressed below.

Leaves of Absence: General Terms

The best practice for employers is to have a formal, written leave of absence policy. This policy should be written to be consistent with FMLA (*if applicable*), the employer's plan documents (primarily the Summary Plan Description, or "SPD") for each health and welfare benefit, and the policies of any applicable insurance carriers. Most leaves of absence are unpaid leaves, whether FMLA applies, FMLA does not apply, or whether the leave is related to a worker's compensation injuries or other reason for absence or inability to work. In the

scenario of an unpaid leave of absence, the general practice is that the employee is allowed the option to choose: (a) to continue benefits, with the employee's share of premiums paid to the employer during leave or otherwise as approved by the employer; or (b) to discontinue benefits during the leave by requesting a qualifying event change and then having the option to reenroll in benefits at the conclusion of leave and return to active status.

For FMLA leaves, which are generally applicable to employers with 50 or more employees, the leave is job-protected and coverage-protected leave. The employee has to be given the option to continue benefits during the leave. FMLA requires the employer to continue its share of applicable premiums, but the employer is not required to pay beyond its standard contribution for active, non-leave employees.

For non-FMLA leaves, the employer is not required by law to allow continuation of coverage. If coverage is allowed to be continued, the employer is not required to maintain its share of applicable premiums. The employer may choose to pay all or part of the premiums, or it may elect to shift the full premium responsibility to the employee.

Payment of Premiums During Leave

When coverage is continued during a leave, employers have options regarding how to collect the employee's share of premiums for coverage during a leave of absence. These options include: (a) pre-tax deductions prior to leave; (b) post-tax payments during leave; or (c) pre-tax or post-tax deductions after end of leave and return to active work. Due to the risk that an employee may not return from leave, best practice is typically (b) above – for the employer to require that premiums be paid on a monthly basis by the employee by check or other method. If premiums are due from the employee during leave and not timely paid, the employer then has the option to terminate coverage for nonpayment after reasonable notification.

Termination of Coverage

Potentially the most difficult issue for employers is if and when to terminate coverage for an employee who does not return from leave or either has a leave period extended beyond the normal FMLA period (12 weeks). Consistent with the above information, best practice is for an employer to include in a formal leave of absence policy – consistent with the SPD(s) of applicable plan(s) as well as insurance carrier policies – that coverage for inactive employees ends after a certain timeframe.

A common eligibility provision in carrier contracts and plan SPDs is that coverage for an inactive employee ends after 3 calendar months or 13 calendar weeks. A sample provision:

> *An individual will remain eligible only for a limited time if active, full-time work ceases due to an FMLA leave of absence, employer approved non-FMLA leave of absence, certified disability or worker's compensation leave, or temporary layoff. Eligibility will end upon the conclusion of the three (3) calendar month period immediately following the month in which the person last worked as an active employee.*

Once an employee goes on leave, if he/she does not return within the specified time, coverage is terminated and COBRA offered. (If the employer is not subject to COBRA due to size, then state continuation is offered for health coverage.) The technical COBRA triggering event is reduction of hours, since the employee is still technically employed, but status has gone from active to inactive. This offer of COBRA protects not only the employee, but the employer, since if the employer fails to terminate coverage and offer COBRA, there will likely be issues down the road when the carrier refuses to continue coverage for the individual for more than 3 months (inactive employee limitation) plus 18 months (COBRA period). An employer's failure to adhere to this timetable could result in liability for excess claims or coverage beyond what the carrier is legally required to pay.

Most carrier provisions are three months. Some carriers will allow a longer inactive period, but an employer should not use a period longer than the carrier default (and what is included in the contract or plan SPD) without approval from the carrier.

> *Note regarding worker's compensation leave*: While the worker's compensation process is a significant consideration for employers, technically worker's comp does not affect the above analysis. For benefits purposes, leave will be handled the same whether the employee is out for worker's comp or for other reasons. Of course, in a worker's comp scenario the employer will want to include the worker's comp process and considerations as part of the overall analysis of the leave of absence and appropriate steps involved in termination of coverage or employment.

As a refresher, similar termination and COBRA concepts apply to other group health benefits – dental, vision, etc. While COBRA does not apply to life and disability benefits, those benefits have portability provisions that may need to be communicated to employees.

Of course, this explanation addresses only termination of coverage. Termination of employment is a separate issue and beyond the scope of this summary. Similarly, certain fact scenarios involved may trigger other issues and analysis under separate laws, including the Affordable Care Act. This memo has not been designed to answer every possible question but instead confirm the framework for effective analysis of benefit issues applicable to leaves of absence.

Acknowledgment: *This memo includes a summary overview of a complicated benefits topic. The memo is provided as general information for plan advisors for the benefit of employer clients. This information, while based in part on advice and consultation received from legal professionals, is intended as general reference and educational material and is not intended as legal advice to any employer or advisor.*