



Employee Benefits During Times of Financial Difficulty

An Employer's Considerations

When an employer experiences financial hardship, the situation can raise concerns regarding its employee benefit programs. Employers can experience financial strain for any number of reasons — low sales and revenue, increased overhead costs, natural disasters, reduced funding, a pandemic or financial mismanagement. In such a situation, an employer typically has questions regarding its employee benefits plan and the costs associated with its offerings.

Following are considerations for employers when addressing one of these difficult financial situations.

Plan documents and termination vs. furlough vs. layoff

Some employers will have to respond to an economic downturn by terminating employees, implementing layoffs or furloughing employees. It's important to remember that "termination," "furlough" and "layoff" are not defined terms under ERISA or the Affordable Care Act.

A furlough is considered to be a mandatory leave with limited or no pay, with the expectation that employees will return to work once regular business resumes.

A termination and a layoff are more similar, but an employee who is temporarily laid off will be asked to return to work. The problem from an employee benefits perspective is that plan documents do not usually differentiate between an employee who is terminated vs. one who is laid off vs. one who is furloughed.

For benefits purposes, eligibility is limited to active full-time employees and employees who work at least a minimum number of hours per week (e.g., 30). If an employee is on protected leave — such as those granted under the FMLA — benefits continue during leave. This means that any employee who is not meeting the hours requirement or is not actively at work (work from home is considered actively at work) based on being terminated, furloughed or laid off — even temporarily — will generally have their benefits terminated and receive an offering of COBRA or state continuation, or have no offer of continuation, depending on the employer's size and state in which the business is located.

It's important to review the plan documents from the carrier to determine whether leave is paid or unpaid and to determine how long benefits may continue during a furlough or layoff. It's also important to determine whether the carrier will allow coverage to continue as long as premiums continue to be paid.

For a self-funded/self-insured plan, the employer should look at its own summary plan description, plan document and Stop-Loss Insurance policy to determine how coverage is affected during a furlough or layoff.

A reduction in hours, which may include a temporary layoff and furlough, is considered a COBRA qualifying event if it results in a loss of coverage. If an employer has fewer than 20 employees, state continuation law ("mini-COBRA") may apply. The IRS COBRA regulations provide that a reduction in hours for a qualifying employee occurs when there is a decrease in the hours an employee is required to work or actually works but the decrease does not include termination of employment.

- If group health plan eligibility depends on the number of hours worked in a given period — such as 30 hours per week — and the employee is not working or has not worked those hours, it is considered a reduction in hours.
- If there is no difference in the plan documents for furloughed, laid-off or terminated employees and the carrier will not grant a concession, then a reduction in or elimination of hours is a qualifying event and the employees affected should be terminated from the group health plan.

We understand this can create hardship and a difficult decision to make during challenging times. It's important to note that loss of coverage opens a HIPAA special enrollment period for an employee to enroll in a spouse's or parent's plan if one is available.

Keeping active employee coverage for furloughed or terminated employees

There have been instances where a furloughed employee or a terminated employee may remain active on a group health plan or change plan elections.

- If the health plan is fully insured, the employer may have a discussion with its insurance carrier if employees who are not working or not meeting hourly requirements for eligibility can remain active on the plan, as long as the premiums are paid.
- For a self-funded (also known as self-insured) plan, the plan sponsor should discuss the situation with its Stop-Loss Insurance carrier. If the carriers providing the underlying and Stop-Loss coverage approve, the plan documents can be amended to allow this continuance of coverage.

Employers should set forth an expiration date for this offering and consult with counsel or their broker to make these types of changes. Approval from the underlying insurance carrier or Stop-Loss carrier is required, to make sure claims will be paid for members who would otherwise be ineligible to continue participating on the plan.

For employees who are unpaid during this time, employers have a few different options to consider in having the members pay their contribution amounts.

- The employer can choose to assume the cost in full and choose not to have members repay, even if they return to work.
- The employer can also set up a repayment agreement, where members will repay any contributions when they return to work. In this scenario, the employer should retain employment or benefits counsel to help create the document and mitigate risk.
- Finally, the employer can request that the members send in their contribution post-tax, such as with a check or cash that is mailed in. Employers who take this route should make sure that such contributions go directly toward the plan cost and are not retained by the employer to pay for other operations costs.

Election changes for employees

Employers at this time are choosing to take a wide range of actions, which may include reducing pay for employees, as well as furlough or termination. Employees who experience any of those events may be able to make changes to their elections for group health plans.

As discussed below regarding specific options, an employer must keep in mind that Section 125 Plan, or Cafeteria Plan, qualifying events and HIPAA special qualifying events continue to apply. Employers should review the plan documents to help determine if an employee is eligible for an election change under either Section 125 or HIPAA.

For example, an employee who is enrolled in a Dependent Care Flexible Spending Account (DCFSA — also known as a Dependent Care Assistance Program, or DCAP) can make a contribution change if the cost of coverage has changed, such as in a case where no childcare provider is available. A change in cost to zero dollars due to a business closure is considered a qualifying event to make a mid-year change to a contribution amount for a DCFSA. Likewise, an employee who is unpaid may be able to suspend certain payments or pay for them post-tax.

If an employee is not necessarily eligible for an election change under Section 125 or HIPAA, state law should be reviewed. Under some state laws, furloughed employees may continue to be eligible for benefits even if they are not meeting hourly requirements for eligibility due to furloughed status.

COBRA offering and assistance

If an employee is eligible for COBRA, the employer must follow COBRA requirements, including sending election notices and allowing grace periods. One concern for employers is whether employees will be able to afford COBRA while not working. An employer does have options with regard to offering COBRA payment assistance to employees.

COBRA sets the premium limit at 102% of the cost of coverage; however, an employer is not required to charge the full 102%. An employer can set a COBRA rate to reflect the amount an active employee pays for benefits, and the employer can continue to pay its portion.

Employers should consider applicable nondiscrimination requirements when deciding whether to change the contribution for all COBRA participants or just those who have a reduction in hours. One caveat is, of course, that the payments made by the employee during unpaid leave will be paid post-tax. This may pose an issue for employees who may not be able to afford their portion of a premium while not receiving a paycheck.

As mentioned, an employer may subsidize all or a portion of the COBRA premium while employees are laid off or on furlough. An employer could also set up a repayment plan, where employees repay the employer for a portion of the COBRA premium when they return to work.

Employers may wish to have employees agree to repayment terms and a schedule before providing subsidized COBRA. Employers should consult with benefits counsel when drafting a repayment agreement.

Applicable large employer (ALE) and stability periods

Another complex situation is when an employee is in a stability period as full-time, meaning the employee should be treated as full-time for purposes of the ACA's employer-shared responsibility provision (ESRP) and continue to be offered health coverage even if not working full-time.

Under the "look-back" measurement method, employees who worked full-time hours during the measurement period generally must be treated as full-time for their entire stability period unless they are terminated. An employer may design its plan to terminate coverage (and offer COBRA) to employees who are in a stability period but have experienced a recent reduction in hours. If an employer chooses to terminate health benefits for an employee in a stability period during which the employee remains employed, the employer may be exposed to the "affordability" penalty if an employee receives a premium tax credit for Marketplace coverage, given that COBRA coverage is unlikely to be "affordable" in these situations.

One way to help with potential exposure is to subsidize COBRA, to make sure that the offering still meets affordability under the ACA.

Return to work and reinstatement of benefits

For group health plans, the ACA requires that benefits be reinstated if the employee was enrolled prior to leave and the unpaid leave did not extend for more than 13 consecutive weeks (26 for educational institutions). Employees who were not enrolled in benefits at the time of departure (i.e., because they had previously waived an offer of coverage) are not required under the ACA to be reinstated on benefits. For employees who were in a waiting period, their time in the waiting period is usually added to whatever remains upon their return.

For example, assume an employer's waiting period is first of the month following 60 days. An employee is temporarily laid off on Day 31, due to lack of grant funds. Upon return to work, 30 days are credited toward the waiting period, and the employee should be able to enroll on the first of the month following 30 days (because of the 30 days served previously).

The facts and circumstances, along with terms of the plan, should be reviewed to confirm how waiting periods and reinstatement work in specific situations. If leave extends for a longer duration, the waiting period may reset.

Non-COBRA-eligible benefits

For benefits that are not COBRA-eligible, such as Disability Insurance and Life Insurance, an employer should discuss options with its insurance carrier and broker. A carrier may allow temporary continuation of coverage for employees who are furloughed, laid off, terminated or not meeting hour requirements for eligibility if the premiums continue to be paid.

Employees Paying Premiums

If an employer has terminated, furloughed or laid-off employees whom it has allowed to continue benefits, the employer needs to determine if and how it wants employees on unpaid leave to pay for their premium contribution. An employer can require a weekly or monthly check be sent in for any benefit offering — including Medical, Dental, Vision, Disability, Life Insurance, etc. — as long as coverage continues.

Ongoing benefits may also include voluntary products that an employee wants to continue. Pay-as-you-go should be offered as an option to employees, although an employer could also set up a repayment plan with employees where the employer subsidizes the entire premium and the employee repays a portion on return to work. Counsel should be consulted to help write a repayment agreement, and employers should ensure that employees understand what the agreement entails.

Reducing benefits mid-year?

Some employers might work to reduce operating costs while they weather a difficult financial situation. Given the high cost of employee benefits, some employers might consider changing aspects of their employee benefit plan, for example removing point solutions, revising plan designs or shifting more of the premium cost onto employees.

Generally speaking, employers have broad latitude to make changes to their benefit plans, even in the middle of a plan year. But for any plan revision — such as a change to deductibles, out-of-pocket limits or co-pays — employees must be given 60 days' advance notice. For changes that constitute a material reduction in service, such as decreasing the employer contributions to the plan, employers simply have to give employees notice within 60 days (including up to 60 days after) the change.

Despite having 60 days, it's best practice to provide notice as soon as possible. It's important to keep in mind that many of these common mid-year notice requirements may create a qualifying event for impacted plan participants.

Employers with robust point-solution or fringe-benefit offerings should review the contracts with their respective vendors to determine if mid-year cancellation is feasible. Employers should also be cautious about cancelling mental health benefits mid-year, in order to avoid mental health parity concerns, and about cancelling point-solution benefits that offer significant medical care, such as robust telemedicine, without consulting counsel.

Following are the timelines for the required notice to employees for common plan design changes, when these changes happen mid-year.

MID-YEAR EVENT	NOTICE REQUIREMENT	POTENTIAL CAFETERIA PLAN IMPACT
Terminating the plan (unexpected plan termination prior to the natural end of the plan year)	Notice within 60 days of the change. (To prevent run-out claim issues, notice as soon as practically possible is strongly recommended.)	Not a qualifying event unless the employer sponsors other group health plans that are not being terminated mid-year, in which case it is a qualifying event for all employees enrolled in the terminating plan. Not a qualifying event unless the employer sponsors other group health plans that are not being terminated mid-year, in which case it is a qualifying event for all employees enrolled in the terminating plan.
Premium increase (for plan participant)	Notice within 60 days of the change.	Qualifying event for all employees enrolled in the plan. Additional rules apply.
Deductible, out-of-pocket limit or copay increase or decrease	60 days' advance notice	Qualifying event for employees eligible for the plan. Additional rules may apply.

Closed business — what now?

Sometimes employers have to close down their entire businesses and no longer operate at all. When a business closes, benefits also end. There may be options for employees to convert certain policies into an individual policy, and carriers should be contacted to help make this determination.

If conversion is possible, this should be communicated to former employees so they are aware of their choice. If COBRA and state continuation does not have to be offered because the group health plan has ceased altogether, an unavailability-of-COBRA notice should be provided.

For impacted individuals who are no longer working (and therefore are losing coverage), this is a qualifying event to enroll for individual coverage or other employer-sponsored coverage (such as if an employee's spouse has employer coverage). If the business reopens, it can start a new group health plan, as well as other benefits.

What employers should do

If you're an employer who has questions, ask your broker and carrier to see what options are available — whether you intend to maintain your employees' or former employees' benefits, or if you want to terminate coverage.

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