

GOVERNMENT SHUTDOWN AND EMPLOYEE BENEFITS

When the federal government shuts down, employers who rely on government contracts or have business models that depend on a fully operational government are now forced to make difficult decisions regarding their workforce. Some employers contemplate reductions in force, layoffs, or furloughs to weather the financial ramifications of the shutdown. This leads to questions about employee benefits, and how benefits should be handled during these leaves of absence.

Employers contemplating a reduction in force, layoff, unpaid leaves of absence, or furloughs, should review the following:

1. Review their employee handbook and plan document for eligibility provisions. How plan eligibility is determined will be critical in determining how benefits are or are not continued.
2. Review their carrier contracts, including stop-loss or reinsurance provisions regarding eligibility.
3. If they are an applicable large employer, review their obligations under the employer mandate/play or pay provisions.
4. Communicate process for benefit premium payments, if applicable.
5. Provide COBRA notices appropriately, when necessary.

Eligibility Policies

Employers are obligated to follow the provisions put forth in their plan documents, and mirrored in their employee handbooks, for benefit eligibility. Employers whose handbooks do not contemplate layoffs, furloughs, or reductions in force, or who have conflicting language between documents, should consult with their legal counsel.

Carrier Contracts

Employers should work closely with their carriers, including stop loss and reinsurance carriers, to ensure that both parties agree about who is and who isn't eligible for benefits. Conflicts between parties will require legal counsel.

Applicable Large Employers (ALE)

To comply with the ACA, applicable large employers must offer their full-time employees health coverage or pay one of two employer-shared responsibility/play or pay penalties. An applicable large employer has 50 or more full-time or full-time equivalent employees in the prior calendar year. Full-time employees are employees who are credited with 30 hours of service a week or more. A full-time equivalent employee is calculated by combining the number of hours of service of all non-full-time employees for the month (not including more than 120 hours of service per employee) and dividing the total by 120.

Under the ACA, any hour for which an employee is paid or entitled to payment must be counted as an hour of service. This includes:

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| ▶ An hour worked | ▶ Vacation |
| ▶ Holiday | ▶ Sick time |
| ▶ Incapacity (including disability) | ▶ Layoff |
| ▶ Military duty | ▶ Paid leave |

This means that employees of applicable large employers will continue to accrue hours of service during a leave of absence due to the layoff provision if they are paid. If the employer is an ALE, and the employee is still considered full-time (e.g., due to being in a stability period), the employer will continue to be obligated to offer the full-time employees affordable, minimum value health coverage. Failure to do so would risk triggering ACA penalties (i.e., the “affordability” penalty, as the COBRA coverage offered due to the reduction in hours is likely to be “unaffordable”).

Employers are provided with two methods to determine an employee’s full-time status: the monthly method, and the measurement and lookback method.

- Under the monthly method, the employer looks at each employee’s actual hours of service each calendar month (an hour worked or an hour of paid time for vacation, holiday, sick time, incapacity including disability, layoff, jury duty, military duty, or other paid leave) each calendar month. An employee is full-time for the month if he or she works 130 hours, no matter how long or short the month is.
- Under the look-back method, the employer looks at the number of hours the employee averaged during a look-back period called a “measurement period.” Once the employer determines whether the employee worked full-time during the measurement period, that determination generally will apply throughout the immediately following stability period regardless of the number of hours the employee actually works during the stability period (unless the employee’s employment ends).

Layoffs

If the employee is laid off during a stability period (not terminated) and is considered full-time, affordable coverage must be offered during the layoff to avoid exposure to potential penalties. Once the layoff is over, if the employee returns to work within 13 weeks (26 weeks for educational institutions), coverage must be reinstated by the first day of the month following his return to work.

The time on layoff will not count as hours of service for purposes of the measurement period if the leave is unpaid. If coverage is terminated and the layoff exceeds 13 weeks, the employee can be treated as a new employee, with a new waiting period or initial measurement period, when he returns (of course, the plan may be designed to reinstate all returning employees immediately upon return). Generally, if the employee had coverage during the layoff (e.g., through COBRA or another extension of coverage), coverage will be reinstated upon return. There will be no hours of service to measure during unpaid leave (except for unpaid jury duty, FMLA or USERRA leave).

Unpaid Leave

If the employee is on an unpaid leave of absence (except FMLA) and in a stability period as full-time, the employee must be offered affordable coverage through the stability period to avoid potential penalties. When the employee’s hours are calculated during the measurement period, the leave of absence (except FMLA) will count as zero hours of service. Employers that are ALEs should seek experienced legal counsel to ensure that their plan documents reflect their practices during any furlough, layoff, reduction in force, or leave of absence to mitigate risk under the ACA.

Payment of Premiums

Employers who continue offering benefits during a furlough, layoff, or reduction in force will need to establish a process for premium payment.

Employers that already have an established process for premium payment during unpaid FMLA leave or during a pay shortage (for example, for tipped employees) should utilize those policies. The IRS has not provided guidance or regulation for handling pay shortages without a loss of benefit eligibility. Employers often refer to the rules provided for handling employee contributions during an employee's unpaid Family Medical Leave Act (FMLA) leave. There are three options that employers have during unpaid FMLA leave:

- ▶ Pre-payment
- ▶ Pay-as-you-go on an after-tax basis
- ▶ Catch-up salary reduction upon return from leave

During the government shutdown, it is likely that only the second two options would be feasible. The premium payment policy should be uniformly enforced for all employees. Employers may set a time limit for the employee to catch up on contributions before terminating coverage, as well as a maximum period of time over which employees may spread payments. Employees should be allowed uniform periods of time to pay back missed contributions; for instance, management should not be given three months to pay back missed contributions when other employees are only given one month.

COBRA

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) allows qualified beneficiaries who lose health benefits due to a qualifying event to continue group health benefits.

COBRA qualifying events include what is called a "reduction in hours." A reduction of hours commonly occurs when an employee goes from full-time to part-time, when an employee is temporarily laid off or furloughed, or when an employee goes on a leave of absence. The IRS COBRA regulations provide that a reduction of hours in a covered employee's employment "occurs whenever there is a decrease in the hours that a covered employee is required to work or actually works, but only if the decrease is not accompanied by an immediate termination of employment."

In this event, employers who are subject to COBRA should timely provide affected employees with their COBRA election notice if their reduction in hours results in a loss of coverage under the plan.

COBRA Strategy for ACA Compliance or Culture Concerns

In the event that a plan document, employee handbook, or carrier policy determines a furloughed or laid off employee is no longer a benefits eligible full-time employee, employers who are subject to COBRA could offer impacted employees COBRA coverage and assist the employee with premium payment.

Under the ACA play or pay provisions, an offer of COBRA coverage is considered an "offer of coverage" and if an employer assists in premium payments, COBRA coverage could potentially be made affordable to ensure the employer was not triggering ACA penalties for failing to offer affordable, minimum value coverage.