

Benefits During Employee Leave

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BENEFITS DURING EMPLOYEE LEAVE

Agenda

- FMLA
 - Employers Subject
 - Eligible Employees
 - Qualifying Leave
 - Benefit Protection
 - COBRA
 - ACA
- Paying for Coverage During FMLA Leave
 - Paid v. Unpaid
 - Section 125 Considerations
 - Health FSA Strategies
- Non-FMLA Leave
 - Benefit Eligibility
 - Effect of Other Laws & Benefits
 - ACA
 - ADA
 - Worker's Compensation
 - Disability
 - Paying for Coverage

FMLA

BENEFITS DURING EMPLOYEE LEAVE

FMLA

- **Employers Subject to FMLA's Requirements**
 - Private-sector employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year
 - All public and local educational agencies regardless of number of employees
- **Employee Eligibility for Entitlement to FMLA Leave**
 - Employee must work at a worksite with 50 employees within a 75-mile radius
 - Employees must have worked for the employer for a total of at least 12 months (not necessarily consecutively)
 - Employee must have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave
- **Length of Leave**
 - Total of up to 12 weeks in a 12-month period
 - Up to 26 weeks for care of a service member
 - Employer can determine the 12-month period used
 - Medical leaves may be taken intermittently

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Qualifying FMLA Leave

- Family Leave
 - Birth of an employee's child or placement of a son or daughter with the employee for adoption or foster care
 - Leave must be concluded within 12 months of birth or adoption
- Medical Leave
 - Employee's spouse, child, or parent with a serious health condition
 - Leave for a serious health condition that makes the employee unable to perform their job
- Extended Military-Related Leave
 - "Qualifying exigency" when an employee's spouse, child, or parent is on active military duty or has been notified of call to active duty
 - To care for a "covered service member" with a serious injury or illness, i.e., a spouse, son, daughter, parent, or next of kin of the employee

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Intermittent/ Reduced Schedule Leave

- Intermittent leave for family leave not required
- Employer must allow for medical leave
 - Employee serious health condition
 - Serious health condition of spouse, parent, or child
 - The leave increments can simply be for the care and support of the family member – does not need to be related to specific medical needs
 - Employer may require a medical certification
 - Employee must make a reasonable effort to schedule leave so as not to unduly disrupt the employer's operations
- Increments of time for reduced schedule leave count against FMLA time
 - Employer can only charge the employee for the actual time used
 - Employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences
 - Time charged cannot be greater than one-hour increments

BENEFITS DURING EMPLOYEE LEAVE

Health Plan Coverage During FMLA Leave

- Employer must maintain the following group health plans for the duration of FMLA leave under same conditions as if the employee had not been on leave
 - Medical or health insurance plan
 - Dental plan and vision plans
 - Prescription drug plan
 - Health flexible spending arrangement (HFSA)
 - Employee assistance plan (EAP), if it provides medical care
- Benefits not subject to FMLA continuation requirements
 - Group term life insurance and AD&D
 - Disability insurance plan
 - Dependent care assistance program (DCAP)
 - Voluntary employee-pay-all plans

BENEFITS DURING EMPLOYEE LEAVE

Maintenance of Group Health Plan Benefits

- Employer must pay the same share of the premiums as if the employee had not been on leave
- The same health plan benefits provided prior to taking FMLA leave must be maintained during the leave
 - If an employer provides a new health plan or changes health benefits while an employee is on FMLA leave, the employee is entitled to the new benefits to the same extent as if the employee were not on leave
 - Any other plan changes (coverage, premiums, deductibles) that apply to all employees of the workforce also apply to employees in FMLA

BENEFITS DURING EMPLOYEE LEAVE

Maintenance of Group Health Plan Benefits (Cont.)

- Benefits during intermittent or reduced leave schedule
 - “Intermittent leave” is leave that is “taken in separate blocks of time due to a single qualifying reason”
 - A “reduced leave schedule” is a schedule that reduces, for a period of time, the number of hours an employee is scheduled to work each week or each day
 - If an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must maintain the employee’s coverage under a group health plan as if the employee were still working full-time

BENEFITS DURING EMPLOYEE LEAVE

Maintenance of Group Health Plan Benefits (Cont.)

- Employer obligation to maintain coverage ceases in certain conditions
 - The employee chooses to drop coverage during leave
 - The employee fails to pay employee's share of premium due
 - Employer must provide a 30-day grace period for premium payment
 - Employer must give employee a 15-day advanced written notice before terminating coverage
 - The employee doesn't return to work at the end of the leave, or informs the employer that he or she does not intent to return from the leave
- **IMPORTANT NOTE:** Any terminated health benefits must be restored upon return from FMLA leave
 - No new waiting period or limitations

BENEFITS DURING EMPLOYEE LEAVE

Maintenance of Other (Non-Health) Benefits During FMLA Leave

- Employer polices regarding other types of leave
 - An employee's eligibility for other benefits during an FMLA leave is determined by the employer's established policy for providing benefits to employees on other forms of leave
 - Employer may have different policies that apply to other types of paid vs. unpaid leave
 - Example – benefits provided could vary dramatically during a paid sabbatical vs. those provided during an extended unpaid non-FMLA leave
- **IMPORTANT NOTE:** Any terminated non-health benefits must be restored upon return from FMLA leave
 - No new waiting period or limitations

BENEFITS DURING EMPLOYEE LEAVE

FMLA and COBRA

- COBRA Qualifying Event
 - Taking FMLA leave is NOT a COBRA qualifying event even if employee chooses not to continue health coverage during the leave
 - A COBRA event occurs if employee, spouse, or dependent child is covered on the day before the first day of the FMLA leave, and the employee does not return to work at the end of the leave
 - COBRA coverage begins as of the last day of the employee's FMLA leave
- COBRA rules when health coverage is terminated during FMLA leave
 - COBRA still does not begin until end of employee's FMLA leave
 - There may be a "gap" in coverage before the onset of COBRA
- Employer may not make COBRA contingent on the employee paying premiums due from FMLA leave

BENEFITS DURING EMPLOYEE LEAVE

12 Week FMLA Leave

FMLA begins June 1, 2018—employee chooses not to pay for health coverage

No health coverage for 12 weeks of FMLA during June, July and August

Employee's FMLA eligibility ends – Employer offers COBRA now

COBRA runs 18 months from this point forward

BENEFITS DURING EMPLOYEE LEAVE

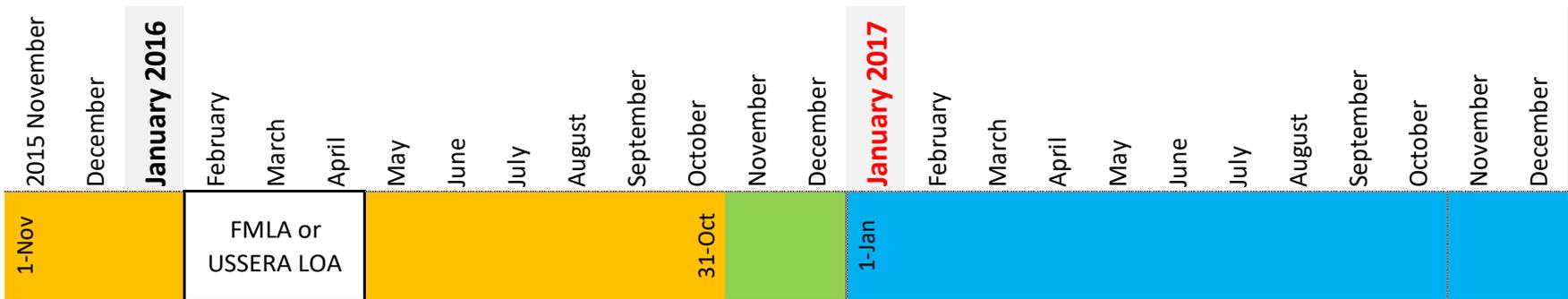
FMLA and the ACA

- ACA Full-Time Employee Definition (Eligibility for Future Benefits)
 - Employers using a look-back measurement period to define full-time status must take unpaid FMLA leave into consideration when determining full-time status
- Averaging service time for special unpaid leaves
 - Prevents periods of special unpaid leave from reducing an employee's hours of service during a measurement period
 - Special unpaid leave is unpaid leave under FMLA, USERRA, or jury duty
 - The employer can treat special unpaid leave in one of two ways:
 - Determine average hours of service by excluding any periods of special unpaid leave during the measurement period
 - Impute hours of service during the periods of special unpaid leave at a rate equal to the average weekly hours of service for weeks that are not part of a period of special unpaid leave

BENEFITS DURING EMPLOYEE LEAVE

Special Leave of Absence Rule

3 Month Unpaid FMLA or USERRA LOA - No Hours of Service



- 1170 hours over 9 months = 130 hours per month
- Employee considered full time during measurement period

-  Standard Measurement Period
-  Stability Period - Eligibility guaranteed regardless of # of hours of service
-  Administrative Period

Paying for Coverage During FMLA Leave

BENEFITS DURING EMPLOYEE LEAVE

Permitted Election Changes

- An employer must allow employee going on unpaid FMLA leave one of two options:
 - Revoke or continue health coverage (including health FSA coverage)
 - Require that health coverage continue, but allow the employee to discontinue contributions
 - In this case, the employer would pay the premiums during the leave and recover them when the employee returned
- Return from FMLA leave is an event which allows employer to permit an employee election change
 - In addition, regulations allow an employer to require employee to reinstate benefits upon return from FMLA leave

BENEFITS DURING EMPLOYEE LEAVE

Paying for Benefits During FMLA Leave

- Premium payments while on paid FMLA leave
 - Paid by method normally used during any paid leave (vacation or sick leave); typically continue payroll deduction
- Premium payments while on unpaid FMLA leave
 - At the same time premiums would be paid by payroll deduction
 - On the same schedule that premiums would be paid under COBRA
 - In advance pursuant to a cafeteria plan (at the employee's option)
 - According to the employer's existing rules for payment by employees on other leave without pay, however, rules cannot require prepayment
 - Other system voluntarily agreed upon by both employer and employee
- Employer must provide advance written notice of the conditions under which the payments must be made
 - Usually contained in the FMLA specific "event" notice

BENEFITS DURING EMPLOYEE LEAVE

Premium payment under a Section 125 plan during unpaid FMLA leave

- Prepay on a pre-tax basis
 - Employer cannot require prepayment
 - Prepayment can not be pre-tax if leave straddles two plan years
 - Example:
 - Calendar year plan year
 - Leave from November through January
 - Can prepay November and December pre-tax
- Pay-as-you-go
 - Paid with after-tax dollars if unpaid leave
- Catch-up on a pre-tax basis
 - Employer and employee agree in advance that pre-tax “catch-up” contributions will be taken out of pay upon return from leave

BENEFITS DURING EMPLOYEE LEAVE

Section 125 Health FSA (HFSA) and FMLA

- Employee must be allowed to revoke HFSA election when going on FMLA leave (or the employer can require coverage under the FSA to continue during the leave with contributions paused until the employee returns)
 - Employer may require HFSA be reinstated upon return
 - If HFSA is revoked – claims incurred during leave may not be reimbursed
- Assuming HFSA is revoked – premium payments and coverage upon reinstatement
 - Prorated for the year based on period of coverage paid for by employee, or
 - Employee makes up missed contributions and full coverage election amount is provided
 - Claims may still not be reimbursed for the time employee was on FMLA and not coverage by FSA

BENEFITS DURING EMPLOYEE LEAVE

Section 125 Health FSA (HFSA) and FMLA

- Example
 - \$1200 HFSA election for year (\$100/mo.)
 - Employee revokes HFSA election during 3-month unpaid FMLA leave
 - Upon return, employee has two options:
- Reinstatement and continue to pay \$100/mo.
 - Maximum plan year benefit available now = \$900 (\$1200 original elections minus \$300 for period no contributions were made to plan)
- Reinstatement with additional \$300 payroll deduction for balance of plan year to make up for missed contributions
 - Maximum benefit available = \$1200
 - Claims incurred during FMLA leave still may not be reimbursed, but full annual election amount is available for claims incurred while actively at work

BENEFITS DURING EMPLOYEE LEAVE

**\$1200 annual HFSA election
12 Week FMLA Leave**

**HFSA fully funded
for \$1200**

FMLA begins July 1, 2018— employee revokes election in HFSA

No HFSA for 12 weeks of FMLA during July, August and September

Employee returns from FMLA Leave and reinstates HFSA wanting full \$1200 benefit

6 Months HFSA contribution @ \$100/mo = \$600

No HFSA contributions during FMLA

3 months HFSA contributions @ \$200/ mo = \$600

No claims incurred during this period can be reimbursed

Non-FMLA

BENEFITS DURING EMPLOYEE LEAVE

Non-FMLA Leave and Benefit Eligibility

- Employer Risk of Offering Benefits During Non-FMLA Leaves
 - Employer must consider plan eligibility rules and insurance contract language
 - Extending benefits to ineligible participants could cause insurance carrier (or stop-loss carrier) to deny coverage
 - Making an offer of COBRA coverage when employee loses eligibility due to a non-FMLA absence from work is best strategy to protect employer
 - Employer could (but is not required to) choose to subsidize employee's COBRA premiums
 - Mitigates risk of extended COBRA obligation and COBRA penalties

BENEFITS DURING EMPLOYEE LEAVE

Non-FMLA Leave and Benefit Eligibility

- Leave not protected by FMLA
 - There are several reasons why a leave may not be protected by FMLA
 - The employer is not subject, or the employee is not eligible
 - The leave is not for a covered purpose
 - The employee has exhausted their FMLA leave
- Typically, an employee on leave that is not covered by FMLA, will no longer be eligible under the terms of the plan and COBRA should be offered
 - In certain cases eligibility may be extended
 - Employer plan eligibility rules – leave policies extending benefits
 - ACA (more later)
 - Disability Policies (more later)
 - Things that do not typically extend employee eligibility
 - Worker’s Compensation (although typically work comp injuries are covered by FMLA if the employer is subject and the employee is eligible)
 - The Americans with Disabilities Act
 - State and local leave laws
 - Disability Policies (more later)

BENEFITS DURING EMPLOYEE LEAVE

ACA Benefit Eligibility during Non-FMLA Leave

- Monthly measurement method
 - Employee is not considered full-time unless the employee average 30 or more hours of service per week
- Look-back measurement method
 - If employee earned full-time status in the previous measurement period, the employee is generally considered full-time for the full stability period
 - Employer has two options:
 - Terminate coverage upon a reduction in hours and offer COBRA – considered an offer of minimum essential coverage, but likely not affordable
 - Continue coverage through the end of the stability period - avoids all potential penalties under employer mandate

BENEFITS DURING EMPLOYEE LEAVE

Disability Policies & Benefit Eligibility During Non-FMLA Leave

- Eligibility for disability benefits, by itself, will not typically require an employer to allow an employee to continue participation in benefits
 - Disability normally runs concurrently with FMLA
 - Can sometimes affect whether a person is credited with “hours of service” under the employer mandate of the ACA
- An employee will be credited with hours of service for period during which he or she is not performing services if...
 - Receiving payments from short-term or long-term disability,
 - Retains status as an employee of the employer, and
 - Payments for the disability benefit are made through an arrangement to which the employer contributed either directly or indirectly
 - Direct = employer contributions to the disability benefit
 - Indirect = employee pre-tax contributions to the disability benefit through employer’s Section 125 plan
- If this results in an employee maintaining full-time status, employer has two options
 - Offer COBRA, save risk of subsection A penalty, risk subsection B penalty
 - Continue to offer active coverage, update plan documents and check with carrier

BENEFITS DURING EMPLOYEE LEAVE

Paying for Benefits During Non-FMLA Leave

- Premium payments while on paid leave
 - Paid by method normally used during any paid leave (vacation or sick leave); typically continue payroll deduction
- Premium payments while on unpaid leave
 - There are no regulations that require a specific approach in this situation
 - The IRS has indicated that in the case of a pay shortage under a Section 125 plan, an employer can use the same options as are presented under the FMLA
 - Pre-pay on a pre-tax basis (if non-FMLA can require this), cannot straddle two plan years
 - Pay as-you-go on an after-tax basis
 - Catch-up on a pre-tax basis
- Health FSA
 - The employer could utilize the same options for the HFSA as are utilized for FMLA leave

QUESTIONS?

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