Benefit Comply
Employee Benefit Compliance Support

BENEFITS DURING A LEAVE OF ABSENCE

A guide to handling benefits while an employee is on a leave of absence

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I. Benefit Eligibility During a Leave of Absence

Unless a leave of absence is protected under federal law (e.g. FMLA or USERRA), or the employer has a leave policy in place that protects benefit eligibility for a period of time, most employees will not be eligible for benefits during a leave of absence. Often employers fail to have proper policies and procedures in place to handle benefit eligibility during a leave of absence and then find themselves in violation of various compliance requirements, and, more importantly, at risk of having to cover claims incurred by individuals who remain enrolled in coverage long after becoming ineligible.

Employers should determine ahead of time how benefit eligibility will be handled during a leave of absence. Consideration should be given to why the leave of absence is needed and for how long. Some situations will require ongoing benefit eligibility for a period of time. Discussion about what is required is set forth below. Beyond what is required, there is flexibility for the employer to be more generous and extend benefit eligibility further; but such policies should be documented and coordinated with the applicable carrier(s).

A. Leave of absence prior to medical coverage becoming effective (e.g. shortly after hire while the employee is still in a waiting period)

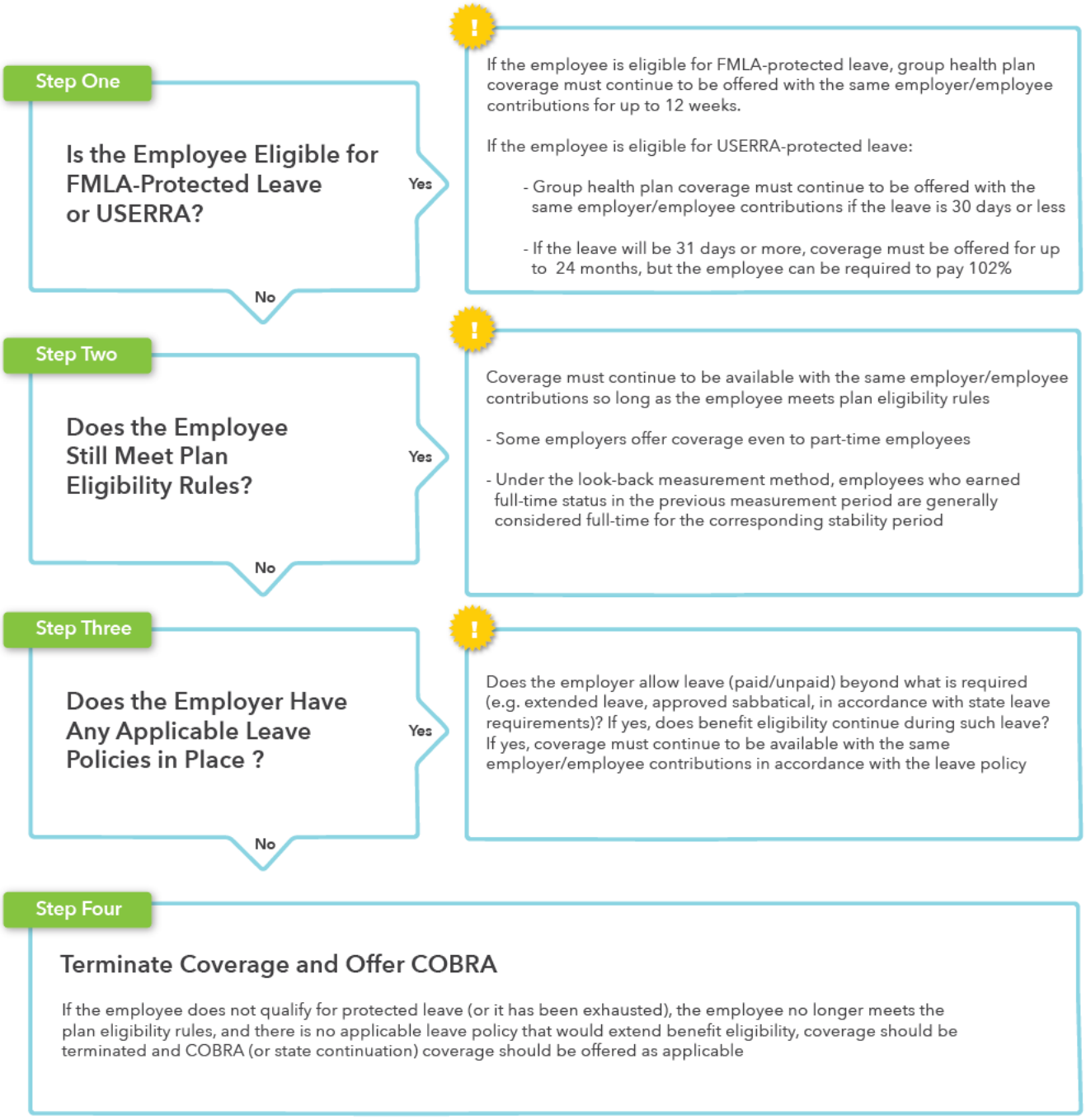
HIPAA nondiscrimination rules generally prohibit plans from denying or delaying coverage based on whether the employee is actively at work at the time coverage would normally become effective due to a health factor. Under these rules, if the leave of absence is health-related, coverage should be made effective at the end of the waiting period; but then if the employee doesn't return to work and is not meeting the plan eligibility requirements, coverage could be terminated at the end of that month and COBRA would be offered. For example, if an employee elected coverage to be effective on May 1, 2019, coverage should be available for May (so long as the employee makes the employee contribution), and coverage could be terminated at the end of May if the employee has not returned to work and is not meeting plan eligibility requirements.

B. Leave of absence for employee already enrolled in benefits

If an employee who is enrolled in benefits takes a leave of absence, continued eligibility for benefits will depend upon:

- whether the employee qualifies for protected leave (e.g. FMLA or USERRA);
- the plan eligibility rules; and
- any leave policies offered by the employer beyond those required (if any).

If the employee is no longer eligible for benefits, the employer should terminate coverage and offer COBRA continuation coverage (if applicable). Continuing to offer benefits to ineligible employees puts the employer at risk of having to provide claims coverage if the carrier discovers the ineligibility and refuses to provide coverage. In most cases, the steps below should be followed:



Workers' comp

There isn't a federal mandate requiring coverage continuation during workers' compensation; rather, workers' compensation benefits are regulated under state statute. Therefore, there may be provisions in the applicable state workers' compensation statute that require that medical benefits be maintained for a specified period of time, with certain requirements around contributions and grace periods, in addition to specifying coordination with FMLA when applicable. Your client would be well advised to discuss the issue with competent employment law counsel familiar with local workers' compensation statutes to understand whether there are any requirements for maintaining benefits, especially if litigation is involved; but our experience is that ongoing coverage is NOT required in most states.

LTD/STD

Eligibility for disability benefits, by itself, will not typically require an employer to allow an employee to continue participation in other employer-sponsored benefits. However, STD will often run concurrently with FMLA and therefore group health plan eligibility (including dental, vision, FSA, etc.) would be protected for the first 12 weeks. Under most plan eligibility rules, group health plan eligibility will likely terminate if leave continues beyond the 12 weeks regardless of whether the employee then moves from STD to LTD benefits. Employers who wish to extend plan coverage beyond what is required by FMLA should clearly define extended eligibility rules in plan documents and SPDs, and should make sure that carriers and stop-loss carriers agree to the extended coverage rules

However, disability benefits can sometimes affect when an employee needs to be considered full-time for purposes of §4980H by applicable large employers (employers with 50 or more full-time equivalents). When an applicable large employer contributes to the cost of disability benefits, or permits employees to make contributions to the cost of coverage on a pre-tax basis, an employee could be considered full time during the time they are receiving STD or LTD.

In other words, "periods during which an individual is not performing services but is receiving payments due to short-term disability or long-term disability result in hours of service for any part of the period during which the recipient retains status as an employee of the employer, unless the payments are made from an arrangement to which the employer did not contribute directly or indirectly. For this purpose, a disability arrangement for which the employee paid with after-tax contributions (so that the benefits received under the arrangement are excluded from income) would be treated as an arrangement to which the employer did not contribute, and payments from the arrangement would not give rise to hours of service."

Americans with Disabilities Act (ADA)

When all available FMLA leave is exhausted, if the employee still cannot return to work and the Americans with Disabilities Act (ADA) applies, the employer should generally attempt to provide a reasonable accommodation, which may involve allowing for a reduction in hours or the extension of additional leave. That being the case, the rules do not require ongoing benefit eligibility for an employee who is taking leave or working part-time as a reasonable accommodation unless the employer also provides coverage for other employees in the same leave or part-time status. Assuming the employer does not offer coverage to part-time employees or employees on a leave of absence, an ongoing offer of coverage would not be required.

II. Payment for Coverage During a Leave of Absence

If the leave of absence is paid, the employee contributions may continue to be deducted from payroll.

If the leave of absence is unpaid, it is advisable to have a process for obtaining the employee contribution and to communicate that process accordingly. FMLA rules provide that an employer can offer the following options to an employee on leave:

- Pre-pay on a pre-tax basis (this cannot be the sole option);
- Pay during the leave on an after-tax basis;
- Make up contributions on a pre-tax basis upon return from leave.

Prepaying is often not an option because there is not enough notice prior to leave's starting. For such situations, some employers prefer to require employees to pay in while on leave to preclude collection issues later, especially if the employee doesn't return. However, others are comfortable allowing the employee to make a catch-up contribution upon return from leave, which then allows for the contributions to be handled pre-tax.

For non-FMLA leave, employers have even more flexibility with payment policies, but many choose to follow whatever payment procedures are put in place for FMLA-protected leave for consistency and ease of administration.

If the employer determines a policy and communicates it, and the employee fails to make the employee contribution in accordance with the employer's policy, there is no requirement that the employer must continue to offer coverage. Coverage may be terminated, in some cases even retrospectively (subject to any carrier restrictions). No notification or grace period must be provided; however, following the standards for FMLA may be a good practice. FMLA requires that the employer provide a 30-day grace period for payment and notification at least 15 days prior to the termination (e.g., if your contribution is not received by XX, your coverage will be terminated).

III. Consequences of Failing to Terminate Benefits in a Timely Manner

When employees remain on leave for an extended period, employers may fail to terminate coverage when benefit eligibility ends (e.g. upon expiration of FMLA-protected leave). In some cases, the employer is simply trying to be generous, but regardless, doing so in this manner puts the employer in a risky position. The employer is better off terminating coverage, offering COBRA, and then subsidizing the COBRA premiums if there is a desire to help the employee.

When coverage continues beyond the point at which plan eligibility ends, in addition to being at risk of incurring penalties for failure to comply with COBRA administration requirements, the employer is at risk of the carrier's refusing to provide claim coverage if it is discovered that the plan is covering ineligible individuals. Counsel should generally be involved in such situations. In any actions taken, communications made, or documentation that is created, the employer is potentially creating a string of evidence that could be used if claims do arise.

We typically recommend that an offer of COBRA be made as soon as possible. The COBRA rules allow the maximum COBRA period to run retroactively from the actual event date (e.g. the reduction of hours) or from the actual loss of coverage date, so the employer has a few options:

- Offer COBRA beginning back when the actual loss of eligibility occurred.
    - The employer could attempt to ask for full COBRA premiums (up to 102%) and terminate coverage retroactively if payment is not made (subject to carrier approval). This approach is the most aggressive and riskiest because the employer is at fault for not handling COBRA administration properly.
    - Alternatively, the employer could ask for full COBRA premiums only prospectively if the individual elects to continue coverage for the remainder of the maximum coverage period, and otherwise terminate coverage on a prospective basis.
- Offer COBRA prospectively from the actual loss of coverage date for the maximum coverage period. However, before considering this option, the employer should check with the carrier. The carrier may not take responsibility for claims beyond the COBRA maximum coverage period based on the original event date.

Whatever the employer decides, the COBRA election letter will need to be tailored to address the situation, and the individual must be given the normal COBRA periods to make an election and payment. Regardless of how the employer chooses to proceed, there is some risk of the individual's making claims against the employer for a failure to properly handle COBRA administration.

IV. Measuring Hours of Service During a Leave of Absence

Applicable large employers (those with 50 or more full-time equivalents) must offer coverage to full-time employees to avoid potential penalties under §4980H. "Full-time" is defined as an employee who averages 30 or more hours of service per week (130 or more per month). An "hour of service" includes each hour for which an employee is paid, or entitled to payment, for (i) the performance of duties for the employer, and (ii) a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence. Therefore, if the leave is paid, hours of service would need to be credited accordingly. If the leave is unpaid, generally no hours of service must be credited unless special unpaid leave rules apply, or in some cases, when the employee is collecting disability payments.

- Special Unpaid Leave – For employers using the look-back measurement method, if the leave of absence is due to FMLA, USERRA, or jury duty (considered "special unpaid leave"), the employer must either exclude the leave of absence from the measurement period or impute hours of service during the leave using the average obtained during the remainder of the measurement period. There is no similar requirement for employers using the monthly measurement method; rather, if the leave is unpaid, no hours of service would be credited.

- Disability Payments – As set forth in IRS Notice 2015-87, *"…periods during which an individual is not performing services but is receiving payments due to short-term disability or long-term disability result in hours of service for any part of the period during which the recipient retains status as an employee of the employer, unless the payments are made from an arrangement to which the employer did not contribute directly or indirectly. For this purpose, a disability arrangement for which the employee paid with after-tax contributions (so that the benefits received under the arrangement are excluded from income under § 104(a)(3)) would be treated as an arrangement to which the employer did not contribute, and payments from the arrangement would not give rise to hours of service."* Therefore, depending upon the structure of the disability benefit, it's possible that an employee may still be considered full-time while on an unpaid leave collecting disability benefits.

NOTE: Guidance indicates that "…*Periods during which the employee is not performing services but is receiving payments in the form of workers compensation wage replacement benefits under a program provided by the state or local government do not result in hours of service."*

In addition, it may also be necessary to consider break in service rules. Under the break in service rules, an employee returning from a leave of absence of fewer than 13 weeks is generally considered a continuing employee, whereas an employee returning from a leave of absence of 13 weeks or more may be considered a new hire for whom a new waiting period or initial measurement period may be imposed as applicable.