

COVID-19 (Coronavirus) Response: Questions and Answers for Health and Welfare Benefit Plans

AUTHORS

John D. Arendshorst

Jeffrey A. DeVree

RELATED PRACTICES

Coronavirus Task Force

Employee Benefits

Employee Benefits Advisory

March 23, 2020

What happens to employees' health care coverage if they are on unpaid leave, layoff or furlough?

The terms of the health plan, and your contract with your health insurer or third-party administrator, will determine whether active employee coverage can continue during short-term leaves of absence. Many plans have minimum hour requirements to maintain active coverage. If the terms of your health plan do not permit coverage to continue during a leave of absence, the plan could be amended to do so. However, it is important to coordinate any such expansion of coverage with your plan's insurer, third-party administrator and/or stop loss carrier. Employers who expand coverage for ineligible employees outside the terms of the plan or policy without consent from the insurer or stop loss carrier could lead to claims by newly-eligible employees not being covered.

How does COBRA continuation coverage apply to employees on leave?

COBRA continuation coverage (or state continuation coverage, if applicable) generally must be offered if an employee loses group health plan coverage due to a termination of employment or a reduction in hours. An increase in the employee's share of the group health plan premium due to unpaid leave or a reduction in hours is also considered to be a COBRA qualifying event. An employer may charge the affected employee up to 102 percent of the applicable premium for COBRA coverage, but the employer may pay some or all of the cost of the premium on the employee's behalf.

Will termination of health coverage for employees on leave subject our company to Affordable Care Act penalties?

If an employer terminates group health plan coverage for employees who are placed on unpaid leave or who have a reduction in hours, the termination of coverage may trigger Affordable Care Act (ACA) penalties. The ACA requires applicable large employers to offer coverage to at least 95 percent of full-time employees. If a full-time employee is placed on leave or has a reduction in hours during a stability period, they may still be considered a full-time employee and must be offered coverage.

In addition, the coverage offered must remain affordable to avoid an ACA penalty. If an employee is on unpaid leave for a significant period of time, the coverage may require a continued or increased employer subsidy to remain affordable. This rule applies both to active employee coverage and to COBRA continuation coverage.

How will employees pay required premiums or contributions during a leave period?

The terms of the health plan determine how employees may pay premiums or contributions to maintain coverage during any leave period. These provisions can be amended prospectively at any time. If an employee does not pay premiums or contributions as required while on leave, their coverage could terminate. An employee will not be eligible for COBRA continuation coverage if their coverage terminates due to unpaid premiums.

If an employer offers minimum essential coverage to employees that is affordable and provides minimum value, the employer will not be subject to ACA penalties if an employee declines the coverage or if an employee's coverage terminates due to unpaid premiums or contributions.

Can employees affected by COVID-19 make changes to their cafeteria plan elections?

Cafeteria plans may permit employees to revoke or change elections midyear as a result of a change in the employment status of the employee (or the employee's spouse or dependents), such as a reduction in work hours that affects the employee's eligibility or cost of coverage. The change in election must be consistent with the change in status.

Employees who are absent from work on FMLA leave must be allowed to either revoke their medical coverage and flexible spending account contributions, or to continue coverage but discontinue payment of the employee share of the premium costs and repay their share upon returning to work.

Employees who have a significant increase or decrease in qualified dependent care costs due to school closures may change their dependent care flexible spending contributions consistent with the change in costs.

Employers should review their plan documents to determine which of these options are permitted and whether they should amend the plan to increase flexibility.

Is our company group health plan required to provide testing for, or treatment of, COVID-19 without a deductible?

The Families First Coronavirus Response Act, enacted on March 18, 2020 requires group health plans (including grandfathered plans) to cover COVID-19 testing without any cost-sharing. Plans must also cover services incurred during visits to health care providers that result in COVID-19 testing, to the extent the item or service relates to the testing or evaluation of the patient's need for a test. These requirements do not apply to group health plans that provide only "excepted" benefits or cover only retirees. If a group health plan is a high-deductible health plan (HDHP), the lack of a deductible applied to COVID-19 testing will be disregarded for determining the status of the plan as a HDHP.

The law does not include any requirement with respect to costs for treatment of COVID-19, so treatment costs will still be subject to your plan's standard deductible and cost-sharing rules.

Does our company need to provide paid leave to employees who are absent from work due to COVID-19?

In some cases, yes. Congress has passed several laws in response to the COVID-19 epidemic, including the Emergency Family and Medical Leave Expansion Act, which requires some employers to provide paid leave to certain employees affected by COVID-19. Varnum's labor and employment law team has published an advisory on these changes: <https://www.varnumlaw.com/newsroom-publications-families-first-coronavirus-response-act>

Can an employer establish leave-sharing programs to allow employees to assist one another with the impact of COVID-19?

Generally, if one employee donates paid leave time to another employee, the leave will be taxable to the donor. However, the IRS permits donation of leave without the donor being taxed if the leave is donated pursuant to a written program established by the employer in response to either a major disaster or for medical emergencies. The COVID-19 emergency may be sufficient for employers to sponsor such a leave-sharing program.

How do HIPAA rules apply to protected health information related to COVID-19?

HIPAA privacy and security rules still apply. However, the rules do permit covered entities and business associates to disclose protected health information (PHI) as necessary to help public health authorities to safely carry out their duties. For example, covered entities may need to disclose PHI as needed to report exposures to the virus or confirmed cases of COVID-19, so long as any such disclosure is the minimum necessary to accomplish the public health purpose. Varnum's employee benefits attorneys can help you determine whether a disclosure is permitted or required and what should be disclosed.

For more information, please contact your primary Varnum attorney or any member of the employee benefits practice team.