LABOR AND EMPLOYMENT

ALERT | MARCH 31, 2020

COVID-19 and COBRA: Health Benefits Issues for Employers Considering Layoffs or Reduction of Employee Hours

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Employers considering temporary or permanent layoffs or significant cuts to employee hours due to COVID-19 will have to manage employee benefit issues that stem from these difficult decisions. This alert provides employers with an overview of the potential impact that temporary and permanent layoffs may have on employee health benefits. As a reminder, employers should always consult with their insurer or plan administrator about the terms of each benefit plan and corresponding contract to accurately determine the impact an employment decision will have on company-sponsored benefits for employees.

IS A LAYOFF OR REDUCTION OF EMPLOYEE HOURS A QUALIFYING EVENT?

The Congressional Omnibus Budget Reconciliation Act of 1985, more commonly known as COBRA, provides employees with certain benefit options if they undergo a qualifying event. A "qualifying event" generally refers to marriage, divorce, childbirth, adoption and, significantly, a job loss when coupled with a loss of coverage. However, a reduction in hours also may be a qualifying event if it results in a loss of coverage. Employers who are implementing temporary or permanent layoffs should consult their health plan to determine whether the plan documents have any information regarding a threshold number of hours employees must work to maintain eligibility for health care benefits. If the reduction in hours causes a loss of coverage, it would be a qualifying event under COBRA.

After a qualifying event occurs, employers must notify the plan administrator or plan sponsor of the qualifying event. Failure to do so could result in employer liability under COBRA. Employers with fewer than 20 employees should refer to their applicable state law as many states have enacted a COBRA equivalent for small employers whose employees have group health plans.

The reduction in hours or layoff is a qualifying event only if it also results in loss of coverage. Consider the example of an employer who pays monthly benefits premiums on April 1, 2020, providing employees with health care coverage for the entire month. Depending on the plan structure, an employee who has coverage and is laid off on April 2, 2020 and reinstated on April 29, 2020 may not lose coverage. Thus, this would not be a qualifying event triggering COBRA notice obligations.

WHAT IF THE PLAN HAS MINIMUM HOURS REQUIREMENTS BUT THE EMPLOYER WANTS WORKERS TO CONTINUE HAVING ACCESS TO HEALTH CARE COVERAGE?

Employers who want to provide employees with access to health care coverage even though employees do not meet the minimum hours requirement may be able to continue offering coverage. In order to do so, employers would likely have to negotiate with the plan sponsor for a waiver of the minimum hours requirement contained within the health plan. However, employers should not

communicate any potential change in the terms of a plan to employees who may be eligible for COBRA continuation until the change is finalized. Such a communication could create an enforceable right for an impacted employee. Instead, employers should speak with their plan sponsors and review the appropriate contracts before communicating any benefits qualification changes to employees. Once a change is negotiated, employers must update all summary plan descriptions. Following this update and confirmation that all notice obligations referenced in the respective plans are being followed, an employer would then be able to communicate the change to eligible individuals.

CAN EMPLOYERS OFFER TO PAY PREMIUMS FOR EMPLOYEES WHO ARE LAID OFF?

As with everything else related to benefit plans, employers who are interested in paying premiums for employees should first look at their plans to determine when the coverage is lost and whether non-employees can be covered. Generally, COBRA allows individuals to opt for continued coverage and to be directly charged up to 102 percent of the premium during any period of coverage. Obviously, it will be difficult for employees who are no longer receiving wages to pay this premium. An employer seeking to support these individuals may elect to subsidize premiums by paying all or part of the premium incurred by an employee after a layoff or reduction in hours. Employers who wish to subsidize premiums should consult the IRS rules regarding discrimination testing before making any final decision. Any discrimination in benefits that favors highly compensated employees could result in tax penalties to an employer or a highly compensated employee.

There may be other options for employers to assist employees, even when not providing a direct subsidy for continued coverage. For example, prior to the layoff, employees may consent to a pre-tax deduction equal to the premiums. Alternatively, employers may provide employees with an advance equal to the cost of the premiums with an understanding that the individual will repay the employer upon a return to work. Employers who permit pre-payment or advance premiums to individuals must check their cafeteria plans (*e.g.,* flexible spending account plans), to ensure this course of action is permitted. Some employers may prefer to have employees directly pay premiums as they are incurred during the COBRA period.

Note that employers also should look to any state or federal COVID-19 assistance programs to determine whether relief is available and the terms and conditions for qualification.

STATE LAW CONSIDERATIONS

While the analysis discussed above applies to plans that are covered by federal COBRA obligations, employers should make sure that state obligations under mini-COBRA laws are also reviewed. For instance, Pennsylvania's mini-COBRA law applies only to non-ERISA employer plans that cover 2 to 20 employees and that do not have any work hours requirement. In comparison, New Jersey's mini-COBRA law applies to non-ERISA plans with 2 to 50 employees who work at least 25 hours per week. Thus, an employer with 21 employees based in New Jersey would be subject to both state and federal COBRA laws.

It is difficult to predict how the current pandemic may lead to changes to existing law in each state. In response to COVID-19, some states may engage in emergency rulemaking to lower the standards required for employees to continue to maintain employer-sponsored health care coverage. Ohio recently took this approach by requiring insurers operating in the state to continue coverage for employees who would otherwise be ineligible for coverage under an employer plan based on a reduction in hours.

ALTERNATIVES TO LAYOFFS

Employers may have another option besides layoffs and furloughs. The Coronavirus Aid, Relief, and Economic Security Act ("CARES"), which President Trump signed into law on March 27, 2020, incentivizes certain employers to retain their workforce. Employers may be eligible for tax credits if they continue paying salary and group health plan premiums for employees during periods when the business suffers a significant revenue decrease or

closes because of the COVID-19 outbreak. These credits are based on the wages actually paid by employers and thus will be reduced if employers lay off workers. Some employers may also be eligible for loans from the Small Business Administration to be used for employee payroll, including costs of group health insurance. As long as employees are retained through June 2020, the loans may be forgiven. Therefore, employers should consider the possible advantages of these emergency government programs in determining whether to lay off or furlough employees.

TAKEAWAYS

As COVID-19 continues to affect businesses, employers will need to make difficult economic decisions about health benefits for workers. Employers should consider a decision-making process involving the following elements: (1) review state and federal law to determine which applies and follow the required processes once a qualifying event occurs; (2) review the health care plan or contract to determine what the plan permits; (3) if necessary, negotiate changes with the insurance carrier; (4) provide updated summary plan descriptions to employees; and (5) take the contemplated employment action. While every employment decision carries some risk, close attention to detail will help mitigate risks for employers.

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center. ◆

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