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# What Employers Need to Know about Handling Benefits When Employees are on Medical Leave



Presented by:

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# AGENDA FOR TODAY

- State paid disability leave laws and when an employer must continue benefits for an employee under these laws
- Employer provided short-term / long-term disability insurance and common employer provided disability leave policies, including when an employer must continue benefits for an employee who is on disability leave
- Provide an overview of states with family and medical leave laws and when an employer must continue benefits for an employee under these laws
- Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and state workers' compensation laws and how may be implicated when an employee is going on leave
- Describe best practices while an employee is out on leave
- Describe best practices for administering benefits when an employee qualifies for multiple types of leave

# State Disability Leave Laws

- State benefits paid to workers who suffer an illness, injury or other disability that prevents them from working and wasn't caused by their job
- States that have state-mandated disability benefit requirements
  - California
  - Hawaii
  - Rhode Island
  - New Jersey
  - New York
- Eligibility, exclusions and benefits will vary
- Taxation and reporting

# Short-Term Disability & Long-Term Disability



- STD is usually a few months to a year whereas LTD is longer.
- Both can be paid directly out of general assets, and if they are may be exempt from ERISA as payroll practices.
  - Plans maintained solely to comply with state workers' compensation, unemployment, or disability insurance laws may also be exempt from ERISA
- Continuing benefits while on disability under the ADA

# FMLA

- What employers does it apply to?
  - 50 + employees within 75 surface miles
- Which employees does it apply to?
  - 12 months of service
  - 1250 hours worked in 12 months before start leave

# FMLA – When Can It Be Taken?



- Birth of Child/Care for Child
  - Applies to men and women
  - Within 12 months of birth
  - May require leave to be taken all at once
- Adoption or Foster Care
- Family Member's or Employee's Serious Health Condition
  - Family member: Spouse, Parent, Child
  - Serious Health Condition
    - Inpatient Care
    - Continuing/multiple treatments
    - Incapacity of more than 3 days
    - Pregnancy or prenatal care
    - Chronic condition
    - Substance abuse treatment
- Military-related Leave
- Intermittent leave

# FMLA – Employees Notice of FMLA Leave



- Employee does not need to say “FMLA” (only has to say enough to suggest leave might be FMLA-qualifying)
- Generally 30 Days Notice
- Oral Notice is Sufficient
- Employee must comply with usual company rules for notice
- If eligible employee is absent because of WC or on STD, generally its FMLA-qualifying
- With intermittent leave employee must identify the absence is related to FMLA leave, if they don't, ASK

- “The employee’s rights to maintenance of benefits during the FMLA leave”;
- “Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments” along with “the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse)”; and
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

- FMLA entitles eligible employees to take *unpaid* leave, but employees may be permitted or required to substitute accrued paid leave (such as sick or vacation leave) for unpaid FMLA leave
- If paid leave is substituted for FMLA leave, the employee's share of health plan premiums must be paid by the method normally used during paid leave (usually payroll deduction).

# Americans with Disabilities Act (ADA)

- Applies to employers with 15 or more employees
- Prohibits employers from discriminating against a qualified individual on the basis of disability
- If individuals with and without disabilities receive the same benefits, then there will be no ADA violation.
  - Prohibits disability-based distinctions
- How does the ADA apply to health plans:
  - Continuation of benefits
  - Plan design
  - Wellness programs

# Workers' Compensation

- Provide employee's income when they are injured on the job and pay for medical expenses related to the injury
- Most employees are covered by workers' compensation policies
- Employees on workers' compensation may also be entitled to FMLA leave

- States with Family Leave
  - California
  - D.C.
  - Maine
  - New Jersey
  - Rhode Island
  - Washington
  - Connecticut
  - Hawaii
  - Minnesota
  - Oregon
  - Vermont
  - Wisconsin

# States with Family and Medical Leave Laws

- States with Paid Family Leave
  - California
  - Rhode Island
  - Washington
  - New Jersey
  - New York
  - D.C.
- Paid Sick Leave
  - Arizona
  - Connecticut
  - Massachusetts
  - Rhode Island
  - Vermont
  - California
  - Maryland
  - New Jersey
  - Oregon
  - Washington
  - D.C.

- FMLA applies to “group health plans” which can include:
  - medical or health insurance plan (including a self-insured plan such as a health reimbursement arrangement (HRA));
  - dental plan;
  - vision plan;
  - prescription drug plan;
  - health flexible spending arrangement (health FSA); and
  - employee assistance plan (EAP), if it provides medical care.
- *No guidance on how FMLA applies to HSAs . . .*

# Benefits That May Be Excluded While on Medical Leave



FMLA does not cover plans that do not provide health care or certain voluntary plans:

- group term life insurance plan;
- accidental death and dismemberment (AD&D) plan;
- disability insurance plan;
- dependent care assistance program (DCAP); and
- individual health insurance policies that generally meet ERISA voluntary plan exception

# Maintaining Benefits For Employees on Leave



- Employer is required to maintain group health insurance coverage (including family coverage) for an employee on FMLA leave on the same terms as if the employee continued to work
- Must allow employees to change coverage during open enrollment or other status changes during the FMLA (e.g. divorce or marriage)
- Should continue providing all regular notices, mailings and information relating to the group health plan otherwise provided to active employees

- Employer's obligation to provide medical benefits ends if:
  - Employee informs employer of intent not to return to work at the end of the leave period
  - Employee fails to return to work when FMLA leave and any other protected leave is exhausted
  - Employee's premium payment is > 30 days late (and employer has given written notice at least 15 days in advance advising that coverage will cease if payment is not received)
- Employer can recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave – but should be careful to comply with wage and hour laws in deducting advanced premiums from employee pay

# Restoring Benefits Upon Return From Leave



- Benefits must be resumed in the same manner at the same level as before the FMLA leave, unless the employee elects otherwise
  - Even if the employee lets coverage lapse during the leave
  - If benefits have changed for the entire workforce, those changes will apply upon a return from leave
- No new waiting periods

# Collecting Premiums From Employees on Leave



- **DOL Rule:** Employer can require employee to pay for FMLA coverage:
  - at the same time that premiums would be paid if by payroll deduction;
  - on the same schedule that premiums would be paid under COBRA;
  - in advance (i.e., prepayment) pursuant to a cafeteria plan at the employee's option;
  - according to the employer's existing rules for payment by employees on “leave without pay,” provided that such rules don’t require prepayment (i.e., payment prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave, or the payment of premiums higher than if the employee had continued to work instead of taking leave; or
  - any arrangement voluntarily agreed to by the employer and employee
- If employee is on paid leave substituted for FMLA – premiums should be deducted on regular schedule

# Cafeteria Plan Rules During Medical Leave



Under IRS rules, an employer has 2 options when an employee goes on FMLA leave:

1. Allow employee to drop coverage during FMLA (including health FSA coverage); or
2. Require that health coverage continue.

If an employer requires employee to keep coverage (or more commonly fails to offer an election to drop coverage), employer must allow employee to discontinue payments during the leave, but can recover advanced premium payments when employee returns. *(balance convenience with likelihood of premium recovery)*

- An employee who elects to continue coverage during unpaid FMLA leave under a cafeteria plan may do so by:
  1. Prepaying Contributions – employee may elect to reduce final pre-leave paycheck or to otherwise make special salary reduction contributions that will cover his/her share of contributions during leave
    - Generally disallowed if leave spans across two plan years as violating the “no-deferred-compensation” rule, which generally prohibits one year's contributions from funding benefits in a subsequent year; employer cannot require prepayment
  2. Pay-as-you-go - employee pays his/her share of the cost of coverage in installments during leave
    - Can be made with after-tax or pre-tax dollars to the extent the employee receives compensation while on leave
  3. Catch-up Contributions - Upon return, employee makes special catch-up salary reduction contributions
    - May be sole option offered to employees on FMLA leave only if it is the sole option offered under other types of unpaid leave

# Cafeteria Plan Rules During Medical Leave Cont.



- Upon returning from FMLA leave, employees have a right to be reinstated in group health plan coverage on the same terms as before the FMLA leave, subject to any changes in benefit levels, if such coverage terminated during the leave (either by revocation or due to nonpayment of premiums)
- Employers must continue to provide employees on FMLA leave with the portion of their cafeteria plan allotment allocated to health insurance premiums paid by the employer prior to leave
- Employers cannot treat employees on FMLA leave less favorably than employees on other forms of leave, for example:
  - Employers are not required to continue to provide flex credits that were being used by an employee to pay for non-health coverage (such as life or disability), unless provided to employees on other forms of leave
  - Employers may require employees taking paid FMLA leave to continue benefits during leave, but only if required during comparable non-FMLA paid leave (and employer allows employee to discontinue contributions)
  - Employers may mandate reinstatement of coverage upon return from FMLA leave, but only if also required upon return from non-FMLA leave

# FSA Administration Issues During Leave



- Must be allowed to revoke coverage during leave or discontinue contributions during leave if the employer does not permit for revocation
  - Uniform coverage rules will apply
- Reinstatement on same terms upon return
- If an participant revokes coverage, then how is coverage treated upon return?
  - *Prorated Coverage.* The employee may choose to have a level of coverage that is reduced by the amount of contributions missed.
  - *Reinstatement of Original Coverage Level.* Under this option, the employee may elect to reinstate the original level of coverage when the leave began by paying any missed contributions.

## When should the employer offer COBRA?

- When the employee fails to return from FMLA
  - When an employee is on an extended leave of absence after FMLA (e.g. ADA leave), most plans provide that coverage ceases because employee is not actively at work. Employer should offer COBRA at that point – carriers could deny claims if employee retained on coverage longer than plan allows
- ACA Considerations *(yes, it's still with us!)*
  - If employer uses the lookback measurement method for determining full-time, eligible status under the ACA, then employee's exhaustion of FMLA leave may (mean that employee's coverage may not be terminated (employer may be obligated to continue coverage until end of stability period)
- When the employee is terminated from employment *(unless termination occurs during FMLA and the employee had elected to drop coverage or was cancelled for non-payment of premium)*
- **No good deed goes unpunished when it comes to extended leaves! Do not be afraid to terminate coverage when eligibility ends under policy (including stop loss coverage) Failure to offer COBRA timely can negate carrier's obligation for claims and stop loss protection. Pay for COBRA instead . . . .**

# Best Practices for Administering Benefits on Leave

- Case by case basis and will depend on the facts
- Identify the type of leave(s) that apply
- Identify the types of benefits the employee is enrolled in
- Review the plan document to determine when eligibility will end
- Leave policies in writing
- Fully-insured versus self-insured
- Track whether employee has been paying premiums

# Best Practices When Employees Qualify for Multiple Types of Leave

- FMLA leave is protected and benefits should continue
- Reasonable position that state leave laws are also protected leave
- Review benefits when the employee's protected leave ends
- ACA considerations



# Final Questions

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# Thank You



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