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COVID-19 and Reductions in Hours, Furloughs, and Layoffs

As the nation responds to the multi-faceted effects of the 2019 Novel Coronavirus (COVID-19), many employers face temporary closures and the grim decision of reducing employee hours, introducing furloughs, or laying off employees. Employers have a number of issues to consider when deciding to reduce the size of their workforce, such as application of the WARN Act or the size of severance packages to offer. Also important to understand and consider is the impact that these decisions will have on health and welfare benefits.

Reductions in Hours, Furloughs, and Layoffs: A Menu of Terms

Although each employer in a given industry may be faced with the same future – a temporary work stoppage or reduction due to COVID-19 – the path chosen in furtherance of that necessity may differ based on the individual employer. Employers have a number of options available to them when it comes to work stoppages or reductions in workforce. An employer may choose to reduce the hours of service for some or all of its employees. An employer can also downsize its workforce by laying off employees, resulting in a permanent reduction in its workforce through terminations. Employers looking for a solution that does not permanently terminate employment relationships can turn to furloughs, which allow employees to return after a temporary unpaid leave, generally lasting a few weeks to a few months.

Counting Hours for Furloughed Employees or Employees with Reduced Hours

Employers considering furloughs or reducing employees' work hours must consider how that decision will impact their employees' status as full-time or not full-time for purposes of the Patient Protection and Affordable Care Act (ACA). Under the ACA's Employer Mandate, employers of a certain size must offer affordable, minimum value coverage to their full-time employees to avoid Employer Shared Responsibility penalties. In the case of a reduction in hours or a furlough, it would seem that an employee whose hours are reduced such that he or she is no longer considered to be a full-time employee would no longer be offered health coverage. However, depending on the method used to

determine full-time status (monthly measurement method or look-back method), an employee's status as full-time (or not) may be locked in for a period of time.

With the monthly measurement method, an employee's hours of service are calculated for a given month and an offer of coverage must be made for any month in which the employee has at least 130 hours of service to avoid an ACA Employer Shared Responsibility penalty associated with that employee. For example, an employee has at least at least 130 hours of service from January through March, but is furloughed for two weeks in April, and then resumes normal working hours for May through December. To avoid a penalty, the employer must offer coverage for January through March and May through December, but does not have to offer coverage for April.

In contrast, an employer using the look-back measurement method may find an employee's full-time status is protected. Using the look-back measurement method, an employee's full-time status is determined during a measurement period for a corresponding stability period (following the measurement period). Therefore, when an employee has been determined to be a full-time employee during the measurement period, his or her full-time status during the corresponding stability period is protected. This means an employee who originally met the full-time employee threshold under the look-back measurement period will continue to be considered a full-time employee for the corresponding stability period even if his or her hours are reduced or he or she is furloughed and no longer meets the full-time hours of service threshold.

Eligibility for Benefits Where there is a Reduction in Hours or Furlough

Employers planning to reduce employees' hours or to implement furloughs in response to COVID-19 should consider how that will affect employees' eligibility for benefits. Plan terms govern plan eligibility. For example, a plan may have an "actively at work" requirement or may require full-time status (as defined in the plan) for an employee to be eligible for coverage. An employee who has a reduction in hours or is furloughed may cease to satisfy the eligibility definition and consequently no longer be eligible for coverage.

Depending on the terms of the plan, the carrier or stop-loss carrier may take the position that employees lose their eligibility for coverage during a work stoppage. Alternatively, a plan could include a provision that permits continued eligibility in the event of a temporary layoff. In either case, the determination is governed by plan terms. Further, in the absence of such a provision, it is possible that the carrier would agree to continue coverage during a COVID-19-related temporary work stoppage. Similarly, a carrier may be willing to allow continued coverage for employees whose hours are temporarily reduced to the extent that they no longer satisfy the plan's hours worked requirement. In

that case, the plan may need to be amended and a summary of material modification delivered to participants to explain the change.

Note that for an employer who uses the look-back measurement method, as noted above, employees who remain employed during a stability period (notwithstanding a temporary period of low or no hours) if determined to be full-time during a measurement period would still be considered full-time during the subsequent stability period. In that case, removing such individuals from coverage during a furlough or reduction in hours would not be optimal and could result in ACA penalties. To protect against that possibility, the employer may be able to arrange continued coverage with the carrier for the temporary period of absence.

Employers should review their plan documents for each benefit offered to determine employees' eligibility for coverage and should discuss with their carriers the implications of a reduction in hours or furlough in response to COVID-19. Employers have flexibility to determine eligibility for their plans and may choose to be more generous than the law requires in this unique situation, but should do so with agreement from their carriers.

Cafeteria Plan Elections

If a furlough or reduction in hours causes an employee to lose eligibility for a benefit under a plan, that constitutes a change in election event allowing that individual to change his or her salary reduction election. If the furlough or reduction in hours does not impact eligibility, there is no change in election event and, therefore, no change in election or coverage may be permitted. An employer may want employees to be able to drop health flexible spending account (health FSA) coverage during a furlough. In that case, the plan's eligibility provisions must state that coverage under the health FSA ends when an employee is no longer actively working.

Applicable Large Employers Must Include Laid Off Employees in Their IRS Reporting

Section 6056 of the ACA requires every applicable large employer (ALE) to file a form (i.e., a Form 1095) with the IRS to report information about its full-time employees and to furnish each full-time employee with a statement containing similar information. These forms must be filed regardless of whether the ALE offers coverage or whether the employee enrolls in any coverage offered.

In completing a Form 1095-C, an employer must indicate on Part II of the form whether it offered coverage for all days of the calendar month to a particular individual (and any dependents). However, if an employee terminates employment with the ALE before the last day of a month and the coverage (or offer of coverage) expires upon termination of employment, but the coverage would have otherwise continued until the end of the

month, then the ALE should report that month as an offer of coverage using code 2B. If the coverage (or offer of coverage) would have continued had the employee not terminated employment during the month, then the ALE will be eligible for relief under the Employer Mandate for that employee's last month of employment.

COBRA Notices for Employees No Longer Covered

For some employees, coverage will end as employers make tough decisions to terminate employment or cut employees' hours to handle the COVID-19 crisis. The requirements under COBRA are clear– continuation coverage must be offered when qualified beneficiaries (certain employees, terminated employees, retirees, spouses, former spouses, and dependent children) lose coverage due to a triggering event (called a "qualifying event"), such as a termination of employment or a reduction in hours worked. Plan sponsors and plan administrators are required to provide qualified beneficiaries with COBRA election notices upon the loss of coverage triggered by qualifying events. The election notice describes the ensuing COBRA rights and obligations to which a qualified beneficiary is entitled, as well as the procedures necessary to make an election of COBRA coverage. COBRA coverage is not automatic; it must be affirmatively elected. Without a timely provided notice, the employer is exposed to lawsuits and fines. When instituting large scale layoffs or terminations, human resources departments may be increasingly prone to costly failures to timely provide the COBRA election notice.

The election notice must be furnished by the plan administrator to qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event (from either the employer or the qualified beneficiary). If the qualifying event is one where the employer has the obligation to notify the plan administrator of the event (such as a termination of employment or a reduction in hours) and the employer is the plan administrator, then the election notice must be provided to the qualified beneficiaries within 44 days from the date that the qualifying event occurs.

Although compliance may be difficult for employers with employees spread across multiple locations, the alternative may prove to be immensely costly. Employers who violate COBRA requirements could face penalties under the Internal Revenue Code and ERISA. Further, employers are at risk of lawsuits filed by the Department of Labor and/or qualified beneficiaries. The compounding effect of COBRA penalties creates an environment that strongly encourages compliance.

Additional Resources

When determining how to respond, it will be important for employers to obtain practical information. Below are some links to useful resources.

WHO, Q&A on Corona Viruses: https://www.who.int/news-room/q-a-detail/q-a-coronaviruses

WHO, Coronavirus Disease (COVID-19) Advice for the Public: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public

CDC, Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19): https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fguidance-business-response.html

EEOC, What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Department of Labor, COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers: https://www.dol.gov/agencies/whd/fmla/pandemic

The information in this article is current through March 18, 2020. However, given the ever-changing landscape of the COVID-19 pandemic, the intent of this article is to provide general information on employee benefit issues. It should not be construed as legal advice and, as with any interpretation of law, plan sponsors should seek proper legal advice for application of these rules to their plans.