

Benefit Eligibility Considerations in a COVID-19 Environment – Returning to Work

Employers with employees returning to work after a leave of absence, reduction in hours (e.g., furlough) or termination of employment (e.g., layoff) may have questions about the implications for medical benefit eligibility and the effect on the ACA's employer shared responsibility rules.

ELIGIBILITY ISSUES

The answer to the benefit eligibility question will depend heavily on whether the employee was terminated from employment (a termination and rehire) or kept active as an employee (e.g., while on furlough) with continued benefit eligibility. Employers should first determine whether the plan document addresses furloughs, rehires, or unpaid leaves of absence.

If the employer is interested in waiving waiting periods for rehired employees or otherwise extending coverage beyond what is described in the plan document, it should make sure to get the carrier's approval.

Plan amendment may be required.

ACA FULL-TIME STATUS ISSUES

Some employers may be rehiring employees who were previously considered full-time employees under ACA rules. If the employee is rehired within 13 weeks (26 weeks for education organizations),¹ the employee will be considered a continuing employee. This means that if the full-time employee was enrolled in coverage, he or she should be offered coverage no later than the first day of the month following resumption of services.

If the employee is rehired after more than 13 weeks (26 weeks for educational organizations),¹ the employee may be treated as a new employee and subject to a new waiting period (or a new initial measurement period if the employee is a part-time, variable hour, or seasonal employee). Part-time, variable hour, and seasonal employees rehired after the end of a stability period do not need to be offered coverage unless the employee worked enough hours during the previous measurement period to achieve full-time status for the subsequent stability period.

PREMIUM PAYMENT

If employment was not terminated and the employee was kept active on health benefits, the employer may resume taking employees' premiums out of the employees' pay. The employer may recoup the cost of any missed contributions during the period the employee was furloughed without pay.

HOURS OF SERVICE

Hours of service do not include hours incurred after the employee has terminated, or when payment is made or due under a plan maintained solely for the purpose of complying with applicable workers' compensation, unemployment compensation, or disability insurance laws.

When counting an employees' hours to determine full-time employee status under the ACA look-back rules, hours of service include periods where the employee is entitled to pay due to vacation, holiday, illness,

¹ And, optionally, the employee is not credited with any hours of service during a period that is both at least 4 consecutive weeks' duration and longer than the employee's immediately preceding period of employment.

incapacity (including disability unless coverage was paid for after-tax and no employer contributions), and leaves of absence (including leave taken under the Families First Coronavirus Response Act).

For special unpaid leaves of absence (such as leave under the FMLA and USERRA), the employer has two options for crediting hours. One option is to exclude the period of special unpaid leave from the applicable measurement period. The other option allows employers to credit the employee with hours equal to the average hours worked during weeks not part of the unpaid leave.

Employer considerations

Employers who furlough employees without terminating employment will need to make careful determinations as to whether employees need to be credited with hours of service under the applicable look-back period. The failure to correctly credit hours could cause the employer to misclassify employees as not full-time and cause penalties under the ACA employer shared responsibility rules. Careful records should be kept so that the employer knows each employee's status as full-time or not full-time during each month of 2020 in order to be prepared for ACA reporting that is done in early 2021. Employers may wish to go ahead and credit employees with hours service during the furlough period. While this would be one way to avoid penalty under employer mandate rules, the employer should get the carrier's approval before proceeding.

CAFETERIA PLAN ISSUES

Restoring Previous Elections

An individual rehired within 30 days may only make a new election if there has been an intervening event that would permit an election change. When more than 30 days have elapsed between an employee's termination and rehire, the cafeteria plan may (by design) allow a new election or require the old election to be reinstated.

Status Change with No Loss of Eligibility

If an employee has a reduction in hours but maintains eligibility under the plan, he or she should generally not be given the opportunity to drop or change a pre-tax salary reduction election to discontinue benefits. There must be both a status change such as a commencement of an unpaid leave of absence and the status change must affect eligibility under an employer plan (except for group term life insurance, dismemberment, or disability coverage). However, there are two exceptions:

- Benefits can be discontinued for nonpayment of premiums when an employee is on an unpaid leave.
- A cafeteria plan may allow an employee to prospectively revoke an election of coverage under a group health plan that provides minimum essential coverage ("MEC")² or better coverage when there is a reduction in hours of service of a full-time employee ("FTE")³ that otherwise does not affect group health plan eligibility. Cafeteria plans are often not amended to address this circumstance.

² MEC is the technical term for most types of health insurance coverage under the ACA. Among other things, it includes employer-sponsored group health plan coverage (e.g., insured and self-funded group health plans, retiree coverage, and COBRA coverage). It does not include excepted benefits -- most dental plans, vision plans, health FSAs, on-site clinics and some EAPs.

³ An FTE means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer. An employer may use 130 hours of service in a calendar month as a monthly equivalent.