



The Benefits of Preparation: Employee Benefit Plan Considerations When Reopening Your Business

May 18, 2020

Plan for Today

- Recent Extensions to Enrollments, Appeals, and Notices / Disclosures
- Impact of Reopening on Retirement Accounts and Pension Plans
- Considerations for Health and Welfare Plans, Cafeteria Plans, and the Affordable Care Act
- Executive Compensation Issues
- Questions

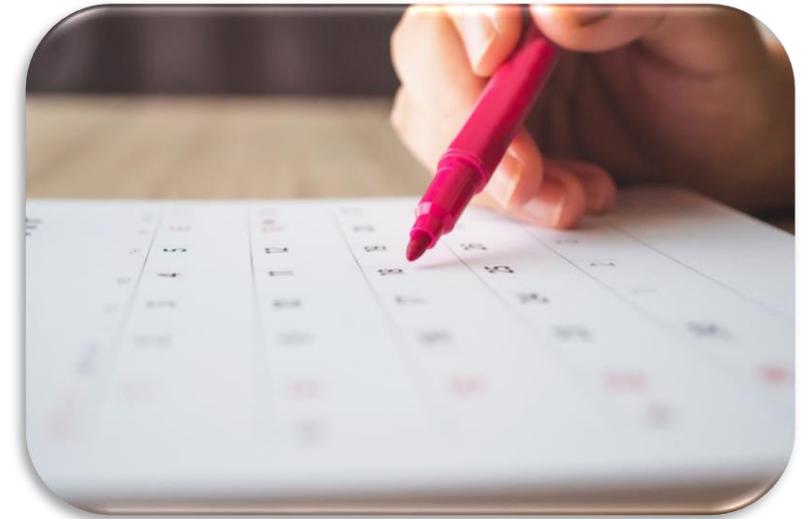


Recent Extensions to Enrollments, Appeals, and Notices / Disclosures

Jeff Belfiglio

Recent Extensions to Enrollments, Appeals, and Notices / Disclosures

- IRS and DOL Guidance “tolls” many deadlines for both plans and participants
- “Tolling” means that in calculating the deadline, you disregard the “Outbreak Period”
- The “Outbreak Period” runs from March 1, 2020 until 60 days after the National Emergency ends. Currently that means the Outbreak Period would last until September 23, but could be cut short or extended or state by state.
- So the clock is stopped or hasn’t started yet on deadlines described below



Recent Extensions to Enrollments, Appeals, and Notices / Disclosures

COBRA Deadlines

- Employer election notice (no benefit to delay)
- Participant/dependent 60-day election period and 45-day payment requirement
- Participant period to notify of qualifying event like divorce or disability

Practical Impact

- COBRA period unaffected, but participant has very lengthy period to decide whether worthwhile to elect COBRA and pay for as much as needed, so adverse selection heightened
- COBRA may be needed for only a short gap, or could be lengthy if not eligible when rehired with reduced hours
- Need to give notice of extension? Give notice at end of Outbreak Period?
- What do you tell providers about coverage while in this limbo period?
- May have to offer 36 months COBRA to ex-spouse retroactively, many months after divorce

Recent Extensions to Enrollments, Appeals, and Notices / Disclosures

Special Enrollment periods

- Participant 30-day period to enroll new spouse or child

Practical Impact

- Like COBRA, participant has very lengthy period to decide whether worthwhile to enroll new dependent retroactively
- Months worth of employee's premium may need to be recovered

Recent Extensions to Enrollments, Appeals, and Notices / Disclosures

Claims and Appeals deadlines

- Deadlines to file claims (run-out periods) are tolled
- Plan has longer period to determine claims
- 180-day appeal period (60 days for retirement plans) suspended

Practical Impact

- Incurred claims can go unreported beyond usual deadline
- Even already-denied health and disability claims could stretch into 2021 before resolved
- Relieves some pressure on harried HR staff and TPAs

Recent Extensions to Enrollments, Appeals, and Notices / Disclosures

- Plan notice deadlines—furnish as soon as practical under circumstances—more flexible on electronic delivery if reasonably believe employees have access
 - Blackout Notices
 - SMM and revised safe harbor notices for CARES Act changes
 - Benefit statements, annual funding notices, distribution notices, etc.
- Deposit of Salary Deferrals
 - Deadlines are **NOT** tolled or modified
 - DOL recognizes problems when payroll handled remotely; no enforcement action, but only if Employers and service providers act reasonably and prudently to comply as soon as administratively practicable under the circumstances



Impact of Reopening on Retirement Accounts and Pension Plans

Lisette Sell

Defined Contribution Plans (401(k) and 403(b) plans)



- Considerations when **furloughed employee returns to work**
 - **Employee likely remained common law employee so remained a plan participant**
 - If unpaid leave, no compensation available for deferral contributions
 - Upon return, deferral contributions will recommence assuming employee remains eligible for plan
 - If paid leave, pay was likely “compensation” under plan so deferral contributions continued
 - **Accrual/allocation requirement (1000 hours of service in a plan year)**
 - Determine whether employee worked sufficient number of hours in plan year, counting both hours prior to layoff and after return (including hours while on paid leave)

Defined Contribution Plans (401(k) and 403(b) plans)



- Additional considerations when **furloughed employee returns to work**
 - **For vesting purposes, time on furlough likely counts as hours of service if:**
 - Leave was paid,
 - Plan uses elapsed time method where periods of service are accumulated (rather than counting hours under actual method), or
 - Employer chooses to grant imputed service while the employee is not performing services
 - **If employee has outstanding 401(k) loan, loan repayments can be suspended for up to one year if on unpaid leave or if on paid leave but pay during leave is less than amount of repayments**
 - Upon return to work, determine when/how to commence repayments in order to fully repay loan by end of original term
 - Under CARES Act, participant may be eligible for one-year delay in repayments scheduled to be made from March 27, 2020 to December 31, 2020 if plan allows

Defined Contribution Plans (401(k) and 403(b) plans)



- Considerations when **laid off employee is rehired**
 - If employee was participating in plan before layoff, the employee can re-enter plan immediately upon rehire
 - If employee was not yet participating in plan before layoff, the employee is not immediately eligible to participate upon rehire but pre-layoff service counts towards eligibility service requirement
 - Exception if plan imposes a “break in service” rule
 - If employee has an employment gap of one or more one-year breaks in service (less than 501 hours/year), pre-break service is ignored until employee has completed a new year of service after rehire
 - Unpaid FMLA leave hours credited if needed to prevent a break in service
 - If 403(b) plan, employee will usually be immediately eligible to make deferral contributions but may need to satisfy eligibility service requirement for matching contribution

Defined Contribution Plans (401(k) and 403(b) plans)



- Additional considerations when **laid off employee is rehired**
 - **Accrual/allocation requirement (1000 hours of service in a plan year)**
 - Determine whether employee worked sufficient number of hours in plan year, counting both hours prior to layoff and after return
 - **For vesting credit purposes in year of layoff, determine whether credit is based on actual method or elapsed method**
 - If actual method, determine whether employee worked 1000 or more hours in plan year, counting both hours prior to layoff and after return (including hours while on paid leave)
 - If elapsed time, vesting is based on accumulated periods of service
 - If period between layoff and return is less than 12 months, employee treated as being employed during that period (not treated as a period of severance)

Defined Contribution Plans (401(k) and 403(b) plans)



- Additional considerations **when laid off employee is rehired**
 - **For vesting status, whether service before layoff is taken into account in determining vested status after return is also based on whether the actual method or elapsed method is used**
 - If actual method, determine whether employee incurred one or more one-year breaks in service
 - If no one-year break, prior service taken into account for vesting status after return
 - If one or more (but less than five) one-year breaks, prior service taken into account if employee completes another year of service after return
 - If elapsed method, determine whether employee incurred a one year period of severance
 - Unlikely if period between layoff and return is less than 12 months
 - **If participant had outstanding 401(k) loan when laid off, determine whether continued to make loan payments (by check), was eligible to defer repayments for a year (under CARES Act) or whether loan was deemed distributed**
 - **If participant took distribution and forfeited unvested portion of account (assuming no partial plan termination), unvested portion must be restored if participant repays distributed amount**
 - **Confirm plan record-keeper and payroll provider are prepared to handle many new deferral elections as well as mass re-enrollment of laid off employees**

Defined Benefit Pension Plans

Same eligibility and vesting considerations apply as with defined contribution plans

- Check terms of plan document

If employee was on unpaid furlough, note that no benefits were accruing since benefits tied to compensation

Consider amending plan to exclude furlough period from final average pay benefit calculation

If soft frozen plan, determine whether returning employees are treated as rehired employees (who cannot re-enter plan) or continuing employees (who can re-enter plan)

Partial Plan Termination

Per the IRS, a partial plan termination (PPT) occurs when there is a “significant percentage decrease” in the number of participants, based on all the facts and circumstances

- 20% or more decrease creates a rebuttable presumption that PPT has occurred; if less than 20%, a PPT won't be deemed to have occurred, absent bad faith
- Percentage decrease determined over the relevant period
 - Typically the plan year although can be multiple plan years if there's a series of related terminations
 - Calculated by dividing the number of terminated participants by the sum of the number of participants at the beginning of the year/relevant period and the participants added during the year/relevant period
 - Number of terminated participants excludes terminations due to death, disability, normal retirement, terminations “for cause,” and voluntary terminations (unless constructive discharge)

Partial Plan Termination (cont'd)

If PPT is found to have occurred, all participants who terminated during the relevant period become fully vested in their account

If participants are furloughed, they are not considered terminated participants

If participants are laid off, there is no authoritative guidance

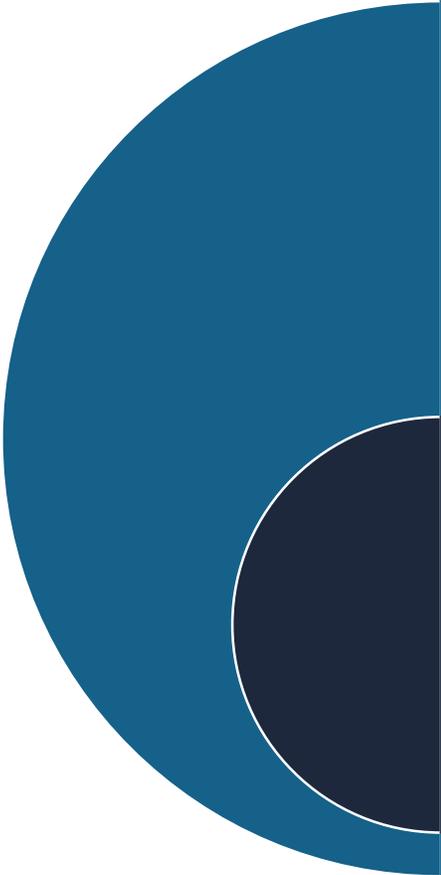
- Rather whether they are considered terminated participants depends on a good faith determination of the likelihood of them performing future duties for the employer
 - If there is a strong belief and expectation that the participants will be rehired soon, reasonable to not consider them as terminated participants
 - If there is uncertainty about the possibility and timing of rehire, probably best to treat as terminated participants



Considerations for Health and Welfare Plans, Cafeteria Plans, and the Affordable Care Act

Dipa Sudra

Health and Welfare Plans – Topics for Today



New guidance on health coverage under
125 plans, FSAs and HSAs

Managing health and welfare coverage on
return from furlough or rehire

Optional Flexibility: 125 Plans and FSAs

Normal rule: 125 plan, health care flexible spending arrangement (HCFSA) and dependent care assistance program (DCAP) elections generally irrevocable for the plan year; limited exceptions.

- Rules applicable to 125 plans and FSAs more stringent than DCAPs
- Previously COVID-19 events rarely permitted mid-year changes for 125 plans or HCFSA (easier for DCAPs)

IRS Notice 2020-29 and Notice 2020-33 provide relief for 2020

- Temporary **optional** relief for **calendar year 2020 only**; can adopt relief retroactively to 1/1/2020 if operated in compliance with Notice 2020-29
- Ignore permitted change events for ER-sponsored health coverage, HCFSA (incl. limited HCFSA) and DCAP changes
- Relief not limited to individuals affected by COVID-19
- Election must be prospective
- **Amendment required** by December 31, 2021 (must not be discriminatory); must **notify eligible EEs**

2020 Only: Changes to Health Coverage

For ER-
sponsored
**health
coverage:**

- New prospective election if EE initially declined ER-sponsored health coverage;
- Revoke prospectively existing election and make new election to enroll in different health coverage sponsored by the same ER (e.g. self to family); or
- Revoke prospectively an existing election, but EE must attest in writing that s/he is enrolled, or immediately will enroll, in other health coverage not sponsored by ER. See Notice 2020-29 for sample language.

IRS
acknowledges
risk of adverse
selection

- Changes can be limited to circumstances where coverage will be increased or improved (e.g. switch from self-only to family coverage, or from low-option plan to high option plan)
- Don't forget SMMs

Verify insurance carrier or stop
loss insurer will permit mid-year
changes

2020 Only: HCFSA and DCAPs

“Do what you want”

- Prospectively revoke election, make new election, or decrease/increase existing HCFSA/DCAP election

Unused amounts in HCFSA and/or DCAP as of grace period or plan year end in 2020

- Pay or reimburse medical care/ dependent care expenses, as applicable, through 12/31/2020 (watch out for HSA incompatibility because HCFSA coverage = “other coverage”)
- Available to plans with grace period, and plans providing for a carryover
- Practical use might be limited for calendar year plans that already “closed the books” and forfeited accounts

Carryover amount for FSAs

- Increased to \$550 for plan years beginning in 2020

Guidance for High Deductible Health Plans/HSAs

- Confirmation that following relief applies retroactively to 1/1/2020:
 - Plan remains HDHP even though it provides medical care services and items purchased related to testing for and treatment of COVID-19 prior to the satisfaction of the applicable minimum deductible
 - Limited exemption for telehealth services (i.e. otherwise eligible individual with coverage under an HDHP may also receive coverage for telehealth and other remote care services outside the HDHP and before satisfying the deductible of the HDHP and still contribute to an HSA)

General Principles

(1) CHECK THE PLAN FOR ALL SCENARIOS; (2) REVIEW WRINKLES ON NEXT SLIDE; (3) CONFIRM ANY CHANGES WITH INSURER/STOP LOSS CARRIER

Coverage maintained under leave of absence provisions (furlough)

- Coverage continues uninterrupted
- Switches to active EE status on return if remains eligible
- ER may want to recoup any premiums it paid while the EE was on leave, with EE authorization

Coverage maintained under COBRA or no coverage (furlough or termination)

- Furloughed: possible immediate re-entry and switch to active EE status if eligible
- Rehire: (1) possible immediate re-entry (e.g. waiver of waiting period if EE rehired within X days); or (2) plan might require waiting period (limited to 90 days, but potential ACA trap)

Returning EE no longer eligible

- Plan could be amended to extend eligibility
- Potential COBRA triggering event

Wrinkles

ACA

- See following slides

COBRA

- Potential EE COBRA election to bridge the gap
- If EE no longer eligible for maintained coverage (e.g. reduced hours), potential COBRA qualifying event

EEs have much longer to elect COBRA because tolled during Outbreak Period

125 Plan Election Changes

- General rule: new elections not allowed for returns within 30 days – prior elections typically restored unless intervening change in status.
- Layoff or furlough with loss of coverage at least 30 days – potential treatment as new hires. Check plan document.
- Furlough but maintained coverage during leave – unclear, consult counsel.

BUT! Impact of new 2020 guidance means there is flexibility for health coverage, HCFSA and DCAP elections

ACA Waiting Periods

- Waiting period cannot exceed 90 days
- Generally, waiting periods can be imposed on rehire if reasonable under the circumstances
 - Regulations do not explain what is “reasonable”
 - If EE had no expectation of being rehired, likely OK
 - Longer absences likely more reasonable (example in regs uses 3 months)
- Same analysis for those who became ineligible for coverage when on furlough, then move back to eligible job classification
- **BUT!** might not be possible to impose waiting period because of other ACA rules...

ACA Employer Mandate: Basics

ACA employer mandate applies to applicable large employers (ALE): i.e. ERs that for a calendar year employed an average of at least 50 full-time employees (including full-time-equivalent employees) on business days during the preceding calendar year

Full-time employee = 30 hours/week; 130 hours/month

Subsection (a) and (b) penalties

Limited non-assessment period (LNAP) of 3 full calendar months for new hires if EE “otherwise eligible” for coverage

ACA Employer Mandate: Break In Service

- Applies regardless of monthly method or lookback
- Definition
 - 13 consecutive weeks during which EE not credited with an hour of service
 - 26 weeks for educational organization
 - Or, rule of parity: period of at least 4 consecutive weeks during which EE is not credited with any hours of service that exceeds the number of weeks of that EE's period of employment with the ALE immediately preceding the period with no hours of service. E.g. 4-week rule of parity means EE who works for 5 weeks and then has no credited hours for six weeks may be treated as a new EE

ACA Employer Mandate: Hours Counting

- Important to count hours correctly
- Include:
 - Each hour for which EE is paid, or entitled to payment, for performance of duties for the ER
 - Each hour for which EE is paid, or entitled to payment, by ER for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence
- Generally, not necessary to count:
 - Periods during which individual receives unemployment compensation (but watch out if they have other hours)
 - Periods after termination of employment

ACA Employer Mandate: Monthly Method

While on furlough/terminated

- No need to offer coverage for ACA purposes because no hours (COBRA might be relevant)

Returning employees

- Can you treat as a new employee?
- Apply waiting periods?
- Depends if there is a break in service because LNAP can apply only once during EE's period of employment

On return, must consider break-in-service rules

- For a continuing employee: must offer coverage no later than first day of calendar month following return (likely seamless if EE continued coverage)
- New employee – new LNAP (i.e. could impose new waiting period)

ACA Employer Mandate: Lookback

Lookback allows ERs to exclude

- Variable hour, seasonal and part-time (i.e. < 30 hours/week) EEs during IMP
- Any EE not averaging over 130 hours/month in the SMP

While on furlough, if EE in a stability period

- Maintain coverage to avoid (a) penalty
- Maintain active rates to avoid (b) penalties (COBRA coverage may be unaffordable)
- Break in service rules do not apply during the furlough (i.e. offer coverage during the stability period even if 13-week break)

Returning from furlough/rehire

- Furloughed EE returning with no break in service - likely uninterrupted coverage regardless of whether full-time
- Rehired EE full-time before termination returning with no break in service - offer coverage no later than the first day of the calendar month following resumption of service (likely seamless if continued coverage)
- If EE had break in service, can be treated as new EE on rehire (i.e. new waiting period could be imposed, or new IMP). For real.



Executive Compensation Issues

Stuart Harris

Stock Option Plans

Prior termination of employment?

Trigger post-employment exercise window?

Many plans have 3-month window, but not required

Whether in plan or not, relevant for ISO purposes

Furlough/Leave of absence?

Again, check plan for characterization of unpaid leave of absence (i.e., at what point considered a termination?)

For ISO purposes, unpaid leave considered continued employment for 90 days, then treated as termination of employment, unless return employment guaranteed by law

Pay Reductions

- Put in writing to avoid misunderstanding
- Avoid commitments to return to normal by specific date (balance optimism with pragmatism)
- Avoid commitments to make up for loss
 - distinction between reduction and deferral of compensation
 - deferrals or promised substitutions raise concerns under Section 409A



Nonqualified Deferred Compensation Plans

- Did prior event constitute a payment-triggering“ separation of service”?
 - Was there a termination of employment or a leave of absence?
 - Reasonable anticipation that employee would not return, or that future services would remain below 20%?
 - Even if a separation from service occurred, was the employee rehired before payments scheduled to commence?
- Can employees modify deferral elections for 2020?
- Effect on eligible participant dollar threshold?

Questions



Thank you



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