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Q&A FROM ASSUREX GLOBAL WEBINAR

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EMPLOYEE BENEFITS DURING AN FMLA LEAVE

Q. If a company is a parent-subsidiary group, does the company only count its own employees to determine whether it employs 50 employees? Or does the company count all employees together?

A. The FMLA does not specifically refer to §414 controlled-group rules or apply any controlled group-type concept; however, DOL guidance indicates that separate entities will be deemed to be part of a single employer if they are considered to be "joint employers" or "successors in interest". There is also another standard called "integrated employer". Both standards are somewhat subjective, but for the purpose of determining if the employer is subject to FMLA, the integrated employer test is most important. If there is any question as to whether the employer is subject to FMLA under such rules, it would be advisable to have the company structure reviewed by an employment law attorney experienced in FMLA.

Q. If a company is headquartered in one state with more than 50 employees, but has offices in many other states (none of which have 50 employees), are all non-corporate employees not eligible for FMLA? How are remote workforce counted?

A. Any employees that do not work at a worksite with at least 50 employees within a 75-mile radius will not be eligible for FMLA-protected leave. In general, employees who work remotely should be counted towards the worksite they report to.

Q. If an employee has worked a total of 12 months, do they also need to have worked at least 1,250 hours in the last 12 months? Or is it one or the other? Are seasonal employees covered if they meet the 1250 hours?

A. An employee must have both worked for a total of 12 months, and for at least 1,250 hours within the last 12-months in order to be eligible for FMLA protected leave. The requirement to have worked at least 12 months, is not a requirement to have worked for a consecutive 12-months. Therefore, it is possible that seasonal employees could become eligible for FMLA protected leave.

Q. If an employee has used 12 weeks of FMLA for themselves, could the employee then be allowed to take an additional 12 weeks of FMLA for the care of a parent within that 12-month rolling period?

A. No. An employee is entitled to a total of 12 weeks during any 12-month period for any family or medical leave. However, the employee may be entitled to up to 26 weeks in certain situations due to military caregiver leave.

Q. What if employee is out on leave due to an injury covered under worker's compensation, but does not formally request the leave to be covered under the FMLA? Does the employer have to put them on FMLA? Does FMLA and short-term disability or worker's compensation run concurrently?

A. It is not the employee's responsibility to request FMLA-protected leave. The employer is responsible for considering the circumstances and designating the leave as FMLA-protected when appropriate. If an employer does not formally designate a leave as FMLA leave, they may not be able to retroactively designate the leave as FMLA. The possible result of this is that the employee could still take up to 12 weeks even after the worker's compensation leave (if they can prove that the employer's failure to timely designate the leave caused them harm). In most cases leaves under worker's compensation and leaves during which an employee is receiving short-term disability payments will be subject to FMLA (since the employee is likely experiencing a serious health condition). Therefore, the leaves would run concurrently.

Q. Can mental health be a serious health condition?

A. A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. Therefore, a mental health condition can be a serious health condition if it requires inpatient care or continuing treatment.

Q. Would a common-law spouse be considered a spouse? Does a parent include an in-law? Does the child need to be a dependent child under the age of 18? Does the FMLA cover siblings? Does the employee need to be the person's primary caregiver?

A. If the employee and the common-law spouse entered into their marriage in a state that recognizes common-law marriage, the common-law spouse is recognized under the FMLA. A parent under the FMLA includes an individual who stood in "loco parentis" to the employee (acted as a parent). For these purposes, it is possible for a sibling to qualify. However, siblings in general are not covered. "Parents" does not include parents-in-law. Sons and daughters under the FMLA must be either under 18 years of age or incapable of self-care because of a mental or physical disability. An employee is not required to be the primary caregiver of a covered family member in order to take FMLA protected leave. Leave for the purposes of psychological comfort and reassurance is covered.

Q. When an employee requests a leave due to a serious health condition, can the employer request information on the serious health condition? Does HIPAA prevent the employer from requesting this information?

A. HIPAA does not prevent an employer from requesting further information to confirm the presence of a serious health condition, but the employee's direct supervisor should not be the individual from the employer that is requesting the information.

Q. Are employers required to use medical certifications? If an employee does not return a certification, is their leave still protected?

A. Employers are generally permitted, but not required, to use medical certifications if leave is being requested for a serious health condition of the employee or a family member. If an employer does require medical certifications and they follow the applicable FMLA rules, leave may be denied or delayed in certain circumstances if an employee does not timely provide the certification.

Q. If an employer posts the poster, and includes a notice in the employee handbook, is it still required to individually tell someone when they are using their FMLA benefits?

A. Providing the posted and general notice does not mean that the employer is not required to provide the specific event notice when an employee is taking a leave covered by the FMLA. When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave and inform the employee of his or her rights and responsibilities under the FMLA.

Q. Is time during an FMLA leave of absence counted towards an employee's 1,250 hours for a given year? Is vacation/sick leave required to continue to accrue during an FMLA leave?

A. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included. If it is an employer's policy to not accrue vacation/PTO while an employee is on leave (not working any hours), the employer is not required to permit individuals on an FMLA leave to accrue these benefits during this time.

Q. Do increments of FMLA protected leave have to be scheduled in advance for intermittent leave, or can an employee call the same day and say they need to take a day off (even where the employer has a policy for other leaves that there must be advanced notice)?

A. Employees seeking to use FMLA leave are required to provide a 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable – generally, either the same or next business day. When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Therefore, it is possible that the employee will be permitted to notify the employer the same day the leave is needed.

Q. Is intermittent leave available for new fathers?

A. "Family Leave" is leave taken to care for the birth of an employee's child or placement of a son or daughter with the employee for adoption or foster care. New fathers are eligible to take family leave. Family leave must be concluded within 12 months of birth or adoption; intermittent leave is not required to be provided for family leave (for mothers or fathers). It is possible that a new mother may experience a serious health condition in relation to a birth, for which she would be entitled to intermittent medical leave. A new father could take intermittent medical leave to care for a spouse or child who is experiencing a serious health condition in relation to a birth.

Q. Does eligibility protection under the FMLA apply to only major medical, or does it apply to dental and vision plans as well?

A. The employer must maintain all group health plans for the duration of FMLA leave under same conditions as if the employee had been continuously employed (e.g. major medical, dental, vision, prescription drug, health FSA, HRA, EAP).

Q. When an employee is on an FMLA-protected leave, and a leave due to an injury covered by worker's compensation concurrently, can you terminate benefits when FMLA expires if they still have not returned to work?

A. An employee who is out of work due to a leave that is covered by worker's compensation and has exhausted FMLA protection is likely no longer eligible for benefit coverage due to the fact that they are no longer working full-time hours. If an employee is no longer eligible, the employer should terminate coverage and offer COBRA. Allowing ineligible individuals to remain covered by the employer's group health plans can present risk to the employer as a carrier (or stop-loss carrier) may argue that the individual is no longer eligible and consequently refuse to cover claims.

Q. If an employer is utilizing the look-back measurement-method under the ACA, and an employee exhausts their FMLA protected leave (but they are still within their ACA stability-period), is the employer required to continue offering coverage through the end of the stability period?

A. If an individual is still within their stability period, the ACA considers the individual a full-time employee. The employer could either continue to offer the individual active coverage, or they could offer the individual COBRA. If the employer offers the individual COBRA, there is a risk that the employee could go to the exchange and receive a subsidy (since COBRA may not be considered affordable). This would result in the employer owing a subsection B penalty. However, an offer of COBRA is considered minimum essential coverage (for purposes of the employer owing a subsection A penalty for failing to offer coverage to at least 95% of full-time employees).

Q. Is an employer required to pay an employee's medical premiums during an FMLA protected leave? If employee premiums are normally paid pre-tax through a cafeteria plan, can premium payments be received post tax (for example though a personal check) during an unpaid FMLA leave? Can an employee on a planned FMLA leave decide to pay their premiums for the FMLA period before they leave, on a pre-tax basis?

A. If the leave is unpaid and the employer cannot collect via payroll, an employer may permit the employee contributions to be prepaid, paid during the leave, or paid upon return. It is up to the employer to designate how the payments be made so long as prepayment is not the only option offered. Prepayment allows the contributions to be handled on a pre-tax basis, but will not always be possible as the need for leave may not be known far enough in advance. Requiring payment during the leave best protects the employer, but would need to be handled on an after-tax basis. Catch-up contributions upon return might result in more instances of nonpayment, but would permit pre-tax contributions. NOTE: An employee may not pay premiums on a pre-tax basis in one year for coverage that will be provided in the next year.

Q. If an employer has given a 30-day grace period, and a notice 15 days before the coverage will terminate, can the employer terminate coverage back to what the employer has paid up to?

A. Generally, coverage should not be terminated retroactively. However, if the employer has established policies for other types of unpaid leaves that state coverage may be terminated retroactively in the circumstance of nonpayment, the employer may be able to apply this policy in this circumstance as well. The employer must still give the 15-day notice before the coverage is terminated retroactively.

Q. If an employee exhausts their FMLA protected time and is still out, is an employer required to give a 15-day notice before terminating his or her benefits coverage?

A. The 15-day notice is only a requirement when coverage will terminate due to an employee's nonpayment of premiums while the employee is on FMLA leave. This same notice is not required if the employer will be terminating the employee's coverage upon exhaustion of FMLA protection. However, in the FMLA designation/event notice the employer should alert the employee to when their FMLA will be exhausted. In addition, termination of coverage upon exhaustion of FMLA-protected leave will typically require a COBRA election notice.

Q. If an employee does not come back from an FMLA protected leave, and the employer was paying the employee's premiums during the leave (the employee was going to pay the premiums when they returned from leave), can the employer send the individual a bill for the premiums?

A. Yes, the employer is permitted to recover the past due premiums from the employee. The employer can attempt to accomplish this by sending the employee a bill. In some states the employer is also permitted to recover past due amounts from the employee's final paycheck.

Q. If an employee returns from an FMLA protected leave in December and owes 8 weeks of premiums, can the employer collect the premiums into the following year? Or, does the employer need to collect the premiums in the same year?

A. When an employee returns from FMLA leave and the employer is utilizing the catch-up method, the employer is permitted to deduct past-due premiums into the next plan year on a pre-tax basis.

Q. Is an employer required to automatically reinstate coverage when an employee returns from an FMLA protected leave? Does immediate reinstatement mean immediate (like the next day) or at the beginning of the next month if that is our normal cadence for ending and starting coverage?

A. The employer is not required to automatically reinstate coverage when the employee returns from the FMLA-protected leave. The employer can give the employee the choice of whether they would like their coverage to be reinstated (or the employer can require the employee to reinstate their coverage). However, the employer must make the coverage effective the day the employee returns from leave (if the employee requests this).

Q. Is there a deadline for an employee to notify the employer to reinstate medical benefits after returning from an FMLA protected leave? Can employees make changes to their benefit plans when they return from FMLA?

A. Return from an unpaid leave is an event that permits a midyear pre-tax election change. Therefore, if the employee's coverage terminated while they were on leave, the employer can permit the employee to make changes to their election when they return from leave (assuming the Section 125 plan document permits). Pre-tax election changes will be subject to the same deadlines other pre-tax election changes are subject to under the Section 125 plan document (normally 30 or 60 days).