

COMMERCIAL INSURANCE

EMPLOYEE BENEFITS

PERSONAL INSURANCE

RISK MANAGEMENT

SURETY



PARKER | SMITH | FEECK

Q&A FROM ASSUREX GLOBAL WEBINAR

OCTOBER 25, 2018

INTO THE WEEDS - AGAIN! ANSWERS TO SPECIFIC EMPLOYER BENEFITS QUESTIONS

Q. Regarding Definition of Location could different departments ie Finance, HR, Facilities, Clinic, Education and with different funding sources be considered - we are a tribal non-profit organization receiving PL 638 grant and IHS grants. Currently have a self-funded plan considering FEHB BC/BS basic plan. Can we have different contributions by employee by departments or depending on available grant funds?

A. Maybe....we would recommend discrimination testing to ensure the highly compensated individuals are not being favored.

Q. If an employee is out due to a workers comp injury and they have exhausted FMLA can they fall under ADA if their return to work is still unknown?

A. Yes, ADA may apply. The employer may decide to provide a period of reduced hours, or even extend the allowed leave of absence as a reasonable accommodation. However, beyond what is required under FMLA, the employer would not be required to continue offering benefits unless the employer has a more generous leave policy in place extending benefit eligibility under such circumstances.

Q. Are there any other options if COBRA is unaffordable to the employee? Our Cobra costs about 7x more than what they would be paying on the plan.

A. Assuming the employee is no longer eligible for coverage, and therefore coverage is terminated and COBRA is offered, the employer could choose to help subsidize the cost of the COBRA coverage. Otherwise, if the individual cannot afford COBRA, it may be necessary to consider other coverage options (e.g. through a public Exchange, or perhaps through a spouse's employer).

Q. Is the loss of other insurance coverage treated in the same way as marriage?

A. Similar to acquiring a new dependent due to marriage, birth or adoption, a loss of eligibility resulting in a loss of coverage will trigger a HIPAA special enrollment right requiring a group health plan to allow mid-year enrollment so long as notice is provided to the plan within 30 days of the loss of coverage (or longer if allowed by plan design).



Q. To determine who is an HCI, if there is a group that has employees, none of which make more than \$120,000 per year, are there then no employees that are actually considered an HCI?

A. The definition of who must be considered a highly compensated individual or key employee differs depending upon which nondiscrimination rules apply. For example, under Section 125 rules, there may not be any highly compensated individuals if none of the employees have salaries that exceed a certain threshold. However, under Section 105(h) rules, highly compensated individuals include the highest-paid 25% of employees.

Q. If the employer's group health plan is primary, are they required to keep employees on the health plan rather than the employee signing up for Medicare coverage if the employee keeps working past age 65?

A. The employee must be allowed to remain covered under the employer's coverage, but could choose to waive and enroll in Medicare instead. The key is that the employer cannot, if its group health plan is primary, provide any sort of incentive for the employee to do that.

Q. What if STD is running concurrently with FMLA. If FMLA runs out do we need to continue STD payments or can we term? Our plan pays STD up to 26 weeks.

A. While group health plan benefits must be maintained during FMLA, and are generally terminated upon exhaustion of FMLA-protected leave, the STD benefits (if any) are handled separately and would continue to apply in accordance with the plan design.

Q. Employment status, does that include transferring departments? or only going from a part time to full time?

A. Under Section 125 rules, if there is a change in employment status that affects eligibility for benefits, the employee may be allowed to make changes in coverage elections. What type of employment status change will affect eligibility for benefits will depend upon the employer's plan eligibility rules.

Q. So if special accommodations are made (like part time work) and we continue to offer the insurance, what happens if their paycheck isn't enough to cover their premium payments? Is the company responsible to pay the difference in order to continue offering coverage?

A. If an employee is on a leave of absence and not receiving a paycheck, or there isn't enough in the employee's paycheck to cover the monthly employee contribution, it's necessary to have a process for obtaining the employee contribution. The employer really has flexibility in how it decides to handle this process, but should put a process in place so that it can be properly communicated and enforced on a uniform basis. It may be helpful and easier administratively to look to other current leave practices and handle the situation the same way (e.g. FMLA allows employees to prepay, pay in after-tax monthly, or do catch-up contributions later). If the employee fails to make the employee contribution in accordance with the employer's policy, coverage may be terminated due to nonpayment.



Q. We had an existing employee inquire about signing up for coverage, but they don't mention any specific life event. Are we supposed to ask/clarify whether an event has occurred?

A. During open enrollment, any eligible employees may enroll. However, outside of open enrollment, the plan is only required to allow enrollment if there is a HIPAA special enrollment right triggered by a loss of other coverage or a newly acquired dependent due to marriage, birth or adoption. The plan could choose to be more generous than required, but should verify that the carrier will provide claims coverage for such individuals. In addition, if there is a desire for the employee contributions to be handled on a pre-tax basis through a cafeteria plan, the employer should be confirming that a recognized change in status event has occurred.

Q. Just to clarify the MSP rules - employers with 20 or more employees, group health plan is primary. (Is that just 20 or more Medicare age-based entitled employees? Or Employer size in total?)

A. 20 or more total employees, not just Medicare-eligible employees. In other words, for most employers, the group health plan will be primary to Medicare.

Q. What if a new employee is in the waiting period, has a medical event and is not able to work and not sure they will be back. Do we still offer insurance when they become eligible?

A. Under HIPAA, when an employee is first eligible for coverage, but in a waiting period...if a leave of absence is due to a health-related factor, HIPAA rules generally prohibit plans from denying or delaying coverage based on whether the employee is actively at work at the time coverage would normally become effective due to a health factor. The only exception to this is that the employer may require that the employee at least start work. Under these rules, if the leave of absence is health-related, coverage should be made effective at the end of the waiting period, but then if the employee doesn't return to work and is not meeting the plan eligibility requirements, coverage could be terminated and COBRA offered.

Q. If we place an employee on unpaid leave of absence (6 mo hiking pacific coast trail for example), we end benefits and extend COBRA. I had never considered this to be a stability period issue? Can you clarify?

A. If an employer is using the look-back measurement method to determine full-time status, an employee who averages full-time hours in the previous measurement period is generally considered to be full-time for the entire corresponding stability period unless employment is terminated, and choosing not to offer coverage would then subject an applicable large employer to potential penalties under §4980H for such months.



- Q.** How has your experience been for when an employee doesn't end up returning - but has paid their premiums for during their time off. For example, requests and takes the full 12 weeks and pays ahead of time for 3 months worth of coverage, but then doesn't return to work.
- A.** If this is an FMLA leave and the employee had not notified the employer of their intent not to return, an employer would treat the end of the leave as the termination of employment date and offer COBRA at that time.
- Q.** I think I remember reading (an FMLA rule) that an employee needs to return for 30 days in order to not have to potentially be required to pay the full premium for each month vs only the standard employee premium. I think that this could end up being a specific FMLA question, just curious on maybe what you may have heard/experience on such a matter. Thanks
- A.** If an employee fails to return to work, the employer may recover the premiums paid for benefits during the leave and an employee must return to work for at least 30 calendar days or retire within 30 days to be considered "returned to work". However, employers may not recover premiums if the employee's failure to return is due to the continuation of a serious health condition of the employee or family or other circumstances "beyond the employee's control".
- Q.** Can you cancel coverage if an employee on leave does not pay their portion of the premiums?
- A.** FMLA contains specific rules for cancellation of coverage for employee non-payment of premium during the leave.
- Employers must give employees at least a 30 day grace period to make each payment.
 - An employer may not cancel coverage for non-payment until 15 days after a written notice is sent to the employee informing them of the intent to cancel coverage.
 - If coverage is cancelled due to non-payment, the coverage must be reinstated when the employee returns from leave.
- Q.** When placing an employee on COBRA, and they come back to work and put them back on the regular plan. A few months later, he quits and is eligible for COBRA, does he get the full 18 months, or are his months reduced since he was already on it for "reduction of hours?"
- A.** As long as the employee was covered by the plan as an active employee the day before the new COBRA event they are entitled to a new 18 months of COBRA coverage.
- Q.** Any tips for off-loading an employee who is on your group health insurance and is Medicare legible?
- A.** Employers with more than 20 employees are subject to the Medicare Secondary Payer (MSP) rules which specifically prohibit employers from enacting policies or providing incentives intended to encourage active employees to waive the employer coverage and rely on Medicare.

COMMERCIAL INSURANCE

EMPLOYEE BENEFITS

PERSONAL INSURANCE

RISK MANAGEMENT

SURETY



PARKER | SMITH | FEEK

Q. Question #3 – Does a COBRA offer qualify as an offer for someone on a leave of absence?

A. For purposes of the 4980H employer shared responsibility rules, an offer of COBRA coverage is considered an offer of coverage to active employees on leave.

This communication is distributed for informational purposes and on the understanding that the author has not been engaged by the recipient to render legal or accounting advice or services. While every effort has been taken in compiling this information to ensure that its contents are accurate, the author cannot accept liability for the consequences of any reliance placed upon it. Readers should always seek legal counsel or professional advice before entering into any commitments.

IRS Circular 230 Disclaimer: Any U.S. federal tax information provided in this document is not intended or written to be used, and it cannot be used (i) for the purpose of avoiding tax penalties, or (ii) in promoting, marketing or recommending to another party, any partnership or other entity, investment plan, arrangement or other transaction addressed herein.