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## Q&A FROM ASSUREX GLOBAL WEBINAR

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### EMPLOYEE BENEFITS DURING AN FMLA LEAVE

**Q.** When an employee is on unpaid FMLA leave and does not pay healthcare premiums, could the 15-day notice be sent at the 15-day mark to coincide with the 30-day grace period (ending health benefits at the end of 30 days if premium not received)?

**A.** Yes. In order for the employer to be able to drop the employee's coverage for nonpayment on the earliest possible date, the notice should be mailed at least 15 days before the end of the 30-day grace period.

**Q.** When EE and ER each contribute a share of the premium, does the employee still have to pay their share of premium during FMLA leave?

**A.** Yes. While an employee is on leave protected under FMLA, the employer and employee contributions should continue just as they do for active employees. If the leave is paid, employee contributions won't be an issue. On the other hand, for unpaid leave, it will be necessary to determine how employee contributions will be handled. FMLA rules provide that an employer can offer the following options to an employee on leave:

- pre-pay on a pre-tax basis (this cannot be the sole option),
- pay during the leave on an after-tax basis
- make up contributions on a pre-tax basis upon return from leave.

FMLA requires that the employer provide a 30-day grace period and notification at least 15 days prior to termination of coverage, e.g., if your contribution is not received by XX, your coverage will be terminated.

**Q.** What about intermittent leave, does that allow them to change their benefits when they return?

**A.** The employer is not required to let the employee change benefits at the end of an intermittent leave. However, if the employer wishes to allow such a change it would be permissible under the Section 125 election change rules.

**Q.** For intermittent FMLA do you have to get recertification every 6 months or is it yearly? Do they have to reapply for FMLA each year?

**A.** No – an employer is permitted to demand a periodic recertification from an employee on intermittent leave, but is not required to do so.



**Q.** Can an employee drop dependent coverage while on FMLA? Can an employee pick and choose which benefits to decline during FMLA? And then can they restore it when they return?

**A.** While employers are generally required to continue offering coverage, including the same employer contributions, during FMLA-protected leave. The employee's election and coverage change rights during an FMLA leave are the same as those that apply to an active employee. If an employee drops any coverage during an FMLA leave the employer must allow the benefits to be reinstated upon return to the same position as existed prior to the leave.

**Q.** If an employee uses the full \$1,200 FSA and then do not return from FMLA, how can we recoup the difference?

**A.** Section 125 health FSA rules required that the employer be at risk for all claims up to the election amount at any time during the year. Dropping the FSA during a leave creates an employer risk similar to when an employee terminates employment or loses eligibility (e.g. due to a reduction in hours). In any of these cases the employer may not recoup their losses. When an employer offers a health FSA, there is risk both ways...for the employer, there is risk if the employee has enough expenses early in the year to claim the full election amount and for whatever reason contributions terminate before the end of the year; and participants have risk in that they may not incur enough medical expenses to claim the full amount of reimbursement elected.

**Q.** What if the employee fails to pay their portion of premiums while on LOA?

**A.** If payment is not made by the employee as required under the employer's policy, coverage may be terminated for nonpayment during FMLA-protected leave only after a 30-day grace period AND a 15-day notice has been provided. If the plan's general policy for nonpayment is to terminate coverage retroactively, that would be okay during FMLA as well. If that's not the case, it would be necessary only to terminate coverage back to the expiration of both the 30-day grace period and 15-day notification.

When coverage is terminated due to nonpayment:

- If the employee returns to work following exhaustion of the FMLA leave of absence, coverage would need to be offered without imposing any waiting period.
- If the employee does not return to work, COBRA should be offered effective upon exhaustion of the FMLA leave.

**Q.** What if the employee doesn't want to re-enroll in the Health FSA upon return from leave? Can they choose not to?

**A.** For those who choose to discontinue coverage during leave, the employer may only require reinstatement if the employer also requires reinstatement of coverage for other employees upon return from a non-FMLA leave of absence.

**Q.** Does dropping insurance during FMLA also require a qualifying event?

**A.** §125 rules recognize the taking of leave under FMLA as a change in status event permitting a mid-year election change. However, §125 rules indicate what is permitted and do not require that changes be allowed, so it's always advisable to check the plan document to understand whether election changes are allowed due to FMLA-protected leave.



- Q.** Does the employee have to "request" FMLA, or if an employee says they need time off for medical, does the employer automatically apply FMLA if time off is requested for a medical reason?
- A.** The employee does not have to request FMLA. The employee is responsible for requesting leave, in advance if possible, and providing information about why the leave is being requested. The employer is then responsible for determining whether or not FMLA is applicable, designating the leave as FMLA and acting accordingly. If the employer fails to properly designate the leave as FMLA and follow the proper notification procedures, it is possible the protected leave period (generally 12 weeks) will not be started until the employer does what is required, thereby extending the protected leave period.
- Q.** If an employee uses all 12 weeks of FMLA leave, then the employer should terminate the employee's health benefits and offer COBRA? If an employee asks for an extended unpaid leave, should benefits be continued at his/her expense or should Cobra be offered?
- A.** It may depend upon the plan eligibility rules...It's important to review what the employer communicated in its medical benefit plan document, summary plan description (SPD), certificate of coverage or benefit booklet relative to the extension/continuation of coverage in such situations. Generally, other than what is required under FMLA, if an employee is on an unpaid leave of absence, the employee will not meet plan eligibility requirements. If that's the case, coverage should be terminated and COBRA offered. There is risk for the employer in continuing to offer coverage if the employee no longer meets the plan eligibility rules in that the carrier may not agree to cover claims incurred by an "ineligible individual" (based on plan eligibility rules) during such time.
- Q.** We pay into a multi-employer health plan for our union members. Our obligation is to pay a % of earnings into the plan. If an employee is on unpaid FMLA leave, do we have any obligation to contribute anything to the health plan? There are no earnings to apply the % to!
- A.** If the employee is participating in a multi-employer plan, the employer must continue to make contributions on behalf of the employee on FMLA leave in the same amount as if the employee was not on leave, unless the multi-employer plan has an explicit provision for maintaining an employee's coverage during an FMLA leave (such as pooled contributions from all participating employers).
- Q.** If someone is on FMLA can they submit charges incurred during that time to be reimbursed by their FSA if they continue coverage or pay those deductions as arrears?
- A.** If coverage under the health FSA continues during the FMLA-protected leave, regardless of how payment is handled (prepaid, after-tax during leave, or catch-up upon return), the employee may submit and be reimbursed for qualifying medical expenses incurred during leave. However, if coverage is discontinued during leave, even if it is reinstated upon return, expenses incurred during the leave would not be reimbursable.



- Q.** When someone comes back after having stopped coverage are they required to take the same coverage if they want to reinstate coverage, or can they go from medical plan A to medical plan B, for example?
- A.** An employee on FMLA leave can revoke or change elections (e.g., because of a change in status) under the same conditions that apply to employees in the cafeteria plan who aren't on FMLA leave. Thus, an employee who returns from FMLA leave may make a new election for the remainder of the plan year, including enrollment in a different plan option, if plan eligibility rules allow for such a change and returning from leave without pay is a change in status under the employer's cafeteria plan.
- Q.** What if Dental & Vision are voluntary employee pay all plans?
- A.** Generally continuation of coverage would not be required under FMLA. The definition of a "group health plan" under FMLA excludes "an insurance program providing health coverage under which individuals purchase individual policies from insurers" so long as the employer's role is limited to collecting premiums through payroll deduction and forwarding the premiums to the insurance company. For this exclusion to apply, the employer may not contribute toward the cost of coverage, participation must be voluntary, the premium may not increase in the event the employment relationship is terminated, and the employer may not receive cash (or other consideration) in connection with the program except for its "reasonable compensation" for "administrative services actually rendered in connection with the payroll deduction
- Q.** If the employer is contributing to an HSA would they need to continue to make hsa contributions to an employee on FMLA?
- A.** FMLA requires group health plan coverage to continue, but an HSA is not generally considered a group health plan. However, even if the HSA arrangement is not considered a group health plan, FMLA requires non-group health benefits to be continued during FMLA if they are continued for employees on other forms of non-FMLA unpaid leave. If contributions are discontinued, they should be reinstated upon return from FMLA-leave.
- Q.** How are pre-tax deductions handled if the employee is writing a check while on leave rather than deductions coming out of payroll? Is it OK for employees to pay after-tax, even if premiums are normally pre-tax.
- A.** If payment is made by check or cash payment during an unpaid leave the payments are made on an after-tax basis.
- Q.** Can you retroactively terminate pre-tax and post-tax coverages?
- A.** While generally coverage may not be terminated retroactively unless fraud or intentional misrepresentation is involved, when nonpayment occurs, retroactive termination is allowed. During FMLA, so long as a 30-day grace period and 15-day notification are provided as required, if the plan's general policy for a leave of absence or nonpayment is to terminate coverage retroactively, that would be okay during FMLA as well.



**Q.** I thought the restriction on pre-tax under FMLA/FSA was based on the leave straddling two plan years. Not calendar years.

**A.** For employers offering the prepay option, guidance clearly prohibits pre-paying for coverage on a pre-tax basis when the leave of absence straddles two plan years. It is tied specifically to the benefit plan year (which might be non-calendar), not necessarily the calendar year. In other words, for an August - July plan year, the pre-payments could not be for July thru September.

**Q.** Can you offer STD while the employee is on FMLA

**A.** Yes, it is possible for disability coverage and FMLA to run concurrently.

**Q.** Is the FMLA "event" notice the same as Notice of Rights & Responsibilities and Designation Notice?

**A.** Upon determining an employee eligible for FMLA-protected leave, the employer must provide, within 5 business days of the initial request for leave, an Eligibility Notice to the employee (orally or in writing) informing the employee whether he or she is eligible for FMLA leave, and a Rights and Responsibilities Notice (by mail) informing the individual of expectations and obligations relating to his or her FMLA leave. The two notices may be combined into one. A model notice may be found at <https://www.dol.gov/whd/forms/WH-381.pdf>

**Q.** After the leave extends beyond 12 weeks, the employee should be offered COBRA? What about continuing coverage because the employee is ACA eligible? Wouldn't the employee have the option to continue coverage under the ACA (which is less expensive than COBRA)?

**A.** The answer depends upon the plan eligibility rules. An employer using the look-back measurement method to determine eligibility may continue to offer coverage through the stability period (generally the plan year) regardless of whether the employee maintains full-time hours. If that's the case, coverage may continue to be available beyond what is required under FMLA. However, not all employers choose to align plan eligibility rules with §4980H rules. If the employee is no longer eligible under the plan eligibility rules and coverage continues to be offered, there could be issues with carriers agreeing to provide coverage for any claims incurred.

**Q.** What if the employee is off for 3 weeks for one medical condition, and then after they come back to work have to take off for another condition, would this be calculated together, or would the 12 weeks start over per episode?

**A.** The separate leaves would be combined. An FMLA-eligible employee is limited to a combined total of 12 (or in some cases 26) weeks of leave for any FMLA-qualifying reasons during a 12-month period.

**Q.** Is it ok to withdraw the unpaid premiums on the first pay check when the employee returns to work?

**A.** Making a catch-up contribution after return from leave is one of the options allowed for employee premium payment during an un-paid leave. The terms of the payment option should be agreed upon between the employer and employee at the beginning of the leave.



**Q.** Does the employer have to notify employees about FMLA with both a posted notice and an individual written notice? Or just one of the above?

**A.** Generally both. All employers subject to FMLA must provide a poster on its premises informing employees about FMLA. In addition, if there are FMLA-eligible employees, the employer must provide a general notice in employee handbooks or other written guidance concerning employee benefits or leave rights. The model language may be used both for the poster and the general notice and may be found at <https://www.dol.gov/whd/regs/compliance/posters/fmla.htm>.

**Q.** If we do not get payments for premiums, coverage is cancelled, and the employee returns; do they have to wait until open enrollment or do we sign them up for health benefits as soon as they get back?

**A.** If coverage is cancelled during FMLA-protected leave, either due to employee election or due to nonpayment, the employee must be given the option to reinstate coverage upon return from FMLA-protected leave.

**Q.** Can you talk about joint ownership for companies with less than 50 employees individual, but over 50 if multiple companies under same holding company?

**A.** The FMLA does not specifically refer to §414 rules; 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. See pp. 11-12 in the FMLA Employer's Guide found at <https://www.dol.gov/whd/fmla/employerguide.pdf>.

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.** When they return from leave and require reinstatement, do you reinstate the 1st of the month following their return or reinstate on day they return?

**A.** FMLA rules require reinstatement as soon as possible. While guidance is not totally clear, the safest approach would be to restore the coverage immediately when the employee returns to work from the leave.

**Q.** If you have multiple sites, some not within a 75 mile radius, and you still have 50 people in the radius, can the others outside the radius be excluded? Is this normal?

**A.** When determining if a particular employee is FMLA-eligible, the employer must consider that particular employee's worksite... if the employer employs 50 or more employees within 75 miles of that particular worksite, the employee is eligible for FMLA. It is certainly possible that employees at one worksite may be FMLA-eligible while employees at another worksite (of the same employer) would not. See more information on pp. 16-18 in the FMLA Employer's Guide found at <https://www.dol.gov/whd/fmla/employerguide.pdf>.



**Q.** What if the benefit cost increases after you terminate coverage and then reinstate it?

**A.** Employees on FMLA-protected leave must be treated the same as if the employee had been continuously employed. In other words, if there is a change in benefits or cost, the change would be applicable to the employee just like any other eligible employee.

**Q.** What if someone didn't have medical coverage when they went on leave because they waived coverage and therefore you can't offer them COBRA at end of FMLA leave?

**A.** If someone waived coverage when offered, there would be no obligation to provide coverage during leave and no COBRA continuation right upon return from leave. Such obligations apply only in regard to individuals covered immediately prior to FMLA leave.

**Q.** Some clients are concerned with terming the coverage especially when they are in litigation with employee due to worker's comp.

**A.** That is a valid concern. However, employers must also be careful in continuing to offer coverage to those who do not meet plan eligibility rules because carriers may not be obligated to continue to provide coverage for any claims incurred during such time. It may be better to offer COBRA and offer to help supplement the cost for a period of time.

**Q.** Does the 30-day grace period begin on the 1st or last day of the month in which coverage would be in effect?

**A.** The 30-day grace period should begin upon the payment due date.

**Q.** Is the 15-day notice based upon 15 days prior to date of cancellation OR 15 days "upon receipt of this letter" situation?

**A.** 15 days from the date of the letter (and date the letter is mailed), rather than upon receipt.

**Q.** I just started for this company a few months ago and am doing the FMLA and work comp section. I thought it was weird that our company offers FMLA after 90 days and it is calculated on a rolling year.

**A.** Employers can certainly be more generous than the FMLA requires (e.g. providing the benefits of FMLA-protected leave before an employee has been employed for 12 months).

In calculating the 12 (or 26 in some cases) weeks, the employer may select any one of the following four methods for determining the 12-month period:

1. The calendar year;
2. Any fixed 12 months (e.g. non-calendar plan year or from first day of employment);
3. The 12-month period beginning the first date an employee takes FMLA leave; or
4. A rolling 12-month period measured backward from the date an employee uses FMLA leave.

See more on pp. 51-52 in the FMLA Employer's Guide found at <https://www.dol.gov/whd/fmla/employerguide.pdf>.

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**Q.** What if an employee returns from a 2017 Leave in 2018, and the employer uses the catch-up option to be reimbursed for benefits coverage? Can the employer resume payroll deductions in 2018 for reimbursement of 2017 benefit plans?

**A.** It should be okay. While guidance clearly prohibits pre-paying for coverage on a pre-tax basis when the leave of absence straddles two plan years, the same restriction is not mentioned anywhere that we're aware of for catch-up contributions on a pre-tax basis following a leave of absence. In addition, it would not seem to violate the "no-deferred-compensation rule", which prohibits funding for a subsequent plan year, but not for a previous plan year.

**Q.** What about if the employer benefit plan is 100% ER paid, but during FMLA leave, the plan renews and changes to a % of EE/ER paid for the premiums?

**A.** Any plan changes (e.g. coverage, premiums, deductibles) that apply to all eligible employees would also apply to an employee on FMLA leave. Therefore, the employee would be expected to contribute just like any other eligible employee to maintain coverage and may also have corresponding election change rights.

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