Brown & Brown

EMPLOYEE BENEFITS

Employee Benefits Compliance During an Employee's Leave of Absence

October 2024

Introduction

Navigating employee benefits during a leave of absence can be a complex and challenging task for both employers and employees. Leaves of absence may arise for various reasons, including medical issues, family care responsibilities, military service, or personal matters. During these periods, it is crucial for employers to understand how health and welfare benefits should be administered and maintained and the various compliance issues that arise during the process.

This guide provides a general overview of employee benefits compliance considerations during different types of leave. It explains how factors such as whether the leave is protected or unprotected, paid or unpaid, and the plan's design can affect an employer's responsibilities in administering their benefit plans.

Protected Leave vs. Unprotected Leave

Understanding the difference between protected and unprotected leaves of absence is essential for employers in determining their compliance obligations.

Protected leave refers to leave that is safeguarded by federal, state, or local laws. Under protected leave, employees often have certain rights and protections during their absence, such as job security, continuation of benefits and reinstatement rights upon return from the leave. Examples of protected leave include the Family and Medical Leave Act (FMLA), Uniformed Services Employment and Reemployment Rights Act (USERRA) and state-specific medical or parental leave.

Unprotected leave refers to leave that is not specifically protected by federal, state, or local laws. This type of leave is typically granted at the employer's discretion and is governed by the company's internal policies. Unprotected leave may be offered after a protected leave has been exhausted. Examples of unprotected leave include personal leave, extended vacation, or educational leave.

DISCLAIMER: *Brown & Brown, Inc. and all its affiliates, do not provide legal, regulatory or tax guidance, or advice. If legal advice counsel or representation is needed, the services of a legal professional should be sought. The information in this document is intended to provide a general overview of the topics and services contained herein. Brown & Brown, Inc. and all its affiliates, make no representation or warranty as to the accuracy or completeness of the document and undertakes no obligation to update or revise the document based upon new information or future changes.*

Are employers required to maintain an employee's benefits when they take a leave of absence?

It depends. If an employee is on a protected leave of absence, as discussed above, they will often be entitled to continue at least some of their benefit coverages under the same terms as if they were actively working. In this case, employers will need to refer to the applicable law to determine exactly what protections the employee may have.

Generally, any such mandate that requires an employer to maintain benefits for an employee on a protected leave would only apply to the health care benefits an employee was enrolled in at the start of their protected leave. Employers should review applicable state law to determine whether coverage for any health care or non-health care benefits are required. Many employers will extend other benefits (such as life insurance and disability insurance benefits) to employees on job-protected leaves of absence, consistent with the terms of the applicable plan. Eligibility requirements for these other benefits (outside of health care benefits) are governed by the terms of the policy or plan.

Employers are not generally required by law to maintain health (or other) benefits during an unprotected leave. Whether an employee maintains eligibility for benefits during unprotected leave is a plan design issue and will depend on the plan's eligibility language and applicable plan provisions. Employers who design their plans to permit employees on unprotected leave to remain covered by a plan should confirm that insurers (and stop-loss carriers, if the plan is self-insured) are in agreement with the employer's intended practice and that the terms of the insurance policy or certificate are consistent. This helps to protect the plan sponsor from inadvertently assuming liability for claims payments. If the plan sponsor instead limits eligibility for medical benefits for employees on unprotected leave, they will need to consider implications under the ACA employer shared responsibility provisions discussed in more detail below.

The Family and Medical Leave Act (FMLA)

When discussing protected leaves, many employers must consider rules related to the FMLA, which provides eligible employees up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. FMLA also provides up to 26 workweeks of military caregiver leave during a single 12-month period. Covered employers must maintain an eligible employee's group health plan coverage during FMLA leave under the same terms as if the employee had not taken leave.[1] Group health plans include employer-sponsored plans providing benefits for medical care, dental and vision care, mental health counseling, substance abuse treatment, prescription drug plans, a health flexible spending arrangement (health FSA), an employee assistance plan (EAP) if it provides medical care, a health reimbursement arrangement (HRA), etc.[2] Any changes to health benefit plans that apply to active employees must also apply to employees on FMLA leave.[3] Employees on FMLA leave must also have open enrollment rights, and plan administrators should be prepared to deliver enrollment materials to those employees on leave. Should an employee choose not to keep their group health plan coverage during FMLA leave, the employer must reinstate the employee at the same coverage level upon their return from leave.[4]

In addition to the requirement to maintain group health coverage, the FMLA mandates that other non-health benefits, such as life insurance, disability insurance, sick leave, vacation, educational benefits, pensions, and retirement or 401(k) plans, must continue during FMLA leave at the same level as they would for non-FMLA leave under the employer's policies. If an employee chooses to discontinue non-health benefits while on FMLA leave, reinstatement of the benefits must be available when the employee returns from FMLA leave without the employee having to requalify for the benefit. These benefits must be continued at the same level as prior to the leave, unless changes to the benefits were made that affected all employees during the employee's leave.[5]

[1] *29 CFR § 825.209(a)*

[2] *29 CFR § 825.209(b)*

[3] *29 CFR § 825.209(c)*

[4] *Fact Sheet #28A: Employee Protections under the Family and Medical Leave Act*

[5] *Id.*

Paying for Coverage During FMLA Leave

When group health plan benefits are maintained during FMLA leave, an employee will be responsible for paying any share of group health plan premiums they were responsible for paying as an active employee prior to the start of the leave.[6]

If paid leave is substituted for FMLA leave, the employee will make their premium payments using the method normally used during paid leave, which is typically through payroll deductions.[7]

For unpaid leave taken under the FMLA, IRS regulations provide three payment options by which an employee can pay for their pre-tax premium payments while on leave – "prepay," "pay-as-you-go" and "catch-up." The payment methods are described below.

- **Pre-Pay:** If an employee takes "foreseeable" leave (e.g., as FMLA leave following a planned surgery), an employee could have the option to pay for premiums before commencing their leave, the employee pays the contributions that would have typically been paid during the leave period. The employee choosing this option may reduce their final pre-leave paycheck or make special salary reduction contributions to cover the contributions during their leave (e.g., make salary reductions on a series of paychecks before leave). Under the FMLA rules, an employee cannot be required to pre-pay but can choose to if given as an option. Employers adopting this arrangement should be cautious of state payroll deduction laws and ensure they do not deduct more than the allowed statutory amount from an employee's paycheck.
- **Pay-As-You-Go:** Under this option, the employee will pay their normal contribution to the employer during their leave in an installment plan. This will generally be a post-tax contribution unless they are using sick and/or vacation days during the leave, in which case the contribution for those periods typically be pre-tax.
- **Catch-Up:** For the catch-up option, the employer and employee agree in advance that the employer will advance the payment for the employee's share of the cost of coverage during the leave and that the employee will reimburse the amount the employer paid on behalf of the employee when the employee returns from the leave. Upon returning, the employee should make special catch-up salary reduction contributions to cover their share of the cost of coverage during the leave (i.e., the amount advanced by the employer on behalf of the employee). Employers adopting this arrangement should be cautious of state payroll deduction laws and ensure they do not deduct more than the allowed statutory amount from an employee's paycheck.

Employers must provide advance written notice to employees stating under what terms and conditions the employee's premium payments must be made.[8] Advance written notice must be provided to the employee each time the FMLA eligibility notice is provided, which is generally within five business days (absent extenuating circumstances) of when the employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason.

FMLA and COBRA

The IRS COBRA regulations provide that a COBRA qualifying event does not occur when an employee begins leave under the FMLA. Rather, the qualifying event generally occurs when the employee fails to return to work following the FMLA leave. Specifically, a COBRA qualifying event occurs when:

- "An employee (or the spouse or a dependent child of the employee) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) under a group health plan of the employee's employer;
- the employee does not return to employment with the employer at the end of the FMLA leave; and
- The employee (or the spouse or a dependent child of the employee) would, in the absence of COBRA continuation coverage, lose coverage under the group health plan before the end of the maximum coverage period."[9]

In most cases, if a qualifying event occurs under the above circumstances, the maximum COBRA coverage period is measured from the last day of FMLA leave (the date of the qualifying event).[10] If an employee who continues group health plan coverage fails to pay the required premium during FMLA leave and does not return from leave, then a COBRA qualifying event occurs on the last day of FMLA leave.[11] The important consideration in this circumstance is whether the employee (or their spouse/dependent) was covered under the group health plan on the day before the first day of FMLA leave.

[6] *29 CFR § 825.210(a)*

[7] *29 CFR § 825.210(b)*

[8] *29 CFR § 825.210(d)*

[9] *Treas. Reg. §54.4980B-10, Q/A-1(a).*

[10] *Treas. Reg. §54.4980B-10, Q/A-2.*

[11] *Treas. Reg. §54.4980B-10, Q/A-3*

FMLA Leave Followed by Non-FMLA Leave

A common approach is to allow employees to continue leave following FMLA under the employer's non-FMLA leave policy. If employees are permitted to continue group health plan coverage during non-FMLA leave consistent with the terms of the plan (e.g., by continuing to pay their premium contributions), then the employer will apply their normal COBRA procedures when determining whether a qualifying event occurs (not the IRS' FMLA COBRA provisions discussed above).

For example, Employee (E) goes out on a 12-week FMLA leave due to the employee's medical condition. At the end of the 12 weeks, E is expected to not return to work for an additional three months. Employer (R) offers E an additional three-months leave as an ADA accommodation. During the extended leave period, E's leave is not job-protected, nor is R required to offer benefits. If R's health plan allows coverage to continue during extended leave, there is no change in the terms and conditions of coverage during the extended leave, and E continues paying the applicable premium during the leave but does not return to active employment at the end of the extended leave, R must offer COBRA coverage to E based on the loss of eligibility for coverage (when the approved leave ends). However, if E does not continue paying the applicable premium to maintain health coverage during the unprotected period, there is no COBRA qualifying event if E does not return after the approved leave because there was no coverage effective immediately prior to the date E is no longer eligible for coverage.

As previously discussed, it is important that employers allowing employees to remain eligible for the health plan on non-FMLA leave to ensure that the insurer (or stop-loss carrier, if the plan is self-insured) is in agreement with the employer's intended practice and the governing plan documents and insurance policies provide for the continued eligibility.

Paying for Coverage During non-FMLA Unprotected Leave

There are no specific rules governing how an employee may pay for coverage during unprotected leave in which an employee remains eligible for benefits and premium contributions were previously made on a pre-tax basis.

A common approach that an employer may take is to follow the same rules that apply to FMLA leaves and provide the three options "pre-pay," "pay-as-you-go" and "catch-up." If an employer allows eligibility for the plan to continue during periods of unprotected leave, they should have language in their plan documents addressing how health and welfare premiums will be paid for the period of leave (e.g., if they choose to follow the FMLA payment methods this should be described in the employer's Section 125 cafeteria plan document).

COBRA Qualifying Event Due to Unprotected Leave of Absence

An unprotected leave of absence is considered a reduction of a covered employee's employment hours for COBRA continuation coverage purposes. When an employee's unprotected leave results in a loss of eligibility for coverage or a change in the terms and conditions of coverage, it triggers a COBRA qualifying event, and the employee must be offered COBRA (assuming the plan is subject to COBRA and the employee was covered under the plan the day before the qualifying event).

Employers must consider two primary factors in this scenario: (1) when the COBRA election notice should be provided to the employee on leave and (2) when the COBRA maximum continuation coverage period begins. These timelines will depend on what is written in a plan sponsor's plan documents as it relates to when the loss of coverage occurs in connection with an unprotected leave. For example, the terms of the plan may provide that the loss of coverage occurs at the start of unprotected leave (or the end of the month in which the unprotected leave starts), at the end of unprotected leave, or at the time unprotected leave begins as a loss of coverage, but the employee is offered alternative coverage.

Leave and the Affordable Care Act (ACA)

Full-time status under the ACA

Under the ACA, an Applicable Large Employer (ALE) can face potential penalties if they do not offer affordable, minimum value medical coverage to full-time employees. For purposes of the ACA employer shared responsibility provisions (ESRP), a full-time employee is, for a calendar month, an employee who is employed on average for at least 30 hours of service per week, or 130 hours of service per month. Therefore, when it comes to determining who is a full-time employee, it is necessary for the employer to count an employee's "hours of service."

What constitutes an "hour of service"?

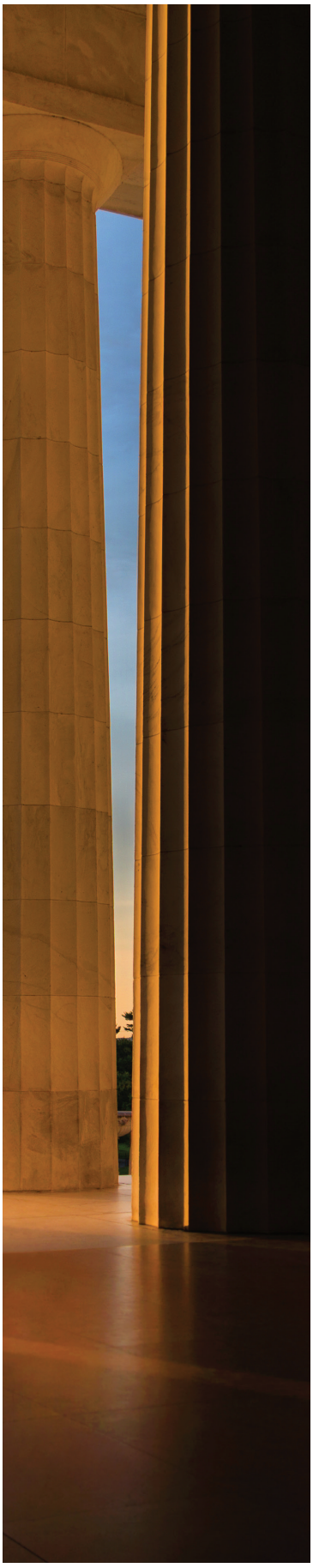
The regulations define an "hour of service" as "each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment, by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence."[12]

Typically, any unpaid hours that occur during an employee's leave do not count as hours of service. Employers using the look-back measurement method must account for periods of special unpaid leave (defined as FMLA, military, and jury duty) when determining average hours of service during a Measurement Period. The averaging rule for special unpaid leave under the look-back measurement method is addressed later in this guide. Employers using the monthly measurement method will not include special unpaid leave in their hours of service calculation.

How does a leave of absence impact an employee's status as a full-time or part-time employee for ACA purposes?

ALEs will need to consider how a leave of absence affects an employee's status as a full-time or part-time employee during the time of the leave of absence, and how the employee will be treated when they return from the leave of absence. For instance, ALEs will need to understand whether the employee remains a full-time employee during the actual time the employee takes the leave of absence (i.e., whether they are considered a full-time employee during that leave of absence) and how the leave of absence affects the employee's future hours of service during the concurrent Measurement Period to determine whether the employee is a full-time employee for the subsequent Stability Period for ESRP purposes.

See page 14 for a chart highlighting which specific types of leave must be counted towards an employee's hours of service.



[12] *Treas. Reg. § 54.4980H-1(a)(24)*

Look-Back and Monthly Measurement Methods

To determine whether an employee is considered full-time for purposes of the ESRP, ALEs must use either the monthly measurement method or the look-back measurement method.

Monthly Measurement Method: As the name suggests, the ALE measures an employee's hours of service on a month-to-month basis. An employee will be considered full-time for a month if the employee averages 130 or more hours of service for that month. The ALE must offer coverage to a full-time employee by the first day of the fourth full calendar month of employment to avoid ESRP penalties for the first three full months of hire (referred to as a limited non-assessment period). From then on, full-time status and ESRP penalties are determined month-to-month. Because this method requires the ALE to track each employee's monthly hours to ensure proper coverage is provided, it can be administratively challenging for ALEs with employees that have fluctuating hours of service per week/month to utilize the monthly measurement method. In addition, although an employer may not be subject to ESRP penalties for failing to offer coverage to a full-time employee for up to the first day of the fourth calendar month of employment, employers differentiating the waiting period for some full-time employee categories versus other full-time employee categories (e.g., 30 day waiting period for full-time salary, but 90 day waiting period for hourly employees) should be cautious about nondiscrimination rules (e.g., under Section 125 and/or Section 105(h)), and should consult with legal counsel related to the issues that may arise with this kind of arrangement.

Look-Back Measurement Method:

Part-time, Variable Hour, and Seasonal Employees

ALEs may utilize the look-back measurement method when determining whether a part-time, variable hour, or seasonal employee is considered a full-time employee for ESRP purposes by measuring their hours throughout an Initial Measurement Period (for new hires) and a Standard Measurement Period (for ongoing employees). If a new hire averages 30 or more hours of service per week (or 130 or more hours of service per month) during the Initial Measurement Period, they would be considered a full-time employee and should be offered coverage during their Initial Stability Period if an employer wants to avoid ESRP penalties. At some point during a new hire's Initial Measurement Period and consecutive Initial Stability Period, a new employee will simultaneously complete a Standard Measurement Period. Once an employee completes a Standard Measurement Period, they will be considered an ongoing employee.

If an ongoing employee averages 30 or more hours of service per week (or 130 or more hours of service per month) during their applicable Standard Measurement Period, they would be considered a full-time employee for the subsequent Stability Period that immediately follows their applicable Standard Measurement Period. If an ALE fails to offer health coverage to this full-time employee during the Stability Period that immediately follows their applicable Measurement Period (and any applicable Administrative Period), the ALE could be subject to ESRP penalties.

Newly Hired Employees with the Expectation of Full-Time Hours

New full-time employees (i.e., new non-part-time/non-variable/non-seasonal employees) should typically be offered coverage after the plan's waiting period (that is no greater than 90 days) and cannot be subject to an Initial Measurement Period if an employer wants to avoid ESRP penalties. For newly hired full-time employees, hours of service would typically be determined on a monthly basis until they are considered an ongoing employee by completing a full Standard Measurement Period. During this period, if an employee's hours of service for the calendar month equal or exceed an average of 30 hours of service per week (or 130 or more hours of service per month), the employee would be considered a full-time employee for that calendar month. However, if an employee transitions from full-time status to part-time/variable hour/seasonal status after they've already become eligible for coverage due to full-time status and they transition into a category that an employer has chosen to apply the look-back measurement method to (e.g., hourly), then depending on what stage the employee currently is in (either has not completed a Standard Measurement Period (or applicable Administrative Period), or is in their Stability Period, will impact how their hours of service during a leave will be treated/calculated. We discuss the impact of a leave of absence under the look-back measurement method below.

Return to Work After Leave of Absence

If an employee experiences a leave of absence in which no hours of service are credited and loses eligibility under the terms of the ALE's group health plan (typically due to unprotected leave), when must the ALE offer the employee coverage upon their return to work in order to avoid ESRP penalties?

The answer depends on whether an ALE may report that the employee is in a limited non-assessment period when the full-time employee is not offered coverage. Whether a limited non-assessment period is available depends on whether the employee is considered a new or continuing employee. The answer also depends on whether the employee is subject to the look-back measurement method or the monthly measurement method as prescribed under the ACA.

13-Week Rule (and 26-Week Rule for Educational Employers) and Rule of Parity

ALEs utilizing either the look-back measurement method or monthly measurement method to calculate an employee's hours of service must follow the 13-week rule, which is further described below. The 13-week rule addresses whether an employee returning from a break in service (e.g., a leave of absence) may be treated as a new employee, which would allow the employer to take advantage of another limited non-assessment period. In other words, the 13-week rule impacts when an employee returning from a break in service can trigger an ESRP penalty.

13-Week Rule

If an employee has **13 or more consecutive weeks** in which the employee was not credited with any hours of service, the ALE can treat the employee as a new employee when they return from that leave period as though they had terminated employment and were rehired by their employer. Therefore, employees who are rehired or on an extended unprotected leave can be subject to a plan's eligibility and waiting period requirements as they would be treated as a new employee under this rule.[13]

If the employee has a break in service (i.e., a period during which no hours of service are credited) of f**ewer than 13 consecutive weeks**, for ESRP purposes, an ALE should treat these employees as a continuing employee when they return from that leave period. To avoid ESRP penalties, an ALE should offer a full-time continuing employee[14] coverage after a period of leave that is shorter than 13 consecutive weeks as of the first day the employee is credited with an hour of service or, if later, as soon as administratively practicable. For this purpose, offering coverage by no later than the first day of the calendar month following the resumption of services is deemed as soon as administratively practicable.[15]

*For educational employers, the maximum period of separation is increased from 13 weeks to 26 weeks

Rule of Parity

Employers may (but are not required to) use the "rule of parity" for breaks in service shorter than 13 consecutive weeks but longer than four weeks. The rule allows employees to be treated as new employees if the break in service (measured in weeks) is at least four consecutive weeks (but not longer than 13 weeks) and exceeds the number of weeks the employee was employed immediately preceding the period during which no services are performed.

For example, if an employee starts employment, works for eight weeks, and then has a period of 10 weeks during which no hours of service are credited, the employer could treat the employee as a newly hired employee when the employee returns to work for the employer after the 10-week break in service.

[13] *Treas. Reg. § 54.4980H-3(d)(6)(i)(A)*

[14] *The continuing employee's full-time status will depend on the measurement method used by the employer and, in the case of the lookback method, the employee's status (as full-time or not) for the stability period in which they return to work.*

[15] *Treas. Reg. § 54.4980H-3(c)(4)(iv)*

Leaves Under the Look-Back Measurement Method

If unprotected leave is 13 weeks or greater

An employee currently in their Initial Measurement Period who experiences an unprotected and unpaid leave of absence of at least 13 weeks with zero credited hours of service may be treated as a new employee subject to a new Initial Measurement Period upon their return to work. A new full-time employee who has not completed a full standard measurement period has their hours of service calculated monthly. A new full-time employee who takes unprotected leave and is not credited with any hours of service during the leave may drop below the 30-hour full-time threshold. Whether the new employee remains eligible for the group health plan during that time will depend on the terms of the plan. The ALE would not be subject to any ESRP penalties for that employee during months they averaged below 30 hours per week and were not considered full-time.

If the unprotected and unpaid leave of 13 or more consecutive weeks occurs during a Stability Period in which the employee is "locked-in" to full-time status based on their hours of service during a Measurement Period, the leave/reduction in hours will not impact the employee's status as full-time, assuming the employee remains employed throughout the leave. To avoid potential employer shared responsibility penalties, the employer must continue to offer coverage to the employee while they are on leave for the duration of their Stability Period, unless employment is terminated, regardless of whether the leave is longer than 13 weeks. However, the regulations appear to indicate that coverage need not be offered when the employee resumes performing services following an unpaid leave longer than 13 weeks. In that case, the employer can treat the employee as a new employee, which generally results in their coverage being terminated and an offer of COBRA being made. If the returning employee is not reasonably expected to average at least 30 hours of service per week (e.g., is a part-time, variable hour, or seasonal employee), the employer would apply a new Initial Measurement Period beginning with the date the employee resumes service. If the returning employee was reasonably expected to average at least 30 hours of service per week, the employee would be treated as new full-time employee with hours of service measured monthly until they completed a full Standard Measurement Period. Due to the above circumstances, employers terminating coverage during the Stability Period are encouraged to consult with qualified legal counsel for specific guidance as the federal guidance provided in the ESRP final rules is not entirely clear on this topic.

If an employer adopts the rule of parity under the 13-weeks rule, an employee who has worked for the employer for less than 13 weeks and has zero credited hours of service for a period of time that lasts for at least four consecutive weeks, and the absence is longer in duration than the time they have been active with the employer, then the employee would be considered a new hire after that period of time.

If unprotected leave is less than 13 weeks

Employees who return to active employment from the break in service of less than 13 consecutive weeks of zero credited hours of service will retain credit for all their hours of service already credited during a Measurement Period (see below discussion for how hours of service are calculated during a leave of absence during a Measurement Period and its impact on the corresponding Stability Period). In addition, if an employee returns to active employment after less than 13 consecutive weeks of zero credited hours of service during a Stability Period, the employee will retain their status as a full-time (or part-time) employee during any applicable Stability Period. Employers may adopt an optional rule of parity that, in some cases, will permit employers to treat returning employees as new hires if the break in service is less than 13 weeks. If the employee has worked less than 13 weeks but has zero credited hours of service over a consecutive period of at least four weeks and that absence is shorter in duration than the time they have been active with the employer, then the employee must be considered an ongoing employee after their consecutive period of absence under the parity rule.

EXAMPLE

An ongoing employee (defined as an employee who has completed a Standard Measurement Period) takes (and returns from) an unpaid unprotected leave of absence during a Stability Period for which they were a full-time employee (i.e., they averaged 130 or more hours of service a month during the applicable Standard Measurement Period). The ALE could be subject to penalties for failing to offer affordable/minimum value coverage to the employee (who would be considered a full-time employee from the date the leave began, throughout the leave and upon the return of the employee) if such offer of coverage is not maintained throughout the full-time employee's Stability Period (so long as they remain employed with the ALE). In this case, no limited non-assessment period would apply, and that is why an employer may be subject to potential penalties for failing to continually offer coverage to this full-time employee. Also, if an employee's employment relationship is terminated with the employer, but the employee is rehired by the employer (subject to the 13-week rule and rule of parity), the same rules would apply, and the ALE may be subject to penalties if an employer fails to offer coverage to an employee that is considered a full-time employee under the look-back measurem`ent method no later than the first day of the calendar month (if the full-time employee is hired mid-month) following an employee's return from employment termination, to avoid potential employer shared responsibility penalties.[16]

Averaging Rule for Hours of Service During a Special Unpaid Leave under the Look-Back Measurement Method

An averaging rule prohibits ALEs from reducing an employee's hours of service during a Measurement Period (Initial or Standard) under the look-back measurement method when an employee is on special unpaid leave. Special unpaid leave consists of leave protected by the FMLA or USERRA and leave for jury duty. Under the rule, the ALE must offset the impact of the special unpaid leave by either:

- Calculating the average hours of service by excluding the period of special unpaid leave during the Measurement Period; or
- Impute the hours of service during the special unpaid leave at a rate equal to the average weekly hours of service for weeks not part of a period of special unpaid leave.[17]

As a result, a special unpaid leave generally will not impact the employee's status as a full-time employee for the following associated Stability Period. The averaging rule for special unpaid leave does not apply when using the Monthly Measurement Method (i.e., special unpaid leave will typically not count towards an employee's hours of service).

[16] Treas. Reg. § 54.4980H-3(d)(6)(iii)

Averaging Rule for Hours of Service During Other Leaves under the Look-Back Measurement Method

Unpaid leave that does not qualify as special unpaid leave does not require an ALE to credit the employee with hours of service during the absence. As a result, it may impact the employee's status as a full-time employee for the following associated Stability Period.

For example, an ongoing employee who retains their full-time status during Stability Period 1 (based on their hours of service during the previous Standard Measurement Period 1) and who takes unpaid state parental leave (which is not considered a special leave under the federal ACA rules) during Stability Period 1 which overlaps with Standard Measurement Period 2, will have their hours of service reduced during the period of time they had 0 credited hour of service when on leave, which can affect their full-time status for the following Stability Period 2.

To determine which types of leaves should be credited toward an employee's hours of service, see the chart at the end of this overview.

Employees of Educational Organizations

As noted above, educational organizations must use a period of 26 consecutive weeks (rather than 13 weeks) when determining whether an employee can be treated as a new employee following a leave of absence. An educational organization may also adopt the rule of parity previously discussed in the 13-week rule section of this document. In addition, a similar rule to special unpaid leave applies to educational organizations. The rules state that an educational organization must offset hours (cannot attribute 0 credited hours of service during this period but must apply the special unpaid leave rules to that period of time) for any employment break periods of the employee falling within a Measurement Period under the look-back measurement method. The ALE can offset the weeks of an educational employment break period by either:

- Calculating the average hours of service by excluding the employment break period occurring during the Measurement Period; or
- Impute the hours of service during the employment break at a rate equal to the average weekly hours of service for weeks that are not part of the employment break.[18]

Educational organizations are not required to take into account more than 501 hours of service for all employment break periods occurring in a single calendar year, however, hours attributable to special unpaid leave are excluded for purposes of the 501-hour limit.

[17] *Treas. Reg. § 54.4980H-3(d)(6)(i)(B).*

[18] *Treas. Reg. § 54.4980H-3(d)(6)(ii)(B).*

Section 125 Cafeteria Plan Elections

Under IRC Section 125, a cafeteria plan may permit an employee who experiences a change in employment status (including the commencement of or return from an unpaid leave of absence that results in a change in eligibility for the underlying benefit or cafeteria plan) to make a corresponding pre-tax cafeteria plan election change.

30-Day Rule

To limit situations in which employers permit terminations and rehires or leaves of absence for the sole purpose of allowing employees to make pre-tax election changes not otherwise allowed under the Section 125 irrevocable election rules, the regulations incorporated a special "safe harbor" employers can follow to help ensure compliance.

An example in the Section 125 cafeteria plan regulations indicates that if an employee terminates employment and is rehired after more than 30 days, the cafeteria plan can be designed to either prohibit the individual from rejoining the plan until the following plan year[19], reinstate the employee's old cafeteria plan election, or allow the employee to make a new election (unless another intervening event would allow such changes to be made to an employee's coverage upon their return). Conversely, if the individual is terminated and rehired within 30 days, the individual cannot make a new cafeteria plan election unless an additional intervening event that would permit an election change takes place. Although the example in the Section 125 regulations applies specifically to a termination and rehire situation, IRS officials have informally indicated that a similar 30-day rule would apply to unpaid leaves of absence.

How does the 30-day safe harbor rule apply to health FSA and DCAP benefits specifically?

The IRS has informally recognized a three-factor approach to apply in situations where the employee is enrolled in a flexible spending account (either a healthcare or dependent care FSA) that allows coverage to continue when an employee has a leave of absence for less than 30 days. If the leave is less than 30 days, then (1) the employee may not reduce their maximum annual FSA benefit election for the plan year; (2) expenses incurred during the period of non-coverage/leave would not be eligible for reimbursement; and (3) an employer may not "catch up" salary reductions upon the employee's return. If the employee's leave of absence was 30 days or greater, the employee would be considered a new hire upon return and would be allowed to make any FSA elections (healthcare or dependent care) that newly hired employees are eligible for.

Can a full-time employee change their election if they return to work for an ALE after a leave of absence longer than 30 days, but cannot be considered a new hire (due to returning before 13 weeks of 0 credited hours of service) during their Stability Period?

If an employee that is considered a full-time employee during their Stability Period takes a leave of absence from an ALE for less than 13-weeks (or greater period, subject to the plan rules) and therefore cannot be treated as a new hire for ESRP purposes, and returns after at least 30 days from the date of first day of leave, an employer must consult their plan documents and Section 125 plan document for guidance on whether the employee can change their election upon their return date. Typically, although the employee is treated as a continuing full-time employee upon their return from leave in this situation (so long as they were considered a full-time employee during their Stability Period and prior to the leave date), the full-time employee would only be able to change their election upon their return under the rules if it was permitted under the plan documents and Section 125 plan document. An ALE could be required to treat an employee returning from a leave as a continuing employee but could treat them as a new hire in the instance that they meet the new hire requirements under both the Section 125 plan and the plan documents.

[19] Employers taking this approach will need to consider the potential for ESRP penalties

New Hire Leave of Absence During Waiting Period

A common approach in plan design is to include a waiting period before an otherwise eligible employee can begin participating in the plan. For instance, employees might be required to complete a 30-day waiting period before their coverage becomes effective.

What happens if an employee takes a leave of absence during their waiting period?

How waiting periods are impacted by an employee's leave of absence will generally depend on how the plan credits hours of service while an employee is on leave and whether the plan incorporates any other provisions that may delay the employee's effective date, such as actively-at-work or continuous-service requirements. Traditional actively-at-work provisions delayed coverage for employees who were not actively at work on the date coverage would otherwise begin (e.g., following a waiting period), and continuous-service provisions delayed coverage until an employee worked for a consecutive number of days without an absence. Subject to limited exceptions, these provisions violate HIPAA's nondiscrimination rules with respect to an employer's medical plan and should not typically be included in an employer's eligibility policy.

Limited Actively-At-Work or Continuous-Service Provisions May Be Permissible

The HIPAA Final Regulations (which apply to group health plans other than excepted benefits) permit plans to incorporate an actively-at-work or continuous-service clause so long as the plan treats employees absent due to a health condition as though they are at work.[20] Thus, employees absent because of a health condition must be given "protected status" for purposes of initial eligibility.

EXAMPLE

A group health plan provides that full-time employees averaging a minimum of 30 hours per week are eligible for coverage, and coverage will become effective on the first day of the month following a 30-day waiting period. In addition to the 30-day waiting period, the plan incorporates language requiring employees to be actively at work on the first day of the following month (the entry date), 30 days from the date of hire, to become covered. If the plan does not treat employees who are absent due to a health condition as though they are actively at work on the first day of the month following 30 days after the date of hire (regardless of whether they are at work), the plan likely violates HIPAA's health status nondiscrimination rules.

[20] *Treas. Reg. §54.9802-1(e)(2)(i)(A)*

No Actively-At-Work or Continuous-Service Provisions

Although the regulations do not directly address the issue, if a group health plan incorporates a waiting period but does not have any actively-at-work or continuous service requirement, the safer approach would be to treat employees absent during their waiting period due to a health condition as though they are actively at work.

EXAMPLE

A group health plan provides that full-time employees averaging a minimum of 30 hours per week are eligible for coverage, and coverage will become effective on the first day of the month following a 30-day waiting period. The plan does not have any actively-at-work or continuous service requirement.

Employee A is hired as a full-time employee on January 1, so their 30-day waiting period ends January 31, and the employee would enter the plan on February 1. The employee is hospitalized and misses work the last week of January and the first two days of February (the time off is unpaid), then doesn't miss a day of work for several months. In this case, the safer approach would be to provide coverage effective February 1 unless there is no circumstance under which a period of unpaid time off taken by the employee would count toward the 30-hour requirement either for initial eligibility or ongoing eligibility into the plan.

No Requirement to Continue Coverage If Eligibility Criteria Is No Longer Satisfied

Once coverage for an employee becomes effective, HIPAA does not require that coverage continue simply because the employee is absent due to a health condition. Thus, subject to other federal/state laws (e.g., COBRA, FMLA, or state-protected leave), coverage may be terminated under the employer's normal policies regarding minimum hours required for coverage (e.g., 30 hours of service per week) or unprotected leaves of absence, even if the employee is unable to work due to a health condition.[21] The important thing is that employers do not treat employees absent due to a health condition in a less favorable way than employees absent for non-medical reasons.

State Leave

Several states require employers to provide disability coverage and/or paid family and medical leave to employees. As part of the requirement to provide protected leave, some state laws mandate that employers continue group health plan coverage for the duration of the leave. As with FMLA discussed above, employers will need to consider the requirements under applicable state law related to continued eligibility under their group health plan(s). Specific state requirements are beyond the scope of this resource, and employers should work with their employment law and benefits law counsel for guidance on complying with applicable state/local law(s).

[21] *Treas. Reg. §§54.9802-1(e)(3)(i)*

Types of Hours of Service and Treatment Under the ACA

The list below is not exhaustive and does not necessarily list every type of hour that would be considered an hour of service under the ACA or an employer's leave policy. In addition, because special rules may apply depending on the specific facts and circumstances, employers should consult with qualified legal counsel regarding whether a particular leave situation must be credited as an hour of service.

Type Service/Leave	Required to be Credited?
Hours worked, and employee is entitled to be paid	**Yes**
Hours not worked but employee is entitled to be paid:	
Holiday hours	Yes
Jury duty	Yes
Layoff	Yes
Military duty	Yes
Paid sick leave	Yes
Paid internship hours	Yes
Vacation (PTO)	Yes
Seasonal employee hours	Yes
FMLA	Yes
Disability (e.g., STD/LTD)	Potentially (see special rules below)
Workers Compensation leave	No
Unemployment compensation	No
Unpaid Leaves of Absence	
FMLA	Potentially (see Averaging Rule for Special Unpaid Leave above)
Military leave under USERRA	Potentially (see Averaging Rule for Special Unpaid Leave above)
Back pay hours	No
Internship hours (when sponsored by educational institution provided intern is not paid by the employer)	No
On-call hours	Yes
Layover hours for airline employees	Yes
Jury duty	Potentially (see Averaging Rule for Special Unpaid Leave above)
Volunteer hours for government entity/tax-exempt organization	No
Special Rules for Academic Employers	
Adjunct faculty hours	Yes
Student employee	Yes (unless hours of service for a work-study program)
Students in work-study program	No
Special Rules for International Organizations	
U.S. expatriates working outside the U.S. (where compensation is taxed as income from sources outside the U.S.)	No
Non-U.S. expatriates working within the U.S.	Unclear
H-2A and H-2B Visa holders	Yes

Disability Leave

The hours for which an employee is compensated under a state-mandated disability plan are excluded due to IRS Notice 2015-87, which states, "an hour of service does not include (1) an hour for which an employee is directly or indirectly paid, or entitled to payment, on account of a period during which no duties are performed if such payment is made or due under a plan maintained solely for the purpose of complying with applicable workmen's compensation, or unemployment or disability insurance laws."[22]

The hours for which an employee is compensated under a disability plan (e.g., STD or LTD) to which the employer contributed directly and did not include such amounts as taxable income to the employee (e.g., through a self-insured disability or salary continuation plan) or indirectly (e.g., through a fully insured disability program for which the employer made contributions toward premiums without the employer imputing income to employees for those contributions, or for which the employee's contributions were through pre-tax salary reduction under the employer's cafeteria plan), result in hours of service for the employee. Hours of service would be attributed to payments made to an employee during the time disability benefits are paid to an employee if an employer pays an employee's disability coverage on a non-taxable basis prior to the time the employee receives benefits under the disability policy. Also, if the employee paid for disability coverage with pre-tax contributions and receives payment from the disability arrangement during a period in which the employee is still employed, then those hours would be considered hours of service as well.

However, a disability arrangement for which the employee paid for disability coverage with after-tax contributions is treated as an arrangement to which the employer did not contribute towards the disability coverage, and payments from the arrangement at the time of an employee's disability would not be considered hours of service to that employee. The regulations are not clear on how hours of service are determined in situations where the employer pays for the disability coverage and then imputes income to an employee for the fair market value of the disability coverage for the amount for which the employer contributes towards the benefit.

Employee leaves of absence significantly impact health insurance coverage, with variations depending on the type of leave and applicable laws. Understanding the interplay between different types of leaves and the employer's obligations regarding coverage under their group health plan(s) is crucial for both employers and employees to ensure adequate coverage and mitigate the potential liability associated with disruptions in employees' benefits. Employers are encouraged to work with qualified legal counsel who can provide specific guidance in developing compliant leave policies and the administration of benefits during leave.

[22] IRS Notice 2015-87

How Brown & Brown Can Help

Connect with your Brown & Brown service team to learn more about how we can help find solutions to fit your unique needs.

Brown & Brown

Find Your Solution at BBrown.com

DISCLAIMER: *Brown & Brown, Inc. and all its affiliates, do not provide legal, regulatory or tax guidance, or advice. If legal advice counsel or representation is needed, the services of a legal professional should be sought. The information in this document is intended to provide a general overview of the topics and services contained herein. Brown & Brown, Inc. and all its affiliates, make no representation or warranty as to the accuracy or completeness of the document and undertakes no obligation to update or revise the document based upon new information or future changes.*

©2023 Brown & Brown. All rights reserved.