

## Guidance from Epstein, Becker, Green ERISA Attorneys on Continuing Benefits During Furloughs and/or Temporary Layoffs

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### Continuing to pay premiums

- If employees are temporary laid off or furloughed (on unpaid, temporary leaves of absence, where there has been a communication that the leave is temporary and not a permanent termination of employment):
  - **The employer can charge employees the cost of employee premiums during the temporary layoff or furlough**, by allowing the employee to prepay, billing the employees directly for employee premiums (pay as you go), or covering the premiums and recouping the amount paid when the employee returns from the temporary layoff or furlough. The FMLA generally requires that the options provided for FMLA leave be at least as favorable as the options under non-FMLA leave so coordination with FMLA, which may vary by state, will be important. (See more below) Furthermore, appropriate documentation and administrative procedures will need to be put in place.
  - **Alternatively, the employer may pay the cost of employee premiums on the employee's behalf** (taking care to follow cafeteria plan rules and nondiscrimination requirements in subsidizing the premiums to ensure tax favorable treatment).
- **Employers can continue active group health care coverage for laid-off or furloughed employees, if the terms of the group health plan permit such continuation.** If the terms of the plan do not permit coverage to continue during a temporary layoff or furlough, the plan could be amended to do so; however, to the extent the plan is insured (or self-insured and contains insured aspects or a stop-loss policy), it will be important to ensure that the applicable third-party insurer and/or third party administrator agrees to the extension of coverage. Service contracts should be reviewed and updated for this purpose.

- **FSAs**
  - **Employers may allow an employee to fund health flexible savings accounts (“FSAs”) during the temporary layoff or furlough.** This would be under the approaches described for employee premiums under a FMLA leave, including consideration of cafeteria plan and nondiscrimination requirements. If health FSAs are not continued during the temporary layoff or furlough, expenses incurred during that period of layoff or furlough may not be covered. (Please note legislative and regulatory proposals are being put forward to expand flexibility of health FSAs during this national emergency.)
  
- **FMLA**
  - **Different requirements apply whether employees are on FMLA leave (which further differ by state) or paid-time off during a temporary layoff or furlough.** Employees who are laid-off or furloughed while on FMLA leave will be entitled to the FMLA’s health coverage continuation requirements. The FMLA applies to private-sector employers with 50 or more employees and 20 or more employees in the current or preceding calendar year. Generally, employees on FMLA leave are entitled to group health plan benefits on the same terms and conditions as if the employee had continued to work. Employees who are laid-off or furloughed while on paid-time-off will be subject to the employer policies and procedures applicable to health coverage; typically, employees will be entitled to coverage during the period they are on paid time off.
  - The Families First Coronavirus Response Act (the “Coronavirus Act”) that takes effect April 2, 2020 through December 31, 2020 provides for paid emergency FMLA leave:
    - Private employers with less than 500 employees are required to provide up to 12 weeks of job-protected FMLA leave if an employee is unable to work or telework due to a need to care for a minor child because the child’s school or care center has closed, or the child’s care is unavailable due to the COVID-19 outbreak
    - Employees are eligible for FMLA leave if they (i) have worked for the employer for at least a year; (ii) have worked at least 1,250 hours during the previous year; and (iii) the employer employs 50 or more employees within a 75-mile radius of the employees’ workplace
    - The first 10 days of emergency FMLA leave (not 14 days as under regular FMLA leave) may be unpaid leave, but subsequent days of leave, are paid leave, based on the regular number of hours worked and being no less than 2/3 the employee’s regular rate of pay, up to a maximum of \$200/day and \$10,000 total
    - The Coronavirus Act exempts employers with fewer than 25 employees from job protection under the FMLA, provided that certain conditions are met, such as the elimination of the employee on leave’s position due to “economic conditions” or the making of changes due to the COVID-19 outbreak that affect the employer’s operations. The Secretary of Labor can exempt employers with fewer than 50 employees from the emergency FMLA leave requirement, “when the imposition of such requirements would jeopardize the viability of the business as a going concern”.
  - **DC:**
    - DC employees are potentially eligible for
      - (i) federal emergency paid FMLA leave under the Coronavirus Act;

- (ii) DC FMLA leave, which is unpaid; and
    - (iii) DC declaration of emergency (DOE) leave, which is also unpaid and applies to those who have been ordered or recommended to self-quarantine
  - DC FMLA leave
    - Provides (i) up to 16 weeks family leave (including taking care of seriously ill family members ) and (ii) 16 weeks medical leave for serious illnesses as defined under federal FMLA
    - Applies to any employer who has 20 or more employees who works more than 50 percent of his time in DC or whose employee is based in DC
    - Employee needs to have worked at least 1,000 hours for 12 months; this period does not need to be immediately before taking DC FMLA leave, but the 1- year work period cannot have taken place more than 7 years prior to taking DC FMLA leave
  - DOE Leave
    - In response to the COVID-19 outbreak, the DC Council has expanded the DC FMLA by creating a new category of unpaid job-protected leave called Declaration-of-Emergency (DOE) leave to cover all DC employees who have been ordered or recommended to self-quarantine while the COVID-19 outbreak is a declared public health emergency by the DC Mayor (no limits on the length of covered service)
    - Unlike under the regular DC FMLA, (i) employees do not need to meet the service requirements; and (ii) all employers are covered, regardless of size
  - The three leaves run concurrently with each other, so employees could choose to first use the paid federal emergency FMLA leave, and then to use the DC FMLA and the DOE leave, depending on applicability and duration of the public health emergency
- MD, VA:
- MD and VA do not have state-specific FMLA, so follow federal FMLA law, and would provide emergency federal FMLA as provided by the Coronavirus Act
- **Paid emergency sick leave under the Coronavirus Act**
    - Employers with fewer than 500 employees are required to provide emergency paid sick leave to employees who are (i) sick with or have been quarantined due to COVID-19; (ii) experiencing symptoms of COVID-19 and seeking medical attention; or (iii) is caring for a child in the event of school closure or unavailable child care provider, among other situations
    - Full-time employees are entitled to 80 hours of sick leave, while part-time employees are entitled to time equal to the number of hours they work on average over a two-week period, with payment based on the employee’s regular rate of pay or the federal, state or local minimum wage, whichever is greater. Pay standards differ in certain situations, such as if an employee is using the sick leave to care for a family member, rather than a child.
    - The Secretary of Labor can exempt employers with fewer than 50 employees from the emergency sick leave requirement, “when the imposition of such requirements would jeopardize the viability of the business as a going concern”

- **COBRA**

- Employers subject to federal COBRA should provide employees with COBRA elections in the event of a temporary layoff or furlough if the temporary layoff or furlough results in both a reduction in hours and a loss of healthcare coverage, which is a COBRA qualifying event. Employers should be subject to federal COBRA if they have 20 or more employees. D.C., VA and MD all have mini-COBRA rules that should apply to employers with less than 20 employees.
- If the group health plan permits laid-off or furloughed employees to continue participation in the group health plan for a period of time (as discussed below), there should be no COBRA qualifying event because the loss of coverage has not yet occurred. If, after a period of time during the leave or furlough, active coverage is no longer extended to the laid-off or furloughed worker, the COBRA qualifying event should occur at that future point in time if the loss of coverage still results from the reduction in hours.
- There are special rules regarding COBRA and FMLA. Leave taken under FMLA does not constitute a qualifying event under COBRA rules. The qualifying event occurs when:
  - An employee is covered under the group health plan on the day before the first day of the FMLA leave (or becomes covered during the FMLA leave period);
  - The employee fails to return to employment at the end of the FMLA leave period; and
  - The employee would, in the absence of COBRA coverage, lose coverage under the group health plan

Thus, generally, the COBRA qualifying event should begin on the last day of FMLA leave.

- **Unemployment Insurance**

- Eligibility for unemployment insurance for employees on temporary layoff or furlough varies by state. There may be waiting time periods before benefits are provided, and partial unemployment claims may be allowed where the workweek is changed for non-exempt employees.
- DC:
  - Employees are eligible for unemployment if they (i) are unemployed through no fault of their own (includes employees of employers that ceased or reduced operations due to government authorities or a reduction in business revenue due to the COVID-19 outbreak); (ii) had wages in at least two quarters of the base period (the earliest 4 of the five complete calendar quarters before filing a benefit claim), with \$1,300 in wages in one quarter of the base period, at least \$1,950 in wages for the 12-month base period, and total base period wages of at least one-and-a-half times the wages in the employee's highest quarter, or within \$70 of that amount; and (iii) able and available to work;
  - In response to the COVID-19 outbreak, DC has waived the requirement to make at least two job contacts per week, making a personal and continuing effort each week to attain gainful employment
  - Partial benefits are available for part-time workers (the formula is to add \$50 to the weekly unemployment amount and subtract 66% of gross weekly wages, and round down)
  - The maximum weekly benefit amount is \$444
  - Benefit duration is generally maximum 26 weeks, if employees remain totally unemployed and otherwise eligible

- MD:
  - Employees are eligible for unemployment if they (i) are unemployed through no fault of their own (e.g., due to layoff); (ii) earned at least \$1,176 in wages in one quarter prior to becoming unemployed, with the total amount earned for the base period (the earliest four of the five complete calendar quarters before filing a benefits claim) equaling at least 1.5 times the earnings of the highest paid quarter (at least \$1,764); (iii) able and available to work; and (iv) actively looking for work (see further below)
  - The weekly work search requirement has not yet been waived—unemployment insurance recipients must make a minimum of three valid job contacts per week and enter them into the Reemployment Exchange (REX) module
  - Workers may be eligible for unemployment benefits if they are part-time workers
  - The maximum weekly benefit amount is \$430
  - Benefit duration is generally maximum 26 weeks, if employees remain totally unemployed and otherwise eligible
- VA:
  - Employees are eligible for unemployment if they (i) are unemployed through no fault of their own (e.g., laid off); (ii) earned at least \$2700 in two quarters of the base period (the earliest four of the five complete calendar quarters before filing a benefits claim); and (iii) are able and available to work
  - If employees have not earned enough in two quarters of the base period, they may qualify under the alternate base period consisting of the last four completed quarters; the alternate is used only if they cannot qualify with the standard base period
  - As of March 15, 2020, the one-week waiting period and weekly job search requirement for receiving unemployment insurance have been suspended for the time being
  - Employees who worked less than normal customary full-time hours may qualify for partial benefits
  - The maximum weekly benefit amount is \$378
  - Benefit duration ranges from 12 to 26 weeks, depending on wages earned in the base period
- **Private or Employer-Provided Disability Insurance**
  - If employees have private or employer-provided disability insurance, and are unable to work because of medical quarantine or illness due to COVID-19 as certified by a medical professional, disability insurance would reimburse covered wages, medical care and other expenses incurred while unable to work
  - Disability policies may follow FMLA criteria for coverage