ALERT | **Employee Benefits & Employment Law**

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MORE EMPLOYEE BENEFIT CORONAVIRUS ISSUES TO ADDRESS

With more and more employers having to cut employee hours or furlough employees in one form or another due to the coronavirus (COVID-19) outbreak, it is vitally important that employers review the terms of their employee welfare benefit plans. This is true for group health plans and non-group health plans (e.g., group life insurance and disability) alike, to ensure that all eligibility conditions are satisfied for employees remaining (or seeking to remain) covered under the plans. So before you make another toilet paper run to the grocery store, we strongly encourage you to take a few minutes to read the important information in this Alert.

The Plan Document Controls

An employee's eligibility for his/her employer's welfare benefit plans is governed by the terms of the plan document. For employers with fully insured plans, many insurance certificates, which are not ERISA plan documents, simply say that employees will be eligible so long as they are regularly scheduled to work, say, 30 hours per week. But what happens when an employee's hours fall below this threshold? Or what if the employee is voluntarily (or involuntarily) placed on an unpaid leave of absence? If you have a written plan document (and hopefully you do), the employee may be able to continue coverage – at least for a specified period of time – after the change in status. It all depends on the language in the document.

In general, if an employee's standard workweek is reduced to below 30 hours/week (or whatever other weekly hour requirement is imposed by the plan), or if the employee goes on a non-FMLA unpaid leave of absence, his/her status as an eligible employee would end and coverage would terminate either immediately or, much more commonly, at the end of the month. The employee would then need to be offered COBRA, if applicable. (Reminder: COBRA is only applicable to "group health plans," and reducing an employee's hours in a way that causes him/her to lose eligibility under the plan will trigger COBRA.)

Yet many plan documents – including those drafted by our law firm – contain an eligibility clause that allows employees to maintain their eligibility status under the plan during leaves of absence. Typically, eligibility continues during:

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- Any paid leave of absence;
- Any period of FMLA leave; and
- A non-FMLA unpaid leave of absence, for such period of time (if any) that the document explicitly authorizes.

Note that coverage can continue during an unpaid leave of absence only if the employee keeps paying his/her share of the premiums, unless the employer has decided to allow the employee to forego such premiums until returning from the leave (and the employer needn't be so flexible). *Bottom line*: employers should check their plan document to see what provisions govern the plan.

Depending on when an employee commences his/her leave of absence, the new provisions in the recently adopted Families First Coronavirus Response Act, which mandates two weeks of paid sick leave in certain circumstances and paid FMLA leave in other circumstances, might come into play. See our Alert from March 20, 2020 for more information.

We are aware that many insurance carriers have stated – formally or informally – that they are willing to extend the periods they will provide coverage for employees who are on unpaid leave. That act of grace is nice, but it is not legally binding. At the end of the day, the written plan document still controls.

Potential Consequences of Not Following the Terms of the Plan Document

Disregarding the plan document's eligibility conditions can create highly adverse consequences. If an employer has a fully insured plan, the insurer could deny coverage, and the employer could all of a sudden find itself self-funding a very large claim. If, on the other hand, an employer has a self-funded plan, the stop-loss carrier can deny coverage as well. Stop-loss carriers frequently audit large claims and, if they discover that a participant's claims were incurred after eligibility was lost, the employer will find itself on the hook for every nickel.

Amend Your Plan Document Now if Necessary

If your plan document is silent on employees' eligibility during leaves of absence, or if you would like to change those eligibility provisions in the wake of the COVID-19 outbreak, now is the time to amend your plan. If you have a fully insured plan and opt to extend eligibility during a leave of absence, you will also want to check with your insurance carrier to be sure that the amendment is acceptable to them. You don't want the plan document to promise coverage that the insurance contract does not permit. Assuming the carrier is on board, the plan document amendment is both simple and inexpensive. Complacency, though, can be incredibly costly.

Special Note: New Federal Guidance on Employer Reimbursement of Paid Leave Required by Families First Coronavirus Response Act

As we noted in our Alert last week on the Families First Coronavirus Response Act, the federal government is reimbursing most covered employers for the paid leave (Emergency Sick Leave and Emergency FMLA Leave), and for the employer share of group health plan premiums during such leave, that are mandated by the statute (up to the statutory caps). Employer reimbursement comes in the form of a credit on the employer's quarterly payroll tax returns (Form 941).

Now there is some additional good news on this subject. The IRS has announced that eligible employers who pay the qualifying Emergency Sick Leave and Emergency FMLA Leave, along with any related employer share of group health plan premiums during such leave (up to the statutory caps) will be able to retain an amount of the payroll taxes equal to the amount of qualifying leave and health care costs that they owe, rather than depositing those amounts with the IRS and then seeking a refund. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the cost of the paid leave and associated group health plan premiums, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less.

If you have any questions, please do not hesitate to call the Employment Law and Employee Benefits Team at Hinkle Law Firm at (316) 267-2000.

Please be assured that our offices are still open. In the event we must move to a remote work environment, we have technology and procedures that will allow us to make the transition quickly and seamlessly. So we fully expect to be available if you need us.

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