Group health plan obligations during leave under the FFCRA

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The U.S. Department of Labor (DOL) has published a temporary rule regarding the paid leave provisions in the Families First Coronavirus Response Act (FFCRA). The FFCRA contains the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Act (EFMLA), both of which generally require employers with fewer than 500 employees to provide for paid, unpaid and/or protected leave in certain circumstances related to the 2019 novel coronavirus (COVID-19) pandemic.

The temporary rule addresses the group health plan obligations of an employer subject to the FFCRA during either EPSLA or EFMLA leave. Under the FFCRA, a group health plan includes any plan that provides major medical, dental, vision and certain supplemental medical care benefits. The temporary rule clarifies that an employer, with respect to group health plan coverage, must treat employees on EPSLA or EFMLA leave the same as current employees who are not on leave. This means the employer must generally maintain coverage on the same terms—for example premium costs, deductibles, covered expenses, etc.—for an employee on EPSLA or EFMLA leave as an employee that did not take leave.

The temporary rule also addresses changes an employer may make to its group health plans and the effect on coverage when an employee's termination of employment occurs while on leave. During a leave period under the FFCRA, any changes made to an employer's group health plans, like a change in deductibles for a new plan year, must treat an employee on leave in the same manner as any other employee. However, an employer's obligation to maintain its group health benefits on the same terms during FFCRA leave ends if the employment relationship terminates (accounting for any protected leave). It's worth noting that an employee may have rights under the Consolidated Omnibus Budget Reconciliation Act (COBRA) to continue group health plan participation should employment end.

Although an employer is required to maintain group health plan coverage for employees on EPSLA or EFMLA leave, an employee does not have to retain the coverage during the leave period. Nevertheless, upon an employee's return from EPSLA or EFMLA leave, an employer is required to reinstate the group health plan coverage of the employee even if he or she chose not to retain group health plan coverage during the leave. Furthermore, that reinstatement generally must be with the same terms as applied before the leave. In other words, an employer may not impose any requirements on the reinstatement, such as a new waiting period.

An important consequence of the temporary rule is that an employer will need to keep paying its share of any group health plan premiums for an employee who retains group health plan coverage during EPSLA or EFMLA leave. The employer cannot offer COBRA coverage to employees on EPSLA or EFMLA leave or require an employee to pay more than his or her normal premium cost. In conjunction with an employer's obligation, an employee is generally

still responsible for his or her portion of any group health plan premium in the same manner as prior to EPSLA or EFMLA leave. This means premiums should generally continue to be deducted from any pay during EPSLA or EFMLA leave in the same manner as prior to the leave, for example through a pre- or post-tax payroll deduction. If there are not sufficient wages to cover the premium costs during EPSLA or EFMLA leave, the temporary rule points to existing Family and Medical Leave Act (FMLA) regulations, which describe alternatives an employer may use to obtain reimbursement.

The temporary rule is effective beginning April 1, 2020, and continues through December 31, 2020, when the FFCRA ends. To the extent an employer has taken action not consistent with the temporary rule, there may be a limited time to remedy the situation. The DOL announced a non-enforcement policy through April 17, 2020, that applies to an employer that acted with "reasonable, good faith efforts to comply with the Act" and remedies any actions taken that were inconsistent with the temporary rule.

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