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UNCOMMONLY INDEPENDENT

COVID-19 questions and answers for U.S. employers:

Compliance issues

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Please note: *The spread of the coronavirus (COVID-19) is a quickly changing situation. For the most up-to-date information and resources, visit the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH). The CDC should be your primary source for emergency preparedness and response to the coronavirus. The below information is designed to guide businesses to known, credible online resources covering the coronavirus and does not constitute medical advice.*

Employers with offices outside the U.S. should review their statutory obligations for reporting suspected cases and paid time off policies with employment counsel to ensure compliance with local and national legislation.

Sections:

- Telemedicine
- USERRA / military leave
- WARN Act issues
- Wellness program issues

Compliance

Cafeteria plans / election changes / FSAs

Can I lower my dependent care FSA contribution if my child's daycare or school closes?

Yes. However, amounts already contributed to the FSA cannot be refunded, even if the employee fears they won't have expenses in the future against which to apply those funds. If the employer were to refund those dollars, the enforcement risk is low, but this is not something we can recommend. Employees may resume contributions if dependent care services are once again needed or become available.

Some carriers are offering employers the option of opening a "COVID-19 special enrollment period" mid-year, due to the coronavirus, and are even offering documents purporting to amend health plans and cafeteria plans to allow for this. Is this permitted?

The special open enrollment period is not permitted by the cafeteria plan rules, at least not to allow for pre-tax deductions from employees enrolling in the special enrollment period. The pandemic is not a cafeteria plan qualifying event, nor is there a change in eligibility (a prerequisite for most cafeteria plan qualifying events).

An employer could allow employees to enroll mid-year and pay premiums on a *post-tax* basis, but unless the cafeteria plan allows for post-tax deductions, ERISA might require the employee contributions to be held in trust, like a VEBA for example. (We note that the DOL does not require a plan to hold some after-tax contributions in trust, like COBRA contributions and retiree contributions, so it's possible to analogize to those situations).

The documents that some carriers are providing, purporting to "amend the health plan, SPD and cafeteria plan," are shoddily prepared, do not (at least the one we've seen)

contain actual amendatory language, and by could be construed to allow *any* employee the right to enroll.

Of course, the IRS has not been aggressive in policing the cafeteria plan rolls, but the employer should consider the cost implications of enrolling potentially many more employees mid-year, who elected not to enroll and pay premium to the plan (i.e., share the risk) at the last open enrollment period.

Any concerns (other than the optics) if the employer wants to increase the cost of coverage to employees, including those on leave?

Increasing the cost of coverage just for those on leave will trigger a COBRA qualifying event.

Increasing the cost of coverage for all eligible employees, whether or not on leave, is permissible (unless a bargaining agreement or other contractually enforceable document or statement provides otherwise). If the cost increase to the employee is "significant" (conventional wisdom says that's 10% or more), the employer's cafeteria plan very likely is written to allow employees to change to a cheaper plan option, if available, or drop coverage altogether.

We are slashing hours for employees, so their paychecks are smaller. Can they cancel their health FSA elections? Can they cancel their medical insurance coverage?

Technically, no. Financial hardship is not a cafeteria plan qualifying event. For *medical* coverage, the IRS will allow an employee who moves from full-time to part-time to cancel their healthcare plan election if they represent they are instead enrolling in other coverage elsewhere, that is at least minimum essential coverage under the ACA.

Having said all that, we recognize the unique circumstances presented by the coronavirus, and recognize also the benign enforcement environment related to cafeteria plan election changes.

Our employees have been placed on an extended leave of absence, under the terms of which we're allowing them to retain eligibility for benefits. Some employees, for financial reasons, don't want to continue some coverages. Can we let them drop?

Continuing eligibility may work well for coverage the employer pays for, like life and AD&D insurance, or where the employee pays for coverage on an after-tax basis, like disability benefits. But for coverages the employee contributes to on a pretax basis, like

medical, dental and vision, while your offer of continued eligibility is generous, it has an unintended consequence: Under the cafeteria plan rules, the employees cannot drop their coverage if they want to do so, because their change in status from full-time to leave of absence doesn't affect their eligibility. The IRS *does* permit an employee to cancel medical coverage upon a switch from full-time to a less-than-full-time position, even if eligibility is not lost, if the employee represents they are acquiring other medical coverage that amounts to at least minimum essential coverage under the ACA.

Having said all this, if an employer were to allow eligible employees to disenroll from coverage due to financial hardship, the enforcement risks are rather modest, particularly under the circumstances.

If an employee is voluntary or involuntarily placed on unpaid leave, like a furlough, but the employee does not lose eligibility for their health FSA, what happens? What are the employee's, and the employer's, options?

In a case like this we think it makes sense to play by the same rules that apply to periods of unpaid FMLA leave. Under the FMLA's rules relating to unpaid leave, the employee has the option to continue to contribute to the FSA (thus keeping coverage in force) by making after-tax payments to the employer, which then forwards those to the FSA administrator. As time permits, the employer may allow for a participant to pre-pay their expected FSA contributions, on a pretax basis, for the expected leave period. This allows for participants to incur and submit claims for reimbursement during the leave. When the length of the leave period is indefinite, or the furlough happens with little warning, the prepay option may prove challenging.

Alternatively, the employee may suspend their FSA account for the unpaid leave or furlough period, choosing not to make premium contributions during the period of leave, but also losing the opportunity to have claims incurred during that period paid by the FSA (there is no coverage during that period). Upon the employee's return, the employee may step back into the shoes of the original FSA election for the year. But because of the period of suspended coverage, the employee's benefit election for the year must either be prorated to reflect the fact of the missed contributions, or the employee's monthly FSA contribution for the remainder of the year needs to be ratably increased.

For example, the employee elects a $1,200 benefit for the year ($100 per month), on April 1 is placed on a three-month furlough and suspends coverage for those three months. Claims incurred during those three months are not covered claims and cannot be reimbursed by the FSA. Upon return the employee's benefit for the year is either

reduced to $900, or the employee's monthly contributions for July-December are increased to $150 to adequately fund the $1,200 annual benefit election.

The employer could choose to cover the employee's FSA premium for the period of leave or furlough, allowing coverage to continue for that period, and then collect the employer's contribution from the employee upon the employee's return (say, $50 per month for the remainder of the year).

COBRA rights / COBRA coverage / subsidizing COBRA coverage

Any concerns (other than the optics) if the employer wants to increase the cost of coverage to employees, including those on leave?

Increasing the cost of coverage just for those on leave will trigger a COBRA qualifying event. Increasing the cost of coverage for all eligible employees, whether or not on leave, is permissible (unless a bargaining agreement or other contractually enforceable document or statement provides otherwise). If the cost increase to the employee is "significant" (conventional wisdom says that's 10% or more), the employer's cafeteria plan very likely is written to allow employees to change to a cheaper plan option, if available, or drop coverage altogether.

We are considering some layoffs. Will our employees who are laid off have a right to purchase COBRA coverage? Is it ok for us to subsidize COBRA coverage for a few months?

Please review the eligibility rules in your plan. If the employees lose eligibility due to employment termination, they are entitled to COBRA coverage.

If employees are merely furloughed, and remain on your employee rolls, they might continue to be eligible depending on how your plan defines eligibility. For example, if your plan treats as eligible any employee considered a full-time employee under the Affordable Care Act, based on average hours over a measurement period, furloughed (not terminated) employees likely remain eligible for all or a portion of the remainder of the plan year. Their status as ACA full-time employees (and therefore, eligible employees) for the next plan year would be determined based on their average hours of service per week or month in the current measurement period, and you'll make that determination at the end of the measurement period.

You are certainly welcome to subsidize COBRA coverage for a period of time. Please note, however, that when you terminate your subsidy toward COBRA coverage (say, in 3

months or 6 months), that does not trigger a special enrollment right under HIPAA that would allow your spouse, for example, to add the spouse and the employee onto spouse's coverage through spouse's employer.

Eligibility / losing eligibility…or not / amending the plan / deemed hours in this measurement period

We are considering some furloughs, hopefully short-term. We tie health plan eligibility to ACA full-time status, and we determine that status by tracking hours of service over a measurement period. Will our employees lose eligibility upon the furlough?

It's possible – even likely – a furloughed employee or an employee whose hours are reduced hasn't lost eligibility at all, at least not for medical benefits.

Many employers now tie eligibility to ACA full-time employee status and determine that status by tracking average hours of service per week or month over a prior measurement period, usually a 12-month period. That is, employees' hours are measured over an extended measurement period, and those employees averaging at least 30 hours of service per week are considered ACA full-time employees – and thus eligible for at least medical coverage – for an ensuing "stability period," which is typically the plan year.

Many employees whose hours are affected by the coronavirus are in the middle of such an ACA stability period for which they earned ACA full-time employee status last year. As long as the employee hasn't had employment *terminated*, eligibility likely continues through the end of the current plan year.

Now, *newly hired* full-time employees are determined to be ACA full-time employees on a *month-to-month* basis until they've cleared their first full *standard* measurement period. As these employees are furloughed, before completing that first full standard measurement period, they'll cease to be considered ACA full-time employees. To maintain their eligibility would, ideally, require a plan amendment, but you might be able to simply get carrier or reinsurer buy-in to continue to treat these employees as eligible during the furlough, and forego an immediate plan amendment to that effect.

In a similar vein, we are placing all employees on furlough, but would like to continue providing benefits. Our plan document ties eligibility to ACA full time status, but we have only been measuring full-time employees over standard

measurement periods. How do we determine if full time employees who have not been employed through an entire standard measurement period retain eligibility?

Most employers use the look-back measurement method for determining ACA full-time employees. Until a newly hired full-time employee (one reasonably expected to be credited with at least 30 hours of service per week) has been employed through an entire standard measurement period, the employee's status as an ACA full-time employee is determined on a month-to-month basis. Most employers have not literally measured newly hired full-time employees' hours because there was no need; the employee was hired into a full-time position and was expected to work (and in fact, was working) full-time hours indefinitely, or least for the foreseeable future.

When a newly-hired full-time employee, who has not been employed through an entire standard measurement period, is furloughed, and the plan by its terms ties eligibility to ACA full-time employee status, literally the employee loses eligibility beginning with the first month in which the employee fails to be credited with at least 30 hours of service per week or 130 hours for the month. If the employer were to observe the terms of the plan, it would terminate the employee's eligibility due to the reduction in hours and offer COBRA.

During this coronavirus crisis, employers who are furloughing employees, including recently hired full-time employees (those not yet employed through an entire standard measurement period), might want to continue to treat the employees as eligible, for the period of furlough. To do so they should communicate with their medical insurance or stop-loss carrier (as applicable), describe what the employers want to accomplish with respect to continuing eligibility, obtain the insurer's or reinsurer's agreement, and ultimately (it need not be done immediately) amend the plan to reflect that eligibility.

We want to continue eligibility for our furloughed employees, but will their coverage be "affordable" for ACA employer mandate purposes?

Maybe. As employees suffer reductions in their pay, the amount they would pay for self-only coverage under the employer's least expensive plan supplying minimum value might drift into the range of unaffordability (9.78% of household income). If that were to happen and an employee still considered to be an ACA full-time employee were to turn down the offer and obtain subsidized individual market coverage in an ACA marketplace, the employer could be assessed an employer mandate penalty under what we've called "Tier 2" of the employer mandate.

However, if the employer's coverage offer, for self-only coverage under the employer's least expensive plan supplying minimum value, were to limit the employee's required

premium contribution to an amount within the ACA's poverty level or rate-of-pay safe harbors, the fact that the employee's household income drops during the year does not cause the employer's offer to become unaffordable, for purposes of the ACA employer mandate.

We don't want our furloughed employees to lose eligibility for coverage, but they might not qualify as ACA full-time employees coming out of the *next* measurement period. What can we do?

Generally, you control your own eligibility rules (if the plan is insured, you might need carrier approval to modify your eligibility scheme; if self-insured, confirm with the reinsurer or stop-loss carrier if you're going to modify those rules).

First, remember that paid leave counts as service for ACA hours-tracking purposes.

Second, if employees will have a substantial amount of *unpaid* time, you can amend the plan (subject to the caveats above) to obtain the result you want here. For example, you could amend the plan to provide that the employees will be credited with the hours they *would have worked* but for the coronavirus-related layoff. We recommend *not* modifying the measurement period; that creates a host of administrative and programming issues.

We are furloughing many employees who are considered ACA full-time employees, and we can no longer afford to supply medical coverage. Are we in danger of an ACA employer mandate problem?

Yes. Because you're furloughing employees and not laying them off (terminating their employment), those who have earned ACA full-time employee status for the current plan year retain that status. If you fail to offer coverage to more than 5% of your ACA full-time employees, in your EIN, you trigger the "nuclear penalty" under the employer mandate, leaving the company subject to a nondeductible tax penalty (accruing monthly) of 1/12th of $2,570 for nearly every ACA full-time employee in the EIN.

We would like to expand eligibility under the group health plan by extending coverage to part- time employees, due to the coronavirus. Can we amend the plan to do that, and allow mid-year enrollment of our part-timers?

Generally, yes. Employers control which employees are eligible for the plan and are free to amend the plan to add more eligible classifications, subject however to insurance carrier consent (for fully insured plans) and stop-loss insurer agreement (for self-insured plans).

Because the employer is adding eligibility for an entire class of employees, it may allow those employees to make the coverage election under its cafeteria plan, and the employees may pay their premiums on a pre-tax basis.

Be aware, however, that once a part-time employee opts into the plan on a pretax basis, the employee is not permitted, a few weeks or months from now, to drop coverage simply because the employee doesn't want the coverage anymore or finds it difficult to pay for. Pretax coverage elections may only be changed as allowed under the IRS's cafeteria plan qualifying event rules.

We are laying off many employees but hope to bring them back later. For ACA purposes, when we rehire them, may we treat them as newly hired, and place the rehired variable hour and part-time employees into a new initial measurement period?

Yes, if they went at least 13 weeks with no paid hours (including paid time off or other paid leave from the employer), upon their rehire you may treat them as newly hired, for ACA purposes. The relevant period is 26 weeks for educational organizations.

Exclusions / excluding treatment of the coronavirus

Should we consider excluding coronavirus testing as a covered service?

Instituting any sort of blanket exclusion within your plan for coronavirus testing and treatment is not recommended, not only because of risk of claims under the Americans with Disabilities Act and HIPAA, but as a matter of public policy and employee relations. It may also be difficult, in at least some cases, to pinpoint exactly what treatments or therapies to exclude, an issue that could be aggravated by the potential for inadequate or vague provider coding of claims.

Families First Act poster

See the FAQ from the Department of Labor:

https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions

Fever screens

Are we permitted to fever screen our employees?

Yes, but subject to some guardrails and best practices.

A fever screen is a form of medical examination that creates issues under the Americans with Disabilities Act (ADA). Typically, medical examinations need to be job-related and consistent with business necessity. For example, the employer should have a reasonable, *objectively based belief* that the employee's ability to perform essential job functions will be impaired by a medical condition, or that the employee will pose a direct threat to self or others due to a medical condition.

That means that, under *normal* circumstances, widespread fever screening of employees who objectively appear asymptomatic would be prohibited. But these are not normal circumstances, and in 2009 the Equal Employment Opportunity Commission (EEOC) carved out a limited exception for fever screening during a pandemic, an exception equally relevant today. In fact, the EEOC has just updated its guidance for the coronavirus pandemic:

> ***During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?***
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> Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. However, employers should be aware that some people with influenza, including the 2009 H1N1 virus or COVID-19, do not have a fever.
>
> Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

So, if an employer is inclined to conduct fever screens, what are the guardrails?

- First, the pandemic must be widespread in the community, as assessed by state or local health authorities or the CDC. The EEOC says this requirement has been met.

- Second, perform the testing in a nondiscriminatory manner – don't single out employees by race, sex, etc. for the fever screening. Be sure to treat the time the employees spend participating in the screening as compensable time.
- Third, tell the employees that the testing is intended to determine only whether the employee has coronavirus symptoms (and, in fact, that should be the only reason for the testing).
- Fourth, have the screens conducted by medical professionals, if available in the workplace. If they're not, utilize management or supervisors to conduct the testing, and ensure they're trained on how to do it. Conduct the testing with as much privacy as reasonably possible, and not within view of other employees.
- Fifth, be as noninvasive as reasonably possible. There are a variety of temperature-gauging devices available that are far less intrusive than an oral thermometer.
- Sixth, treat the results as appropriately confidential. Where warranted, employers may be permitted to share *relevant* evidence with public health officials, as part of the community's pandemic risk mitigation efforts led by those officials. But don't keep the information in the employee's personnel file, for example.
- Seventh, if the employees are in a collective bargaining unit, ensure nothing in the bargaining agreement prohibits the screening.
- Finally, remember that an employee might nevertheless be infected with the coronavirus and not have an elevated temperature. A negative screening result does not guarantee the employee is not infected.

The Occupational Safety and Health Administration (OSHA) has issued general guidance to employers on measures to ensure the safety of their employees during this pandemic. That guidance is worth reviewing.

Furlough vs. layoff

What's the difference between a furlough and a layoff?

When we refer to furloughs, we mean involuntary leaves of absence, but not an outright employment termination. When we use the term layoff, we mean an outright termination of employment.

HSAs/HDHPs and coronavirus testing / treatment

May my HSA-compatible high deductible plan pay for coronavirus testing and treatment below the high deductible?

Yes. The IRS has expressly authorized high deductible health plans to pay for these services before the high deductible has been satisfied.

Mandates / COVID-19 testing

Is our health plan *required* to cover the cost of coronavirus testing? Can we apply the deductible or other cost-sharing requirements, like copayments?

The new Families First Act requires all medical plans to cover, with no member cost sharing, coronavirus testing *and the related doctor's visit (presumably whether in person or via telemed),* without imposing cost sharing (e.g., deductibles, copays or coinsurance). Nor may the plan impose any pre-authorization or medical management requirements for coronavirus testing. The new coverage requirement does not require plans to waive cost sharing for coronavirus *treatment*.

Paycheck protection program (PPP)

If we receive the SBA PPP loan, can we still claim the tax credits for the emergency sick leave and the FMLA+?

Yes, but not for the same wages taken into account as "payroll costs" under PPP.

Under the PPP, is interest on any other debt obligations (aside from mortgages) forgivable? We've been hearing different things, the most common being interest expense is an eligible expense to use loan proceeds on but will not be forgivable.

The SBA says this about use of loan proceeds:

QUESTION: What are allowable uses of loan proceeds?

ANSWER:

- Payroll costs.
- Costs related to the continuation of group healthcare benefits.
- Paid sick, medical or family leave.
- Employee salaries, commissions or similar compensations (see exclusions above).

- Payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation) .
- Rent (including rent under a lease agreement).
- Utilities.
- Interest on any other debt obligations that were incurred before the covered period.

Can you pay scheduled bonuses that were suspended due to crisis and apply this to your loan forgiveness? Not all employees participate in the bonus program.

Bonuses can be considered "payroll costs" for purposes of loan forgiveness. Just remember, however, that payroll costs never include compensation paid to someone on an annualized basis in excess of $100,000.

Can publicly-traded businesses qualify for PPP loans?

The SBA received significant criticism for loaning PPP funds to publicly traded companies that had other avenues for raising cash. As a result, federal officials issued the following new FAQ:

> ***Question:*** *Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*
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> ***Answer:*** In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."
>
> Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely

on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

Payroll tax credits

Do dental and vision coverage qualify as group health coverage for which an eligible employer can claim the tax credits?

Yes, dental and vision coverages are included. Any health coverage that qualifies for COBRA continuation would qualify as a "group health plan" for purposes of the tax credits.

Does sick leave and FMLA+ apply to US citizens working outside the U.S.? And are their wages eligible for the credit too?

The Fair Labor Standards Act (FLSA) is used to determine whether the employee has worked the requisite hours to qualify for FMLA leave. Presumably, the FLSA rules would apply to determine if the employee qualifies for FMLA+ by virtue of being employed for at least 30 calendar days. The FLSA does not apply to an employee working in a foreign country, even though the employee may be a U.S. citizen working for a U.S. company. Those individuals would not qualify for FMLA+ leave (and the employer could not claim any tax credits for the wages paid during a leave).

My employer is using temporary employees through a staffing company. Who gets to claim the tax credits?

The staffing company is treated as the temporary employees' "employer" and issues them Forms W-2. If the staffing company is the common law employer, the only entity able to claim the tax credits would be the staffing company (and only if the staffing company had fewer than 500 employees).

Governmental and tax-exempt employers that have fewer than 500 employees are subject to the paid sick and FMLA+ leave mandates. Do they qualify for the tax credits?

Tax exempt employers are able to claim tax credits for the qualifying leave, but governmental employers, such as cities, towns and school districts, cannot.

Premiums / employer pre-payment and recoupment / inability to pay premiums

We would like to pay the medical and dental premiums for our employees while they're furloughed and are not being paid, but we would like them to repay the amount we paid on their behalf (the amount they would have otherwise paid) once they return to work. Is that permissible?

Yes. If the catch-up, when the employee returns, will occur across the cusp of a new cafeteria plan year, there are some issues with collecting the back premium on a pre-tax basis, but we suspect this will be a short-term subsidy by the employer and that recoupment could occur before the end of the year. If it extends later, the recoupment in the next cafeteria plan year should be post-tax, out of an abundance of caution.

It would be a best practice to get the employee's agreement to repay in writing, if even in an email, but if that's not possible we nevertheless think most employers will not encounter a problem with employees later, as the recoupment begins. See also the next FAQ.

Our state prohibits employers from withholding money from paychecks without written consent. Can we still collect the employee contribution amounts we paid on behalf of furloughed employees upon their return to work?

For ERISA employers, we think the answer is "yes." The Department of Labor has opined that ERISA preempts state wage withholding laws to the extent they interfere with the administration of an ERISA plan. Preemption of state wage withholding laws would then allow the employer to withhold the premium payment amounts it fronted the employee during the furlough. It might be an even better argument if the plan document expressly permitted the employer to withhold those dollars, but we're not convinced it's necessary that the plan do so.

Best practice would, of course, be to spread the recoupment out over a reasonable number of pay periods.

We are experiencing cash-flow issues and have furloughed employees. We are continuing to pay our share of the premium for their benefits for now, but we may not be able to soon, due to the economic downturn caused by the Coronavirus pandemic. What should we do?

The danger here arises with respect to employee *contributions*, and employee *expectations* –that is, do they think they have coverage when in fact they do not, due to the employer's premium payment shortfall.

Employee contributions to an ERISA plan are plan assets and cannot be used to pay for the employer's expenses or debts unrelated to the plan. They must be used to pay premiums, claims or administrative expenses related to the plan. Employee premium payments for fully insured plans must be forwarded to the insurance carrier within 90 days.

In the event a plan sponsor is experiencing financial difficulties that prevents it from paying premiums (or claims, under a self-insured plan), it would be best to not continue to deduct employee premiums nor lead employees to think that coverage is and will continue to be in place when in fact the plan is or might soon become insolvent.

For plan sponsors experiencing financial difficulty paying premiums or claims, here are a few options, and a discussion of their advantages and disadvantages.

Fully insured plans

States are encouraging and, in a handful of cases, prohibiting carriers from canceling policies due to nonpayment of premium. But this solves only part of the plan sponsor's issues.

The employer is not permitted to hold employee contributions for more than 90 days and can't use those dollars to pay other debts. So, holding on to employee premium payment dollars for an extended period, while trying to pull together cash to pay the employer's share of premium, triggers an ERISA problem.

One imperfect solution to the ERISA problem would be to forward the *employee* contributions to the carrier as partial payment. But if the carrier won't agree to continue coverage during the grace period, employees have paid premium and think they have coverage, but they won't. If the carrier agrees to continue coverage during the grace period but the employer is never able to pay its share of premiums, the carrier will cancel the policy, likely retroactively. The employees, again, will have paid premium for no coverage, and somehow their partial payment needs to be refunded to them.

And what happens if the employer forwards employee contributions to an insurer, but the sponsor never is able to forward *its* contributions to the insurer, and the insurer cancels the policy, probably retroactively? The employees' contributions are still with the insurer, but they did not have coverage for periods when they believed they did.

The better play might be to suspend the plan. Stop taking employee premiums, refund the premiums taken for periods for which the employer can't make its share of the payment, and notify participants that coverage is suspended as of a given date the employer negotiates with the carrier.

Self-insured plans

Self-insured employers that are experiencing financial difficulties should stop taking employee contributions when it becomes clear that claims will not be paid based on the funds currently available and those projected to be available within the next 90 days. They too should consider suspending the plan. Then they should notify participants that the plan cannot continue to pay benefits as promised and suggest that employees should seek coverage elsewhere and/or understand the plan will not pay any claims incurred after a specified date.

Compliance Services has a model notice to employees about plans becoming insolvent due to employer insolvency.

Section 139 payments

We've read something about tax-free payments to employees to reimburse them for non-healthcare expenses incurred during the coronavirus pandemic. What are these payments? Are there limits?

Employers can provide different tax-free reimbursement of expenses employees incur as the result of the coronavirus pandemic. First, they can reimburse employees tax-free for reasonable business expenses the employees incur working remotely, such as business supplies, etc. In addition, the president's declaration of a state of emergency related to the pandemic allows employers to provide tax-free payments for unreimbursed "personal, family, living or funeral expenses" related to the coronavirus. That reimbursements occur under Tax Code section 139 and are called "section 139 expense reimbursements."

These payments cannot include lost wage payments; wage or salary continuation payments would be taxable. But section 129 reimbursements could apply to things like added childcare costs that are "reasonable and necessary" due to school or day-care closings.

Interestingly, employees are not required to substantiate their expenses the way they must do flexible spending account claims, for example, but the payments must reasonably approximate the expenses the employee actually incurred. Beyond that, there is little guidance on the nature of expenses and other costs an employee incurs related to the coronavirus that the employer may reimburse tax free under section 139.

Telemedicine

Many insurers that include a telemedicine feature with their plans are waiving all cost sharing for telemedicine visits, whether or not coronavirus related. Does this create a compliance concern for HDHPs?

No. The CARES Act provides that all telehealth visits, for any reason, are payable below an HDHP high deductible without jeopardizing the HSA compatibility of the plan. This rule applies through the plan year beginning in 2021.

We are thinking of buying telemed coverage for a portion of our employees who are not enrolled in the major medical plan. In fact, they're not even eligible for that plan. Does this create compliance concerns?

Yes. The telemed coverage is a health plan, subject to ERISA (for ERISA employers), HIPAA, COBRA and perhaps even the ACA's obligation to cover all mandated preventive care with no cost sharing. It's possible the ACA obligation may be avoided if regulators were to conclude that the telemed coverage supplies "insignificant benefits," but the COBRA obligation would apply, and employees can sue over COBRA notice failures.

USERRA / military leave

We have employees being called up for National Guard duty. What are our obligations with respect to their benefits and reemployment rights?

Great summary here… https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-COVID-19-Impact.pdf

… and wealth of information here …
https://www.dol.gov/agencies/vets/programs/userra/USERRA%20Pocket%20Guide#23

WARN Act issues

If we're forced to lay off a large number of employees or close a facility, are we subject to the WARN Act and its advance notice requirements (or pay and benefits in lieu of notice)?

Possibly. Federal and state WARN laws require, generally, 60-day advance warning of mass layoffs/closures, or alternatively 60 days of pay and benefits. Federal rules apply to employers with 100+ employees; the event must affect 50+ employees at a single

worksite. State rules vary. We note that California has waived the 60-day notice requirement under the state's mini-WARN act.

The federal law, and typical state laws, include exceptions for "unforeseen business circumstances" and for faltering companies. The "unforeseen circumstance" situation might be a double-edged sword: the longer the employer delays layoffs/closings, the harder to say the situation is unforeseen. There are other exceptions for "natural disasters." Speak to employment counsel about this.

Wellness program issues

We have a wellness program that requires employees to go participate in health screenings, engage in certain activities and/or meet certain health-related goals to receive a discount on premiums for the upcoming plan year. The deadline to meet these requirements is coming up and due to shelter-in-place restrictions on account of the pandemic, medical service shortages, and illness, employees may not be able to meet the requirements. Can I deem them to have passed the requirements given the unique pandemic circumstances? Am I ever *obligated* to waive the requirements?

You're always free to waive a participation-, activity- or outcomes-based requirement particularly where, as during this pandemic, it may be difficult for employees to satisfy the conditions. If you're going to waive the requirements, however, be sure to do so on a nondiscriminatory basis. All employees who are subject to the same sorts of pandemic-related challenges should be treated the same.

And yes, you might be *obligated* to waive such requirements. Plans that require individuals to meet participation-, activity- or health outcomes-based standards must waive the requirements or provide a reasonable alternative standard for those for whom it is not reasonably possible (e.g., can't get to a biometric screening due to shelter-in-place restrictions), medically inadvisable or unreasonably difficult due to a medical condition to meet the requirements. Social distancing restrictions and threat of the coronavirus likely warrants accommodation in plans that require employees to go to the doctor or complete certain health goals they cannot achieve by staying in their home.