Updates
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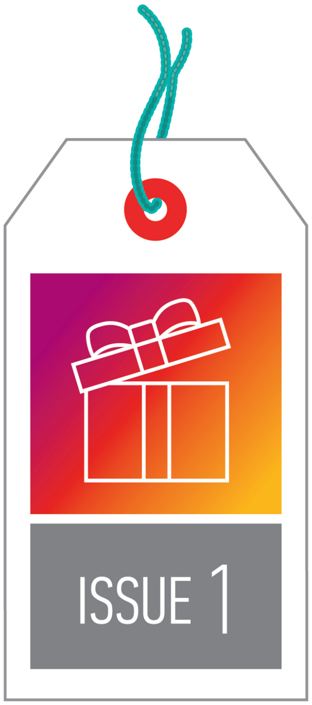
Variable Hour Employee Benefits Eligibility Under COVID-19



g a Lavish Gift This Holiday Season or an Unintended Lump of Coal in Their

COVID-19 has forced many employers to make unanticipated changes to their workforce, with many retailers rolling out a combination of furloughs, layoffs, and breaks in service to address changing market demands and shelter-in-place orders. Other retailers, particularly in grocery and online markets, saw an unplanned spike in demand, and went on a hiring binge and increased their existing employees' hours to ensure they remained adequately staffed. These scheduling modifications may have unintentional consequences for the employees' group health plan eligibility for both the remainder of the current year and into the next plan year unless employers review and make necessary revisions to their group health plans.

In a furlough, active employees are put on a temporary leave, but the employment relationship is not severed. In most situations the leave is unpaid, but it may be partially paid by the employer, or supplemented with other banked leave such as paid time off (PTO). A furlough is distinguishable from a layoff, where the employer terminates the employment relationship, either temporarily or permanently.

Under the Patient Protection and Affordable Care Act (PPACA), an Applicable Large Employer (ALE) with 50 or more full-time or full-time equivalent employees must offer health coverage providing minimum essential coverage to substantially all of its full-time employees. For this purpose, "full time" is defined as an employee averaging 30 or more hours per week or 130 hours per month. An employer must count each hour for which the employee is paid or entitled to payment for the performance of duties for the employer as well as each hour for which an employee is paid or entitled to payment where no duties are performed due to vacation, holiday, illness, incapacity, layoff, jury duty, military leave, or leave of absence (including leave taken under the Families First Coronavirus Response Act). Hours of service do not include hours incurred after an employee has terminated service, or if payment is made solely to comply with workers' compensation, unemployment, or disability insurance laws.

ALEs have two options to determine whether a variable hour employee meets that full time definition: (1) monthly measurement method or (2) look-back measurement method. An individual is full time under the monthly measurement method if their hours of service for a calendar month are equal to or exceed 130 hours. However, the determination under the look-back method is a little more complicated, requiring an employer to monitor and track employee hours over a previously selected 3- to 12-month measurement period. If a variable hour employee averaged 30 hours or more per week during that measurement period, then the employee must be offered benefits for a subsequent 6- to12-month stability period or pay the employer shared responsibility payment penalties. If the variable hour employee did not meet the 30-hour or more per week threshold, they are locked out of coverage for the stability period and will not subject the employer to potential penalties. For ease of administration, most employers use both a 12-month look-back and stability period.

If an employer had a variable hour employee's hours spike during the COVID-19 pandemic due to increased demand, they would be counted as a full-time employee as soon as they meet the 130-hour threshold under the monthly measurement method. Under the look-back method, the variable hour employee would not be eligible for the duration of the stability period, unless they had a change to full-time status (assuming that the employer does not subject full-time employees to the look-back measurement method).

But what about the more common COVID-19 market situation, in which a variable hour employee's hours were reduced, or even eliminated? The law mandates that employers continue to offer coverage to *some* employees on a furlough, layoff, or other leave of absence. Employees subject to a monthly measurement method at the time of a furlough or leave of absence cease to be eligible for active health benefits and shift to COBRA continuation coverage when their hours drop below the minimum 130 (unless on a paid leave or protected leave, in which case the leave may not be counted against the employee in the calculation). Employees subject to a look-back measurement method who are in a stability period continue to be eligible for health coverage during a furlough and employers should maintain their usual contribution subsidy, if any. A failure to do so could subject the employer to penalties under PPACA. In a layoff situation, however, once the employment relationship is severed, the affected employee ceases to be eligible for active coverage and may be transitioned to COBRA.

Now that many retail employers are gearing up for a busy holiday season, they are facing a quandary of how to address returning employees and their eligibility for group health plan benefits under the current year and into the next. How to address this issue depends on three factors: (1) how long the break-in-service lasted; (2) how the plan document is currently drafted; and (3) whether the employer wants to be more generous than the law requires.

If an employee returns to work within 13 consecutive weeks of beginning a furlough, layoff, or leave of absence their eligibility for group health plan benefits depends on whether the employer utilizes the monthly method or the look back method. Under the monthly method, eligibility is determined on a rolling monthly basis and the employee will become eligible for active health benefits as soon as they resume working the minimum hours requirement. However, under the look-back method, if the employee is currently in the stability period, the employer must continue to offer health coverage to the employee as it would for other active employees. If the employee returns in a measurement or administrative period, they will reenter that stage of the process with zero hours credited for the duration of the furlough. If the employee was on a paid or job protected leave of absence such as the Family and Medical Leave Act (FMLA) or Uniformed Services Employment and Reemployment Act (USERRA), the leave cannot be counted against the employee in the look back method.

Generally, if the break in service extends beyond 13 weeks, the employee can be treated as a new hire if the break in service exceeded 13 consecutive weeks without an hour of service, or if the break in service was at least four weeks long and is longer than the employee's period of employment immediately preceding the break. But doing so could mean that variable hour employees who were previously benefits eligible return to work and are now subject to a substantial gap in coverage.

Timeframe	Furlough	Layoff	Leave of Absence
Return to Work before 13 weeks or other Rule of Parity*	**Monthly Measurement Method:** Employee becomes eligible for coverage when they resume working the minimum 130 hours requirement. **Look Back Method:** If employee is in stability period, continue coverage or pay penalties. If employee is in a measurement or administrative period, resume with zero hours credited during the break in service.	**Monthly Measurement Method:** Employee becomes eligible for coverage when they resume working the minimum 130 hours requirement. **Look Back Method:** If employee is in stability period, continue coverage or pay penalties. If employee is in a measurement or administrative period, resume with zero hours credited during the break in service.	**Monthly Measurement Method:** Employee becomes eligible for coverage when they resume working the minimum 130 hours requirement. **Look Back Method:** If employee is in stability period, continue coverage or pay penalties. If employee is in a measurement or administrative period, resume with zero hours credited during the break in service. Protected leaves cannot be counted against the employee.
Return to Work 13 weeks or longer	Treat as a new employee, or if employer wishes to be more generous—amend the plan document.	Treat as a new employee, or if employer wishes to be more generous—amend the plan document.	Treat as a new employee, or if employer wishes to be more generous—amend the plan document.

*Under PPACA, special rules may govern, and longer periods apply to educational agencies.

An employer could certainly be more generous than the law requires, and not count reduced or missed hours against an employee's eligibility criteria, or decide to waive a normally applicable waiting period or permit coverage continuation before attaining the minimum hour requirement.. Before making such changes, the employer should: (1) review ancillary plan administration issues under PPACA, COBRA, FMLA, and tax rules applicable to the employer's group health plan with counsel; and (2) discuss options with any applicable insurance carrier or stop loss provider to ensure that they will permit a change in eligibility. As a final step, the employer should prospectively amend plan documents as necessary. A failure to properly amend plan documents could violate ERISA fiduciary duties—even if the employer is being more generous to employees—so it is critical to carefully review and amend plan documents prior to rolling out any changes.

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