

Extended Coverage

In General

Extended coverage provisions are needed to avoid the unfortunate results of coverage otherwise being abruptly shut-off (layoff, plant shutdown, labor strife, e.g.). Such provisions with self-funded plans address these issues:

1. Employer-Provided Leave
2. Disability of Participant
3. Federally-Mandated
 - a. COBRA
 - b. FMLA
4. State-Mandated.

Employer-Provided Leave

In General

Frequently, an employer wishes to extend coverage to a participant, while such participant is not meeting the actively-at-work requirements as an administrative convenience. The leave is cut short if the participant terminates employment. The leave normally provides that coverage is also extended to the covered dependents. The leave must be a formally approved arrangement evidenced by some written agreement by the employer such as a board, resolution, e.g.

Work Stoppages

A labor strike is a common reason for work stoppage. Some states take the position that a person's employment is not terminated during a strike, on the basis that the term *employment* is broad enough to include the relationship existing while an employee is on strike. However, according to the plan document, stopping work because of strike terminates coverage.

Each employer must exercise its own judgment in determining whether coverage should be continued for participants who are on strike. Some employers may elect to retain only part of their coverages or retain full coverages for a limited period.

Similar logic would apply to temporary layoffs such as retooling.

Disability of Participant

In General

No one single benefit administrative area may be more difficult-or expensive-than extension of coverage for disability.

Several approaches are commonly seen in practice:

- Insured Approach.
- Self-Funded Approach.

Insured Method

A liberal extension period (6-12 months, e.g.) is provided when the participant is unable to work due to disability but only the condition causing disability. This would cover pregnancies. The coverage would be extended even if the participant were a terminated employee (i.e., legally severed from employment). Coverage for dependents and for conditions not causing the disability is not provided.

Self-Funded Method

A less liberal extension period (3 months, e.g.) is provided when a participant is unable to work due to disability. The coverage is for all causes-it includes coverage for dependents-but is conditioned on participant's employment with the employee *not* being terminated. Should the employment be terminated, such coverage would discontinue.

Family And Medical Leave Act

Purposes of the Law

The Family and Medical Leave Act (FMLA) permits employees to balance their work and family life by taking reasonable unpaid leave for certain reasons. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. The FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers, and which minimizes the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

Scope of the Law

FMLA applies to all:

- Public agencies, including state, local and federal employers, and local education agencies (schools).
- Private sector employers who employ 50 or more employees for at least 20 work weeks in the current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce which includes joint employers and successors of covered employers.

Employee Eligibility

To be eligible for FMLA benefits, an employee must:

- Work for a covered employer.
- Have worked for the employer for at least a total of 12 months.
- Have worked at least 1,250 hours over the prior 12 months.
- Work at a location where at least 50 employees are employed by the employer within 75 miles.

Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 workweeks of *unpaid* leave during any 12-month period for one or more of the following reasons:

- For the birth or placement of a child for adoption or foster care.

- To care for an immediate family member (spouse, child, or parent) with a serious health condition.
- To take medical leave when the employee is unable to work because of a serious health condition.

Spouses employed by the same employer and jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (but not a parent *in-law*) who has a serious health condition.

Leave for birth or adoption (including foster care placement) must conclude within 12 months of the birth or placement.

Intermittent Leave. Under some circumstances, employees may take FMLA leave intermittently-which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

Where FMLA leave is for birth or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.

FMLA leave may be taken intermittently whenever it is medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work. If the need for intermittent leave is foreseeable based on planned medical treatment, the employee is responsible for scheduling the treatment in a manner that does not unduly disrupt the employer's operation, subject to the approval of the health care provider.

In such cases, the employer may also transfer the employee temporarily to an alternative job with equivalent pay and benefits that better accommodates recurring periods of leave than the employee's regular job.

Substitution of Paid Leave. Subject to certain conditions, employees *or* employers may choose to use or require the use of accrued paid leave (such as sick or vacation leave) to cover some or all of the otherwise unpaid FMLA leave.

The employer is responsible for designating if paid leave used by an employee counts as FMLA leave, based on information provided by the employee. In no case can an employee's paid leave be credited as FMLA leave after the leave has been completed.

Serious Health Condition. *Serious health condition* means an illness, injury, impairment, or physical or mental condition that involves:

- Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility.
- Any period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider.
- Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care.

Health Care Provider. Health care providers who qualify under the regulations to provide certification of a serious health condition for an employee or an immediate family member include:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices;
- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the state and performing within the scope of their practice under State law.
- Nurse practitioners and nurse-midwives authorized to practice under State law and performing within the scope of their practice as defined under State law.

Notice and Certification

Employees seeking to use FMLA leave may be required to provide:

- Thirty-day advance notice of the need to take FMLA leave when the need is foreseeable.
- Medical certifications supporting the need for leave due to a serious health condition affecting the employee or an immediate family member.
- Second or third medical opinions and periodic recertification, at the employer's expense.
- Periodic reports during FMLA leave on the employee's status and intent to return to work.
- A *fitness-for-duty* certification to return to work.

When leave is needed to care for an immediate family member or the employee's own illness *and* is for planned medical treatment, the employee must attempt to schedule treatment so that it will not unduly disrupt the employer's operation.

Employer Notices. Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

Enforcement

FMLA will be enforced by the Wage and Hour Division of the U.S. Labor Department's Employment Standards Administration. This agency will investigate complaints of violations. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance.

Maintenance of Health Benefits

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken, and on the same terms as if the employee had continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums while on leave. For example, if the group health plans involves payments by the employer and the employee, an employee on FMLA leave must continue making insurance premium payments to maintain insurance coverage, as must the employer. The employee and employer need to work out the method for the employee to pay his or her share of health insurance premiums while on unpaid FMLA leave.

An employer's obligation to maintain health benefits under FMLA will stop if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is used up.

In some instances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

Other Benefits. Certain types of earned benefits, such as seniority, need not continue to accrue during periods of unpaid FMLA leave. For other benefits, such as elected life insurance coverage, the employer and the employee need to make arrangements so that the benefits may be maintained during periods of unpaid FMLA leave. Except for *accrued* or *earned* benefits (such as seniority), the employee must be restored to the same benefits upon return from FMLA leave as if the employee had continued to work the entire FMLA leave cannot result in the loss of any benefit that accrued before the employee's leave began. Accordingly, an FMLA leave period cannot be counted as a break in service for purposes of vesting or eligibility to participate in benefit programs.

Job Restoration

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to *before* using FMLA leave.

Key Employee Exception. Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, the employer may refuse to reinstate certain highly-paid *key* employees after using FMLA leave during which health benefits are maintained.

Miscellaneous Considerations

State Laws

If the employer is subject to such laws, the FMLA does not alter the requirements of state law. Thus, state law, not the FMLA, may dictate on some issues. If an employer has multiple locations, the employer must decide whether to have different policies for states with generous leave laws, or to make the more generous leave law applicable for all locations.

Status of Employees on Leave

Systems must be devoted by the Employer for tracking leave time. Regular contact intervals should be established to determine the likelihood of employees returning to work and time scheduling.

What Compliance Steps Must Employer Take?

Compensation. In some situations, paid leave may be used before or in lieu of unpaid FMLA leave.

Effect on Benefits. The employer must determine what benefits should be continued during the leave period. The law requires employers to establish *written procedures* on how contributions to benefit plans will be collected and paid.

Revised Communications Materials

COBRA forms, summary plan descriptions, employee handbooks, employment and other contracts should be reviewed for accuracy.

Other Laws Which May Be Elected

- State law requirements regarding disability, workers' compensation and leave time.
- Leave requests and medical certifications may also trigger accommodation requirements under the Americans With Disabilities Act.
- COBRA, severance pay and retirement plan eligibility issues engage ERISA requirements.

Confidentiality

Employers should restrict access to all such materials.

COBRA

In General

The Consolidated Omnibus Budget Reconciliation Act of 1986 brought in the group continuation benefits-generally known as COBRA.

COBRA specifies that health care coverage must be offered to the classes of individuals listed below. Continuation of coverage must be offered at a cost of no more than 102% of the rate paid by the employer for active employees (which may include employer contribution and other fees) for the same coverage offered to active employees in the same family situation. These individuals may be offered lesser coverage if they cannot afford the 102% premium. They must be allowed to make monthly payments, and in addition, there must be a grace period of not less than 30 days for each payment.

In addition, COBRA requires the employer to offer continuation coverage to the spouse of a qualifying employee who rejects coverage for himself or herself. The offer to the spouse should be in writing and acceptance or rejection of coverage should also be in writing. This requirement thus goes beyond any exit interview at which the employee might reject continuation of family coverage.

A conversion option must be provided to employees electing COBRA if it is currently offered to active employees.

The total responsibility for compliance falls upon the employer. The employer can contract out of the administration but remains fully liable for all failures to comply with the requirement of the Act. Penalties include loss of the tax deduction for the employer, *heavily compensated* employees may be taxed on the value of the contributions made by the employer on their behalf. Other penalties may also be applied under ERISA.

Qualifying Event

A *Qualifying Event* is, with respect to any *covered employee*, any one of the following events, which would result in the loss of coverage of a *qualified beneficiary* if there were no continuation-coverage rules:

- Death of the covered employee.
- The termination or reduction of hours of the covered employee's employment other than by reason of the employee's gross misconduct.
- Divorce or legal separation of the covered employee from the employee's spouse.

- The covered employee becoming entitled to Medicare benefits.
- A dependent child ceasing to be a dependent child under the generally applicable requirements of the plan.
- A bankruptcy proceeding with respect to the company from whose employment the covered employee retired.

Similarly Situated

One of the requirements of continuation coverage is that the coverage must be identical (as of the time the coverage is being provided) to coverage provided under the plan to similarly situated beneficiaries with respect to whom a qualifying event has not happened. If coverage is modified for any group of similarly situated beneficiaries, the coverage must also be modified in the same manner for all individuals who are qualified beneficiaries.

Similarly situated individuals are those defined by the plan to be similarly situated. Regulations may take into account the type of plan (e.g., high or low option), the type of coverage (single or family), and if appropriate regional differences in health costs. Similarly situated is not intended to mean medically identical. For instance, all employees with heart ailments may not be similarly situated.

Qualified Beneficiary

A *qualified beneficiary* is an individual who is a beneficiary under the group health plan either as the spouse or the dependent child of a covered employee on the day before the covered employee's *qualifying event*.

A *covered employee* is an individual who receives group health coverage by virtue of his performance of services for one or more persons maintaining the plan. Thus, references in the health care continuation rules to company and employee are considered to include persons receiving or performing services and not just those in an employer-employee relationship. A *covered employee*, then, can include an individual by virtue of the performance of services as an independent contractor for a third party or as a partner for his partnership. In addition, a self-employed individual may be a *covered employee*.

A *covered employee* can be a qualified beneficiary if his coverage under the plan ends because of termination or reduction of hours of employment.

A special rule is provided for retirees and surviving spouses in the case of bankruptcies. If the company of a retired covered employee commenced bankruptcy that resulted in a loss of coverage or a substantial elimination of coverage within one year before or after the date of the commencement of the proceeding, the term qualified beneficiary is expanded. The term *qualified beneficiary* includes a covered employee who has retired on or before the date of substantial elimination of coverage and any other individual who, on the day before the qualifying event, is a beneficiary of the plan as the:

- Spouse of the covered employee.

- Dependent child of the employee.
- Surviving spouse of the covered employee.

Coverage Period

One of the requirements of continuation coverage is that the coverage for a qualified beneficiary must begin on the date of the qualifying event and end not earlier than: a statutory maximum period, the end of the plan, the failure to pay a premium, or the eligibility for certain group health plan coverage or Medicare.

- The statutory maximum period for which coverage is required differs depending on the qualifying event, which precedes the continuation coverage.
- For all cases other than bankruptcy and the termination or reduction of the employee's hours, the statutory maximum period of coverage is 36 months after the date of the qualifying event.
- For employment terminations and reduced hours, the maximum period of coverage is 18 months after the date of the qualifying event. This period is 29 months if the qualified beneficiary is disabled at the time of the qualifying event.
- For multiple qualifying events, if a qualifying event (other than bankruptcy) occurs during the 18 months after the date of the termination of employment or reduction of hours, the maximum period of coverage is 36 months after the termination of employment or reduction of hours.
- Continuation coverage must be available for 36 months after a qualifying event that consists of the covered employee becoming entitled to benefits under Medicare. For qualified beneficiaries other than the covered employee, the continuation coverage period extends from the date of the covered employee's Medicare-entitlement (or a later qualifying event) until the close of the 36-month period beginning on the date that the covered employee becomes entitled to Medicare. If there is a qualifying event for which the continuation coverage period is 18 months, and, before this period expires, the covered employee becomes entitled to Medicare, then a qualified beneficiary other than the covered employee is entitled to continuation coverage for 36 months from the date of the original qualifying date, (rather than from the date on which the covered employee became entitled to Medicare).

Notice Requirements

COBRA has notice requirements on the company, the employee and the ERISA plan administrator.

Company's Notice

The company is required to notify the plan administrator of the following qualifying events within 30 days of the date of the qualifying event:

- The death of a covered employee.
- The termination or reduction of hours of a covered employee's employment.
- The covered employee becoming entitled to Medicare.
- A Title 11 bankruptcy with respect to the employer.

Employee's Notice

Each covered employee or qualified beneficiary is responsible for notifying the plan administrator of the occurrence of the divorce or legal separation of the covered employee from the employee's spouse, or a dependent child ceasing to be a dependent child under the applicable plan requirements. The notice must be given to the plan administrator within 60 days after the date of the qualifying event.

Plan Administrator's Notice

The plan administration is required to notify the beneficiary of his rights to continuation coverage (which notice is to include a description of the rules relating to preexisting conditions) in cases of:

- The death of a covered employee.
- The termination or reduction of hours of covered employee's employment.
- The covered employee becoming entitled to Medicare.
- A title 11 bankruptcy proceeding with respect to the company.

The plan administrator is also required to notify the beneficiary of his rights with respect to continuation coverage after the beneficiary notifies the administrator that there has been a divorce or legal separation of the covered employee from the employee's spouse or that a dependent child has ceased to be dependent.