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Employee Benefits During an FMLA Leave

Benefit Comply, LLC

Employee Benefits During an FMLA Leave

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- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
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Agenda

- FMLA Overview
  - Who has to offer?
  - Who is eligible, and when?
  - Notification Requirements
  - Employment Protection
- FMLA and Benefit Eligibility
  - During FMLA Leave
  - During Extended Leave Beyond FMLA
  - FMLA and COBRA
  - FMLA and the ACA
- Paying for Benefits During an FMLA Leave
  - Paid Leave v. Unpaid Leave
  - Section 125 Considerations
  - Health FSA Strategies

FMLA Overview

FMLA Overview

- Employers Subject to FMLA's Requirements
  - Private-sector employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year
  - All public and local educational agencies regardless of number of employees
- Employee Eligibility for Entitlement to FMLA Leave
  - Employee must work at a worksite with 50 employees within a 75-mile radius
  - Employee must have worked for the employer for a total of at least 12 months (not necessarily consecutively)
  - Employee must have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave
- Length of Leave
  - Total of up to 12 weeks in a 12-month period
    - Up to 26 weeks for care of a service member
  - Employer can determine the 12-month period used
  - Medical leaves may be taken intermittently

FMLA Overview

- Reasons for FMLA Leave
  - Family Leave
    - Birth of an employee's child or placement of a son or daughter with the employee for adoption or foster care
      - Leave must be concluded within 12 months of birth or adoption
  - Medical Leave
    - Employee's spouse, child, or parent with a serious health condition
    - Leave for a serious health condition that makes the employee unable to perform their job
  - Extended Military-Related Leave
    - "Qualifying exigency" when an employee's spouse, child, or parent is on active military duty or has been notified of call to active duty
    - To care for a "covered service member" with a serious injury or illness, i.e., a spouse, son, daughter, parent or next of kin of the employee

FMLA Overview

- Intermittent/Reduced Schedule Leave
  - Intermittent leave for Family leave not required
  - Employer must allow for Medical leave
    - Employee serious health condition
    - Intermittent leave for serious health condition of spouse parent or child
      - The leave increments can simply be for the care and support of the family member – does not need to be related to specific medical need
    - Employer may require a medical certification
    - Employee must make a reasonable effort to schedule leave so as not to unduly disrupt the employer's operations
  - Increments of time for reduced schedule leave to count against FMLA
    - Employer can only charge the employee for the actual time used
      - Employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences
      - Time charged cannot be greater than one-hour increments

FMLA Overview

- Serious Health Condition
  - An illness, injury, impairment or physical or mental condition that involves a period of incapacity…
    - Involving inpatient care
    - Requiring absence for three or more days that also involves continuing treatment by a health care provider
      - "Treatment" means two or more visits to a health care provider; or
      - One visit to a health care provider which results in a regimen of continuing treatment
    - Due to pregnancy or prenatal care
  - Serious health condition also includes…
    - A chronic condition requiring multiple visits to a health care provider
    - Permanent or long-term condition and for which there may not be effective treatments
    - Due to the need for multiple treatments under the direction of a health care provider for a condition that would likely result in an absence of three or more days if left untreated

Leave Requirements

- Coordination with Employer Employment Policies
  - Employer may require an employee to use otherwise available paid leave benefits concurrently with FMLA
  - The employee may elect to use paid leave benefits concurrently with FMLA if the employer does not require it
  - Concurrency is only appropriate if the employee qualifies for both FMLA and the company paid leave
- Coordination with Workers' Compensation
  - Most workers compensation claims are for conditions that would also qualify as a "serious health condition" under FMLA
  - Employer should designate time off due to WC as FMLA if serious health condition is involved
  - Medical certification often not necessary since employer has detailed medical information from WC event

Notification Requirements

- Posted Notice
  - Employer must post notice in “conspicuous places on the premises”
- General Notice
- Employer must provide written guidance for employees describing:
    - Basic information on FMLA entitlements and employee obligations
    - Company-specific information related to FMLA
  - Can be included in an employee handbook or other written form
- Employee’s Responsibility
  - Employee is only required to give verbal notice to employer of the need and the reason that leave is required
    - Employee does not need to expressly assert rights under the FMLA
    - Employer may establish process for requesting leave, but… “failure to follow these procedures does not allow employer to deny or delay FMLA benefits”
    - Failure to provide 30-day notice (if the leave is foreseeable) may allow the employer to require that the employee delay leave for up to 30 days

Notice Requirements

- FMLA “Event” Notice
  - Once employer is aware of need for leave it must provide specific notice to employee within a reasonable time
  - Must describe “the specific expectations and obligations of the employee” during FMLA, and the “consequences of a failure to meet those obligations”
  - Must be provided to employee every six months during the course of an FMLA leave (i.e., for reduced schedule or intermittent leave)
  - Employer cannot take action against an employee for failure to comply with FMLA requirements if this notice is not provided
  - If employer fails to properly designate leave as FMLA in writing, the employee enjoys all of the rights and benefits provided by the FMLA, but the employer may not be able to count the time as FMLA leave

Medical Certifications

- Certification of medical condition
  - Employer may require an employee to submit certification from a health care provider to support a requested medical leave
    - Employer must allow at least 15 calendar days from request
      - If employee doesn't produce certificate in time frame required employer may be able to deny or delay continuation of FMLA
      - Employer may contact provider to authenticate and clarify details of a medical certification
  - If certification is inadequate or incomplete
    - Employer must give employee a reasonable opportunity to cure deficiency
    - Second opinions may be required if the employer has reason to doubt the validity of the first certification
      - Employer may choose the health care provider and pay for certification
    - Third opinions may be required if first and second opinions conflict

Employment Protection

- Restoration to Position
  - Employees are entitled to restoration to the same or an equivalent position to that which was held prior to the leave
  - Employees are entitled to equivalent benefits, pay, and other terms and conditions of employment
  - Denial of restoration
    - Employee would have lost job had he/she not been on leave
    - Employee fraudulently obtains leave
    - Employer has uniformly-applied policy prohibiting outside employment and employee works elsewhere during FMLA leave
    - Employee fails to provide fitness-for-duty certificate, if it has been required by the employer

FMLA and Benefit Eligibility

Eligibility During FMLA Leave

- Health Plan Coverage During FMLA Leave
  - Employer must maintain the following group health plans for the duration of FMLA leave under same conditions as if the employee had been continuously employed
    - Medical or health insurance plan
    - Dental plan and vision plans
    - Prescription drug plan
    - Health flexible spending arrangement (HFSA)
    - Employee assistance plan (EAP), if it provides medical care
  - Benefits not subject to FMLA continuation requirement
    - Group term life insurance and AD&D
    - Disability insurance plan
    - Dependent care assistance program (DCAP)
    - Voluntary employee-pay-all plans

Eligibility During FMLA Leave

- Maintenance of Group Health Plan Benefits
  - Employer must pay the same share of the premiums as if the employee had not been on leave
  - The same health plan benefits provided prior to taking FMLA leave must be maintained during the leave
    - If an employer provides a new health plan or changes health benefits while an employee is on FMLA leave, the employee is entitled to the new benefits to the same extent as if the employee were not on leave
    - Any other plan changes (e.g., in coverage, premiums, or deductibles) that apply to all employees of the workforce also apply to employees on FMLA

Eligibility During FMLA Leave

- Maintenance of Group Health Plan Benefits (Cont.)
  - Benefits during intermittent or reduced leave schedule
    - “Intermittent leave” is leave that is “taken in separate blocks of time due to a single qualifying reason”
    - A “reduced leave schedule” is a schedule that reduces, for a period of time, the number of hours an employee is scheduled to work each week or each day
    - If an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must maintain the employee's coverage under a group health plan as if the employee were still working full-time

Eligibility During FMLA Leave

- Maintenance of Group Health Plan Benefits (Cont.)
  - Employer obligation to maintain coverage ceases in certain conditions
    - The employee chooses to drop coverage during the leave
    - The employee fails to pay employee's share of premium due
      - Employer must provide a 30-day grace period for premium payment
      - Employer must give employee a 15-day advanced written notice before terminating coverage
    - The employee doesn't return to work at the end of the leave, or informs the employer that he or she does not intend to return from the leave
  - IMPORTANT NOTE: Any terminated health benefits must be restored upon return from FMLA leave
    - No new waiting period or limitations

Eligibility During FMLA Leave

- Maintenance of Other (Non-Health) Benefits During FMLA Leave
  - Employer polices regarding other types of leave
    - An employee's eligibility for other benefits during an FMLA leave is determined by the employer's established policy for providing benefits to employees on other forms of leave
    - Employer may have different policies that apply to other types of paid vs. unpaid leave
      - Example - benefits provided could vary dramatically during a paid sabbatical vs. those provided during an extended unpaid non-FMLA leave
  - IMPORTANT NOTE: Terminated non-health benefits must be restored upon return from FMLA leave
    - No new waiting period or new limitations

Extended Leave Beyond FMLA

- Extended Leave
  - If the employee remains on leave beyond what is allowed under FMLA, typically the employee will no longer be eligible under terms of the plan
    - COBRA continuation should be offered (more later)
    - §4980H (ACA) requirements should be considered (more later)
  - Potential for extending coverage beyond FMLA
    - State leave laws and worker compensation rules generally cannot require employers to extend benefits due to ERISA preemption
    - Employer plan eligibility rules – leave policies extending benefits
      - Be careful, benefits beyond FMLA could cause issues with claim coverage unless coordinated with the insurance or stop-loss carrier
    - If the Americans with Disabilities Act (ADA) applies, a reasonable accommodation may involve allowing for a reduction in hours or the extension of additional leave (beyond FMLA)
      - Benefits required only if they would be available to any other employee in the same situation (e.g. part-time employees eligible for benefits)

FMLA and COBRA

- Continuation Coverage Under COBRA
  - COBRA Qualifying Event
    - Taking FMLA leave is NOT a COBRA qualifying event even if employee chooses not to continue health coverage during the leave
    - A COBRA event occurs if employee, spouse or dependent child is covered on the day before the first day of the FMLA leave, and the employee does not return to work at the end of the leave
    - COBRA coverage begins as of the last day of the employee's FMLA leave
  - COBRA rules when health coverage is terminated during FMLA leave
    - COBRA still does not begin until end of employee's FMLA leave
    - There may be a "gap " in coverage before the onset of COBRA
  - Employer may not make COBRA contingent on the employee paying premiums due from FMLA leave

FMLA and COBRA

FMLA and the ACA

- Benefits Following the Expiration of FMLA Leave
  - Monthly measurement method
    - Employee is not considered full-time unless the employee averages 30 or more hours of service per week
  - Look-back measurement method
    - If employee earned full-time status in the previous measurement period, the employee is generally considered full-time for the full stability period
    - Employer has two options:
      - Terminate coverage upon a reduction in hours and offer COBRA
        - Considered an offer of coverage under §4980H(a)
        - Could potentially trigger a penalty under §4980H(b) due to unaffordability if the employee enrolls through a public Exchange and qualifies for a tax subsidy
      - Continue coverage through the end of the stability period
        - Not required, but avoids any potential penalty under §4980H((b)

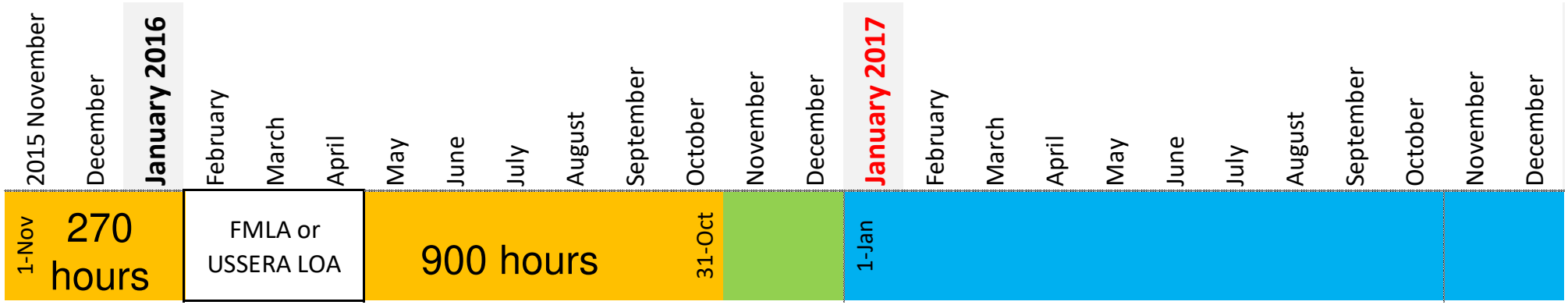
FMLA and the ACA

- ACA Full-Time Employee Definition (Eligibility for Future Benefits)
  - Employers using a look-back measurement period to define full-time status must take unpaid FMLA leave into consideration when determining full-time status
- Averaging service time for special unpaid leaves
  - Prevent periods of special unpaid leave from reducing an employee's hours of service during a measurement period
  - Special unpaid leave is unpaid leave under FMLA, USERRA, or jury duty
  - The employer can treat special unpaid leave in one of two ways:
    - Determine average hours of service by excluding any periods of special unpaid leave during the measurement period and applying that average for the remaining measurement period
    - Impute hours of service during the periods of special unpaid leave at a rate equal to the average weekly hours of service for weeks that are not part of a period of special unpaid leave

FMLA and the ACA

Special Leave of Absence Rule

3 Month Unpaid FMLA or USERRA LOA - No Hours of Service



- 1170 hours over 9 months = 130 hours per month
- Employee considered full time during measurement period

Standard Measurement Period

Stability Period - Eligibility guaranteed regardless of # of hours of service

Administrative Period

Paying for Benefits During FMLA Leave

Permitted Election Changes

- An employer must allow employee going on unpaid FMLA leave one of two options:
  - Revoke or continue health coverage (including health FSA coverage)
  - Require that health coverage continue, but allow the employee to discontinue contributions
    - In this case, the employer would pay the premiums during the leave and recover them when the employee returned
- Return from FMLA leave is an event which allows employer to permit an employee election change
  - In addition, regulations allow an employer to require employee to reinstate benefits upon return from FMLA leave

Paying for Benefits During FMLA Leave

- Premium Payments While on Paid FMLA Leave
  - Paid by method normally used during any paid leave (i.e. vacation or sick leave); typically continue payroll deduction
- Premium Payments While on Unpaid FMLA Leave
  - At the same time premiums would be paid by payroll deduction
  - On the same schedule that premiums would be paid under COBRA
  - In advance pursuant to a cafeteria plan (at the employee's option)
  - According to the employer's existing rules for payment by employees on other leave without pay, however, rules cannot require prepayment
  - Other system voluntarily agreed upon by both employer and employee
- Employer must provide advance written notice of the conditions under which the payments must be made
  - Usually contained in the FMLA specific “event” notice described previously

FMLA and Section 125

- Premium Payment Under a Section 125 Plan During Unpaid FMLA Leave
  - Prepay on a pre-tax basis
    - Employer cannot require prepayment
    - Prepayment can not be pre-tax if leave straddles two plan years
    - Example:
      - Calendar year plan year
      - Leave from November through January
      - Can prepay November and December pre-tax
  - Pay-as-you-go
    - Paid with after-tax dollars if unpaid leave
  - Catch-up on a pre-tax basis
    - Employer and employee agree in advance that pre-tax “catch-up” contributions will be taken out of pay upon return from leave

FMLA and Section 125

- Section 125 Health FSA (HFSA) and FMLA
  - Employee must be allowed to revoke HFSA election when going on FMLA leave (or the employer can require coverage under the FSA to continue during the leave with contributions paused until the employee returns)
    - Employer may require HFSA be reinstated upon return
    - If HFSA is revoked - claims incurred during leave may not be reimbursed
  - Assuming HFSA is revoked - premium payments and coverage upon reinstatement
    - Prorated for the year based on period of coverage paid for by employee

      or
    - Employee makes up missed contributions and full coverage election amount is provided
      - Claims may still not be reimbursed for the time employee was on FMLA and not covered by FSA

FMLA and Section 125

- Example
  - $1200 HFSA election for year ($100/mo.)
  - Employee revokes HFSA election during 3-month unpaid FMLA leave
  - Upon return, employee has two options:
    - Reinstate and continue to pay $100/mo.
      - Maximum plan year benefit available now = $900 ($1200 original election minus $300 for period no contributions were made to plan)
    - Reinstate with additional $300 payroll deduction for balance of plan year to make up for missed contributions
      - Maximum benefit available = $1200
      - Claims incurred during FMLA leave still may not be reimbursed, but full annual election amount is available for claims incurred while actively at work

FMLA and Health FSA

$1200 annual HFSA election
12 Week FMLA Leave

HFSA fully funded for $1200

FMLA begins July 1, 2018– employee revokes election in HFSA

No HFSA for 12 weeks of FMLA during July, August and September

Employee returns from FMLA Leave and reinstates HFSA wanting full $1200 benefit

6 Months HFSA contribution @ $100/mo = $600

No HFSA contributions during FMLA

3 months HFSA contributions @ $200/ mo = $600

No claims incurred during this period can be reimbursed

Benefits During Other Non-FMLA Leaves

- Employer Risk of Offering Benefits During Non-FMLA Leaves
  - Many Employee Absences from Work do Not Qualify for FMLA Protections
    - Employee not eligible for FMLA
    - Other types of leave (e.g. educational leave, sabbaticals, etc.)
    - State required leave with no benefits related requirements
  - Extending Benefits to Employees on Other Types or Leave
    - Employer must consider plan eligibility rules and insurance contract language
    - Extending benefits to ineligible participants could cause insurance carrier (or stop-loss carrier) to deny coverage
    - Making an offer of COBRA coverage when employee loses eligibility due to a non-FMLA absence from work is best strategy to protect employer

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