



The COVID-19 pandemic has brought many challenges to employers across the country as they deal with sudden economic hardship and restrictions on their operations. We've put together some information that relates to benefits issues that we hope answers some of the common questions we are seeing.

Can employees remain on our group health plan if they are furloughed?

- The answer will depend mostly on the terms of the plan document and how eligibility is defined. For example, eligibility under group health plans often depends on the number of weekly or monthly hours worked by an employee. A furlough can cause an employee to become ineligible for benefits, if the employee fails to work the required number of hours.
- In some cases, however, an employer may amend the terms of their group health plan to permit coverage to continue during a furlough. In the case of both insured and self-insured plans, it is imperative that employers coordinate with any third-party insurer or third-party administrator when implementing any amendment. While employers with self-insured plans likely have flexibility to amend any hours-worked requirements, insured plans will need approval from their third-party insurer.
- If the insurer or administrator cannot accommodate such an amendment, employers should avoid the temptation to do a "favor" for employees by allowing them to remain on the group plan after losing eligibility under the plan. If an insurer were to investigate and determine that claims were made by an ineligible employee, the claims could be denied, the policy revoked and/or the insurer could pursue fraud claims.

Can we subsidize the employee premium during the furlough period?

- Yes, employers generally may waive or reduce employee premiums on behalf of furloughed employees who continue coverage under the employer's group health plan. We would need to be mindful of the Internal Revenue Code's cafeteria plan rules, which prohibit certain mid-year changes to elections under a cafeteria plan but include exceptions for significant cost changes and other status change events.
- Absent a complete waiver of employee premiums, there may be no payroll from which to deduct the employee premiums. In this case, employers may continue to require furloughed employees to pay the employee premium by billing the employees directly or recouping the premiums once the furlough period ends. (Keep in mind the paid sick leave requirements of the Families First Coronavirus Response Act (FFCRA), covered in a prior client alert from our firm).

If our group health plan cannot accommodate continued coverage during a furlough, will we be required to offer COBRA to employees who are furloughed?

- Yes, if the group health plan is subject to COBRA (federal or state "mini-COBRA" such as Cal-COBRA), all covered employees (and their covered dependents) who experience both a reduction of hours and a loss of group health plan coverage due to the furlough are entitled to elect COBRA.
- If employees are terminated rather than furloughed, this will trigger a COBRA election.
- If furloughed employees are allowed to continue participation in the group health plan during the furlough period, then no COBRA election is required because there is no loss of coverage for furloughed employees.

- Note that the most recent legislation dealing with the COVID-19 pandemic does not provide for government-funded COBRA subsidies. However, employers may elect to subsidize all or a portion of COBRA premiums on behalf of any terminated employees.

How will COVID-19 affect our 401(k) plan(s)?

The “Coronavirus Aid, Relief, and Economic Security Act” or the “CARES Act” was signed into law on March 27, 2020.

- The CARES Act will allow distributions of a participant’s plan account, up to \$100,000, for expenses related to a COVID-19 diagnosis or for expenses related to being furloughed or quarantined without incurring a 10% income tax penalty. No income tax will be assessed if these amounts are repaid to a plan within 3 years. Alternatively, if participants elect not to repay the distribution, they may spread the income over a 3-year period for income tax purposes. Additional guidance will be required for purposes of reporting these plan distributions.
- The CARES Act will also affect plan loans. For the 180-day period following the enactment of the CARES Act, the maximum amount allowed for a plan loan will double to \$100,000 or 100% of the participant’s account balance, if less than \$100,000. New plan loans will be repayable over a 5-year period. Any payments on existing plan loans will be delayed for a 1-year period. Plan sponsors and administrators must closely monitor their loan repayment schedules in the coming years to ensure that loans are repaid timely. Plan sponsors should consider amending their plans to allow plan loans if loans are not currently offered.
- The CARES Act suspends required minimum distributions (RMDs) from qualified plans and IRAs in 2020. This includes the RMDs for anyone who turned 70.5 in 2019 and who would otherwise be required to take their first RMD by April 15, 2020.

Can we provide our employees tax-free disaster relief assistance payments?

- Yes, the Internal Revenue Code permits certain qualified disaster relief payments to be excluded from the employee’s income and are not subject to employment taxes, and the employer is entitled to a tax deduction for the payment as a business expenses. A “qualified disaster relief payment” is defined as a payment to an individual that is reasonable and necessary to reimburse for personal, family, living or funeral expenses incurred as a result of a qualified disaster. This special rule in the Internal Revenue Code allows for tax free-payments because of the Presidential disaster declaration that was issued on March 13, 2020. Thus, an employer is able to reimburse an employee for medical, housing and other expenses incurred as a result of the pandemic tax-free, which likely includes reasonable expenses incurred to enable the employee to work from home, such as a printer, utility costs, and dependent care expenses.
- The exclusion does not apply to payments that are otherwise compensated for by insurance and cannot be sued to replace wages, salary or business income. There is also not a requirement to adopt a written plan, but it is a best practice to establish a written policy defining the terms under which reimbursement payments will be paid to assist employees impacted by the pandemic tax-free.

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