

BENEFITS, COMPENSATION, AND RETIREMENT PLAN CONSIDERATIONS FOR EMPLOYERS CONTEMPLATING OPERATIONAL CHANGES

A company may be facing the choice to temporarily close or significantly reduce operations due to COVID-19. If this is the case, there are important benefits and compensation-related issues that should be considered.

Plan Eligibility

Review plan eligibility provisions when considering reductions in hours, extended leaves of absence, alternative work arrangements, temporary layoffs, etc. and how these changes impact employee eligibility under the plan. Employers should be careful about changing eligibility rules in response to the COVID-19 epidemic without consulting with carriers, stop-loss insurers, third-party administrators, and legal counsel.

Affordable Care Act Considerations

Consideration should be given to the Patient Protection and Affordable Care Act (ACA) and the consequences an employer may face based upon decisions to reduce employment. Such actions will have an impact on an individual's eligibility for health coverage, and therefore may result in additional ACA requirements under the employer shared responsibility provisions of the law. Analyzing the employee populations affected by reduced operations is important in order to avoid potential penalties under the law. Employers should determine whether impacted employees are in a stability period or considered *full-time* under the ACA. Failure to provide affordable coverage to employees may result in employer shared responsibility issues, and therefore would subject employers to penalties for non-compliance.

Benefit Election Changes

Employees may be eligible to make changes to their health and welfare benefits coverage elections because of a reduction in hours, affecting eligibility or have a loss of other coverage through a spouse's employer—these will be treated as qualified life events.

COBRA Notification

Employers should ensure that employment terminations and other employment status changes that trigger loss of health plan coverage are reported in a timely manner to avoid COBRA compliance issues.

HIPAA and Other Privacy Issues

Employers need to be mindful of the Health Insurance Portability and Accountability Act (HIPAA) and state privacy laws, as they relate to issues concerning the disclosure of protected health information. In general, HIPAA does not apply to employers collecting health information, as long as the information is for plan operations.

In addition, because employers may have employees at locations outside of company headquarters, it is important that state privacy laws also be followed. Employers should work closely with their advisors to ensure compliance.

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Premium Payments

Employees may not have a method to pay their share of benefit plan premiums through payroll deductions. There are several options to prevent termination of coverage for non-payment, including permitting employees to pay via check or establishing a repayment schedule once operations return to normal. Reduced compensation levels may not be adequate to cover all contribution requirements for benefit plans. As such, it may be advisable for employers to consider establishing a prioritization formula to take deductions first for medical/Rx benefits followed by other benefit payroll deductions. Alternatively, it may be preferential to implement premium holidays. Before implementing any of these changes, employers should carefully review the applicable cafeteria plan rules that may come into play.

Benefit Payment Amounts

For benefits tied to compensation, consider the impact of temporary reductions in pay on benefit levels—for example, if a disability benefit is a percentage of pay or a pension plan is a percentage of final average pay.

Also, under disability, employers should be aware that being quarantined and not able to work will not likely qualify as a payable claim, as quarantine alone does not qualify as a medical condition and thus does not meet the definition of disability. However, should a diagnosis be rendered, then one may qualify for disability depending on actual job duties assigned.

Dependent Care

Employees may want to review dependent care spending account elections, if childcare or elder needs change. Employees who participate in a commuter benefit contribution plan may also want to make changes. As such, the cafeteria plan rules should be considered for options and relevance.

401(k) Deferrals

If compensation is still being paid, employers must continue to take 401(k) deferrals from the employee's eligible pay unless employees elect to discontinue contributions. Plans with matching or other employer contributions must continue to fund those contributions, unless the plan is amended to discontinue employer contributions. For example, if a plan contains a safe harbor, there may be some hurdles to overcome to alter this provision in the middle of the year. Alternately, employers should consider whether to send advance notice to their employees that a closure is being contemplated to permit employees to reduce, cease or even maximize their contributions in the short-term. Keep in mind that if those who are involved in administration of payroll and 401(k) funding are on layoff, the assignment of timely contributing 401(k) deferrals must be carried on, to avoid potential DOL penalties.

401(k) Loan Repayments and Hardships

Employers may allow employees who are on layoff or unpaid leave of absence to delay repayment of 401(k) loans for up to 12-months. However, this 12-month period cannot extend beyond the IRS maximum limits for loan repayment. When the employee returns, the loan must be re-amortized or the missed payments and interest repaid in a lump sum. Some plans allow terminated employees to continue paying off plan loans, typically by check. In addition, employees who are on furlough or have reduced hours, and are not yet terminated, may apply for

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hardship distributions. The plan must continue to be administered in accordance with its terms—even if the employer is sympathetic to the situation.

Questions about the compensation rules governing employee furloughs, reduced hours and pay, on-call telecommuting, and related subjects (For more information, review the [U.S. DOL Fact Sheet #70](#))

What if an employer is facing difficulty in meeting payroll and is considering not paying non-exempt employees on a regular basis?

Generally, employers must pay the Fair Labor Standards Act (FLSA) covered employees the full minimum wage and any statutory overtime due on the regularly scheduled payday for the workweek in question. Failure to do so constitutes a violation of the FLSA. If the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, there is some flexibility of meeting this obligation—if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.

What if an employer wishes to reduce the wages or number of hours of an hourly employee?

The FLSA requires that all applicable non-exempt employees receive at least the applicable federal minimum wage for all hours worked. In a week in which employees work overtime, they must receive their regular rates of pay and overtime pay at the applicable statutory rate. As such, an employer can still lower an employee's hourly rate if the rate paid is at least the minimum wage. There is nothing that precludes an employer from reducing the number of hours the employee is scheduled to work.

What about employers who are considering furlough options but may wish to have an employee on call or performing work at home? Is on-call time considered hours worked under the FLSA?

The regulations on this issue are tied to particular facts and circumstances. For example, consider the following:

The employee was engaged to wait—this is work time. For example, a firefighter who plays cards while waiting for an alarm is technically working during such periods of inactivity and is in fact, engaged to wait.

The employee was waiting to be engaged—this is not work time.

Employees who perform part or all of their normal job duties during a furlough day are working while performing such duties.

Impact of sales compensation plans, annual incentive plans, etc.

Due to the economic slowdown, certain incentive targets may no longer be achievable. Revising hurdle rates and other targets should be considered and if deemed practical, changes should be implemented and communicated.

Ultimately, the desire is to retain top talent and as such, be cautious in contemplating prudent measures.

Please contact Elliot for more information or if you wish to discuss.



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