

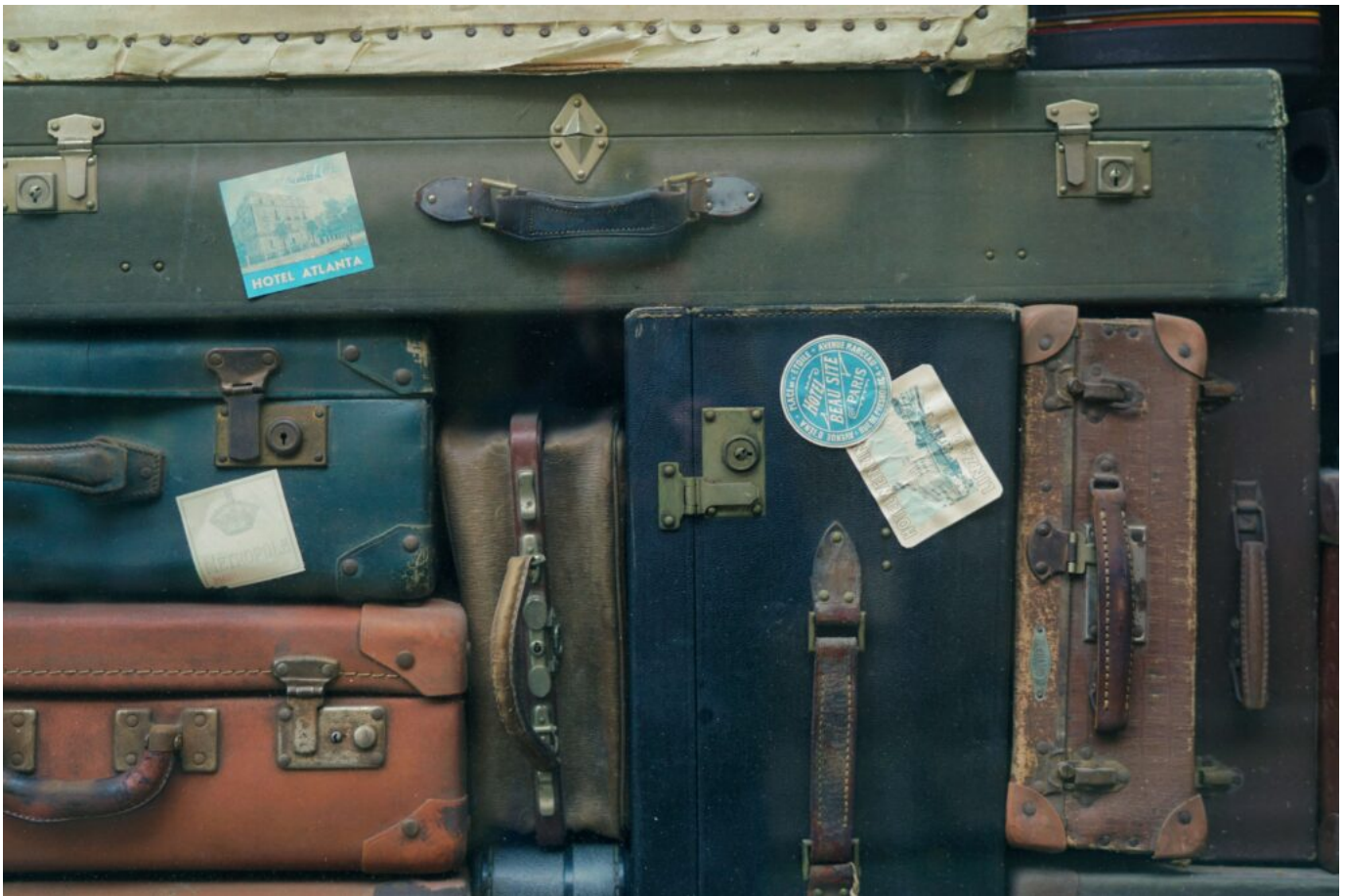
Leave in the Time of COVID-19

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The COVID-19 pandemic is a public health and economic cataclysm, and few employers have been able to escape its impact on their business operations and employees. In their efforts to better manage their workforces during this period of extreme economic instability, many employers are turning to unpaid leaves of absences and furloughs as a way to scale back on costs temporarily while maintaining a connection to employees whose help will be critical to restarting normal business operations (whenever that may be). However, at a time when access to health care and financial support for impacted employees is more important than ever, indefinite unpaid leaves or absence and furloughs can present complex administrative issues for many common employee benefit plans. In the discussion that follows, we highlight some of the more important employee benefits issues to consider when employees are placed on unpaid leaves of absence or furloughs.



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What are the differences between leaves of absence and furloughs?

As a threshold matter, it is important to distinguish between the terms “leave of absence,” “furlough,” “layoff,” and “reduction in force.” From the employee’s perspective, an unpaid leave of absence and an unpaid furlough are functionally identical in the sense that the employee is not actively performing services during the period at issue but is still an “employee.” However, a leave of absence tends to address individualized circumstances that temporarily prevent an employee from performing available work, while a furlough typically extends to a group of employees who are affected by a temporary absence of work. Although many furloughs may resemble a leave of absence, they also may involve a

reduction in hours (e.g., an employee may be furloughed one day per week). Layoffs and reductions in force also are tools that employers can deploy to address changes in their employment needs, but they generally involve an actual termination of employment and trigger additional and different benefit plan responses. In the discussion below, we focus on how unpaid leaves of absence and furloughs may complicate benefit plan participation and we distinguish between these two terms as needed to highlight any unique issues they may present.

Is the leave paid or unpaid?

In the case of paid leaves of absence or furloughs, most payroll withholding functions can continue to operate normally during the leave period. Employee contributions to retirement plans (including repayment of outstanding participant loans), health plans, Section 125/cafeteria plans, and voluntary benefits (e.g., supplemental life or disability insurance, legal assistance, etc.) generally may continue as long as the employment relationship continues and as long as there is pay from which to withhold, subject to the applicable plan/insurance policy terms. In essence, employees on a paid leave of absence or furlough are treated in much the same manner as employees who are actively at work. However, “active employment” requirements in some benefit plans and group insurance policies may limit the time when active coverage can be maintained for employees on a paid leave or furlough.

In the case of an unpaid leave of absence, normal withholding functions clearly cannot continue because employees are not receiving regular paychecks. Instead, employee contributions for benefit plans must be funded outside the usual payroll withholding process. Generally, any premium or other payment due from an absent employee can be made by direct payment by the employee (e.g., payment by check or credit card), advancement by the employer with later repayment upon the return to work, or a combination of the two. For example, a participant with an outstanding participant loan under a 401(k) plan who is furloughed but not discharged generally would be able to continue making loan payments during the furlough period by check or electronic funds transfer. Similarly, a furloughed employee might pay his or her share of the monthly cost of health plan premiums by mailing in a check to the employer.

What effect does an unpaid leave/furlough have on benefit plans?

Below, we have summarized general rules that apply to benefit plans in the unpaid leave/furlough context. Although these general rules are helpful, the terms of the applicable benefit plan and/or insurance policy at issue provide specific information about eligibility and participation requirements during absences from work.

During brief paid leaves of absence, concerns about active employment, minimum hours, and similar requirements may be diminished, but unpaid leaves/furloughs during which no services are performed generally can present more acute participation issues. Where longer unpaid leaves/furloughs are anticipated, modifications to plan documents may be possible (and necessary) to permit continued

coverage, but changes to insurance policies to allow continued coverage may not be viable, particularly for the sort of short-term relief that many employers would seek. Responses by insurance carriers to these situations have been mixed thus far, with most extending the cutoff date for active coverage to accommodate unpaid furloughs.

Note that self-funded health plans still may encounter insurance coverage issues when allowing non-working employees to remain covered on an “active” basis: many self-funded plans rely on stop-loss insurance coverage to protect against the risk of large claims, and extending coverage in ways that increase the stop-loss carrier’s risk may be met with resistance or outright rejection of excess loss claims. However, this is an issue that can be addressed on a negotiated basis *before* proceeding with extended coverage.

- *Retirement/401(k) plans*

An employee on an unpaid furlough clearly would not be able to make new salary deferrals, but, as discussed above, he or she could continue to make periodic loan repayments if applicable by check or electronic funds transfer (although we note that some 401(k) plan documents may delay loan repayments in the unpaid leave/furlough context). Employers will need to be vigilant when monitoring outstanding participant loans to ensure that any delinquencies are addressed promptly. In addition, the expanded availability of participant loans and hardship distributions under the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) likely will create additional administrative work for employers where furloughed employees are involved. Employer matching contribution obligations generally will cease once employee salary deferrals are discontinued, but employer “profit sharing” or nonelective contributions still may be due depending upon the terms of the plan.

In some circumstances, leave of absence hours may be taken into account for purposes of participation, contributions, and/or vesting in retirement plans; however, unpaid leave hours generally are not counted. Upon returning to work from an unpaid leave/furlough, an otherwise-eligible employee generally would be entitled to immediate reenrollment in a retirement plan.

- *Group health plans*

Addressing unpaid leaves/furloughs is relatively straightforward for retirement plans, but group health plans may present more complexities regarding continued eligibility and participation. As an initial matter, employers may want to look at their health plan documents/insurance contracts to determine how unpaid leaves/furloughs will impact eligibility and participation.

Typically, group health plan documents and insurance contracts treat employees on unpaid leave (outside the context of the Family and Medical Leave Act or other benefits-protected leave laws) as ineligible for continued “active” coverage, at least after a lapse of a relatively brief period of time. In that situation, affected employees and their dependents generally become eligible for continuation coverage

under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). However, as discussed below, in many cases, leaves or furloughs will not have an immediate impact on health plan eligibility due to eligibility policies many employers have adopted to comply with the employer mandate applicable under the Affordable Care Act (ACA).

In the COVID-19 context, many employers have expressed a desire to maintain “active” coverage during a leave/furlough period. Although continued coverage is often possible to provide, employers may want to consider reviewing the terms of the applicable health plan documents to confirm how unpaid leaves/furloughs are treated for purposes of eligibility and participation. Where plan amendments are appropriate to permit continued access to health plan coverage or to clarify existing plan eligibility terms, language limiting the coverage extension specifically to COVID-19 related leaves and furlough can be helpful in order to avoid extending coverage to unintended situations. (For example, the continued coverage provisions could be limited to leaves attributable to globally declared pandemics.) In addition, before making amendments to health plan documents, coordination with any group insurers or stop-loss carrier is essential.

Another important consideration to bear in mind regarding health plan eligibility during leave/furlough periods is the impact under the ACA’s employer mandate. During leave or furlough periods, the employment relationship generally remains intact, and any affected employees are therefore still taken into account when applying the employer mandate and its related reporting requirements. Among other things, an unpaid leave or furlough period may eventually lead to a loss of full-time status for affected employees and more immediately, where affected employees are transitioned to COBRA coverage, the associated premium costs may be “unaffordable” for ACA purposes.

Where furloughed employees are transitioned to COBRA coverage, the premiums COBRA permits employers to charge are unlikely to be “affordable” (i.e., less than 9.78 percent of 2020 household income) absent employer subsidies. In addition, the loss of income occasioned by an unpaid leave/furlough is likely to exacerbate affordability issues if the employer relies on the Form W-2 or rate of pay affordability safe harbors under the ACA. To avoid creating a risk of exposure to penalties under the ACA, many employers will choose to maintain coverage at the same (or reduced) premium rates that applied while the affected employees were actively working. Although changes to the cost-sharing approach for health plan premiums may implicate various tax-based nondiscrimination rules designed to limit the provision of preferential benefits to more highly paid employees, when an employer uniformly assumes a greater share of the costs of making coverage available to furloughed employees (the majority of whom are likely to be less highly compensated), these concerns are less likely to have a real-world impact.

As a final note on employer-subsidized COBRA coverage, individuals who lose access to employer-sponsored health coverage generally have a special enrollment period available to purchase individual coverage through one of the ACA’s healthcare exchanges. A COBRA subsidy offered to employees who

terminate employment can create exchange enrollment problems where the employees fail to enroll in individual coverage during the special enrollment period. For example, if the employer subsidizes COBRA premiums for three months and then the employee drops COBRA in month four due to its cost, that employee would have lost his or her special enrollment rights for exchange coverage. The employee would be able to enroll in the next open enrollment period, but might not have access to coverage for several months.

Finally, although not an immediate concern for most employers, unpaid leaves/furloughs may impact the status of affected employees as benefits-eligible in the future. Under the ACA's employer mandate, "full-time" employees (i.e., those working 30 or more hours per week on average) and their dependents generally must be offered qualifying health plan coverage or else the employer risks incurring a potentially-significant tax penalty.

Although paid leaves of absence or furloughs often will be taken into account when determining whether affected employees are considered to be full time, unpaid leave and furloughs generally would not be. Depending upon how long a leave/furlough period lasts, an affected employee who has been classified as full-time and therefore eligible for benefits may lose that status heading into 2021. The ACA does not limit health plan eligibility to full-time employees, and employers may extend eligibility more broadly if they so choose to address COVID-19 leaves or furloughs.

For dental and vision coverage available under group health plans, the general analysis and issues discussed above are relevant. However, because these benefits often are provided via group insurance (and are not subject to the ACA's employer mandate), active employment requirements are more likely to present eligibility implications, particularly for extended leaves and furloughs. Accordingly, it is possible that COBRA rights may be triggered for dental or vision coverage when they are not triggered for medical or prescription drug benefits. The varying COBRA treatments can present administrative complexities to be vetted as part of the employer's overall leave/furlough strategy.

- *Other insured benefits*

Generally, employer-provided group term life and disability insurance requires active employment for continued coverage. Although some policies may include coverage for certain leaves of absence, longer leaves or furloughs relating to COVID-19 are likely to exceed the grace period permitted by most group policies. If a furloughed employee becomes ineligible for continued life or disability insurance coverage due to the unpaid leave/furlough, individual conversion rights may be available to permit the employee to maintain some coverage until a return to work is possible.

Employers tend to be cautious when considering whether to continue to treat an absent employee as eligible for coverage during a leave or furlough. Without express policy terms to rely on or binding guidance from the carrier, an employer that extends coverage informally risks self-insuring the promised death or disability benefits.

- *Voluntary insured benefits*

Voluntary benefits tend to have limited employer involvement beyond payroll withholding, and an unpaid leave/furlough may or may not impact the availability of particular benefits. The governing documents for the benefits at issue can help determine whether any active employment, minimum service, or similar requirement is applicable. If an employee continued to be eligible for these benefits during an unpaid leave/furlough, the employee would need to make arrangements to pay premiums directly to the carrier rather than through the employer's payroll system.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's [Coronavirus \(COVID-19\) Resource Center](#) as additional information becomes available. Critical information for employers is also available via the firm's [webinar programs](#).

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