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EMPLOYEE BENEFITS LAW

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Furloughs and Leaves: Implications Under the Employer Shared Responsibility Requirements of the Affordable Care Act

Following the recent Executive Order issued by Governor Cuomo that all non-essential employers in New York must reduce their workforces by 100% by Sunday at 8:00 p.m., many New York employers are facing difficult personnel decisions regarding how to address the closure of their facilities. Employers outside of New York face similar decisions as a result of state actions to reduce the number of operating businesses to combat the spread of COVID-19 or downturns in business. While many factors are pertinent in any workforce reduction decision, one of the factors for an employer who is considering placing employees on furlough or leave, without a termination of employment, is the impact of the Employer Shared Responsibility (ESR) requirements of the Patient Protection and Affordable Care Act (ACA) on group health plan coverage during the furlough or leave period.

In particular, employers that utilize a "look-back" measurement period to determine full-time employee status should be aware that they may, in certain circumstances, be subject to a penalty under the ESR requirements, if employees placed on furlough or leave (and not terminated) are not offered affordable coverage under the employer's group health plan during the furlough or leave period.

ESR Background

The ESR requirements provide that a large employer (generally defined as an employer with 50 or more full-time equivalent employees, based on employees during the prior year) must offer affordable medical coverage that provides minimum value to the employer's full-time employees each month, or pay a penalty (they also provide for an employer mandate – "play or pay" – that requires an employer to offer minimum essential coverage to at least 95 percent of its full-time employees, or pay a penalty). A full-time employee for this purpose is defined as an employee who averages 30 hours of service per week, or 130 hours of service per month. An employer may determine full-time status by either utilizing a "look-back" measurement period or a monthly measurement period. Annually, employers identify employees who are considered full-time based on the measurement period selected by the employer on IRS reporting forms (IRS Forms 1094-C and 1095-C).

Employers who use the look-back measurement period must establish the measurement period during which hours are counted to determine full-time status. The measurement period is followed by an optional administrative period and then a stability period, during which an employee is considered either full-time (or not full-time) for the entire period, based on whether the employee averaged 30 hours of service per week, or 130 hours of service per month during the prior measurement period. Employers must establish both an initial measurement period for new hires who are not expected to work full-time (e.g. part-time or seasonal employees) as well as an ongoing measurement period to determine full-time status for employees who have completed the initial measurement period.

Often, employers using a look-back measurement period will select a one year period ending prior to open enrollment for the upcoming plan year as the ongoing measurement period (e.g., November 1 - October 31) and the plan year as the associated stability period. For example, a common measurement period is November 1 through October 31, with a stability period of January 1 through December 31. Employees who satisfy the hours requirement will, subject to a limited exception, be considered full-time employees for the entire stability period, as long as they remain employed, regardless of the number of hours worked during the stability period. Accordingly, employees who are furloughed or put on leave will continue to be considered full-time employees for purposes of the ACA during a furlough or leave that occurs during the applicable stability period (usually the plan year), even though they are not actively working.

Medical Coverage During Furlough or Leave Period Is Dictated by Terms of the Plan

If an employer's group health plan is designed so that employees who are considered full-time employees during an ACA stability period continue to be eligible to participate during the entire stability period, regardless of a reduction in hours, health coverage will not terminate as a result of the reduction in hours associated with the furlough or leave period, and such employees will continue to participate in the plan during the stability period in the same manner as prior to the furlough or leave (participation would typically end if the employee is subsequently terminated).

However, if the plan provides that employees who reduce hours in connection with a furlough or leave are no longer eligible for coverage, regardless of whether the employee is in an ACA stability period in which the employee is considered full-time, coverage should be terminated pursuant to the terms of the plan in connection with the reduction of hours and the employee should be offered COBRA.

ESR Penalty May Apply In Cases Where Medical Coverage Is Terminated

If coverage terminates because the employee is no longer eligible pursuant to the terms of the plan, the employer must offer the employee COBRA during the furlough or leave period, unless non-COBRA continued medical benefit coverage is required under law (e.g., under the FMLA).

A COBRA offer likely will not be considered affordable under the ESR requirements, if the employee is required to pay 102 percent of the applicable premium (i.e., the permitted COBRA rate). This could subject the employer to an ESR penalty if the employee (1) declines COBRA coverage, and (2) obtains subsidized coverage on the ACA Marketplace (subsidized coverage is available for those individuals whose family income does not exceed 400 percent of the federal poverty level).

For 2020, the monthly per employee ESR penalty for failing to offer affordable coverage is $321.66. For example, if 100 employees are furloughed and 75 employees elect COBRA coverage and the remaining 25 employees obtain subsidized coverage through the ACA Marketplace for one month, the applicable penalty for the month is $8,041.50 (25 x $321.66). If the employee is subsequently terminated, the penalty will no longer be applicable – it only applies during a period in which the employee is employed and considered a full-time employee.

Because of the number of variables involved, it often will be difficult for an employer to assess whether it will be subject to an ESR penalty. For example, an employee who declines COBRA coverage could be taking the opportunity to enroll in a spouse's plan in lieu of COBRA, in which case no penalty would be applicable. Additionally, even if an employee declines COBRA and enrolls in ACA Marketplace coverage, it is possible the employee may not qualify for a subsidy based on the employee's family income level. Nonetheless, employers utilizing the look-back measurement period should assess the impact of a potential ESR penalty when faced with terminating the group health coverage of full-time employees placed on furlough or leave who are in an ACA stability period.

Bond will continue to monitor COVID-19 legal issues and is hosting weekly webinars to update employers and businesses on the latest federal and state developments. You can register for the complimentary weekly webinar here.

If you have any questions about this memorandum, please contact the attorney at the firm with whom you are regularly in contact or any attorney in our Employee Benefits and Executive Compensation Practice Group.

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