

2024

Benefits During Leaves of Absence

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Leaves of Absence

We have an employee who has exhausted FMLA but remains out on leave? How long can they keep their benefits during the extended leave? At what point should they be COBRAed?

Three Step Analysis



- 1 – Is the leave of absence legally protected?
- 2 – Do plan documents address eligibility during leave?
- 3 – What is employer's policy regarding benefits during leave?

Step 1: Legally Protected - FMLA

■ FMLA

- Employer is subject to FMLA, employee is FMLA eligible, reason for leave qualifies as FMLA leave
- Health plans (medical, dental, vision, Health FSA, HRA, etc.) must be maintained on same terms and conditions as if employee was actively at work during 12-week period of FMLA leave
 - Alternatively, employee can choose to discontinue health coverage during leave
- All other benefits can be terminated (if consistent with other leave policies), but many employers do not
 - Must be restored at end of FMLA leave if cancelled during leave



Step 1: Legally Protected - FMLA

- FMLA (cont.)
 - If employee is being paid through payroll, then take pretax deductions as normal
 - Three options for paying premiums during unpaid leave
 - Prepay (but only with employee consent)
 - Pay as you go
 - Catch up payments
 - Cannot cancel coverage during leave for non-payment of premiums until a) after 30-day grace period; and b) providing the employee 15 days advance written notice that coverage will be cancelled for non-payment



Step 1: Legally Protected - FMLA

- FMLA (cont.)
 - Employee must be offered COBRA at end of 12-week FMLA period if they do not return to work (even if the employee dropped coverage or it was cancelled for non-payment of premiums)
 - Unless leave policy allows for continued coverage during nonFMLA leave (see Step 3).
 - Otherwise coverage must be restored upon return to work with no waiting period



Step 1: Legally Protected - ADA

- ADA
 - An employee who has exhausted their 12 weeks of FMLA leave may be entitled to an extended leave as a reasonable accommodation under the ADA
 - But the ADA does not contain any benefit protections – employer must apply its own leave policy to the ADA portion of the leave (see Step 3)



Step 1: Legally Protected - USERRA



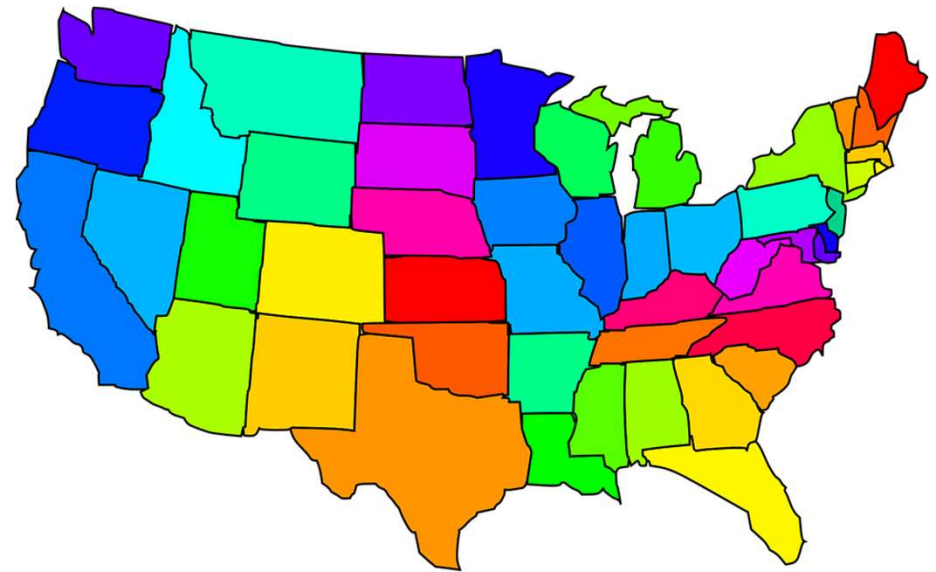
■ USERRA

- Military Leave - National Guard and Reserves training; deployment in active military; boot camp for new recruits, etc.
- If leave is 30 days or less health coverage must be maintained as though the employee was actively employed
- If longer than 31 days employee must be offered continuation on health plans for up to 24 months at 102% of premiums
- All other benefits should follow employer's standard leave of absence policy

Step 1: Legally Protected – State Leave Laws

■ State Leave Laws

- Benefits protection may be included in both unpaid leave laws (e.g., WI) and paid leave laws (e.g., MA)
- Varies significantly by state both in terms of types of leave; whether there is benefits protections; what benefits are protected; how much employee has to pay; etc.
- ERISA pre-emption?



Step 1: State Leave Laws

Unpaid Leave

Analogous to FMLA

- Typically provides job protection and often benefits protection
- Leave is unpaid; any wage replacement comes from vacation / sick / PTO; STD / LTD; or company leave policy, e.g., paid maternity / paternity leave

Sick & Safety Time (SST)

Analogous to vacation / sick / PTO

- Employees accrue a specified amount of paid time off that can be used for illness or injury; family illness; and/or other qualifying reasons, e.g., domestic violence
- Generally limited amount of time off and reasons for leave

Paid Family Leave (PFL)

Analogous to STD & maternity / paternity leave

- Provides for compensation during periods of extended leave
- May or may not provide job and benefit protections
- Some states have separate disability and PFL programs (e.g., CA and NY); other states combine disability and PFL into a single comprehensive program (e.g., CO and WA)

Any given state may have one, two or all three types of leave laws

Step 1: State Leave Laws

Employees are generally subject to the law of the state where they work

Not company HQ

- E.g., Company HQ is in Oklahoma (no state leave law) but has employees who work in CA and WA (state leave laws)
- Employer must comply with CA and WA state leave laws for employees who work in those states

Not where employee resides

- E.g., Employee resides in NJ (state leave law) but works in PA (no state leave law)
- Employee not entitled to leave under NJ law

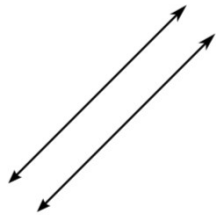
Physical location of work is what counts

- E.g., Employee works from home in CO (state leave law). Employee reports to manager at company HQ in Kansas (no state leave law)
- Employee entitled to leave under CO law

Employees without fixed work locations or who work in multiple states may need to be analyzed individually

Step 1: State Leave Laws

A leave covered by state law may also qualify as leave under federal law, e.g., FMLA



If leave qualifies as both federal and state leave, the leaves will usually run concurrently

- Time off counts against both leave allowances
- Employee receives benefit of most generous law with respect to pay, benefits, job restoration



Not every leave will count as both federal and state leave, e.g.

- Employee eligible for leave under state law but not federal law
- Employee has exhausted leave under federal law but still has leave available under state law
- Reason for leave qualifies under state law but not federal law

Step 1: Legally Protected

- Worker's Compensation
 - Most worker's compensation laws do **not** guarantee a leave of absence or protect benefits during leave
 - But most such laws **do** require the employer treat an employee on leave due to a work-related illness or injury no worse than employee on leave due to a non-work-related illness or injury, including benefit protections
 - Many worker's compensation absences will also qualify as FMLA in which case benefit protection provisions of that law would apply



Step 1: Special Case – Pre-Eligibility Leaves

- Employee out on a leave of absence during benefit plan waiting period and has not returned to work by the date the benefits are supposed to be effective
 - Leave is due to the employee's own serious health condition
 - Major Medical Plan – Under HIPAA nondiscrimination rules, actively-at-work clauses are not enforceable for medical absences; employee must be allowed to enroll as of normal effective date but that can apply employer's non-FMLA leave policy thereafter
 - All other plans – follow the terms of the plan document
 - Leave is for some other reason than the employee's own serious health condition
 - All plans – follow the terms of the plan document

Step 2: Plan Documents

Leaves of Absence in Plan Documents

Some plan documents have specific language addressing how long coverage can be maintained during a leave of absence

Other documents are silent, vague or ambiguous, or defer to the employer to determine eligibility during leave



Be sure to check all plan documents as they may not all say the same thing

Health, dental, vision, HRA, Health FSA documents often silent or vague

Ancillary lines, like life, disability, AD&D, more likely to have specific, often short periods of leave during which coverage can be maintained

Remember to check Wrap Plan Documents



To the extent that the plan document contains specific language regarding coverage during a leave of absence, plan document will control

To the extent the plan documents don't resolve the issue must fall back on employer's own leave policies

Step 2: Plan Documents

Where to look

Leave of absence language may be found in a number of different sections in the plan document

- Eligibility
- When does coverage end?
- Definitions
- Continuation / COBRA
- Leaves of absence

Step 2: Plan Documents

Standard Life Insurance Contract

OTHER PROVISIONS

Limits on Right To Convert if
Group Policy terminates
or is amended:

Minimum Time Insured: 5 years

Maximum Conversion Amount: \$2,000

Suicide Exclusion:

Applies to:

- a. Plan 2 Life Insurance
- b. Dependents Life Insurance on your Spouse
- c. AD&D Insurance

Leave Of Absence Period:

60 days

G. When Life Insurance Ends

Life Insurance ends automatically on the earliest of:

- 4. The date you cease to be a Member. However, if you cease to be a Member because you are working less than the required minimum number of hours, your Life Insurance will be continued with premium payment during the following periods, unless it ends under 1 through 3 above.
- d. During a leave of absence if continuation of your insurance under the Group Policy is required by a state-mandated family or medical leave act or law.
- e. During any other scheduled leave of absence approved by your Employer in advance and in writing and lasting not more than the period shown in the Coverage Features.

UHC Health Plan

Who Is Eligible for Coverage?

The Plan Sponsor determines who is eligible to enroll and who qualifies as a Dependent.

You are eligible to enroll in the Plan if you are a regular full-time Employee who is scheduled to work at least 30 hours per week.

What Events End Your Coverage?

Coverage ends on the earliest of the dates specified below:

- **You Are No Longer Eligible**

Your coverage ends on the last day of the calendar month in which you are no longer eligible to be an Employee or Enrolled Dependent. Please refer to *Section 9: Defined Terms* for definitions of the terms "Eligible Person," "Employee," "Dependent" and "Enrolled Dependent."

Eligible Person - an employee of the Plan Sponsor or other person connected to the Plan Sponsor who meets the eligibility requirements shown in both the Plan Sponsor's Plan and supporting documents. An Eligible Person must live within the United States.

Step 2: Health FSAs & DCAPs

Start of Leave

- FSA/DCAP election continues; OR
- Employee discontinues election during leave

During Leave

- If election continues, how are contributions paid?
- Can employee be reimbursed for claims incurred during leave?

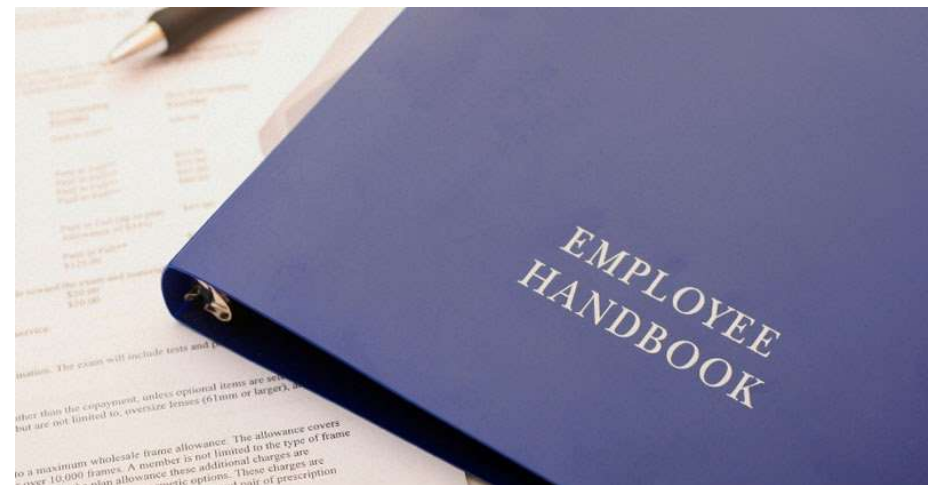
Return from Leave

- Pre-leave election is reinstated; OR
- Employee can make a new election

- Ideally Health FSA / DCAP plan document should address these issues

Step 3: Employer Leave Policies

- If the leave is not legally protected and plan documents are silent or vague, it falls on the employer to set a policy to determine how long coverage can be maintained during a leave of absence
- Key is consistency – once set, same policy should be applied uniformly to all leaves of the same type:
 - Non-FMLA medical and parental leaves; worker's compensation absences not subject to FMLA; STD-related absences
 - Different rules for different types of leaves (e.g., medical leave vs. personal leave) generally OK



Step 3: Employer Leave Policies

Set a definite date when coverage will end

- Do not maintain open-ended policy with no end date
- Keep length of time “reasonable”

Connection to larger leave policy

- How long is an employer prepared to extend leave of absence in a typical situation?
- How does that influence how long employee should be allowed to maintain benefits?

Impact of ACA

- If employer is an ALE, consider impact of lookback measurement rules
- An employee who is ACA full-time will retain that status during the leave and could trigger an ESRP if health coverage is cancelled and COBRAed during the leave

Consider corporate culture, employee relations, and costs

- Are extended periods of protected leave with benefits important to recruiting and retention?
- Does the company take a paternalistic approach to benefits?
- How much will it cost to maintain benefits during an extended period of leave?

Step 3: Employer Leave Policies

Policy should address not only how long an employee can maintain benefits during leave but also paying for those benefits and consequence if employee fails to pay

- Same basic options as FMLA, but now prepayment can be mandatory, and grace period / advance notice of cancellation rules don't apply
 - Prepay
 - Pay-as-you-go
 - Catch up payments

COBRA

- If coverage is cancelled due to loss of eligibility that is a COBRA qualifying event (reduction in hours)
- But if coverage is cancelled for non-payment of premiums that is not a COBRA qualifying event

For non-FMLA leave, employee can be required to re-satisfy the waiting period if coverage is cancelled during leave

- Check the plan documents

Step 3: Employer Leave Policies

When

- Ideally employer should set its policy in advance *before* an employee goes out on an unprotected leave
- If faced with a leave with no established policy, set the policy now *but* then consider whether its reasonable to apply the policy to that employee now, or if you need to provide some advance notice

Where

- Typically documented in the employer's non-FMLA leave policy in the employee handbook
- Wrap document is also often a good option for documenting leave policy
- In some cases, amending individual certificates, SPDs or plan docs may be an option

Step 3: Employer Leave Policies

- No leave policy that addresses benefit continuation during the leave
 - Increased risk of discrimination / retaliation claims
 - Increased costs as ineligible employees allowed to linger on the plan
 - May delay start of COBRA continuation period
 - Carrier / TPA may deny claims for employees allowed to remain on plan during leave
 - Carrier / TPA may not be willing to retroactively undo claims for employees inadvertently left on the plan