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Emerging From the COVID-19 Pandemic: Returning Employees and Benefits Considerations

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During the coronavirus pandemic, businesses were faced with myriad important employment considerations, including the difficult decision of having to furlough or lay off employees. Even those that did not take such actions may have had far more employees requesting a leave of absence than in prior years, especially as a result of the new legislation enacted to address the crisis. The employment changes that occurred as a result of the pandemic have caused employers to focus on employee leave administration. Employers have had to consider a number of legal requirements in connection with those employment changes and continue to grapple with these requirements as they bring employees back to work. In addition, employers must consider the potential impact these employment changes may have on the employer's benefit and compensation programs as they bring employees back, and will need to familiarize themselves with a number of legal requirements as they do so.

As with so many issues surrounding benefit plans, the first inquiry employers must make is: what do the plan documents provide? It is rare

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for a benefit plan to address a furlough, so in most instances employers will need to review their policies regarding leaves of absence to determine what action to take. Employers are bound by the plan terms, and any changes will typically require a plan amendment. The carrier will also need to be consulted for any fully-insured benefits. Depending on the nature of the amendment, participants may have to be notified.

This column addresses some of the key legal considerations employers should keep in mind as they review their plan documents in preparation for bringing employees back from leave or layoffs. In addition, it addresses certain areas of benefits that employers may want to reconsider post-pandemic in order to properly incentivize employees.

Health and Welfare Plans

Benefit Reinstatement and Eligibility

Many employers needed to reduce employees' hours, often to zero, as a result of the pandemic. Most plans require a minimum number of hours for employees to continue receiving benefits, and a significant reduction in hours therefore impacted eligibility for benefits absent plan amendments. Similarly, when employees return to work, they will generally become eligible for benefits again. To the extent an employee was on a leave of absence, whether employer- or employee-initiated, employers will need to review the type of leave taken. Certain protected leaves of absence, such as under the Family Medical Leave Act, have legal requirements regarding benefits during and upon a return from the leave. Employers must be careful that any such requirements are satisfied. Benefits eligibility for employees returning from an unprotected leave of absence will typically be governed by the terms of the plan. To the extent that employers wish to make changes to the plan terms, an amendment will be necessary and employers will also need to coordinate with any applicable carriers.

For rehired employees, employers must pay careful attention to any necessary waiting periods. Depending on the length of time employees were absent, waiting periods may not be applicable. Requirements under the Patient Protection and Affordable Care Act ("ACA") regarding waiting periods are discussed more fully below. In other instances, employers may want to waive certain eligibility requirements, in which case plan amendments may be necessary.

Election Changes

Even if employees are being reinstated, they may be able to make a mid-year election change. Ordinarily, participants in a cafeteria plan must make their elections before the beginning of the plan year and

those elections remain in place throughout the plan year. However, Section 125 of the Internal Revenue Code of 1986, as amended, provides that a cafeteria plan may permit mid-year election changes as a result of changes to employment status, including, crucially, a termination or commencement of employment or a commencement of or return from an unpaid leave of absence.[1] Employees who are returning from a furlough or who are rehired may therefore have an opportunity to make changes to their elections. However, if an employee terminates employment and is rehired within 30 days, it will be treated as if no termination occurred.[2] This requirement is to prevent employers and employees from engaging in sham terminations. While not specifically addressed in the regulations, this 30-day requirement should also apply to an unpaid leave of absence.

Employers who sponsor dependent care flexible spending account programs have the option to allow employees to change their elections due to a significant cost change. This includes a change in care providers. Many employers likely saw requests for changes to dependent care flexible spending accounts during the pandemic. As employees return to work, they will likely want to revisit their elections as child care costs are likely to change.

Employers who elected to adopt changes for 2020 allowed by Internal Revenue Service ("IRS") Notice 2020-29 with respect to permissible cafeteria plan election changes will need to administer those changes throughout 2020. Employers have until December 31, 2021 to adopt any necessary plan amendments. Employers will also need to notify employees of these changes in accordance with their obligations under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Affordable Care Act Considerations

Employers will need to consider how any changes to compensation affect their affordability analysis under the ACA, especially since the rate-of-pay safe harbor cannot be used for salaried employees whose pay was reduced during the year.[3] In addition, if an employee obtained exchange coverage during any period of unemployment, it is possible they may have been eligible for a subsidy, which raises the risks of ACA penalties. Employers will need to carefully document any periods of unemployment or leave and ensure that they are properly reported on annual returns for 2020.

Depending on the length of absence, a terminated and rehired employee may be treated as a new hire or as a returning employee. Generally, under the ACA, a break in service must be longer than 13 weeks in order for an employee to be treated as a new hire. Any break in service less than 13 weeks would be treated as a continuing employee and the employee would not be subject to applicable waiting periods. Even if the breaks in service are longer than 13 weeks, employers may wish to waive waiting periods for rehires, which will likely require a plan amendment.

Safety Screening and HIPAA

A key concern of employers is keeping their workforce healthy as they return to the office. In addition to preventive measures like maintaining social distancing and requiring face masks, many employers are also considering the use of testing to ensure that people in the workforce are healthy. Careful consideration must be given to the privacy considerations of any such testing scheme. In addition to state law privacy concerns, employers may need to consider the application of the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA only applies to covered entities (such as health plans, healthcare providers, and healthcare clearinghouses) and their business associates. In most instances, HIPAA does not apply to employers acting in their capacity as an employer. Thus, as an example, if an employer requires employees (and third parties entering the workplace) to undergo a temperature check, HIPAA would not typically apply if an employee is taking the temperatures. However, instances where a doctor, nurse or nurse practitioner is taking the temperature checks will likely involve HIPAA issues.

Retirement Plans

Eligibility and Vesting

Employers should review their plan's requirements regarding eligibility and vesting to determine the impact of any termination and rehire, leave, or furlough. Employees returning from an unpaid leave, including a furlough, may have lost service credit for purposes of eligibility and vesting. Depending on the facts and circumstances, a plan amendment to credit eligibility or vesting service during an absence may be warranted. Rehires may be treated as a new employee under some plans. In particular, employers will need to review eligibility requirements under any frozen defined benefit plans in order to determine treatment. In most instances, rehires are unlikely to be treated as continuing employees under frozen plans and therefore are no longer eligible to participate, affecting such employees' retirement benefits.

Distributions

Participants in qualified retirement plans, such as 401(k) plans, ordinarily face significant penalties if they take a distribution, including hardship distributions, before reaching age 59 1/2. However, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provided plan sponsors with certain optional opportunities to allow participants greater access to the funds in their retirement accounts. In particular, plans could authorize "coronavirus-related distributions" of

up to $100,000 that were subject to special taxation requirements such as no early withdrawal penalty and deferred income tax payments, an increase in the maximum loan amount to $100,000, and a penalty-free extension on plan loan repayments. Employees are eligible for the enhanced distributions under the CARES Act regardless of whether they are actively at work or not, so employers who adopted the changes will need to continue to administer them even once employees return. For those employees with outstanding plan loans, loan repayments will need to be restarted from payroll once employees are back at work in order to avoid a default. However, before restarted any loan repayments, employers will need to consider whether any loans are eligible for extensions under the CARES Act. Employers will also need to adopt plan amendments for any changes under the CARES Act by the end of 2022 (for calendar year plans).

Other Considerations

Plan sponsors are typically subject to a number of strict timing requirements under ERISA. The U.S. Department of Labor relaxed some of these standards in EBSA Disaster Relief Notice 2020-01. Employers who relied on the relaxed standards for certain ERISA requirements under the notice will also need to ensure that they are now able to meet all ERISA requirements as set forth in the statute without relying on such relief, and correct any documentation issues that may have occurred as a result of the pandemic.

Employers will need to ensure that any changes to compensation are properly reflected for purposes of determining retirement plan contributions, and will also need to restart employee contributions for employees returning from an unpaid leave of absence in a timely manner. Employers should also ensure that they properly credit service that might have been accrued during any period of leave under the terms of their plan, for example, for purposes of satisfying a 1,000 hour requirement to receive profit sharing contributions. Depending on the facts and circumstances, a plan amendment to credit service during a leave of absence may be warranted. In addition, any changes in a returning employee's compensation must be captured for purposes of determining any employer contributions, such as matching or non-elective contributions. Employers should check their plan document to ensure that they are administering the plan in compliance with the plan's definition of compensation for determining the amount of such contributions. Employers should also check their plan document to determine how to treat the prior elections of any returning employees.

Any employers who made changes to their plan design, including changes to employer contributions, in 2020 will also need to make sure that these changes are properly communicated to employees if required by ERISA.

Compensation

Companies will need to determine whether any compensation programs, such as annual bonuses, are impacted by salary changes. For example, many bonuses are based on a percentage of annual compensation. A determination will need to be made whether the bonus will be based on annualized or earned compensation when addressing unpaid leaves. Separately, many companies will have to reset their financial projections for the year following the significant downturn, meaning that incentive awards may now be out of reach. Employers may wish to revisit these targets and determine whether any adjustments are warranted. To the extent the company decides to make changes, revised documentation, such as award agreements and employee communications, will have to be prepared.

In addition to incentive compensation arrangements, companies may want to revisit their employment agreements with employees, in particular with senior employees. Many decisions were made quickly under the circumstances, but employment agreements should be amended, if applicable, to reflect any agreed changes to compensation and/or duties as well as any waivers of good reason triggers. If a returning employee received severance pay, it may be desirable to make amendments to employment contracts or severance policies so that service for which the severance pay was received is not counted again if the employee is subsequently let go.

New Benefit Programs

Now that employees are returning to work, whether in the office or remotely, employers may want to consider new benefit arrangements in order to properly incentivize employees and ensure that their benefit program is meeting employee needs. As an example, the pandemic caused many health plans to rely on telehealth, and plans may want to consider extending these services after the emergency ends. Employers may also want to consider offering employee assistance programs to provide anxiety and stress counseling and offering on-site medical arrangements. In light of the significant hit to many employees' retirement savings as a result of the pandemic, employers may also want to revisit their retirement plans to determine whether any changes could be implemented to better help participants save for retirement, including restarting any suspended employer contributions. Employers should also work with their plan advisers to determine whether any additional participant education programs would be helpful.

Conclusion

The global coronavirus pandemic created unprecedented conditions for employers as they sought to protect their employees and their

business. Companies were faced with new situations and legal quandaries that needed an immediate solution. Leave administration has historically been a thorny area for companies because it presents numerous legal and practical questions. The pandemic pushed those considerations to the fore. As businesses resume operation and bring employees back, they will need to consider the various requirements that arise in the context of employee benefits. Many of the changes will require plan amendments and administrative tweaks. Companies should work closely with their counsel to ensure that they are satisfying applicable legal requirements and are putting themselves in the best position going forward.

Notes

1. Treas. Reg. § 1.125-4(c)(2)(iii).
2. Treas. Reg. § 1.125-4(c)(4) Example 8.
3. Treas. Reg. § 54.4980H-5(e)(2)(iii).