



During the COVID-19 pandemic, some employers would like to pay the entirety of the health plan premium or subsidize COBRA premiums for furloughed employees. What compliance considerations are there to that approach?

If employers want to minimize the disruption of their furloughed employees' health care, employers may choose to supplement the health plan premium in a greater manner or to subsidize COBRA during the furlough period. Ultimately, the employer must consider the plan terms, any qualifying event implications, and COBRA maximum duration periods.

First, the employer will need to consider the plan terms. If employees being furloughed will cause a loss of eligibility under the plan, then the employer should not merely pay a greater portion of the premium. Instead, they should likely terminate the employee's coverage (since they're no longer eligible) and offer COBRA. They could then choose to subsidize the COBRA.

If employees being furloughed will not cause a loss of eligibility under the plan, then COBRA would not be warranted since there would not be a COBRA-triggering event. In this case, the employer could choose to pay a greater portion (or all) of the premium for employees while they are on furlough. The employer would just want to clearly indicate to employees whether or not they intend for the fronted premiums to be paid back by employees upon any future return to work. Amended plan documents and communications might also be necessary to reflect the change in the employee's cost.

One additional consideration for employers that pay a greater portion of the premium is whether this will create a qualifying event for others who waived the plan to choose to enroll now. This could be the case where the employer's plan recognizes the qualifying event based on a significant cost change. If the employer did not want to allow for employees who waived coverage to enroll on the plan because the employer increased its contribution, then they might need to amend their Section 125 plan document to indicate that they do not allow employees who had previously waived coverage to enroll in the plan pursuant to this event. Employers should work with the entity that drafted their Section 125 plan document to communicate their position on any potential qualifying event.

If the employer offers COBRA and chooses to subsidize it, then they should make sure to clearly communicate the offer of COBRA. In other words, they will want to make sure employees know that they have received an offer of COBRA and not a subsidization of active coverage. In furtherance of this goal, they should provide the requisite COBRA notices. They also need to indicate how long the COBRA subsidy will last and that the subsidized COBRA goes towards their COBRA coverage maximum duration period. Further, any severance or separation agreements that are being written to include the COBRA subsidy should be reviewed by the employer's HR professionals or legal counsel to ensure that the agreement is clear that the coverage that is being subsidized is COBRA coverage.

In addition, while employer COBRA subsidies are generally not taxable to the former employee, an employer COBRA subsidy of any non-tax dependent (including most domestic partner) coverage would be taxable. Employers should work with their CPA or tax counsel in determining any potential tax consequences.

As an additional note, many have wondered whether the additional payment of health care plan premiums or COBRA subsidies will cause an employee to become ineligible for unemployment benefits. This will depend on the state's unemployment insurance provisions. However, keep in mind that the vast majority of states do not limit unemployment benefits (or even underemployment benefits) for individuals who have access to health care through COBRA or active coverage.