Employee Benefits During Leaves of Absence

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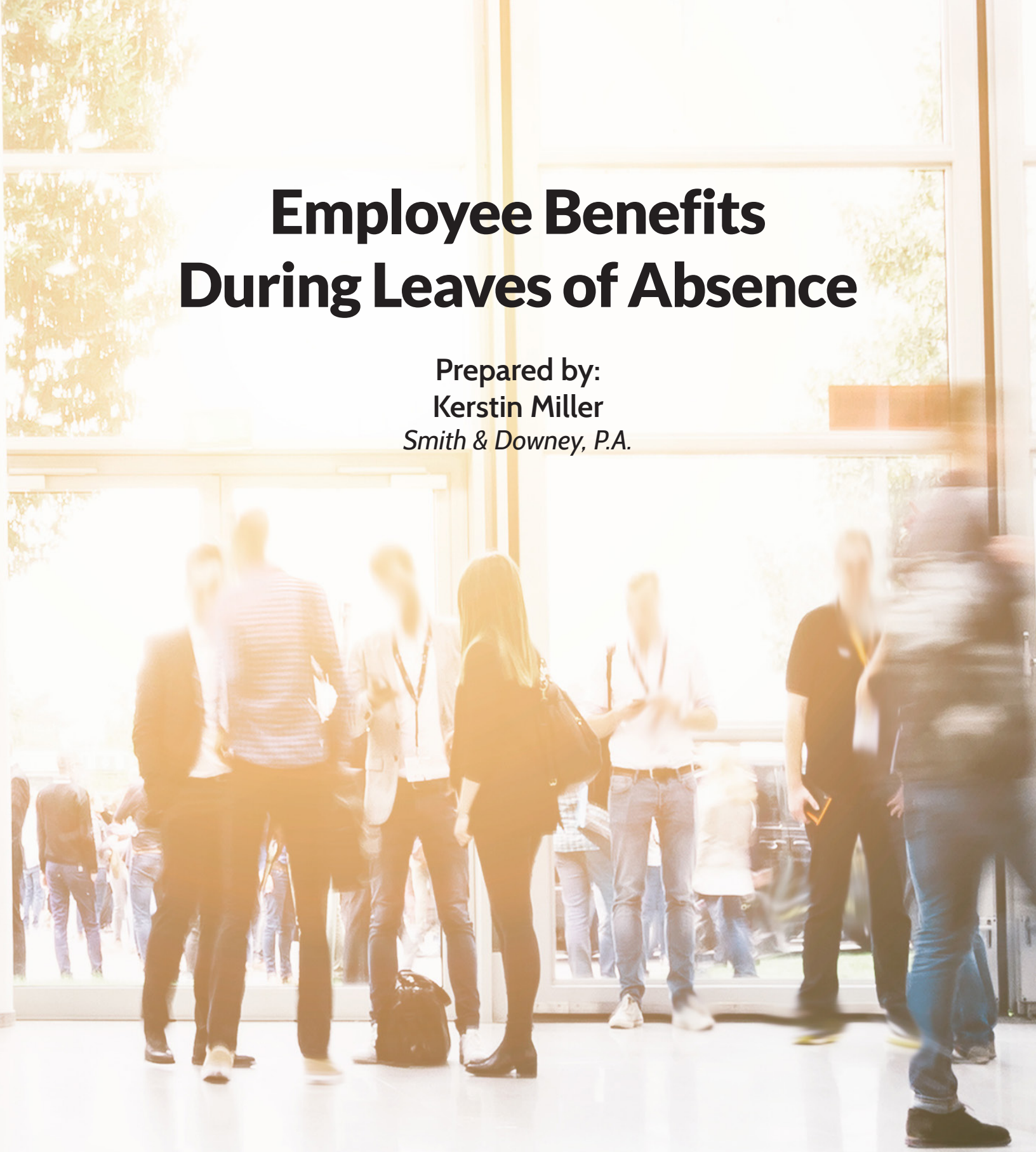

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EMPLOYEE BENEFITS DURING LEAVES OF ABSENCE

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I. INTRODUCTION

It is critical for employers to understand what benefits employees are entitled to receive during leaves of absence. While many employers are aware that the terms of various benefits plans limit benefits to employees who work a certain number of hours, there is confusion regarding when a leave of absence requires the termination of benefits, and when it does not. While this is a complex area of law that is not easily summarized, the following is a general overview of benefits requirements during some of the most common types of leave.[1]

II. BENEFITS DURING FEDERAL LEAVE

A. The FMLA

The Family and Medical Leave Act ("FMLA") requires covered employers[2] to provide covered employees with up to 12 weeks of unpaid leave in any 12 month period for the following reasons: (1) the birth of a child or care for a newborn child; (2) placement of a child for adoption or foster care; (3) need to care for a family member with a serious health condition; (4) the employee's own serious health condition; or (5) any "qualifying exigency" arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or called to covered active duty status. For an employee to be eligible for FMLA, that employee must: (1) have been employed by the employer for at least 12 months (need not be consecutive); (2) have worked at least 1,250 hours during the 12 month period immediately preceding the commencement of the leave; and (3) be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

Other than medical benefits, the FMLA does not require the FMLA period to count for purposes of benefits accrual or seniority. However, employees on FMLA must be treated the same as employees on other types of leave with respect to the accrual of benefits and seniority. For example, if an employee on unpaid sabbatical is allowed to continue earning PTO during the

[1] Please note that this Outline is only a very general discussion of some issues in the law, and is not intended as legal advice for any particular situation.

[2] Covered employers are public agencies, schools (public and private), and other private entities with 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year (including a joint employer or successor in interest to a covered employer).

sabbatical, an employee on unpaid FMLA should also be allowed to continue earning PTO during the FMLA period.

Employers are required to continue "group health benefits" during FMLA except in limited circumstances (e.g., if the employee fails to pay the employee's share of premiums after being properly notified of both the requirement to pay and the failure to pay). The employer must maintain the same health benefits during an employee's FMLA leave of absence as if the employee was still working continuously through the entire period of FMLA leave. If the health plan changes during FMLA, employees on FMLA leave are entitled to new or changed plan/benefits to the same extent as if the employee was not on FMLA.

The following types of benefits may be deemed to be a "group health benefit" that must be maintained during FMLA leave:

- Multi-Employer Health Plan (maintain benefits unless the plan contains an explicit FMLA exclusion)
- Employee Assistance Plan (EAP) (Only if provides medical care)
- Flexible Spending Account (FSA) (health care FSA coverage)

The following types of benefits are generally not deemed to be a "group health benefit" that must be maintained during FMLA leave:

- Employee Assistance Plan (EAP) (referral only)
- Flexible Spending Account (FSA) (dependent care FSA coverage)
- Health Reimbursement Account (HRA)
- Health Savings Account (HSA)
- Life Insurance

While employers are required to maintain group health coverage during FMLA, there are limits. For example, an employer may require an employee to pay the employee's share of premiums during the leave, but it must properly notify the employee of such a requirement on the requisite FMLA form notice. An employer may drop group health coverage if an employee fails to timely pay the employee's share of premiums, and the employer provided written notice at least 15 days before termination of coverage explaining that payment was not received and that coverage will be dropped on a specific date at least 15 days in advance unless payment is received by that date. But even if coverage is properly terminated during FMLA, upon return to work, the benefits must resume in the same manner and at the same levels as if the employee had not taken FMLA. To that end, it is not always in the employer's best interest to drop benefits during FMLA even if it is technically permitted to do so.

Aside from the employee's failure to timely pay premiums, health coverage may also be dropped under the following circumstances: (1) the employee is terminated, and the employment relationship would have terminated even if the employee had not taken FMLA; (2) the employee informs the employer of his or her intent not to return to work; (3) the employee fails to return from FMLA leave; or (4) the employee continues on leave after exhausting his or her FMLA leave entitlement (subject to the terms of the plan).

B. The ADA

The Americans with Disabilities Act ("ADA") does not generally require continuation of health coverage or other benefits if a leave of absence or a reduction in work hours brings the employee outside of coverage under the terms of the plan. However, benefits must be provided if they are available to other employees who have received time off under similar circumstances. For example, if part-time employees who work 20 hours a week are eligible for benefits, then a full-time employee who is working a reduced schedule of 20 hours a week as an ADA accommodation would be entitled to the same benefits.

If employees are not otherwise entitled to continue health benefits during an extended ADA leave of absence, then the absence is likely to be a COBRA qualifying event. It is critical that employers recognize this as a COBRA event and timely provide the employee with the paperwork necessary to elect COBRA.

C. USERRA Military Leave

The Uniformed Service Employment and Reemployment Rights Act ("USERRA") provides job protection for employees who are absent from work due to service in the uniformed services. Upon reinstatement from USERRA leave, employees are entitled to receive all seniority-based benefits that the employee would have received had he or she remained continuously employed during the period of service. Employees are also entitled to receive those benefits provided to persons of similar seniority, status, and pay who are on a comparable leave of absence or furlough.

Employees who are called to active duty must be allowed to continue health care coverage for the lesser of: (1) the 24-month period beginning on the date leave begins or (2) the day after the service member fails to timely apply for reinstatement of employment. If the employee is called to active duty for less than 31 days, coverage must be provided at the regular employee premium rates. If the employee is called to active duty for 31 days or more (up to 24 months), the employer can require payment of no more than 102% of the full premium under the plan, which represents the employer's share plus the employee's share, plus 2% for

administrative costs.[3] USERRA does not specify how an employee must notify the plan administrator that he or she intends to continue health care coverage. Plan administrators may develop requirements addressing how continuing coverage may be elected, consistent with the term of the plan and the USERRA rules.

Like with the FMLA, there are also limited circumstances in which the employer can terminate coverage for non-payment of premiums while an employee is on USERRA leave.

III. BENEFITS DURING STATE LEAVE

A. State and Local Leave

In a growing trend, a number of states and local jurisdictions have enacted laws that require leaves of absence (sometimes paid) that go beyond the requirements of the FMLA, the ADA, and USERRA. For example, a number of states have enacted FMLA-like laws that are more generous than the FMLA (e.g., they cover employers with fewer than 50 employees, cover employees with less than 12 months of service, or provide an expanded definition of "family"). Other states have enacted paid sick leave laws that require the employer to provide a certain quantity of paid leave under certain situations (e.g., to care for the employee's or a family member's illness or preventive medical appointments).

Many of these state and local laws require employers to maintain health benefits for employees while they are on the state- or local-mandated leave. Employers should tread carefully before automatically assuming that such requirements must be followed. Some jurisdictions (for example, the Sixth Circuit Court of Appeals, which has jurisdiction over federal courts in Kentucky, Michigan, Ohio, and Tennessee) have held that ERISA preempts state laws that mandate the payment of benefits contrary to the written terms of an ERISA plan. *See, e.g., Sherfel v. Newson*, 768 F.3d 561 (6th Cir. 2014).

In this area of unique complexity, employers should consult with an attorney to ensure that their policies are both fully compliant with state and local leave requirements and fully compliant with ERISA.

[3] While USERRA benefits are similar to those under COBRA, the USERRA benefit is available even when the employer has fewer than 20 employees and where the health care coverage is being provided through a non-ERISA benefit plan. Employers who are also subject to COBRA must continue to apply COBRA rules in addition to the USERRA rules, as applicable.

B. Workers' Compensation

Many state laws mandate that employers either pay for health insurance during workers' compensation, or compensate for lost health insurance benefits along with lost wages. However, ERISA generally preempts these laws as they relate to plans subject to ERISA. Employers should carefully consider both: (1) whether the law of the applicable state requires the continuation of benefits during workers' compensation leave; (2) whether that law is preempted by ERISA as it relates to relevant employee benefits plans; and (3) if so, whether the workers' compensation leave is a COBRA event.

IV. BENEFITS DURING EMPLOYER-PROVIDED LEAVE

In general, employers must follow the terms of the plan whenever providing benefits to employees who are taking leaves of absence outside of the few specific types of leave where benefits are regulated by statute. For example, if an employee is permitted to take a lengthy sabbatical, the employee may not remain covered under the terms of a group health plan, and the sabbatical leave may become a COBRA-qualifying event. Moreover, employers must ensure that they do not treat employees on general leave better than they treat employees on FMLA and other similar statutorily-mandated leaves.

V. TRENDS AND HOT TOPICS

A. FMLA "Extensions"

Employers should be particularly wary of mistakenly providing health care benefits to employees when they are not covered under the terms of the plan. For example, many employers mistakenly believe that they can grant an employee's request for an "FMLA extension" in which health care benefits are covered. While the law would allow (and may even require!) an employee's leave of absence to be extended as a reasonable accommodation for an employee with a disability, the extended leave is not an FMLA "extension" under the law—it is merely an ADA accommodation. Similarly, if an employer allows an employee who is on FMLA to care for his or her parent with a serious health condition a few extra weeks to return to work after exhausting FMLA, that leave is not an FMLA "extension" under the law—it is merely a new period of absence granted by a generous employer. Accordingly, the FMLA regulations regarding the provision of benefits would not apply to the extended period of leave after the twelve weeks of FMLA is exhausted, and the employer may, depending on the terms of the plan, be required to terminate benefits and provide the employee with notice of a COBRA-qualifying event.

If an employer mistakenly allows an employee to continue to pay premiums for health coverage, at a time when the terms of the plan do not allow for such coverage, the employer could ultimately be held responsible for the payment of the employee's medical bills during that time. *See, e.g., Clarcor, Inc. v. Madison National Life Ins. Co.*, 2011 U.S. Dist. LEXIS 74455 (M.D. Tenn. July 11, 2011) (holding that employer—as opposed to stop loss carrier—was liable for employee's substantial medical costs because employer permitted employee to continue health benefits during short-term disability after exhausting FMLA, even though employee was not covered under the terms of the plan).

B. Non-Discrimination Testing

Not only are there problems that arise from providing benefits to employees who are not actually covered under the terms of the plan, but there are also problems that arise from providing more favorable benefits to highly-compensated employees during leaves of absence, as opposed to the rank-and-file employees. Employers should keep in mind the ERISA rules for non-discrimination testing. If a plan has been found to provide discriminatory benefits during leaves of absence, penalties may be imposed.