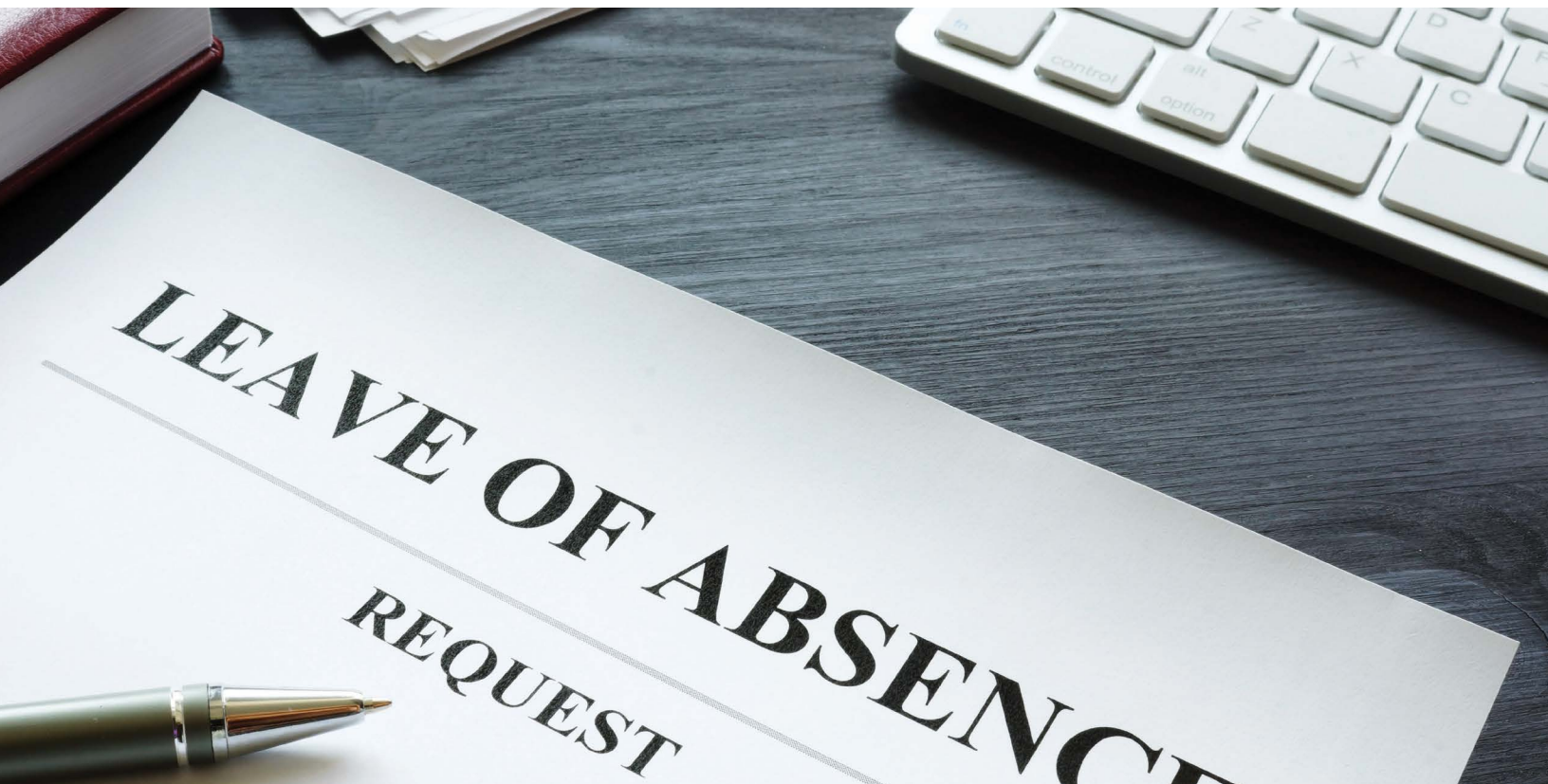


## How Long Should Benefits Be Continued During an Employee's Leave of Absence?

Christy Showalter, JD, MBA

Senior Employee Benefits Compliance Officer | National Specialty Practices



**Question:** One of our employees has been on medical leave for the past four months. Do I have to continue offering our medical insurance benefits or can I go ahead and terminate the medical coverage?

### Summary:

Ideally, the question of how long to continue benefits during an employee's leave of absence (LOA)<sup>1</sup> has been proactively addressed and documented in your benefit plan materials. This answer requires coordination and consideration of the interplay between the insurance carrier's contractual provisions, federal and state benefit regulations as well as your organization's internal policies and precedents.

Before extending benefits to an employee on a LOA, it is critical to review the underlying benefit plan document to confirm whether the employee remains an eligible

participant. What are the eligibility requirements and will the carrier be willing to pay claims incurred while the employee is not actively at work? Are there any federal or state benefit regulations that may impact the extension of coverage, such as the Family and Medical Leave Act (FMLA)? In the event the decision is left to the discretion of the employer, is there a policy or precedent that should be followed to ensure consistency and minimize the risk of discriminatory treatment? Consider these issues and the below analysis as you develop your own policy and answer the question of how long to continue benefits for an employee on leave.

## **Detail:**

There are a number of issues to consider when determining how long to continue benefits for an employee who is not actively at work, such as during a leave of absence (or, said another way, when determining at what point the employee is no longer eligible for benefits such that coverage should be terminated and COBRA offered due to the employee's reduction in hours worked). Unfortunately, there is often not a bright line answer; but, rather, the answer is typically very plan-specific, coming down to how the employer itself has defined eligibility in its benefit plan documents and in its internal policies and procedures (and the answer can even vary by each benefit!).

### ***Carrier Contractual Provisions***

Arguably, the most important consideration in developing a policy addressing continuation of benefits during leave is the determination of how long your insurance or stop-loss carrier has agreed to continue benefits when an employee is either on leave or not actively working enough hours to satisfy the eligibility criteria defined in the plan document. Whether fully-insured or self-funded, you want to be certain that the employee remains eligible under the terms of the contract or plan document before continuing coverage. It is becoming more common for carriers to request documentation relating to an employee's leave, particularly when there has been a large claim. If the carrier determines that the employee was ineligible for continued benefits, the employer could unexpectedly find itself financially responsible for claims incurred during or even after the leave.<sup>2</sup>

Check your plan's eligibility and termination conditions to determine whether your plan document or contract with your insurance (or stop-loss) carrier specifies the maximum period of time coverage can be continued during an approved leave. At what point does an employee fail to meet the eligibility criteria as defined by the plan? Is there a provision extending coverage for an employee on leave? If the plan documents do not specifically address these questions, it is advisable to confirm with the carrier whether a maximum coverage period applies or if it will defer to the employer's internal policy. Keep in mind that periods of coverage may vary from plan to plan (i.e., medical, life, disability) and for each type of leave (i.e., FMLA versus non-FMLA leave, and leave due to the employee's own illness versus leave for other reasons). Work closely with your benefits advisor in negotiating with the carrier to ensure these contractual provisions not only mirror your Human Resources policies and intentions but also comply with the regulatory requirements outlined below to avoid unintentional, but substantial, financial and legal exposure.



### ***Federal and State Leave Regulations***

A related consideration is whether the employee's leave is protected by the FMLA. If yes, then the FMLA generally requires that the employee's health benefits be continued for the duration of the protected leave, up to 12 (or 26) weeks.<sup>3</sup> In addition, state leave laws may require an even longer extension of coverage. For example, California and Tennessee both have regulations requiring that certain employers offer up to four months of leave and continued benefits for absences related to pregnancy disability<sup>4</sup> or to adoption, pregnancy or childbirth.<sup>5</sup> Failure to provide benefits in compliance with these federal and state regulations could result in legal exposure.

Work closely with your benefits advisor to determine if your plan documents provide for continued coverage in compliance with all applicable federal and state leave regulations. You don't want to be in a position where your plan document requires termination of coverage following 12 weeks of FMLA leave, while state law requires four months (or more) of benefits. It is also important to classify and document leaves of absence in a timely manner. Documentation may be important not only to prove compliance with the law's notification requirements but also to explain why coverage was continued while an employee was not actively working full-time hours.

### ***The Affordable Care Act (ACA) and Stability Periods***

Additionally, if you are an Applicable Large Employer (ALE) subject to the ACA's Employer Shared Responsibility mandate, your choice of measurement method (monthly or look-back) to determine your employees' full-time status may be a consideration in how long to continue benefits during a leave of absence. To appreciate the difference in

these two methods, it is important to remember that under the ACA, an employee classified as “full-time” should receive an offer of medical coverage for the applicable period; otherwise, a failure to offer coverage could trigger penalties under Internal Revenue Code (“Code”) Section 4980H. Moreover, the employee should be reported as full-time on your Code Section 6056 reporting (Forms 1094-C/1095-C).

If you are using the *monthly measurement method*, status is determined by *current* hours of service, and employees averaging 30+ hours of service per week in a given month (130+ hours per month) are considered “full-time.”<sup>6</sup> Status and resulting eligibility for coverage can change on a month-by-month basis. Accordingly, an employer has significant discretion in determining how long to continue benefits during leave, as there is a very low risk of penalty in terminating coverage when the employee is not actively working full-time hours.

In contrast, under the *look-back measurement method*, hours of service are averaged during a measurement period to determine an employee’s status during a stability period<sup>7</sup> – with these periods typically ranging from 6 to 12 months. If an employee averages 30+ hours of service per week (130+ hours per month) during the measurement period, the employee is classified as full-time for ACA purposes through the *end* of the stability period, regardless of the number of hours currently being worked during the

stability period. Because these calculations are based on *historical* hours, the employee’s status under the ACA is not immediately impacted by a leave of absence (at least until the subsequent stability period), and the employee should generally continue to receive an offer of coverage through the end of the stability period.<sup>8</sup> Of course, even if the employee is in a stability period, it does not necessarily mean the employee *must* be offered coverage (remember, it’s *pay or play*); however, it does mean the employee is considered full-time under the ACA and must be reported as such on the 1095-C. If coverage is terminated due to a leave of absence or reduction in hours worked and is not offered through the end of the stability period, the employer may be subject to an ACA penalty.

As you can see, if you are using the look-back measurement method, it is important to work closely with your benefits advisor, who can help you weigh the cost of continuing coverage through the stability period against the risk/cost of potential penalties. Particularly if you elect to continue benefits through the end of a stability period, your benefits advisor can help ensure your plan documents have been updated to reflect your practices, including your measurement method and any applicable stability periods; otherwise, the document’s contractual terms and limits on continuation of coverage during a leave could require you to terminate coverage early – before the end of the stability period - potentially resulting in unintended ACA penalties.

### ***Employer Policies and Precedents***

After considering the above issues, what if there is still no clear answer to how long benefits should be continued during a leave of absence? In this case, the decision may be left to the discretion of the employer, and internal policies or prior precedents may be determinative. To minimize risk, it is a best practice to have a policy in place that clearly addresses the maximum length of time an employee may be covered under each benefit policy while on leave before coverage is terminated due to the employee’s inactive status and/or reduction in hours worked. As with most HR practices, consistency is critical, and a clear policy will help ensure employees are treated similarly. In developing this policy, all plan documents (i.e., medical, dental, life, disability, etc.) should be reviewed to ensure that the carriers are willing to continue coverage for the length of time defined in the employer’s policy, and any applicable federal and state benefit regulations, including the ACA, should be taken into account. Until a compliant policy can be adopted and communicated to employees, an employer may need to follow past precedent in determining how long to continue benefit coverage.





## Premium Payments During Leave

If the employee remains eligible for coverage and benefits are continued, employers may still require timely remittance of the employee's share of the premium during the leave. In this situation, the employee should generally remain responsible for the same premium rates as any other eligible employee, meaning the employer should continue to contribute its share of the premiums and not require the employee to pay the full premium for as long as the employee is considered eligible under the policy. It is also a best practice to provide employees with advance written documentation of the payment schedule, including the amount, due date, grace period, to whom payment should be made and the consequences for untimely payment. Employers should provide a minimum 30-day grace period for payments to comply with the Affordable Care Act's (ACA's) requirements for an offer of coverage under the Employer Shared Responsibility (ESR) mandate

as well as the FMLA's provisions for the maintenance of health coverage (which also require 15-day advance written notification before benefits are terminated).

### Payment options often include:

- Deduction from any employer-provided payment (i.e., vacation or sick pay)
- Direct payment on the same schedule as payroll deductions or for COBRA (after-tax)
- Prepayments pursuant to a "cafeteria" plan at the employee's option (pre-tax)
- "Catch-up" payments following the employee's return to work

If payment is not made timely and within the specified grace period, then coverage may be terminated due to nonpayment. Note that nonpayment of premiums is not a COBRA event.

## Conclusion:

The determination of how long to continue an employee's insurance benefits during a leave of absence can be complicated due to the number of considerations that potentially impact the answer. By reviewing the insurance carrier's contractual provisions, federal and state benefit regulations as well as your own policies and precedents, you can confirm when the employee loses eligibility under your plan to minimize potential financial and legal risk and to treat employees fairly and consistently.

## References

- 1 - While this particular Q&A specifically discusses continuation of benefits during an employee's leave of absence, the same considerations apply during any period of inactive status, such as a furlough, layoff or sabbatical.
- 2 - See *Clarcor, Inc. v. Madison National Life Insurance Company, Inc.*, No. 11-6177 (6th Cir. 2012) (unpublished), holding that a stop-loss carrier was not responsible for claims incurred after employer extended coverage to an employee on leave who no longer met the eligibility criteria outlined in the plan document.
- 3 - See 29 C.F.R. § 825.209
- 4 - See Cal. Code Regs., tit. 2, § 11044(c)
- 5 - See T.C.A. § 4-21-408
- 6 - An "hour of service" generally means "each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence" (see 26 C.F.R. § 54.4980H-1(a)(24)). Note this definition includes hours associated with pay for disability benefits (short-term or long-term) from a third-party carrier if the employer pays some or all of the disability premium or if the employee's contributions were made on a pre-tax basis; however, it does not include payment "under a plan maintained solely for the purpose of complying with applicable workmen's compensation, or unemployment compensation or disability insurance laws" (see 29 C.F.R. § 2530.200b-2).
- 7 - Under the look-back measurement method, an "hour of service" includes not only the hours defined in footnote 6 but also special unpaid leave under the FMLA, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) or on account of jury duty (see 26 C.F.R. § 54.4980H-1(a)(44)).
- 8 - It is a best practice to include a description of applicable measurement and stability periods in benefit plan documents to provide a clear definition of eligibility for carriers, administrators and participants.
- 9 - See 26 C.F.R. § 54.4980H-3(g)
- 10 - See 29 C.F.R. § 825.212(a)



McGriff.com

McGriff, its affiliates and representatives do not offer legal, tax or medical advice. Please consult your legal, tax or medical professional regarding your individual circumstances.

© 2022 McGriff Insurance Services, Inc. All rights reserved. McGriff Insurance Services, Inc. is a subsidiary of Truist Insurance Holdings, Inc.

REV\_030922