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CAN I KEEP My Furloughed Employees on My GROUP POLICY during the COVID-19 Pandemic?

In an effort to gently advise WMI policyholders of the dangers of leaving someone on a group health insurance policy after the individual (and/or his or her dependent) no longer qualifies as an eligible insured, I recently sent a memo to all of our insured groups. The memo (which is largely reproduced below) informed employers of the financial, legal, and even criminal risks of defying the insurance policy's eligibility requirements (particularly the "active-at-work" and "legal spouse" requirements), and leaving individuals on the health insurance even though they should be terminated.

I still believe the advice I doled out in my memo is sound; but as fate would have it, no sooner did I disseminate the memo than the world as we knew it changed. As a result of COVID-19, many employers have been forced to temporarily shut down their businesses or furlough employees. This has put many individuals at risk of losing their health insurance coverage, and it has led to many calls from kindhearted (but frantic) employers wanting to continue this valuable benefit for employees and their families during this time of great uncertainty and economic hardship.

Whether an employer can leave employees on the group insurance policy during the COVID-19 pandemic is not a simple question, and there is no one-size-fits-all answer. There are, however, a few important factors to consider: (1) Is the employment action a temporary furlough or a permanent layoff; (2) Is the employee entitled to paid or unpaid leave under the Family and Medical Leave Act ("FMLA") (as expanded under the recently enacted Families First Coronavirus Response Act ("FFCRA")); (3) Is the individual eligible to continue coverage under COBRA or state extension laws; (4) Does the policy or plan document contain language that would allow the employee to continue coverage during the pandemic without violation, and if not, can the plan be amended; and (5) Is the plan fully-insured

by a licensed insurance company, or is it self-funded and sponsored and administered by the employer?

The Nature of the Employment Action: For many people caught in a reduction in force, it doesn't much matter whether their employment inactivity is deemed a furlough or a layoff. The effect is the same: you don't go to work and you don't get paid. However, since furloughs are generally intended to be temporary and layoffs are usually permanent, the nature and classification of the employment action can have important consequences when it comes to continuation of health benefits. It should be noted, however, that it is the nature of the employment action and not the label assigned to it that governs employee status and continued insurance eligibility. Rather than quibble about definitions, I am using the term "furlough" to mean a temporary unpaid leave of absence and the term "layoff" to mean a separation of employment that is intended to be permanent.

The FMLA: This federal law generally applies to employers with 50 or more employees, and it entitles eligible employees to take unpaid leave for certain medical reasons for up to 12 weeks. During the leave, the employee is entitled to continue group health insurance under the same terms and conditions as before the leave, and the employee must continue to make



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normal premium contributions. The FFCRA expanded FMLA leave for specified reasons related to COVID-19 (e.g. coronavirus sickness, quarantine, or the care of a minor child), and extended leave requirements to all private employers regardless of the number of employees.

COBRA: This federal law generally requires employers with 20 or more employees to offer the option of continuing the group health insurance coverage after an event that would otherwise cause them to lose their coverage (e.g. termination, reduction in hours, death of employee spouse or parent, retirement, etc.) Coverage is available for 18 months (36 months in certain situations), and absent an altruistic gesture from the employer, the former plan participant is responsible to pay the premium. If an employee furlough constitutes a qualifying event that results in a loss of insurance eligibility, COBRA might be the easiest way for the employee (and his or her dependents) to continue the group health insurance coverage. Some states have similar “mini-COBRA” laws (i.e., state extension laws) that apply to smaller employers that should be considered when the employer has 19 or fewer employees.

Plan Language and Insurance/Funding Mechanism: Many insurance policies or self-funded plan documents contain language that specifically allows furloughed or absent employees to continue their group coverage for a specified period of time without violating the governing terms and conditions of the coverage. This is the easiest and cleanest way to protect employees from losing coverage during the COVID-19 pandemic, but verification with the insurance company would be wise. Even when coverage is provided through a self-funded plan that is designed and administered by the employer, the plan would be advised to double-check with the stop-loss carrier to ensure reinsurance protection in the event a high-dollar claim triggers a reinsurance claim.

For those of you keeping score at home, here is my March 2020 memo to all WMI employer groups. It has widespread application regardless of the employer, insurance company, or self-funded status, and I hope you find it helpful.

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It has come to our attention that there may be instances where employers are allowing individuals to participate in their group health insurance plan even though the individuals do not satisfy the eligibility requirements of the policy. There are many ways

in which this might occur, but the most common are: (1) allowing an employee to participate in the plan even though he or she does not actively work the required number of hours or otherwise satisfy the employer’s eligibility criteria; (2) allowing an ineligible family member to participate in the plan; (3) allowing a terminated employee to remain on the plan after termination or retirement; (4) allowing an employee’s former spouse to remain on the plan; (5) allowing an employee’s dependent child to remain on the plan after the child no longer qualifies as a dependent; or (6) adding a relative’s child or a grandchild that does not satisfy the criteria of a dependent under the policy.

Federal and state laws are clear that individuals who do not satisfy the eligibility requirements of a group health insurance policy are prohibited from participating in the plan. This is true whether the individual is an employee or a dependent, and regardless of whether the employer is aware of, or otherwise allows, the improper participation to occur. Employers have an obligation to notify WMI when participants lose eligibility, and any person who illegitimately participates in a group health insurance program can be charged with insurance fraud and subjected to criminal and civil penalties. These charges and penalties, along with the possibility of regulatory action by the United States Department of Labor, may also be levied against companies and individuals who knowingly or willingly allow or participate in this conduct.

In addition to the potential criminal and civil liability, it is important for financial reasons that employers maintain the integrity of the insurance policy’s eligibility criteria. Specifically, WMI contracts with licensed reinsurance companies to provide financial protection for claims once they reach a certain dollar amount. When a person’s claims hit the reinsurance retention level, the reinsurer will usually perform a detailed audit to ensure coverage eligibility before they accept liability on the claims. If the reinsurer discovers an individual was ineligible to participate in the plan but was improperly allowed to participate, it is quite possible that the reinsurer will deny the claim and leave the employer (and other involved individuals) responsible to pay the claims.

If ineligible individuals are currently participating in your company’s group health insurance plan, it is imperative that you discuss this matter with your legal counsel and to take appropriate action to immediately rectify this problem.

If you have questions about this article or would like to discuss your company’s health insurance program, feel free to contact me at **(801) 263-8000** or **info@wmimutual.com**.