

How do Work Hour Changes Affect Cafeteria Plan Benefits?

We have received a number of questions concerning how temporary employee furloughs or reductions in hours because of the COVID-19 virus affects Cafeteria plan benefits. Following is a general discussion of the issues raised. Some of the plan provisions may be specific to documents prepared by Advantage Administrators and may not reflect the provisions of documents prepared by other providers. Keep in mind that your plan document is always the final authority for how your particular plan operates.

How you classify your employee (terminated, reduced hours, furloughed, leave of absence or FMLA leave) will determine the options available for that employee.

Definitions Used in this Discussion:

Termination of Employment - The employee is no longer considered to be an employee.

Temporary Lay Off or Furlough - The employer instructs the employee not to come to work for an extended period of time but the individual is still considered to be an employee. The term "Furlough" for this discussion will include temporary lay offs.

Reduction in Hours - The employer temporarily reduces the number of hours worked by the employee.

Non-FMLA Leave - An employee requests, and is granted by the employer, an extended period of time where the employee is excused from service (examples: a sabbatical or to deal with a serious illness).

FMLA Leave - The employer is subject to the Family Medical Leave Act and the reason for the employee's leave is for the illness of the employee or a family member. (NOTE: FMLA generally applies only to employers with more than 50 employees.)

IMPORTANT: If you do not have written policies covering these events, we suggest that policies be put into place and communicated to employees before these issues arise.

WHEN IS AN EMPLOYEE NO LONGER AN ELIGIBLE EMPLOYEE FOR PURPOSES OF PARTICIPATING IN A CAFETERIA PLAN?

Most plans impose eligibility conditions for an employee to be able to receive the tax benefits of the Cafeteria plan. The most common conditions are an hour of service requirement (Example: an employee must be regularly scheduled to work more 20 or more hours per week) or an insurance coverage requirement (Example: an employee must satisfy the eligibility conditions for any of the employer's group medical plans).

These conditions leave a lot of room for interpretation. For example, you will need to set a policy as to whether someone who is temporarily furloughed or who has a temporary reduction in hours is considered to still satisfy the "regularly scheduled" standard.

I. EMPLOYER CONTRIBUTIONS TO A HEALTH SAVINGS ACCOUNT

NOTE: An employee will normally have the right to change their Health Savings Account election at any time for any reason. Contributions to an HSA can only be made if the employee meets the eligibility conditions set forth in the Tax Code (such as the requirement to be covered under a High Deductible Health Insurance Policy and not having any disqualifying coverage).

Termination of Employee's Employment

All employer deposits to the Health Savings Account would immediately cease. Former employees could continue to make tax deductible deposits to their Health Savings Account by personal check if otherwise eligible to make contributions.

Furlough or Reduction in Hours

1) Employee no longer satisfies Cafeteria Plan eligibility requirements.

If an employee no longer satisfies the eligibility requirements to participate in the Cafeteria plan, (for example, because they no longer meet the minimum hour of service requirement) employer pre-tax contributions to the employee's HSA would immediately cease. If the employer chooses to continue making HSA contributions to the furloughed employee's HSA, the deposits must be treated as taxable employee compensation (subject to employment and withholding taxes). The employee can deduct the amount deposited on the employee's individual Form 1040. Employees who are still receiving compensation from the employer can continue to make deposits to their HSA through payroll deduction, but such deposits would be after-tax (subject to employment and withholding taxes).

(2) Employee continues to satisfy Cafeteria Plan eligibility requirements

If an employee continues to satisfy the eligibility requirements to participate in the Cafeteria plan, employer pre-tax contributions to the employee's HSA must continue, even if the employee is no longer providing services to the employer. (NOTE: Employees who are still receiving compensation from the employer can continue to make pre-tax HSA deposits through payroll reduction.)

FMLA or Non-FMLA Leaves of Absence

Whether employer HSA deposits will continue to be made for employees on FMLA or an other approved Leave of Absence will depend on the Employer's policy for providing such deposits while the employee is on an approved Leave of Absence. If the Employer does not have a specific policy covering HSA contributions, the employer should look to its policy regarding the continuation of other non-health benefits (such as group term life insurance) while the employee is on a Leave of Absence.

II.

DEPENDENT CARE

Termination of Employee's Employment

Regular termination rules would apply. For most plans, coverage ends as of the day employment is terminated. The former employee has 60 days to submit valid claims for reimbursement.

Termination of Spouse's Employment

If the employee no longer needs or qualifies for dependent care benefits because the spouse is no longer employed, the employee can change their dependent care election to reduce or eliminate the benefit amount. The employee must change their election within 30 days of the termination of the spouse's employment to be a valid election change.

Furlough of Employee or Spouse, FMLA or Non-FMLA Leave

If the employee or the employee's spouse is put on furlough, leave of absence, FMLA leave or a similar temporary cessation of employment and no longer needs or qualifies for dependent care benefits, the employee can change their dependent care election to reduce or eliminate the benefit amount as long as the election change is submitted within 30 days of the date that the furlough or leave of absence begins.

III.

HEALTH FLEXIBLE SPENDING ACCOUNTS

Termination of Employee's Employment

Regular termination rules apply. If an employer is not subject to COBRA (or if the employer is subject to COBRA but the terminated employee does not elect COBRA) most plans terminate coverage as of the employee's employment termination date. The employee will typically have 60 days from their employment termination date to submit valid claims.

Spouse Terminates employment, is placed on furlough or FMLA or Non-FMLA Leave

The employee can change their Health FSA election as long as the change is consistent with the event justifying the change. For example, if the spouse had elected Health FSA benefits through the spouse's employer and will now no longer be eligible for those benefits, electing (or increasing the election) for the employee's Health FSA would be consistent with that event. Decreasing the employee's Health FSA election would not be consistent with the event. In general, election changes must be made within 30 days of the event to be valid.

Furlough of Employee

1) Employee no longer satisfies Cafeteria Plan eligibility requirements.

If an employee no longer satisfies the eligibility conditions for participation in the Cafeteria plan, (for example, because they no longer meet the minimum hour of service requirement) the employee would be treated as if they had terminated service. If an employer is not subject to COBRA (or if the employer is subject to COBRA but the terminated employee does not elect COBRA) most plans terminate coverage as of the date that the employee no longer satisfies the eligibility conditions for participation in the Cafeteria Plan. The employee will typically have 60 days from that date to submit valid claims.

(2) Employee continues to satisfy Cafeteria Plan eligibility requirements

If an employee continues to satisfy the eligibility requirements to participate in the Cafeteria plan, the employee continues to be eligible to submit claims during the furlough. If the employee does not receive compensation (or if the compensation paid to the employee is not enough to pay the required contribution amount), the employer can require the employee to pay the excess amount with:

- a) pre-tax pre-payments prior to the start of the furlough. Must be limited to benefits that will be received during that plan year.
- b) after-tax dollars remitted to the employer during the furlough
- c) pre-tax dollars deducted after the employee's return.

The employee may change their Health FSA election if an event occurs that would otherwise permit a change in election (such as a change in family status).

FMLA Leaves of Absence

1. Paid Leave where employees are required to continue coverage.

An employer may require participants to continue Health FSA Benefits while they are on paid leave. If so, the employee contributions are normally paid by pre-tax salary reductions.

2. Unpaid Leave or Leave where employees are not required to continue coverage.

In the event of unpaid FMLA leave (or paid FMLA leave where coverage is not required to be continued), an employee may elect to continue or discontinue their Health FSA benefit during the leave. If the Participant elects to continue Health FSA benefits while on FMLA leave, then the employee may elect to pay his or her share of the Contributions in one of the following ways:

- with after-tax dollars, by sending monthly payments to the Employer by the due date established by the Employer;
- with pre-tax dollars, by having such amounts withheld from the employee's ongoing compensation (if any), including unused sick days and vacation days, or pre-paying all or a portion of the contributions for the expected duration of the leave by pre-tax salary reductions out of pre-leave compensation (which is permitted only for FMLA leaves) [To pre-pay the contributions, the employee must make a special election to that effect prior to the date that such compensation would normally be made available. Only benefits to be received during the current plan year may be pre-paid.]; or
- under any other arrangement agreed upon between the employee and the Employer (e.g., "catch-up" amounts withheld pre-tax from the employee's compensation upon the Participant's return).

If the employer requires all employees to continue coverage during unpaid FMLA leave, the employee may elect to defer payment of the required contributions until the employee returns from leave.

Non-FMLA Leaves of Absence that affect eligibility

The employee can change their Health FSA election as long as the new election is made within 30 days of the beginning of the leave of absence.

If the employee does not change their Health FSA election (elects to continue to receive Health FSA benefits), the employer can require the employee to pay the excess amount with:

- a) pre-tax or after-tax pre-payment before going on leave (pre-tax pre-payment is available only for benefits provided during the current plan year)
- b) after-tax dollars remitted to the employer during the furlough
- c) pre-tax dollars deducted after the employee's return.

Non-FMLA Leaves of Absence that do not affect eligibility

If an employee continues to satisfy the eligibility requirements to participate in the Cafeteria plan (and no event occurs that would otherwise permit a change in election), the employee continues to be eligible to submit claims during the non-FMLA leave of absence. If the employee does not receive compensation (or if the compensation paid to the employee is not enough to pay the required contribution amount), the employer can require the employee to pay the excess amount with:

- a) pre-tax or after-tax pre-payment before going on leave (pre-tax pre-payment is available only for benefits provided during the current plan year)
- b) after-tax dollars remitted to the employer during the furlough
- c) pre-tax dollars deducted after the employee's return.

IV. REHIRES OR RESUMPTION OF EMPLOYMENT

Resumption of Active Employment After a Furlough or Within 30 Days of Termination of Employment.

An employee who was terminated from employment and rehired within 30 days, or an employee who was terminated from the Plan because they no longer satisfied the eligibility conditions (example: No longer met the minimum hour of service requirement) while on furlough (even if the furlough lasted more than 30 days), will immediately be reinstated in the plan with the same elections as prior to the termination.

Rehire of Terminated Employee More than 30 Days After Termination.

An employee who is re-employed more than 30 days after termination will be treated as a new employee and must satisfy plan waiting periods before becoming eligible to participate.

Resumption of Employment After FMLA or Non-FMLA Leave Causes Termination of Benefits.

If employment is resumed within 30 days after the beginning of the leave, the employee will immediately be reinstated in the plan with the same elections as prior to the termination. If employment is resumed more than 30 days after the beginning of the leave, the employee will be treated as a new employee, subject to special re-enrollment rights for employees on FMLA leave.