



# BENEFIT *Advisor*

## In This Issue

*In this first issue of the McGrawWentworth Benefit Advisor for 2012, we examine the impact of how benefit coverage is handled for leaves of absence and severance situations. Employers can create significant liability if they commit to coverage extensions without carrier approval.*

*For the new year, it may make sense to review your leave of absence or severance policies to make sure you are not committing to coverage when the carrier may not be obligated to accept liability.*

*We welcome your comments and suggestions regarding this issue of our technical bulletin. For more information on this Benefit Advisor, please contact your Account Manager or visit the McGrawWentworth web site at [www.mcgrawwentworth.com](http://www.mcgrawwentworth.com).*

## “Leaves, Severance and Health Coverage”

Almost all employers allow employees to take leaves of absence. Some are mandated by law, such as FMLA leaves. Others may be permitted by an organization’s internal policy, such as personal leaves. All employers should formulate a comprehensive leave of absence policy that addresses specific leave situations and how benefits are handled during those various leaves.



Leave policies that allow for health coverage continuation must be reasonable. It is critically important that employers communicate their leave policies to their insurance carriers and stop loss vendors. Although insurance and stop loss carriers must allow coverage to continue as required by COBRA, they may not want to accept the risk for any additional coverage during a leave not mandated under federal or state law. If an employer allows for an extended period of coverage, but the carrier is unwilling to cover the individual during that time, then the employer could become liable for any medical expenses incurred during that extension.

Employers often face the same situation with severance agreements. Any time covered beyond the normal COBRA continuation period should be

approved in advance by your carriers. This is important even if your plan is self-funded. If your stop loss carrier refuses to acknowledge the entire coverage period allotted by a severance agreement, then your organization may be liable for any stop

loss claims incurred by the individual during the extended coverage period.

Employers should occasionally examine their leave and severance

policies. In particular, the assurances made to continue coverage during those leaves should be reviewed to ensure that these commitments will be honored by your carriers.

This *Advisor* will discuss specific leaves and severance situations and the concerns about continuing coverage:

- FMLA Leaves
- USERRA Leaves
- Workers Compensation Absences
- Personal Leaves or Sabbaticals
- Severance Agreements

Leave of absence policies will often address sick time and other short-term leaves, such as jury duty or bereavement leave. Due to their brevity, these situations do not necessarily cause concern for benefits. Thus, this *Advisor* is focused on longer-term leave situations, where there is a potential liability for committing to benefit coverage that a carrier may not agree to extend.

### FMLA Leaves

FMLA applies to employers with 50 or more employees within a 75-mile radius. If any location has fewer than 50 people employed within a 75-mile radius, FMLA does not apply to that location.

FMLA requires employers both to protect the employee's job and to extend health benefits during an approved FMLA leave. However, employers can



require employees to pay the same contributions as active employees in order to continue health coverage during the leave.

FMLA leave is permitted only to eligible employees in specific situations:

- For an employee's own serious health condition.
- For the serious health condition of an immediate family member, including a dependent child, spouse or parent. Leave must be taken for the employee to provide care for the family member.
- For the birth or adoption of the employee's child.

- For any "qualifying exigency" caused by the active military duty or a call to active duty status of the employee's spouse, child or parent.
- To care for a covered service member with a serious illness or injury. The service member must be the employee's spouse, child, parent or next of kin.

Leave is permitted for up to 12 weeks if requested due to a serious health condition, or for parental bonding time following the birth or adoption of a child. If the reason is a qualifying exigency related to military duty, 12 weeks is also permitted. However, for military caregiver leave, a total of 26 weeks is allowed.

Please note that an eligible employee is limited to no more than a total of 26 weeks of leave for any FMLA-qualifying reason during a single 12-month period, as determined by the employer. But unless an employee needs to care for a covered service member, he or she is limited to a combined 12 weeks for all other qualifying reasons during the 12-month period.

Depending on the circumstances, FMLA leave may be taken on an intermittent basis.

More details on FMLA can be found in our *Benefit Advisor* and *Special Alert* at [http://www.mcwent.com/Benefit\\_Advisor/2009/BA\\_Issue\\_1.pdf](http://www.mcwent.com/Benefit_Advisor/2009/BA_Issue_1.pdf) and [http://www.mcgrawwentworth.com/Special\\_Alert/2009/Special\\_Alert\\_Issue\\_9.pdf](http://www.mcgrawwentworth.com/Special_Alert/2009/Special_Alert_Issue_9.pdf).

From a health plan standpoint, carriers recognize the need to extend coverage during an FMLA leave. Coverage needs to be continued only if the employee and any eligible dependents are covered on the day prior to the beginning of the employee's FMLA leave. Employees can choose whether or not to maintain coverage during the FMLA leave.

If an employee chooses not to continue coverage, it must be reinstated when the employee returns to active work at the end of an FMLA-approved leave. COBRA should be offered if an employee fails to return from an FMLA leave, and the qualifying event date is the day an employee fails to return from the leave. COBRA is extended from that date for the initial 18-month continuation period. This is one of the few situations where there can be a gap between active and COBRA coverage.

Health benefits are considered medical, dental and vision coverage; FMLA does not require an employer to extend life, disability or other coverage during a leave period. However, some employers may choose, for administrative reasons, to extend life coverage during an FMLA leave. It is a low-cost benefit, and it is often easier to continue coverage than to terminate and later reinstate it. But employers that want to take this approach should first ensure that their life contract permits coverage to be extended during the FMLA leave.

Employers should proceed with caution when it comes to disability coverage. First, if an employee is on an FMLA leave due to his or her own serious health condition, the employee may be eligible for benefits if he or she was covered as of the date of disability. Disability carriers are generally reluctant to extend coverage to employees that are not actively working.

Some organizations get confused about how FMLA and short term disability coordinate. Simply put, they don't, because they serve different purposes. FMLA protects the employee's job and allows health benefits to continue. Short term disability provides income replacement when an individual is unable to work because of a disabling condition. FMLA and most short term disability plans have different definitions of disability for qualification purposes.

For example, for an FMLA leave to be approved, time off is needed for a "serious health condition." Short term disability plans generally require that an employee be unable to perform the normal duties of his or her job as a result of a diagnosed medical condition.

The employer must administer the short term disability plan and FMLA leave separately. In some cases, short term disability benefits may end while FMLA is still available, as is frequently the case for maternity leave. FMLA allows 12 weeks of leave time for the birth of a child, but short term disability plans commonly cover six weeks of leave following delivery. If an employee wants to take a full 12 weeks for the birth of a child, short term disability income benefits may only be payable for six weeks. But the employer must still protect the job and extend health

benefits for the entire 12 weeks allowed by the FMLA.

In many cases, an individual may qualify for both FMLA leave and short term disability benefits. In these cases, the FMLA leave and short term disability benefits will run concurrently. In some cases, an individual may qualify only for FMLA.

Finally, employers should be cautious about extending coverage beyond the FMLA period. Any extension of health coverage beyond the norm must be approved by your carriers. An employer could easily extend coverage by paying for COBRA coverage on behalf of an employee. In this case, COBRA would start at the required time (i.e. when the employee fails to return from leave). The employer does not run the risk of assuming potential liability because carriers must comply with the FMLA and COBRA requirements.

### USERRA Leaves

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination in reemployment, retention, or any other employment-based benefit. It also protects employment privileges and benefits for employees called to "active duty in the uniform services." When an employee completes active duty and returns within the applicable timeframe, the employer must offer the employee his or her previous position. They must also reinstate all employee benefits as if the employee had never left.



USERRA also contains obligations to extend health plan coverage to any service member called to active duty. Please note that an employer's obligation to offer COBRA is not nullified by the USERRA continuation requirements. Employers need to extend both options to the service member and al-

low the individual to choose which continuation option makes the most sense. In some cases, COBRA might be the better option, while USERRA continuation

could be preferable in others.

The chart on page 4 summarizes the differences between USERRA continuation and COBRA continuation.

In many cases, service members do not elect to continue coverage under the group health plan, because they become eligible for Tricare. This is likely the most cost-effective option for a service member returning to active duty.

If the military leave is 30 days or less, the employer must continue current health benefits. During this 30-day timeframe, the employee can be required to pay the same contribution as any other active employee in the same coverage class.

Provision	USERRA Continuation	COBRA Continuation
<b>Maximum Coverage Period</b>	24 months for employee and dependents.	Initially, employees and dependents are entitled to 18 months. Dependents may have coverage periods of up to 36 months following secondary qualifying events.  Extensions are also available under certain circumstances for the Social Security disabled.
<b>Election Rights</b>	Employees are granted election rights for themselves and any dependents covered by the plan at the time the employee is called to active military service.  Dependents cannot elect coverage independently.  USERRA does not define who can be considered a "dependent." It is generally believed that employers can defer to their health plan's definition of dependent for USERRA purposes.	Employee and dependents have independent election rights. With COBRA, a spouse could elect continuation even if the employee declined.
<b>Cost for Coverage</b>	Cost can be up to 102% of the actual premium.	Cost can be up to 102% of the actual premium. If an individual qualifies for a disability extension, 150% of the applicable premium can be charged from the 19th through the 29th months.
<b>Applicability</b>	USERRA continuation rules apply to all employers regardless of size.	COBRA rules apply only to employers with 20 or more full-time employees.
<b>Terminating Events</b>	The USERRA coverage ends after 24 months, or earlier if the employee is discharged from active military service.  Coverage can be terminated if the employee fails to pay continuation premiums.  Coverage may be terminated if the group health plan is terminated for other active employees.	COBRA can be terminated for a number of reasons:  - Maximum benefit period expires. - Medicare entitlement. - Coverage under another group health plan. - Late payment or non-payment of COBRA premium. - Health plan discontinues coverage for all similarly situated non-COBRA beneficiaries. - For any reason for which active employees would also have coverage terminated. For example, if the employee commits fraud against the plan, coverage can be terminated.
<b>Election Period and Process</b>	USERRA does not specify timeframes for electing coverage or a process to do so. Employers must establish reasonable procedures to allow this election.	COBRA specifies timeframes that must be followed in regard to the COBRA rights notification and coverage elections.

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USERRA continuation applies only to health benefits, and not to life and disability coverage. As with an FMLA leave, life and disability coverage must be reinstated immediately when a service member returns to work.

Employers sometimes like to be more generous with employees that need to return to active duty in the service of our country. Nonetheless, they should be extremely cautious in extending any coverage beyond what is required under COBRA or USERRA.

Calls to active service could possibly last longer than the COBRA or USERRA continuation periods. Carriers are not likely to agree to extend coverage beyond the normal continuation period. This may leave an employer at risk for any time covered beyond what is permitted by USERRA or COBRA.

Life and disability continuation may be even more troublesome. In many cases, when a service member is called to active duty, he or she is deployed overseas. Many carriers will not cover employees living outside the United States. In addition, deaths or disabilities due to acts of war are explicitly excluded under most contracts. Carriers are not likely to permit extended coverage when employees are no longer working because of active military service.

Employers should ensure that USERRA is covered in their leave of absence policies. However, the employer should not commit to extending benefits beyond what is required by USERRA.

## Workers Compensation Absences

Workers compensation provides income replacement and coverage for medical services that are associated with work-related injuries or illness. Workers compensation programs are state-based and will vary from state to state. In some cases, state law will require employers to continue health coverage when an employee is on a workers compensation leave. Other states do not include this requirement as part of their workers compensation program.

It is imperative for your organization to be familiar with the workers compensation requirements in the states where you have employees.

Workers compensation leaves can qualify for FMLA protections, as many claims will meet the FMLA qualifications. If an employee is eligible for FMLA leave, the employer must continue coverage and protect the job, at a minimum, for 12 weeks. If the employee fails to return to work at the end of an approved leave, COBRA should be offered to the individual.

Employers often struggle with how workers compensation and FMLA coordinate. As with short term disability, they don't. In general, they serve two different purposes. Workers compensation provides income replacement and benefits for treating the workplace injury or illness. FMLA protects the job and offers the ability to continue comprehensive health coverage at the

cost for active employees. They have different definitions of disability, so employers need to administer them separately.

In some cases, a workers compensation carrier may determine that an employee is capable of returning to work in a "light duty" capacity. The employee may not yet be ready to return to work without restrictions. If the employee has FMLA leave time remaining, and the injury or illness meets the require-

ments of a serious health condition, then the employee can stay out on FMLA. This means the employee has job protection and the ability to continue health insurance at the

active employee cost. However, the workers compensation carrier will likely discontinue benefits because the employee did not return to work.



## Personal Leaves or Sabbaticals

In some cases, employers allow leaves beyond the FMLA. Personal leaves of absence can be allowed for reasons that may not be eligible under FMLA, USERRA or any other legislatively required leave. Employers should establish specific requirements defining a permitted personal leave, including the timeframe and how benefits will be administered.

The safest way to handle benefits during a personal leave is to discontinue them. If the employer feels obligated to continue health benefits during a personal leave, the best approach is to pick up the cost of COBRA for a specified period of time.

With this approach, the employer will not be extending coverage beyond the typical COBRA continuation period. If an employer chooses to allow coverage to continue without running concurrently with COBRA, then the carrier must first approve the personal leave continuation. This is imperative, or the employer could be stuck with significant liability.

A recent court case illustrates this point. An employer offered to continue coverage for three months beyond FMLA for a personal leave. The carrier did not approve the extended leave time period. In this case, the carrier refused to extend COBRA because the employee did not elect COBRA in a timely manner.

The employer argued that COBRA was elected in a timely manner, after the employee experienced a loss of coverage. However, according to the contract and plan documents, the COBRA qualifying event date and loss of coverage should both have occurred at the end of the FMLA period.

This case is still working its way through the legal system. It illustrates the potentially huge liability when employers allow coverage extensions in situations that are not addressed by the vendor contracts or documents.

Life and disability benefits will be difficult to extend during a personal leave. A life insurance carrier may allow it for a short period of time, such as three months. But disability carriers will typically not extend coverage in situations where an employee is not actively working.

Sabbaticals are longer periods of leave, and more typically seen with employers in technical fields or higher levels of education. These extended leaves are used as opportunities for personal and professional growth. It would be uncommon for employers to extend benefits during a sabbatical, which can last between six months to two years.

If an employer wants to extend health benefits during any part of a sabbatical, the best approach is to pay for COBRA benefits. It is unlikely that a life or disability carrier will allow coverage continuation during a sabbatical.

### Severance Agreements

Human resources departments are often challenged by severance agreements, the details of which are sometimes determined before the human resources department becomes involved. This can create substantial liability for employers. It is critical that human resources be involved in severance agreements from the beginning, to make sure they are handled properly.

In many cases, benefits are offered as part of a severance agreement. The benefits may be extended for a specified period of time, from a few months to a few years. Some severance agreements may even extend health plan coverage until the former employee turns 65. This is not uncommon in situations where an organization wants to provide incentives for an executive to retire early, and no retiree health plan is available.

In terms of health benefits, severance agreements should denote that COBRA continuation runs concurrently with the severance time period. If COBRA always runs concurrently, severance agreements can

allow 18 months of health plan continuation without securing approval from the health plan. If the employer wants to extend coverage beyond 18 months, or offer continuation for a time without running concurrently with COBRA, then the insurance carrier or stop loss carrier should agree to the continuation time period in writing.

Life and disability can also be an issue if extended by a severance agreement. Certainly employers can ask life insurance carriers for a coverage extension in severance situations. Carriers will occasionally grant the request. It is imperative that the employer secure



a confirmation in writing if a coverage extension is granted. Disability carriers typically will not agree to extend coverage to an individual who is not working for your organization.

### Concluding Thoughts

Employers may not always perceive the potential liability of extending health or other benefits during an employee's leave. All plans have certificates of coverage explaining the rules of the plan, including when coverage terminates and any available continuation options. If an employer wants to extend coverage beyond what is allowed by the plan, it is imperative that the carrier provide prior approval for the extension. Failure to get this approval can result in significant employer liability.



Employers need to track all of these special situations. If an employer is looking to replace a carrier, it is important that these situations be disclosed to the prospective new carrier before the contract is written. Employers face a potential liability if the new carrier does not allow the continued coverage.

In this new year, it makes sense to take a fresh look at your organization's leave of absence policy. Make sure any coverage extensions, beyond what is required by state or federal law, are approved by your carriers. If possible, run any leave extensions concurrently with COBRA in order to reduce potential liabilities.

If you have any questions, please contact your McGraw Wentworth Account Manager. **MW**

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