# CUT AND PASTE POST
# MAY, 2020

## Administering Benefit Plans during the COVID Crisis

The U.S. Department of Labor, Employee Benefits Security Administration (EBSA) and the Internal Revenue Service (IRS) have recognized that, as a result of the COVID crisis, participants and beneficiaries of group health plans, disability or other employee welfare benefit plans, and employee pension benefit plans may find it difficult to exercise their health coverage portability and continuation coverage rights, or to file or perfect benefit claims. These agencies published a Rule extending some of the timeframes applicable to group health plans, disability and other welfare plans, pension plans, and their participants and beneficiaries under ERISA and the Tax Code.

Among other things, under the Rule, *plans must disregard the entire "Outbreak Period"* in applying the following timeframes:

- HIPAA: The 30-day period (or 60-day period if covered under CHIP) to request special enrollment in a group medical plan due to losing other coverage or acquiring a new dependent.
- COBRA: The 60-day election period; 60-day period for beneficiary to notify the plan of a qualifying event or Social Security determination of disability; 45-day grace period for initial premium payment; and 30-day grace period (or longer) for subsequent premium payments.
- Group health and disability plans: The plan's timeframes for filing claims, appealing claim decisions, and requesting external reviews.

According to the Rule, the "Outbreak Period" started on March 1, 2020 and, runs "until sixty (60) days after the announced end of the National Emergency or such other date announced by the Agencies in a future notification." The Rule applies to ERISA plans (plans sponsored by private-sector employers) which are regulated by the DOL. Separately, the Department of Health and Human Services (HHS) is encouraging non-ERISA plans sponsored by governmental employers to extend deadlines in a similar manner. HHS may consider issuing similar regulations.

For more information, go to EBSA's Disaster Relief Information for Employers and Advisers.

**In addition, the DOL:**

- Extended the deadlines for plans to furnish required disclosures and notices (e.g., plan documents, SPDs, COBRA notices, and others) during the Outbreak Period. The reasons for delay must be related to the coronavirus outbreak. For details, see Disaster Relief Notice 2020-01.
- Posted a series of general FAQs about benefit plans to help workers understand their rights and options during the pandemic. Topics include group medical options through employer plans and individual insurance options from the Marketplace, collecting pension plan benefits, and making 401(k) account changes.

*Inside:*

## Mystery Solved: Concurrent Leave under the EFMLEA

The Emergency Family Medical Leave Expansion Act (EFMLEA) provides up to 12 weeks of leave to an employee who needs time off to care for a child whose school or daycare is closed or otherwise unavailable. The first 2 weeks of EFMLEA is unpaid. After that, the employee is entitled to up to 10 weeks of paid leave, to a maximum of $200.00 per day or $10,000 in the aggregate.

Under the 'regular' FMLA, employers may require employees to run (unpaid) FMLA leave concurrently with employer-provided paid leave.

When the EFMLEA was published, it was unclear whether an employer could require employees to run paid Emergency Family Medical Leave Act concurrently with other forms of paid leave that may be provided. This question appears to have been resolved.

According to the DOL's Families First Coronavirus Response Act Question and Answers, after the two unpaid workweeks of EFMLEA leave, employers may require employees to run employer-provided paid leave concurrently with paid EFMLEA leave. The paid leave taken used must be leave that "would be available to the employee in that circumstance". For example, if an employer would require an employee to use vacation or personal leave to stay home with a child who is not ill, the employer may require the employee to use EFMLEA leave concurrently with personal leave or paid time off, but may not require the employee to use medical or sick leave for this purpose.

If an employee requests, or an employer requires an employee, to run these paid 2 leaves concurrently:

- The employee must receive the full amount of pay to which s/he would be entitled under the existing paid leave policy for the period of leave taken.
- If the employee runs out of leave, the employer must pay the employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per workday and $10,000 in the aggregate, for expanded family and medical leave.

## Supreme Court Remands Case Involving Course and Scope of Employment

The City of Billings (City) had no written policy addressing how supervisors should respond to reference checks from prospective employers.

In *Brendan v. Billings*, a City supervisor provided a positive reference for a current employee. After the employee left City employment, the Supervisor filed an anonymous tip that the employee wasn't all that great. When the prospective employer called to follow up on the tip, the City supervisor volunteered to provide proof of the "HR Nightmare" the employee had been. On day #2 of his new job, the employee was fired. The former employee sued the City, claiming it was 'vicariously liable for the tortious acts" of the (now fired) supervisor.

A District Court entered a summary judgement in favor of the City, finding that the supervisor had acted outside the course and scope of his employment. The employee appealed to the Montana Supreme Court.

In a 3-2 decision, the Supreme Court found that, while the City had not specifically authorized the supervisor to anonymously tip the new employer or to follow up with additional information, there were "genuine issues of material fact precluding summary judgment" as to whether the supervisor was acting outside of the course and scope of employment. The District Court's summary judgment was reversed, and the case was remanded for further proceedings.

***Professional Pointer:*** If you don't have a written procedure for responding to reference checks, write one!