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| In this issueCompliance[Return to Work – Benefit Considerations 1](#_Toc44580994)*focus*[In Other News… 3](#_Toc44580995)Quarterly Q&A………….7 | ⭘ |

# Introduction

Happy Summer! We are officially halfway through ~~the longest year on record~~ 2020. While Quarter 1 was dominated by COVID-19 and related benefits issues, we have begun to return to a sense of normalcy – at least from a regulatory perspective – in Quarter 2. In this issue of *Compliance Focus*, you will find a veritable assortment of compliance items, from HSAs to Qualified Transportation Benefits to COBRA, and more. And of course, there is still plenty of guidance related to COVID-19 and its implications for employers, as it becomes increasingly clear that this pandemic is far from over.

# Return to Work – Benefit Considerations

As employers begin the process of bringing employees back to work, they inevitably have questions about how to handle benefits during a return to work versus handling benefits during a furlough or layoff. Below are several items employers may need to consider for employees returning to their previous employment status following a change in employment status arising from the public health emergency (COVID-19).

**Eligibility Rules**

If employees voluntarily dropped coverage upon the change in employment status (even though eligibility was not lost) or previously waived coverage, will they have another opportunity to enroll in benefits upon returning to a full-time position? Or will such employees have to wait until the next open enrollment? And if employees lost benefit eligibility upon the change in employment status (e.g. reduced hours, leave of absence, furlough or layoff), what are the plan eligibility rules for an employee who is returning to an eligible position? Does a new waiting period apply?

For either scenario, if plan eligibility rules are unclear, or if the employer would like to alter them, the employer should confirm what the carrier (or stop-loss vendor) will permit and then implement a return-to-work policy that can be followed uniformly for all similarly situated employees. When making such determinations, consider the following rules.

* Waiting Period Rules. Under the ACA waiting period rules, employers of all sizes are permitted to impose a new waiting period of up to 90 calendar days each time an employee becomes eligible. In other words, waiting period rules permit an employer to impose a new waiting period upon employees returning to an eligible position.
	+ For small employers, there is flexibility to impose a new waiting period or shorten the waiting period subject to any carrier restrictions.
	+ However, applicable large employers (ALEs) with 50 or more FTEs must also consider the break in service rules imposed under §4980H, which may limit the ability to impose a new waiting period.
* §4980H Rules (the “Employer Mandate”). The §4980H rules, which apply to ALEs, impose rules restricting when the employer may impose a new waiting period or initial measurement period for employees returning to a full-time position following a break in service. A “break in service” is a period of time in which the employee is not receiving any pay (due to termination of employment, furlough, or leave of absence). The rules apply whether the ALE is using the monthly measurement method or the look-back measurement method, as set forth below:
	+ Following a break in service of <13 weeks (26 weeks for educational organizations), employees must be treated as continuing employees. If they were covered prior to the break in service, coverage must be made available no later than the 1st of the month following their return to an eligible position; nothing is required for those who previously waived coverage.
	+ Following a break in service of 13 weeks or more (26 weeks for educational organizations), employees may be treated as new hires, allowing the employer to impose a new waiting period or initial measurement period as applicable.

In addition to eligibility upon return to work, ALEs who use the look-back measurement method should consider how the change in employment status might affect eligibility in the next plan year. Although it is necessary to count all hours paid, including federally protected paid leave or employer-provided paid time off, employees with reduced hours or a period of time with no pay might average less than full-time hours over their measurement period and not be considered full-time for the employer’s next stability period. Some employers may choose to exclude such period of time from their measurement period, or impute hours equal to the employee’s regular average, to ensure that those who are normally considered full-time employees will continue to be full-time in the next stability period in spite of the temporary change in employment status.

**Employer/Employee Contributions**

If employers adjusted the employer/employee monthly contributions toward benefits to be more or less generous as needed, is there a need to make additional adjustments? Some employers only intended the contribution adjustments to be temporary. Employers should carefully communicate employee payment responsibilities for benefits.

The employer should also consider any payroll adjustments that may be required. For example, if employers agreed to pay 100% of the premium costs during the change in employment status, but employees are required to make catch-up employee contributions upon return, the employer may need to adjust salary reductions when employees first return, and then again once the employee makes all catch-up contributions. Employers should consider allowing employees to make catch-up contributions over several payrolls rather than all up front if the amount due is significant, both to help employees and to avoid violating any state wage and withholding requirements.

If employers adjusted HRA funding or employer HSA contributions, is there a need to make any further changes? Employees may want to adjust health FSA, DCAP, transportation, and/or HSA contributions through the employer’s cafeteria plan to the extent permitted by §125 rules and the employer’s cafeteria plan.

**§125 Election Changes**

Upon changes in eligibility or changes in employment status, as well as upon changes in the cost of coverage or benefits provided, employees may want to make pre-tax election changes to correspond with an increase or decrease in coverage. Employers should be ready to address various employee requests to change pre-tax elections and should understand what §125 rules permit.

If there is a change in employment status that affects plan eligibility, employees may make pre-tax election changes. Similarly, if the employer makes significant changes to plan coverage or adjusts employer contributions, employees are generally permitted to make pre-tax election changes (but not for the health FSA). However, if the change in employment status does not affect plan eligibility, the rules do not clearly permit a pre-tax election change. A change in pay or hours without a corresponding change in eligibility does not permit a pre-tax election change either.

 **BENEFITS NEWS HIGHLIGHTS**

* The IRS reported in [Notice 2020 – 23](https://www.irs.gov/pub/irs-drop/n-20-23.pdf) that ERISA Plans with 5500 Filing due dates or extended due dates falling on or after April 1, 2020, and before July 15, 2020 now have until July 15, 2020, to file their information reports.
* Because the due date for filing Federal income tax returns is now July 15, 2020, individuals may make contributions to their HSA (Health Savings Accounts) for 2019 at any time up to July 15, 2020. (See [Question and Answer #27](https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers).)
* Click [here](https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/states-order-insurers-to-let-employers-cover-furloughed-workers-coronavirus.aspx) for a SHRM article which provides details about several state insurance commissioners ordering “insurance companies to let employers continue covering employees under group policies, even if employees would normally lose eligibility due to layoffs or reduced hours.
* Last year, the Supreme Court agreed to hear Maine Community Health Options v. United States, a [case](https://www.scotusblog.com/2019/12/argument-analysis-justices-appear-sympathetic-to-insurers-in-dispute-over-risk-corridor-compensation/) to decide whether health insurance companies that offered plans on the exchange are entitled to compensation for losses they suffered as a result of the federal government’s declining to make “risk-corridor payments,” as was originally intended when the ACA was enacted. On April 27, 2020, the Court [decided](https://www.supremecourt.gov/opinions/19pdf/18-1023_m64o.pdf) in favor of the insurers, concluding that by “establishing the temporary Risk Corridors program, Congress created a rare money-mandating obligation requiring the Federal Government to make payments…” Further, the Court found that Congress “neither repealed nor discharged” this obligation, and therefore “petitioners may seek to collect payment through a damages action in the Court of Federal Claims.”
* Groom Law Firm [reports](https://www.groom.com/resources/employers-get-bit-flurry-of-class-action-lawsuits-allege-deficiencies-in-cobra-election-notices/) on recent ERISA litigation activity regarding violations of COBRA’s election notice requirements. The lawsuits allege deficiencies, even in notices based on the Department of Labor’s (DOL’s) Model Election Notice, that caused former employees to not elect COBRA when they could have.

For DCAPs, a change in eligibility due to a change in employment status permits a pre-tax election change. In addition, a change in provider or change in cost of care will also permit a pre-tax election change.

# In Other News…

## *Recap of 2nd Quarter Issue Briefs and Alerts*

****Families First Coronavirus Response Act (FFCRA)—DOL Temporary Rules****

On April 1st, the Wage and Hour Division of the Department of Labor (DOL) released a temporary rule that is effective April 1, 2020 – December 31, 2020. The temporary rule focuses on the Emergency Paid Sick Leave Act (Paid Sick Leave) and the Emergency Family and Medical Leave Expansion Act (Expanded FMLA). For the most part, the temporary rule simply summarizes in one place the legislative language set forth in the Families First Coronavirus Response Act (FFCRA) and the DOL’s subsequent guidance provided via FAQs.

The temporary rule does not introduce any new concepts, but it does provide further clarification for some requirements.

More here: <https://benefitcomply.com/compliance-alert-families-first-coronavirus-response-act-ffcra-dol-temporary-rule/>

**IRS Releases Guidance on FFCRA Tax Credit**

In early April, the IRS released guidance and sample forms related to the tax credit available to private employers with fewer than 500 employees who are required to provide Paid Sick Leave and Expanded FMLA leave as required by the Families First Coronavirus Response Act (FFCRA)**.**

More here: <https://benefitcomply.com/compliance-alert-irs-releases-guidance-on-ffcra-tax-credit/>

**COVID-19 – Look-Back Measurement Method**

 **BENEFITS NEWS HIGHLIGHTS (Cont.)**

* On June 2nd, the American Benefits Council [released a list](https://www.americanbenefitscouncil.org/pub/9DBEDD63-1866-DAAC-99FB-265ECC598AED) of its legislative and regulatory priorities related to stabilizing employee benefits for employers to help make re-opening easier during the Covid-19 pandemic. Among other things, the proposal included recommendations for the federal government to subsidize COBRA premiums; increase affordability of individual market insurance; implement risk adjustment and risk corridors to stabilize premiums; and encourage the use of on-site clinics and telehealth programs.
* On June 10th, the Treasury Inspector General for Tax Administration (TIGTA) [released a report](https://www.treasury.gov/tigta/auditreports/2020reports/202043028fr.pdf) finding that IRS collection of employer shared responsibility payments under Section 4980H fell far short of original projections. Originally, the IRS expected to collect $17 billion in penalties for 2015–2016 and $167 billion between 2016 and 2026. However, only $749 million was collected for 2015–2016, and now the projection through 2026 is just $8 billion.
* On June 19th, the DOL's Employee Benefits Security Administration (EBSA) issued [proposed updates](https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/compliance-assistance-guide-appendix-a-mhpaea-proposed-updates.pdf) for 2020, including additional guidance and examples, to the existing mental health parity self-compliance tool. The tool is designed to help plans and issuers gauge compliance with mental health and substance use disorder coverage requirements. Public comments on the proposed 2020 version are due by July 24, 2020.

Applicable large employers (ALEs), those employers with 50 or more full-time equivalents (FTEs), are required to offer medical coverage to full-time employees to avoid potential penalties under §4980H. Full-time status for this purpose is determined using either the monthly measurement method or the look-back measurement method. For ALEs using the look-back measurement method, there may be some unexpected implications for employees who request leave or whose hours are temporarily reduced related to COVID-19. It may also affect employees who are terminated from employment and later rehired.

More here: <https://benefitcomply.com/issue-brief-covid-19-look-back-measurement-method-implications/>

**Health Savings Accounts (HSAs) - Common Questions**

As we see more and more employers offering high-deductible health plans (HDHPs), there is an increased need for employers and employees to understand HSA eligibility rules, contribution requirements, and which expenses are reimbursable on a tax-favored basis. This issue brief contains a summary of HSA eligibility and contribution rules, along with a series of frequently asked questions and responses.

More here: <https://benefitcomply.com/compliance-alert-health-savings-accounts-hsas-common-questions/>

**Agency Guidance - National Emergency Extended Time Frames**

On April 28th, the Department of Labor (DOL) and the Department of Treasury (IRS) jointly issued a final rule extending several specific notice time frames applicable under HIPAA, COBRA, and ERISA. The rule extends the time frames for ERISA claims processes, COBRA elections, COBRA payments, and HIPAA special enrollments. In addition to the final rule, the DOL issued Disaster Relief Notice 2020-01, indicating there will be leniency regarding enforcement of the timing and delivery method for all disclosures required under ERISA and confirming the extended filing deadline of July 15, 2020, for Form 5500 and Form M-1 filings due between April 1st and July 15th, 2020.

More here: <https://benefitcomply.com/compliance-alert-agency-guidance-national-emergency-extended-time-frames/>

**New COBRA Model Notices**

On May 1st, the Department of Labor (DOL) issued new COBRA model notices and corresponding frequently asked questions (FAQs) to better guide individuals who may be choosing between Medicare and COBRA continuation coverage. The General Notice and the Election Notice were updated to provide more information about Medicare, including details about late enrollment penalties for failing to enroll in Medicare when first eligible. They also clarify primary and secondary payer status between Medicare and COBRA continuation coverage.

**BENEFITS NEWS HIGHLIGHTS (Cont.)**

* The 2017 Tax Cut and Jobs Act amended section 274 of the Internal Revenue Code effective for taxable years beginning after December 31, 2017, to eliminate the employer deduction for expenses related to qualified transportation and commuting fringe benefits. Our original compliance alert on these changes can be viewed [here](http://benefitcomply.com/%E2%80%A2-compliance-alert-tax-treatment-of-transportation-benefits-changes-under-new-law/). On June 20th, the IRS and the Treasury Department released [proposed regulations](https://www.govinfo.gov/content/pkg/FR-2020-06-23/pdf/2020-13506.pdf) that clarify the requirements and provide simplified methods for calculating the cost of such disallowed benefits.
* On June 23rd, the IRS, the Treasury Department, and the DOL [released a joint FAQ](https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-43.pdf). It addressed some common questions related to coverage for COVID-19 testing and diagnosis, along with other issues related to provision of these services and compliance with the ACA.
* Also on June 23rd, the Commonwealth Fund [released survey findings](https://www.commonwealthfund.org/publications/issue-briefs/2020/jun/implications-covid-19-pandemic-health-insurance-survey?mkt_tok=eyJpIjoiTldFek1HSTVNV1V6TWpnMiIsInQiOiJhUUwzb0l2aDh2UFducVp5Wmg5dzdITFNKVFhPN0tMTVcxdURkNWtcL2ZlU3dXQ2J4cEdrMmJjRXh3VHFpY2dUb3ZLd1FcL3g3MUh1a21qbDFDeW9DMjg1cjltbGJUc1NRQTJmTUlYOHBhNnE4NWZhS1BRNEV3ejVCN2ZRUzA3RlBNIn0%3D) highlighting the effects of the COVID-19 pandemic on health insurance coverage, including implications for employer-sponsored insurance.

More here: <https://benefitcomply.com/compliance-alert-new-cobra-model-notices/>

****Back to Work Employer Checklist****

The health and economic conditions created by the COVID-19 crisis have caused unprecedented disruption in the workforce. Now, as some employers begin to bring employees back to work, they are faced with a new set of challenges. This checklist is designed to help employers think about the multitude of issues posed as employees return to work after temporary layoffs, leaves of absence, and furloughs. The checklist is divided into two parts: Part 1 covers important employment law and HR issues, and Part 2 focuses on employee benefits concerns.

More here: <https://benefitcomply.com/return-to-work-employer-checklist/>

## **IRS Notices Announce Increased Flexibility for Certain Plans**

The Internal Revenue Service (IRS) issued two notices to assist with the nation's response to the 2019 Coronavirus outbreak. The first notice, [IRS Notice 2020-29](https://www.irs.gov/pub/irs-drop/n-20-29.pdf), increases "flexibility with respect to mid-year elections under a §125 cafeteria plan during calendar year 2020 related to employer-sponsored health coverage, health Flexible Spending Arrangements (health FSAs), and dependent care assistance programs (DCAPs). This notice also provides increased flexibility with respect to grace periods to apply unused amounts in health FSAs to medical care expenses incurred through December 31, 2020, and unused amounts in dependent care assistance programs to dependent care expenses incurred through December 31, 2020." Finally, this notice clarifies that recently announced exemptions for high deductible health plans (HDHPs) to remain HSA qualified apply retroactively to January 1, 2020.

The second notice, [IRS Notice 2020-33](https://www.irs.gov/pub/irs-drop/n-20-33.pdf), increases "the carryover limit (currently $500) of unused amounts remaining as of the end of a plan year in a health Flexible Spending Arrangement (health FSA) under a § 125 cafeteria plan that may be carried over to pay or reimburse a participant for medical care expenses incurred during the following plan year. Second, this notice clarifies the ability of a health plan to reimburse individual insurance policy premium expenses incurred prior to the beginning of the plan year for coverage provided during the plan year."

More here: <https://benefitcomply.com/compliance-alert-agency-guidance-irs-notices-announce-increased-flexibility-for-certain-plans/>

**COVID-19: Benefits-related Checklist**

Benefit Comply has put together a checklist summary of legislative and regulatory changes related to COVID-19 that affect employer-sponsored health and welfare benefits. It also includes some temporary actions employers and carriers have taken in response to business and coverage needs during this public health emergency.

The checklist may be found here: <https://benefitcomply.com/coronavirus/>

**HSA Requirements and Limits for 2021**

In late May, the IRS released the 2021 health savings account (HSA) annual contribution limits and high deductible health plan (HDHP) requirements in IRS Rev. Proc. 2020-32.

More here: <https://benefitcomply.com/compliance-alert-hsa-requirements-and-limits-for-2021/>

## ****Reminder: PCORI Fees****

Employers who sponsored self-funded medical plans ending sometime during 2019 are required to report and pay the ACA Patient-Centered Outcomes Research Institute (PCORI) fees no later than July 31, 2020. In the spending bill passed late in 2019, the PCORI fee (which was set to expire) was extended another 10 years, and therefore even plans ending in October – December 2019 are subject to the fee. At this time, the IRS has not provided any extension to the July 31st deadline to report and pay the PCORI fee.

More here: <https://benefitcomply.com/compliance-alert-reminder-pcori-fees/>

**Updated PCORI Fees Released**

In Notice 2020-44, the IRS provided the adjusted PCORI fees for plan years ending in October 2019 through September 2020. The guidance does not provide for an extension of the July 31st deadline to report and pay the PCORI fee, but there is a bit of relief provided for certain plans in the method used to count covered lives.

More here: <https://benefitcomply.com/compliance-alert-updated-pcori-fees-released/>

**Agency Update**

During the first couple weeks in June, the government agencies (the EEOC, IRS, DOL and HHS) held public meetings, released proposed and final rules, and updated forms and fees affecting employee benefit offerings. This alert summarizes the following items:

* PCORI Fee - Updated Form 720
* Qualifying Medical Expenses - Direct Primary Care & Health Care Sharing Ministries
* EEOC Wellness Rules - Notice of Proposed Rules
* §1557 Nondiscrimination Rules Modified

More here: <https://benefitcomply.com/compliance-alert-agency-updates/>

**COBRA Merger & Acquisition (M&A) Considerations**

For employers involved in mergers and acquisitions (M&As), benefits are just one of the many factors employers must consider and handle. Many employers going through an M&A transaction address benefits later in the process than they should, but COBRA is often not addressed at all; and failing to offer COBRA risks civil penalties as well as medical claims coverage costs for affected individuals. When a merger or an acquisition takes place, generally the seller must offer COBRA, unless the seller discontinues all group health plans or the parties agree contractually to different terms. If the seller discontinues all group health plan offerings, then the obligation may transfer to the buyer. The obligations differ a bit depending upon whether a stock or an asset purchase took place.

More here: <https://benefitcomply.com/issue-brief-cobra-merger-acquisition-ma-considerations/>

**Quarterly Q&A**

**Question:** An applicable large employer using the rate-of-pay safe harbor to set employee premium rates has recently furloughed a portion of its employees. In other words, these individuals are still employed, but they are on an unpaid leave of absence. However, because the employer is using the look-back measurement method, most of these employees remain considered full-time for purposes of whether penalties would apply under Code §4980H.

The employer’s coverage was considered affordable for employees before they were put on furlough. However, since employees are unpaid during this leave, the employer is concerned that the coverage it offers will no longer be considered affordable. Will the employer’s coverage remain affordable during the time that employees are on furlough?

**A:** If the employees’ rate of pay has not changed and the premiums do not change, coverage will remain affordable during the furlough.

**B:** The employer will not be able to tell whether coverage is affordable until the employees’ W-2s are finalized.

**C:** The coverage will not be affordable during furlough since the employees will not be paid.

**Answer**: **A.** If the employees' rate of pay has not changed and the premiums do not change, coverage will remain affordable during the furlough.

*Background*

Applicable large employers—those with 50 or more full-time equivalents (FTEs)—are required to comply with the employer shared responsibility rules under §4980H (also known as the “employer mandate”). To avoid potential penalties, employers are required to offer minimum value, affordable coverage to full-time employees and their dependent children. Coverage is considered “affordable” for purposes of satisfying §4980H(b) requirements so long as the employee contribution satisfies at least one of three available safe harbors (i.e., federal poverty level [FPL], rate of pay, or Form W-2).

*Rate of Pay Safe Harbor*

Under the rate of pay safe harbor, an hourly employee’s monthly contribution for single coverage is affordable if it is ≤ 9.78% (for 2020) of the employee’s hourly rate multiplied by 130. The calculation uses the employee’s rate of pay as of the first day of the coverage period, unless the rate of pay is reduced, in which case the lower amount is used.

130 (to match the definition of full-time) is used in the calculation even if the employee actually works more or less than 130 hours during a calendar month. Therefore, this particular safe harbor protects the employer even in situations in which the employee’s hours may be less than full-time and the employer remains obligated to continue offering coverage during the stability period.