

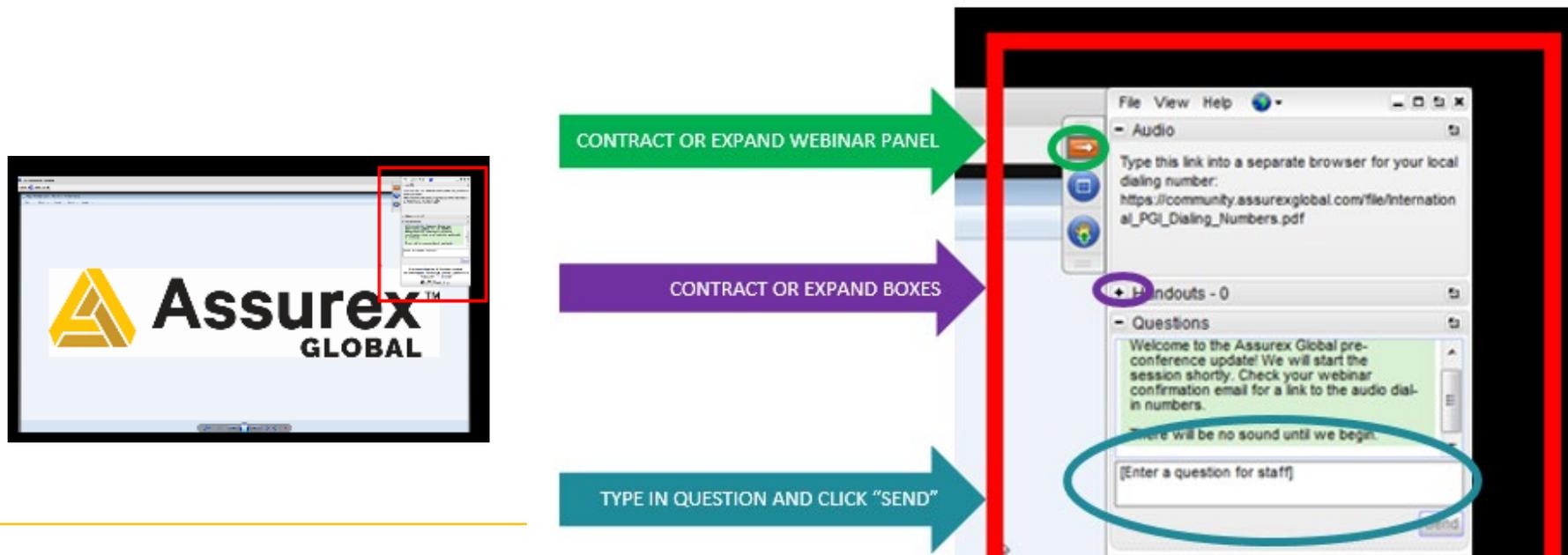
2020

Employer Benefits Questions on Pressing COVID-19 Issues

Presented by Benefit Comply

COVID-19 & Employee Benefits

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



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Agenda

1. Can an employer terminate plans or decrease employer contributions midyear?
2. Are employers required to make any amendments to their plans due to COVID-19?
3. Employees want to make changes to their Health FSA and DCAP elections due to a variety of reasons related to COVID-19 – when can I let them make a change?
4. Are laid off employees eligible for benefits? What about employees on furlough?
5. I know about employee test results and COVID-19 related treatment. What do the HIPAA Privacy and Security rules allow me to do with that information?
6. Are employees eligible for FFCRA emergency paid sick leave if there is a “shelter-in-place” order where they live?
7. What are the Exceptions to Expanded FMLA and Paid Sick Leave for Small Employers?
8. How do employee benefits costs factor into the Payroll Protection Program loans?

QUESTION:

Can an employer terminate plans or decrease employer contributions midyear?

Employer Initiated Plan Changes

- Midyear Plan Termination/ Amendments
 - Employer plan sponsors are permitted to make plan changes midyear, including deciding to terminate plans entirely, or discontinue HRA benefit
 - Applicable large employers could face §4980H penalties if they fail to offer minimum essential coverage that provides minimum value at an affordable rate to full-time employees
 - ALE status based on last year's employment records
 - If all employees are laid off/reduced hours there may not be any full-time employees

Employer-Initiated Plan Changes

- Employer Health Plan Contributions
 - Employers are permitted to make midyear changes to contributions
 - Employees can make corresponding pre-tax election changes if employer changes contributions
 - Consider affordability under the ACA
- Changes to Employer HSA & HFSA Contributions
 - Employers have flexibility in changing employer HSA and HFSA contributions

QUESTION:

Are employers required to make any amendments to their plans due to COVID-19?

Plan Amendments (Required Plan Changes)

- Background
 - FFCRA requires most health plans to cover costs associated with COVID-19 diagnostic testing with no cost-sharing
 - Includes any costs related to taking the test (e.g. the office visit, lab costs, etc.), but does not apply to medical care to treat someone sick from COVID-19
 - Applies to employer-sponsored group health plans (both fully-insured and self-funded), government-sponsored coverage, and individual health plans
 - HSA-Eligibility
 - IRS Notice 2020-15 - Coverage of COVID-19 related testing or treatment prior to meeting an HDHP's plan deductible will not interfere with an individual's HSA eligibility
- Documentation Requirement Issues
 - Was the coverage in the SBC? Probably not – No 60-day advance notice
 - Not a reduction in benefits – SMM requirement 210 days after the end of plan year

Plan Amendments (Optional Plan Changes)

- Employee Benefits Provisions in CARES Act
 - HDHPs can provide first dollar coverage for telehealth services
 - Effective immediately, HDHPs can cover telemedicine services before participants have met the applicable minimum deductible, without jeopardizing the employee's HSA eligibility
 - This HSA safe harbor expires for plan years beginning 1/1/2022
 - Plan Documentation Issues – same as testing requirement above
 - Health FSAs, HRAs, and HSAs can reimburse OTC medicine
 - Reverses prohibition passed as part of the ACA
 - Also allows menstrual care products to be treated as medical expense that can be reimbursed on a tax-free basis
 - Plan documentation issues - May need plan document amendment - Most plan documents currently exclude OTC medicine

QUESTION:

Employees want to make changes to their Health FSA and DCAP elections due to a variety of reasons related to COVID-19 – when can I let them make a change?

Section 125 Election Changes

- Health FSA Election Changes
 - Midyear changes to FSAs may generally be made only in situations articulated in the rules; Change in status event that affects eligibility for coverage, FMLA leave, Judgment, decree, or order. (For example, QMCSOs.), COBRA qualifying events, Entitlement to Medicare/Medicaid
 - Examples of situations where a midyear election change would likely be permitted:
 - Spouse loses job (employee would be permitted to enroll/increase FSA election)
 - Leave under FMLA (employee could decrease or cancel election)
 - Employee is laid off/furloughed or under reduced hours and loses eligibility for benefits (could decrease or cancel FSA election)
 - Examples of events that would not permit a midyear election change:
 - A reduction in hours or pay (non-FMLA) without a corresponding change in eligibility
 - Surgeries/other elective procedures being cancelled
 - New items available to reimburse through HFSA

Section 125 Election Changes

- DCAPS
 - Allowances for midyear election changes tend to be flexible. Changes generally permitted due to Changes in status that affect eligibility, Change in cost and coverage (change in the cost of a dependent care provider, or participant changes providers), FMLA leave
 - Examples of situations where a change to a DCAP would likely be permitted:
 - Daycare closes due to statewide shutdown orders (Could reduce/revoke election)
 - Uses after-school care, but now need full-day care (Could enroll/increase election)
 - Schools close and employee needs full-day childcare (Could enroll/increase election)
 - Employee takes expanded FMLA to care for a child whose school has closed (Could decrease/revoke election for duration)
 - Spouse loses job (Employee may decrease/revoke election)
 - Employee is laid off or furloughed (Employee may decrease/revoke election)

QUESTION:

**Are laid off employees eligible for benefits?
What about employees on furlough?**

Plan Eligibility Issues

- Furloughs – Employees Remain Employed
 - If there is a reduction in hours/leave of absence, it's necessary to consider plan eligibility rules and any applicable employer policies in order to properly administer benefits
 - An employer may already have a leave of absence policy for specified circumstances which extend benefit eligibility for a period of time
 - ALE eligibility considerations (“employer mandate”)
 - If an employer is using the look-back measurement method, employees may remain eligible for benefits for the duration of the current stability period, unless employment is terminated
 - If an employer is using the monthly measurement method, employees may not meet current plan eligibility requirements during a period of reduced hours

Plan Eligibility Issues

- Termination of Employment
 - If employment is terminated, employees will typically no longer be eligible for benefits and are not eligible for the Paid Sick Leave or Expanded FMLA
- COBRA or State Continuation
 - Generally applicable to loss of eligibility due to leaves, furloughs and terminations
 - Employer could choose to subsidize COBRA for a period of time
 - If employee elects COBRA, employee may be ineligible to enroll in individual coverage through the Exchange until next open enrollment period
- Watch for Unique State Emergency Order Mandates
 - WA state requires employers to maintain health benefits for high risk employees who request an accommodation
 - Unclear how this would apply to ERISA plans

Plan Eligibility Issues

- Employers Wishing to Expand Eligibility Related to COVID-19
 - Employers have flexibility to amend current leave and eligibility issues
 - Non-discrimination questions - safest to extend benefit eligibility to all similarly situated individuals
 - IMPORTANT NOTE – Carriers and stop-loss carriers are not automatically obligated to honor expanded eligibility rules. Employers must coordinate with carriers to expand eligibility
 - Many carriers have offered flexibility through a specific date (e.g. May 31)
 - Employer could continue some benefits (e.g. medical) and not others

QUESTION:

I know about employee test results and COVID-19 related treatment. What do the HIPAA Privacy and Security rules allow me to do with that information?

HIPAA Privacy and Security Rules

- Does HIPAA Even Apply?
 - HIPAA applies to “Covered Entities” which includes employer sponsored health plans
 - Medical, Dental, Prescription, Vision, HFSA, EAP, HRA
 - Protected Health Information (PHI)
 - Individually identifiable information that is related to health or condition of an individual, or provision or payment for health care AND
 - Most Importantly - Is created or received or maintained by a covered entity
 - PHI Examples
 - Claims and plan enrollment data – PHI
 - Medical information from FMLA forms – NOT PHI
 - Employers often have access to medical information that has nothing to do with HIPAA

HIPAA Privacy and Security Rules Employer Questions

- I found out an employee or spouse tested positive for COVID-19 through health plan data what HIPAA issues do I need to think about?
 - Authorizations normally required to disclose PHI for other than treatment, payment and plan operations.
 - Narrow exceptions for preventing “imminent threat to health and safety”
 - Should not use PHI for employment purposes without valid authorization
- My benefits and HR people are working from home now - how does this impact my obligations under the HIPAA rules?
 - HIPAA privacy safeguards
 - HIPAA security issues
- What other things should employers think about?
 - New Business Associates?

QUESTION:

Are employees eligible for FFCRA emergency paid sick leave if there is a “shelter-in-place” order where they live?

FFCRA Emergency Paid Sick Leave

Background

Effective 04/01/2020, all employees working for an employer with <500 employees are eligible for two weeks paid emergency sick leave if they cannot work due to one of the following reasons:

Reasons Directly Related to the Employee	Related to Employee Needs to Care for Others
Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19	Employee caring for another individual who is subject to an official quarantine or isolation order or has been advised by a healthcare provider to self-quarantine.
Employee has been advised by a healthcare provider to self-quarantine due to COVID-19	Employee is caring for a son or daughter where the school or daycare has been closed, or the childcare provider is unavailable, due to COVID-19 precautions (Note: may also qualify for expanded FMLA).
Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis	

More information at DOL pandemic website at - <https://www.dol.gov/agencies/whd/pandemic>

FFCRA Emergency Paid Sick Leave

General shelter-in-place and official stay-at-home orders trigger employee right to two-week paid leave only if the employer has work for the employee and the order is the reason the person cannot work.

- Employee not eligible for paid leave examples:
 - Employee can still work or telework in area subject to order
 - The employer, or location is closed due to the order so employer has no work for the employee
 - Employee feels they are high risk and does not want to work
- Employee would be eligible for the leave examples:
 - Employer is open and has work for employee, but employee cannot reach worksite due to travel restrictions that are part of the order

QUESTION:

What are the Exceptions to Expanded FMLA and Paid Sick Leave for Small Employers?

Small Employer Exceptions

Background

Employers with <500 employees must provide 2 weeks paid emergency sick leave for certain employees impacted by COVID-19 and up to 12 weeks of partially paid FMLA for employees who cannot work due to children subject school or daycare closure.

- Exceptions
 - Employers with fewer than 50 employees are not required to grant emergency paid sick leave (for care of a child) or expanded FMLA if providing the leave would jeopardize “*the viability of the small business as a going concern*”.
 - Employers with fewer than 25 employees are not required to restore an employee to their equivalent position after taking expanded FMLA leave if certain conditions are met.
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> Qs 43,58,59
- Note: No exception exists for other emergency sick leave reasons (e.g. quarantine, isolation order, etc.)

QUESTION:

How do employee benefits costs factor into the Payroll Protection Program loans?

Payroll Protection Program Loans

Background

Employers with fewer than 500 employees may qualify for a low interest loan equal to 2 ½ time average “payroll costs.” The loan may be forgiven (in whole or in part) if the employer maintains sufficient payroll and other eligible expenses during a specific period of time.

- Using Group Health Plan Costs in the PPP
 - To determine maximum loan amount
 - “...payment for the provision of employee benefits consisting of group health care coverage”
 - Unclear if this includes employer and employee costs – consult with lender to determine maximum loan calculation method they are using
 - To determine amount of loan to be forgiven
 - SBA to issue forgiveness regulations late April

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