FAQs During the COVID-19 Era

Fluctuating Employee Size Effects on COBRA, Medicare, & More

Common Questions from HR & Benefits Folks

What should I do?

That is the most common question—"What should I do?"

There are a lot of changes during the COVID-19 era due to the fluctuations in employee numbers and the multitude of mid-year plan changes. This frequently asked question (FAQ) guide will answer some of the most common questions from human resources and employee benefits departments.

The answers are general and may not include specific caveats. Consult your Leavitt Group representative for application to your circumstances.

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Frequently Asked Questions

COBRA

Question 1

Our employee size dropped from 56 to 12 this year due to layoffs resulting from COVID-19 closures. Are those employees entitled to federal COBRA or Cal-COBRA? If so, for how long?

COBRA uses a look-back determination, much like the familiar Affordable Care Act (ACA).

Simply put,"Your employee count last year determines your COBRA status for this year."

It depends. Once the employer size drops below 20 employees the clock will start.

Eligibility for Cal-COBRA or COBRA is affected when:

- An employer on 50% of the preceding year, on an average business day, meets the threshold.
- They must meet that threshold for at least 50% of the preceding year using an average business day's worth of hours (guidance is provided on counting below).

Each year, the entitlement will depend on whether the employer was above or below this threshold in the preceding year.

If an employee was on Cal-COBRA last year and this year the employer is subject to federal COBRA, it does not change the entitlement status of qualified beneficiaries.

FOR EXAMPLE:

If on December 1st the employer adds the 20th employee, then when counting employees on the first day of the plan year (using the preceding year) the employer will not likely have had 20 employees on 50% of the typical business days the preceding year; therefore, Cal-COBRA will be in effect instead of federal COBRA.

Conversely, adding the 20th employee earlier in the year, or having had more than 20 employees due to fluctuations in workforce, then it is likely the employer had 20 or more employees for 50% of the preceding year on a typical business day. Hence, federal COBRA applies.

COUNTING EMPLOYEES

Count full-time and part-time common law employees:

- Excluding self-employed individuals, independent contractors, and members of a corporate board of directors (unless also an employee).
- All employees of all related employers under common control must be counted.
- Leased or temporary agency employees are not counted.

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OTHER CONSIDERATIONS

- Count employees for each typical business day.
- Count per pay period.
- Attribute total number of employees for pay period to each typical business day within the pay period.
- Count part-time employees in aggregate (total number of hours worked by part-time and divide by sum of hours needed to be full-time; often 30).
- Use the same method for all employees and for the entire year.
- Do not count part-time employees' vacation, holiday, and sick-leave hours.

CAL-COBRA

Cal-COBRA is administered by the employer or a third-party administrator.

- Legal obligations rest with the employer to comply appropriately.
  - » Must ensure timely notice of Cal-COBRA eligibility within 14 days of qualifying event notice, as well as enrollment forms and notice of duration of coverage and payment terms once the qualifying event has occurred.

Question 2

We are located in California. When would Cal-COBRA kick-in?

Employers must count their employees annually to make this determination.

Once COBRA entitlement ends, Cal-COBRA begins. Employers making this transition will have some employees on their COBRA plan and other(s) on Cal-COBRA, depending on when they encountered their COBRA or Cal-COBRA qualifying event. Carriers administer Cal-COBRA—be sure to coordinate and consult the carrier for advice regarding any transition.

Cal-COBRA may also kick in for the Cal-COBRA extension. Once federal COBRA is exhausted, California residents participating in a California-domiciled health plan may be entitled to another period through Cal-COBRA. An underlying health plan must be in place. (See the Kaiser Family Foundation for a chart of each state's COBRA laws.) If the business closes and there are no other plans in the control group, the entitlement goes away as well.

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MEDICARE

Question 3

Our company size changed during the year due to COVID-19 layoffs. When would Medicare become the primary payor, and our company plan secondary? My company has several older employees who would like to elect Medicare.

When an employer size falls below the threshold (counting full/part-time employees), the employer plan will become secondary to Medicare. An employee's circumstance may also affect Medicare-eligibility. See Centers for Medicare Services (CMS) guidance.

Generally, the threshold is 20 or more employees or a Multi-Employer Welfare Association Plan (MEWA) where at least one in the association has 20 or more employees. In this case, the group health plan pays primary to Medicare. Small employers in a MEWA can request a Small Employer Exception.

LEAVES

Question 4

Our company had 110 employees in 2019, but recently laid off 63 employees due to lockdowns. At what point do our employees lose FMLA entitlement if our company size changed?

FMLA will apply to employers with 50 or more (full and/or part-time) employees within a 75-mile radius. A private employer (including joint and successor employers) is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year. See FMLA rule. Be sure to consult state laws as well.

Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) work weeks in the current and preceding calendar year.

FOR EXAMPLE:

If an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2020 subsequently dropped below 50 employees before the end of 2020, and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2021, the employer would continue to be covered under FMLA throughout calendar year 2021 because it met the coverage criteria for 20 workweeks of the preceding (i.e., 2020) calendar year.

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AFFORDABLE CARE ACT

Question 5

We (California business) have been considered an Affordable Care Act (ACA) applicable large employer (ALE) but recently downsized to only 35 employees. At what point do we stop being considered an ALE?

The year after which the employee count fell below 50.

Whether an employer is an ALE is determined each calendar year, and generally depends on the average size of an employer's workforce during the prior year.

See Leavitt Group article "What happens when a small employer grows into an Applicable Large Employer?"

If an employer has **fewer than 50** full-time/equivalent employees on average during the prior year, the employer is not an ALE for the current calendar year. Therefore, the employer is not subject to the employer shared responsibility provisions or the employer information reporting provisions for the current year.

If an employer has **at least 50** full-time/equivalent employees, the employer is an ALE for the current calendar year, and is therefore subject to the employer shared responsibility provisions and the employer information reporting provisions.

DETERMINING EMPLOYEE COUNT

To determine its workforce size for a year, an employer adds its total number of full-time employees for each month of the prior calendar year to the total number of full-time equivalent employees for each calendar month of the prior calendar year, and divides that total number by 12. See IRS guidance for examples.

Question 6

These COVID-19 restrictions keep shutting down my business. We had an employee move from part-time to variable hour and then to full-time only to go back to variable hour. When would an employee regain eligibility for our group health plan?

See Leavitt Group article "What happens when a small employer grows into an Applicable Large Employer?"

It depends. There are many caveats in the law that say when the hours changed in the measurement period, it will affect the timing for which the employee will become/lose benefits eligibility.

If change occurs before completing a standard measurement period, the employee is entitled to benefits depending on the hours for that month.

If the change occurs once employed through an entire standard measurement period, the employee is entitled to benefits for the entire preceding stability period. Once an employee has reached the next stability period, their benefits eligibility status will be modified to meet whether they met the hours' threshold required.

When changing the employment status of the employee, the employer may change benefits eligibility sooner. There are many special rules. See IRS Guidance for examples.

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DISCONTINUING BENEFITS & NOTICE

Question 7

We are a small group of 14 full-time employees. Business is slow. We will be forced to discontinue paying toward employee health insurance. How do we communicate this to our employees?

Timely, transparently, and clearly. While advanced notice of a plan terminating isn't generally required, it is advisable to provide 60 days' notice, if possible.

Employees understand that organizations are facing challenges, so the sooner you share the reality of the situation, the better. Be clear on exactly what this will mean for each employee financially and set aside time for individual conversations as needed. If possible, share the employee-focused reason for taking this action (for example, a goal of avoiding reductions in positions or closing), versus just for profit-related reasons.

ERISA, as well as other benefits rules, do not require advanced notice of discontinuation of benefits. However, if a manufacturer or agricultural business, the WARN Act may.

DISCRIMINATION

Question 8

Can we provide better plans for our permanent office staff over the variable hour field workers? I've heard a management carve-out is possible.

There are multiple compliance requirements (ACA, HIPAA, and IRC, to name a few) in play that say, in short, no. However, there is a little room for discrimination for the plan sponsors more comfortable with risk.

- Have written, clearly-defined business classes.
- Consider the impact on non-highly compensated employees these rules are intended to protect.
- Consider paying 100% for insured plans for any class with highly compensated employees.
- Allow removing that class from the testing pool under IRC §125.
  - This loophole may close under ACA.
  - Self-funded plans are tested under IRC §105(h) and this loophole does not exist there.

It may be possible to have small, highly-compensated classes receive the better benefit because the rules use a ratio that could provide some room for carve-outs. The rules are complex and multi-layered, and as a result these comments are general in nature and do not fully reflect the complete rules.

Consult with your tax professional or a service provider who can conduct nondiscrimination tests for you. Leavitt Group does not conduct these tests. However, we have established preferred partnerships with service providers who provide those services.

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WORKERS COMPENSATION

Question 9

If an employee no longer has sick time available and contracts COVID-19, can they file a workers compensation claim assuming they believe they contracted the illness at work?

It depends. Contracting COVID-19 is hard to prove. Generally, employees cannot bring workers compensation claims because they are exposed to the risk as part of everyday life. Unless a disease is peculiar or particular to a certain occupation and not a disease which the general public is exposed equally to, this is not likely a workers compensation claim.

This rule may vary by jurisdiction.

Fourteen states enacted rules to extend workers compensation to COVID-19-related illness. See those rules here. For example, California employers are subject to an order that states all workers testing positive and not working exclusively at home may file a workers compensation claim if meeting certain criteria. See FAQs and criteria on the CA rule.

California law, a more progressive stance than many other states, provides two new rebuttable presumptions that an employee's COVID-19 illness is an occupational injury and, therefore, eligible for workers compensation benefits; if specified criteria are met. Employees who are sick can stay home and be provided workers compensation benefits, thereby reducing the spread of the virus to others at work and in the community.

Additional Resources

Department of Labor Regulations & Sample Notices

Department of Labor COBRA FAQs

Cal-COBRA Department of Managed Health Care FAQs

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Summary of Actionable Steps

- Conduct an audit of your current policies. Do they consider all of these potential circumstances? If not, prepare by amending your policies for situations discussed in this article.
- Develop and announce policies, where necessary, establishing how benefits will be treated when hours fluctuate. The benefits booklet is a great place to do so! Or, consider an announcement email.
- Always document compliance requirements and corresponding actions.
- Be consistent.
- Work with your Third Party Administrator and insurance carriers. They often are flexible for special circumstances.
- If residing in California, the insurance carrier will administer Cal-COBRA. Be sure to consult them for when Cal-COBRA kicks in.
- Update plan documents for any changed policy. Policy changes that are temporary in nature (e.g., they last only through the national emergency) note the temporary nature of the policy and there would not be the need to amend the policy again upon the termination of the policy at the end of the national emergency.
- California employers are encouraged to reexamine their ACA offer of coverage. California enacted an individual mandate, making it more likely that employees will go to the Exchange Marketplace for coverage to avoid a tax penalty.
- Ensure policies are written and thorough.

Leavitt Group is here as your trusted advisor throughout these turbulent times. Be sure you are subscribed to our compliance news alerts for the latest guidance on how to navigate the COVID-19 ever-changing times.