

## **Boot Camp: Permitted Election Changes Part 3 – Leaves of Absence**

**Q&A** – the following questions were asked during the two webinar sessions in (June 2017)

**Q: If an employee is coming back from FMLA leave and had terminated coverage during the leave, they do have a new Qualifying Event to re-enroll correct?**

A: Unless the employee specifically indicates that they no longer wish to remain on the plans when they return and they have a Qualifying Event to drop the plans,.

If an employee chooses to continue the plans while on leave and the employee's coverage is canceled due to non-payment, the plans immediately reinstate when an employee comes back from FMLA leave. For this reason, many employers choose not to cancel coverage and simply indicate on their paperwork that any monies not paid through pay-as-you-go will be collected from payroll upon the employee's return to work.

If an employee chooses to suspend their plan while on leave and reinstate it upon return, then this individual's account would reinstate upon the employee's return to work.

If an employee chooses to terminate their plan when going on leave, when they return to work they have not experienced a Qualifying Event for FMLA eligible benefits because they never lost eligibility under the plan. For non-FMLA eligible benefits, if they lost eligibility due to the leave, coming back to work would be a permitted election change event because they regained eligibility for the benefit.

**Q: Since an employee can keep the health insurance coverage, can he/she also continue HSA for that corresponding month(s)?**

A: So long as the employee remains HSA eligible during the leave, the employee can continue to make HSA contributions. Therefore, during periods of paid leave, the employer can continue to deduct the HSA contributions from the employee's paycheck.

The employee could, however, change or discontinue his/her payroll deductions for HSA contributions so long as this request is made on a prospective basis.

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**Q: Please address ACA regulations regarding measurement/stability periods and losing eligibility due to reduction in hours.**

A: The ACA regulations regarding the measurement and stability periods apply only to non-excepted major medical policies. If an individual on unpaid personal leave does not lose eligibility under the major medical plan because your organization uses the stability period, the individual cannot be dropped from the plan.

The individual would experience a permitted election change event and could drop the plan only if they intend to enroll in another health insurance plan. Otherwise, unfortunately barring experiencing another permitted election change event, the individual will have to remain on the plan.

For other plans, the individual could be dropped from the plan even during the stability period, so long as the employer's eligibility standards allow for this.

If, however, the eligibility for those other plans is somehow contingent upon the individual's eligibility under the major medical plan, then barring experiencing another permitted election change event, the individual will have to remain on the plan.

**Q: Why can you change medical plans (HMO to PPO) if giving birth? Can't they just add to the existing plan, not only baby but any/all family members?**

A: HIPAA Special Enrollment rights require that the individual be offered the ability to enroll in all benefit packages that are available when an employee is first eligible. Therefore, the individual may add the child due to the birth of the child and also change types of coverage at that time. At the time the employee adds the baby, the employee may also add the spouse, but other family members are NOT also able to be added at this time.

**Q: I believe that a dependent care account cannot be continued while on leave since the child will be at home and not in childcare. Is this correct?**

A: Under the dependent care reimbursement rules, it is true that an individual who is capable of self-care cannot be reimbursed for childcare expenses for a time period where the child is at home with the individual. If the individual is not capable of self-care due to hospitalization

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or a serious medical condition, childcare related expenses are still eligible for reimbursement.

As well, eligibility for the individual to receive reimbursement for dependent care expenses is not a mitigating factor on whether or not the individual is allowed to enroll in the dependent care account or whether the individual may have payroll deductions for the account. So long as the individual has not lost eligibility under the dependent care account and the individual has not requested to terminate or lower their election, they must be allowed to stay on the plan. Individuals who are on leave may desire and may continue payroll deductions during a leave in which they have not lost eligibility so they may use them for eligible expenses following their return to work.

For these types of circumstances (and many others) it may be best to examine the reimbursement request form to ensure that the onus on whether or not the individual is eligible for reimbursement is placed on the account holder.

**Q: If an employee on FMLA leave is receiving only short term disability (STD) benefits, is this considered a paid leave? If receiving STD and also substituting some paid time to complement their STD benefits – is this considered paid leave?**

A: If the employee on FMLA leave is receiving a short term disability benefit payout via payroll from the employer, then this is considered to be a paid leave. If the short term disability benefit is received directly from the insurance carrier, informal IRS guidance suggests that this would also be considered a paid leave, however you may want to discuss this with your attorney because facilitating payroll deductions becomes complicated. Substituting paid leave to complement the short term disability would be considered paid leave.

**Q: Under unpaid FMLA – if the employee chooses to suspend the plan, does the employer have to pay the full amount for that time period? Or does no one pay and when the employee returns, they go back on without a waiting period?**

A: If the employee chooses to suspend the plan while out on unpaid FMLA leave, there is no coverage and therefore no payment due for the plan. For this reason, the employer and employee would have no payments during that time period.

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**Q: If an employee returns from FMLA leave, you mentioned that we have to reinstate them even if they failed to pay benefits when they said they would so long as we sent the employee a 15 day termination letter and terminated. So now they are back, can we take the monies owed out of their paycheck?**

A: This depends on state and local payroll law(s). If this is permitted, it is “best practice” to include language to this effect on the paperwork that the employee completes prior to going on FMLA leave. This way the individual is agreeing to this provision at the same time that they are agreeing to make the payments while on leave and a separate document will not be necessary upon the employee’s return.

**Q: Under Pennsylvania law, the employer must pay for health benefits for 30 days while an employee is on military leave.**

A: USERRA does have a provision that states that the employer must continue to pay for its share of benefits if the individual’s military service is less than 31 days, but each state may have its own provisions concerning military leave. Please consult your own state regulations for details on requirements under USERRA leave.

**Q: When an employee has chosen catch-up can the make-up missed deductions be pre-tax deductions too if the employee was participating in the pre-tax Section 125 plan?**

A: So long as the missed payroll deductions occur within the same plan year, they may be taken pre-tax. If they are outside of the plan year, however, those would need to be taken on a post-tax basis.

**Q: When you say BESTflex – can you explain what that is exactly?**

A: The BESTflex Plan™ is the trademarked name that Employee Benefits Corporation uses for its cafeteria plan administration services.

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