What do employers need to consider when contemplating COVID-19-related furloughs or leave and their impact on benefits?

If the furloughed employee or a family member of the employee has the coronavirus, then it is possible that the leave they take will be FMLA leave. In that case, benefits would continue on the same terms as before the employee took the leave, for the duration of the FMLA leave (usually up to 12 weeks in a 12-month period).

If the furloughed employee or the employee's family member has not been diagnosed with the coronavirus or if FMLA is not applicable, then the situation becomes more complicated. How long any affected employee's benefits must be continued will vary based upon the employer's size, whether they are subject to the employer mandate, whether they use the monthly or look-back measurement methods, what their plan document says, what any SCA or DBA contracts say, what is outlined in their Section 125 Plan Document as a qualifying event, and how long the furlough lasts.

ERISA Plan Document and Any Employment Contracts
The employer will first need to look at the plan document and review the plan's terms of eligibility. If they have had this issue before, they may have previously put language in the plan document about furloughs or leaves of absence and continued coverage. If there are SCA or DBA contracts in place, they might want to review those as well to see if there are any special provisions. This goes for all benefit offerings — medical, dental, vision, life, disability, etc.

If there are no special terms, then it just comes down to regular old eligibility — which for medical, dental, and vision probably says something like "employees are eligible if they normally work X hours per week or are determined to be full-time." Or, the eligibility might state that an employee becomes ineligible if they are not actively at work after a certain amount of days. Either way, as soon as the employee no longer meets the terms of eligibility, coverage would be terminated, and COBRA offered (if applicable).

Employer Mandate
If the employer is a large employer, then they need to consider the employer mandate rules for medical coverage as well. If they are using the monthly measurement method, then an employee who drops down to less than full-time status would no longer be entitled to an offer of coverage and could be terminated at the end of the month with COBRA offered for reduction of hours.

If they are using the look-back measurement method and the employee was one who was previously determined to be full-time in a measurement period, then the employee would remain eligible through the end of the stability period regardless of the number of hours they work. If the employee was offered coverage continuously from the date of hire, then the employee would remain eligible for the next three months and could only be terminated if they averaged less than 30 hours per week for that three months.

Payment of Contributions
For all sizes of employers, if an employee continues to be eligible under the plan, the employer needs to indicate how they expect to receive the employee premium contributions while the employee is out on leave and may not have a paycheck from which to make deductions. Generally, the rules for FMLA premium payments can be relied upon in this situation. The employer may require that employees pay during the furlough period by personal check. The

payments may be due per pay period or per month. The employees should be provided with written notice of the payment method, due date and consequences for nonpayment (termination of coverage). Alternatively, the employer could permit the employee to pay upon return, but this is typically not preferred when the return date is unknown.

Section 125 Cafeteria Plan Document and Reinstatement
All sizes of employers also need to consider the Section 125 cafeteria plan rules. Let's say that an employee continues to be eligible for coverage under the terms of the plan and/or employer mandate rules but wants to drop coverage because of no pay. Is this allowed? There is a qualifying event permitting employees to drop coverage based on an unpaid leave of absence if the Section 125 Cafeteria Plan Document provides that such employees lose eligibility under the cafeteria plan. If they return to work within 30 days after dropping coverage, they would be reinstated to the same coverage with no chance to change elections.

For a large employer subject to the employer mandate, if an employee returns to work within 30 days but before 13 weeks, they would be reinstated to eligibility and would have the right to change elections. If they return beyond 13 weeks, they could be required to meet a new waiting period or start a new measurement period.

COBRA
The eligibility also directly affects the requirement to offer COBRA. To be COBRA eligible, the employee must experience a COBRA triggering event (which in the furlough situation could be a reduction of hours) AND a loss of eligibility for coverage. Although the employee would be experiencing a reduction in hours (albeit temporarily), if the employee would continue to be eligible for coverage, they would not lose eligibility for coverage. So COBRA would not need to be offered if coverage continues. On the other hand, if the furlough is longer than anticipated this could cause a loss of eligibility (as discussed above), and COBRA would need to be offered when the employee's coverage is terminated. This also reinforces the fact that the employer needs to clearly outline eligibility terms in the plan document.

There are many moving parts to designing a compliant furlough or leave plan, so employers should consult with outside counsel for guidance on a plan that best serves their needs.