COVID 19 – What Are Some of the Important Affordable Care Act Implications (Part 2)

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Earlier this week we released part 1 of our series on the COVID-19 pandemic. While the future and how long the world has to cope with COVID-19 is unknown, it is clear, unfortunately, that many employers will have to layoff and/or reduce the hours of service of a certain segment of their workforce. We have been inundated with questions regarding the crisis and the impact it may have on an employer's workforce as it relates to the Affordable Care Act (ACA). In part 1 of this COVID-19 series we examined the importance of plan document language, how the look back measurement method will be impacted as a result of COVID-19, and how an employer's applicable large employer (ALE) status may be impacted by COVID-19. In part 2 of this COVID-19 series we will examine how the ACA will impact an employer who rehires employees after a layoff and how the ACA interacts with certain provisions of the Families First Coronavirus Response Act.

We plan to layoff employees but rehire the same employees once business picks up. What are the ACA implications?

The ACA has clear rules with regard to break in service rules that an employer must follow. It will be critical for an employer who has layoffs to follow the proper ACA guidelines when hiring those employees back. To refresh your recollection, the ACA determines whether a

break in service occurs by examining the number of weeks for which an employee has not accumulated an hour of service. The rule states that if an employee resumes services with the employer after a period in which the employee was not credited with an hour of service for a period of 13 (or more) consecutive weeks, the employee will be treated as having been rehired as a new employee. However, if the 13 week rule does not apply, so long as the rule of parity (discussed below) does not apply, the employee will be treated as a continuing employee. Importantly, the term week is also clearly defined in the final regulations. Week, as it is used in the final regulations, means any period of seven consecutive calendar days applied consistently by the employer. Therefore, a week can be viewed as a seven day block. Our previous article on the subject walks through several examples of the application of the 13 week rule that employers may find beneficial.

The regulations also allow employers to adopt the rule of parity. There are two time frames that are compared to apply the rule of parity. First, the employer must calculate the number of weeks (which must be at least four weeks) that the employee was not credited with an hour of service. Then the employer will calculate the number of weeks the employee was credited with an hour of service with the employer immediately preceding the period in which the employee was not credited with an hour of service. If the number of weeks the employee was not credited with an hour of service (which must be at least four weeks) exceeds the number of weeks the employee was credited with an hour of service with the employer immediately preceding the period in which the employee was not credited with an

hour of service, the employee will be treated as having terminated from employment and having been rehired as a new employee. Please note that any period in which an employee is not credited with an hour of service that is 13 weeks or greater will be treated as the employee being terminated and rehired as a new employee for ACA purposes.

If an employer determines the employee should be treated as a continuing employee when he/she resumes services, the employee should have his/her status reinstated. Therefore, if an employee was previously offered health coverage prior to his/her absence, he/she would need to be offered coverage as soon as administratively practical. The regulations state that the first day of the calendar month following the resumption of services will be deemed to satisfy the as soon as administratively practicable standard. This requirement only applies if the employee accepted the employer's offer of coverage or, presumably, if the employee did not have the time to accept or decline coverage as the result of the employee being in an administrative period. So long as the special unpaid leave rules (discussed below) do not apply, the period for which the employee does not accumulate hours of service will be counted when determining whether an employee accumulated enough hours of service to be offered health coverage during his/her initial measurement period or standard measurement period for the subsequent stability period.

However, if the employer determines an employee should be treated as a new employee, the employer will simply classify the employee as a full-time employee, a part-time employee ,

a variable hour employee, or a seasonal employee. The employer will then follow the appropriate measures as dictated by its plan document and measurement periods which, as discussed in part 1 of this series, are hopefully synchronized.

How does the Families First Coronavirus Response Act interact with the ACA?

The President recently signed the Families First Coronavirus Response Act into law. Among other items, the new law significantly expands the Family and Medical Leave Act of 1993 for any employer with fewer than 500 employees. The law provides the Secretary of Labor the power to exclude certain employers who are health care providers or emergency responders from the new FMLA requirement. Furthermore, the Secretary of Labor has the power to exempt small businesses with fewer than 50 employees from the new FMLA requirement when the imposition of the requirement would "jeopardize the viability of the business as a going concern." These regulations are not out at the time of this publication so employers wishing to use the exclusion or exemption will need to look into the details of the regulations.

To be eligible for the new FMLA provision created by the Families First Coronavirus Response Act, an employee must have been employed for at least 30 calendar days. If an employee has worked 30 calendar days and the employee has a child under the age of 18 whose school or daycare has been closed or the child care provider is unavailable due to COVID-19, the employee will be eligible for the new FMLA provision. With almost every

school in the country closed for the foreseeable future, if not for the school year, almost every single employee with a child will meet these two requirements.

Unlike the other FMLA leave provisions, the employee will be compensated for most, if not all, of his/her leave. An employee eligible for the new FMLA provision may take the first 10 days of the leave as unpaid. However, and importantly, the employee may elect to substitute vacation leave, personal leave, medical, or sick leave for the unpaid leave. After the initial 10 days the employee is paid two-thirds of the employee's regular rate of pay multiplied by the employee's normal hours of service in a given week.

The new law explains that an employer who has an employee with a varying schedule should take a six month average looking back from when the leave starts. During its calculation the employer must include hours the employee was on leave of any type. If an employee has not been employed for the six months the employer is supposed to use to calculate the average, the employer is instructed to use the reasonable expectation of what the employee would normally be scheduled to work.

The payments are capped at $200 a day and $10,000 in the aggregate. The new COVID-19 provision added to the FMLA begins on April 1, 2020 and ends on December 31, 2020 and allows an employee to take up to 12 weeks of leave.

A separate part of the Families First Coronavirus Response Act, referred to as the Emergency Paid Sick Leave Act, requires an employer to provide paid sick time if an employee is unable to work (or telework) due to the need to be absent because the employee:

1. is subject to a Federal, State, or local quarantine order related to COVID-19;
2. has been advised to self-quarantine by a health care provider due to concerns regarding COVID-19;
3. is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. is caring for an individual who is described in (1) or (2) above;
5. is caring for his/her child whose school or daycare is closed or the employee's child's care provider is unavailable; or
6. is experiencing other substantially similar conditions specified by the Secretary of HHS in consultation with the Secretary of Treasury and the Secretary of Labor.

Similar to the newly added FMLA provision, an employer is subject to the Emergency Paid Sick Leave Act if it has fewer than 500 employees. An employer operating as a health care provider or an emergency responder has the option to exclude its employees from the Emergency Paid Sick Leave Act. The Emergency Paid Sick Leave Act is available to all employees regardless of how many days the employee has been employed. The Emergency Paid Sick Leave Act can be used by employees starting on April 1, 2020 and ending on December 31, 2020

An employer will be responsible to pay its full-time employees two weeks (up to 80 hours). An employer will be responsible to pay its part-time employees the average number of hours that the employee works over a two week period (up to 80 hours). The exact same rules discussed above apply for an employer who has an employee with a varying schedule.

The amount the employee is entitled to depends on which provision from the six listed above the employee is using to take the sick leave. If an employee is eligible for the Emergency Paid Sick Leave Act as a result of (1), (2), or (3) in the list above, the employer calculates the paid sick leave by multiplying the employee's average hours times the employee's regular rate of pay. Employees are entitled to their regular rate of pay or, if greater, the greater minimum wage rate that applies between the Federal and applicable State minimum wage laws. The paid sick leave is capped at $511 per day and $5,110 in the aggregate for an employee who is eligible as a result of (1), (2), or (3) from the list above.

If an employee is eligible for the Emergency Paid Sick Leave Act as a result of (4), (5), or (6) in the list above, the employer calculates the paid sick leave by multiplying the employee's average hours times two-thirds of the employee's regular rate of pay. Again, employees are entitled to their regular rate of pay or, if greater, the greater minimum wage rate that applies between the Federal and applicable State minimum wage laws. The paid sick leave is capped at $200 per day and $2,000 in the aggregate for an employee who is eligible as a result of (4), (5), or (6) from the list above. While beyond the scope of this paper, employers are entitled

to tax credits which will theoretically cover the cost employers incur from the new paid FMLA provision and the Emergency Paid Sick Leave Act.

Now that we have examined the new provisions from the Families First Coronavirus Response Act that will impact employers, it is important to see how each fits into the ACA framework. The ACA looks at hours of service as opposed to hours worked. The term hour of service encompasses each hour an employee is paid, or entitled to be paid, for the performance of duties to the employer. Critically, the term hour of service also includes each hour the employee is paid, or entitled to be paid, by the employer for periods during which no duties are performed due to vacation, holiday, illness, incapacity, layoff, jury duty, military duty, or leave of absence.

After reviewing the definition of hour of service, it is clear that all hours for which an employee is paid under the new FMLA provision will need to be counted as a hours of service. If an employee elects to have the first two weeks of the new FMLA provision unpaid, the hours will not be included as hours of service. Additionally, it is clear that all of the time taken under the Emergency Paid Sick Leave Act will need to be counted as a hours of service. Therefore, an employer will include these hours of service when tallying an employee's total hours of service during an initial measurement period or a standard measurement period.

If the employee elects to take the first two weeks of the new FMLA provision unpaid, the special unpaid leave rules of the ACA would apply. Not many employers are aware of these

rules but the ACA has special rules for how an employer is supposed to handle time an employee spends away on FMLA under the special unpaid leave rules. The term special unpaid leave includes unpaid leave that is subject to the FMLA, the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA), or on account of jury duty.

An employer will apply the special unpaid leave rules only if an employee is treated as a continuing employee after applying the 13 week rule and the rule of parity discussed above. If an employee is treated as a continuing employee, the special unpaid leave rules will apply. Considering the most time an employee may miss due to unpaid leave under the Families First Coronavirus Response Act is two weeks, the special unpaid leave rules will always apply if the leave being discussed is limited to those two unpaid weeks.

If an employee has special unpaid leave, the employer will treat the employee as credited with hours of service for the special unpaid leave period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of a period of special unpaid leave. In computing the average weekly rate, the employer will select a reasonable method which will be applied on a consistent basis.

Conclusion

COVID-19 is impacting almost every employer in the country. There are myriad laws that must be reviewed and analyzed as employers create their plan for the future. In this article, we reviewed how the break in service rules associated with the ACA need to be applied by employers. Additionally, we examined how the the new provisions of the Families First Coronavirus Response Act interact with the ACA hour counting and special unpaid leave rules. From an ACA perspective it is important employers properly apply the rules discussed in this article, so the employer is able to accurately determine who needs to be offered coverage in the future. Our software automates all of these calculations to assist employers and provides a user-friendly interface for clients to review their data in real time. Should you have any questions or need assistance with tracking hours of service or Forms 1094-C and 1095-C reporting, please contact us.

About the author – Ryan Moulder serves as General Counsel at Accord Systems, LLC, provides Legal Counsel to Healthcare Compliance Inc. and is a Partner at Health Care Attorney's P.C. Ryan received his LL.M. from Georgetown University Law Center and his J.D. from Saint Louis University School of Law. He has distinguished himself as a leader in the Affordable Care Act arena and has written and spoken on a variety of ACA topics as it relates to compliance for companies.