



Ep. 03: Employers: Benefits Considerations Post-Pandemic

June 25, 2020

Well, it's been fun working at home, but it's now time to return to the trenches. One of the issues we're all going to have to look at is employee benefits.


Kathy Conklin: Hi, I'm **Kathy Conklin**. I'm a member of the Labor and Employment group at McGlinchey Stafford. I'm located in our New Orleans office. I'm joined today by **Rasch Brown**, who is also a member of our Labor and Employment team in New Orleans.

Rasch Brown: Kathy, one question that clients have been asking is, how do they restore health benefits to people that are returning to work?

Kathy Conklin: Well, one of the big questions is, what have you been doing while people were not working? A lot of people don't realize that on their health plans, if people were no longer working as full-time employees, they may be should have been given COBRA. And if they should have been offered COBRA, then they should be given COBRA notices and election forms. The government just recently extended the COBRA extension periods, too. They created something called an "Outbreak Period" that started on March 1st and is going to end whenever the agencies say that this Outbreak Period ended. Anybody who is deciding on an election, like a COBRA election, will have 60 days following the end of the Outbreak Period. So people who have been out, potentially, have a very long time to elect COBRA.

Rasch Brown: What about those employers that continued to pay premiums as though the employees were still active employees?

Kathy Conklin: Well, that might've been a mistake. Most employee benefits plans require that employees be actively working to be covered under their health plans, and potentially these people weren't entitled to the benefits. If you've been paying the benefits anyway, you might be able to re-characterize it as employer-paid COBRA benefits, but it's something to think about. Alternatively, the mantra under ERISA law is, "always



check your plan document." The plan documents may have said, as long as the employees were on an approved leave of absence, it was fine for them to be covered by the health benefit plan. So, check your plans.

Rasch Brown: Well, what about those situations where the employer is going to rehire the workers, put them back to work -- what happens to their health coverage then?

Kathy Conklin: Normally, employees who are on a leave of absence, if they've been furloughed, they would step right back into the health plans with no additional steps. If the employees were actually terminated, again, check your plan documents. You may have a new wait period that you have to consider. You may have to take some formal action to waive that wait period.

Rasch Brown: Well, as you know, the pandemic has created quite an economic crisis. What about the employer who can't afford to pay the same share of the health plan premium as the employer did before? Can that be changed?

Kathy Conklin: Yes. You can reduce the amount that you're paying for your employees' health plan coverage. Normally there's a 60-day advance notice that applies when you're reducing the health coverage, or you're increasing amount of copays that employees have to pay. But the employer's share of employee premiums is not one of those changes. So the 60 day advance notice does not apply. So you can go ahead and do that.


Rasch Brown: Now, how does the employer mandate under the ACA come into effect? And how does that work?

Kathy Conklin: Well, that's a good question because there has been no waiver of the Affordable Care Act rules. So an employer has a mandate to offer affordable coverage to their employees. If an employer reduces the amount that the employer is paying towards their employees' health plan coverage, it could cause problems under the ACA. So it's definitely something to worry about.

Rasch Brown: Well, one other issue that's coming up relates to retirement plans. Are there changes that an employer should consider to enable employees to access their accounts?

Kathy Conklin: The CARES Act did enable employers to amend their plans for employees who have suffered true losses due to this pandemic. It has to be someone who has suffered an economic loss, or who has suffered the disease. An employer can amend the plan to let those people access up to \$100,000 from their accounts. Even if they're under age 59 and a half, they will not pay the 10% early withdrawal penalty. And they'll get two years to pay the taxes on it. In fact, if they decide that they can repay the money, they can avoid any income tax consequences, if they can repay it within three years of taking this distribution.

Rasch Brown: What about the circumstance if an employee wants to take a loan from the retirement plan?

- 
- Kathy Conklin:** That's another change the CARES Act enabled employers to make. Employers can increase the loan limit, which is normally \$50,000, up to \$100,000. And it can waive payments of loans that are already taken out for a period of time. But note, these are only discretionary changes. Employers don't have to make them. So if employers feel like employees are going to raid their retirement accounts unnecessarily, employers don't have to make those amendments. If employers do want to make those amendments, they have up to two years to actually adopt the paperwork.
- Rasch Brown:** Now, if I'm an employer and I want to change the plan, when do I have to make the changes to the retirement plan?
- Kathy Conklin:** You do not have to make that change until the close of your 2022 plan year.
- Rasch Brown:** And speaking of an employer's 401(k) plan, some employers have been asking whether they can suspend the matching contributions for the rest of the year.
- Kathy Conklin:** Employers can suspend matching contributions. Again, there are some considerations. If you have a Safe Harbor plan, you have to have suffered an economic loss. You'll have a 30 day advance notice that you have to give your participants, and you'll have to apply the discrimination testing for that year. Even if your plan is not a Safe Harbor plan, you may have a true-up contribution requirement. So you'll have to check, because when you're looking at the matching contributions you may have already made for the plan year, it may cause you to have to make a true up at the end of the year. But absent those considerations, employers are not locked into their matching contributions.
- Rasch Brown:** Is this a good time for an employer's 401(k) committee to look at the investment options available under the plan?
- Kathy Conklin:** That's a good point. Employers usually have 401(k) committees that are fiduciaries, and it is their job to look at the investment options available to participants. Obviously this pandemic has caused a lot of havoc in the markets. So I think that the investment committees should take a look, make sure that they are observing their plans' investment guidelines, and checking to make sure all those plans' funds that are available, meet their purposes.
- Rasch Brown:** Can you tell us whether an employer can gain an extension for filing a Form 5500 for the plan?
- Kathy Conklin:** The Form 5500 extension was not actually part of the overall COVID relief, except for a narrow group of plans that had their Form 5500 due between April 1st and July 14th. Everybody else is on their normal plan 5500 timing. For calendar year plans, the forms are due on July 15th. You can get your normal two-and-a-half month extension, but that's all. The normal rules apply here.
- Rasch Brown:** So it's back to normal with respect to the retirement plans?

Kathy Conklin: Yes. In fact, it's back to normal for most of the benefits rules we've discussed. As we learned with Katrina, just because an emergency has occurred, all the laws are not suspended. So employers should be aware that the employee benefits rules should be complied with.

Thank you for joining us. This has been **Kathy Conklin**.

Rasch Brown: And I'm **Rasch Brown**.

Thanks for tuning into this episode of "More with McGlinchey." If you have a question or would like to propose a topic, we'd love to hear from you at podcast@mcglinchey.com. For additional resources on this topic, please visit mcglinchey.com. On behalf of the law firm that brings you more, we hope you'll join us next time.



Kathy Conklin
Member, New Orleans
(504) 596-2876
kconklin@mcglinchey.com



Francis "Rasch" H. Brown III
Member, New Orleans
(504) 596-2735
fbrown@mcglinchey.com

© 2020 McGlinchey Stafford PLLC. All Rights Reserved. More with McGlinchey is presented by McGlinchey Stafford and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of competent counsel. Prior results do not guarantee a similar outcome. The content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast, and all rights are reserved.