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Can Employees Make Midyear Changes to a Cafeteria Plan?

Does the New Overtime Rule Apply to Nonprofits?

How Do I Tell if Our Business Is Covered Under the ACA?

Can One of My Employees on Workers' Compensation Use FMLA?

HR consultants continue to provide expertise and serve as a valuable resource for navigating the pressing challenges facing employers today. This team fields questions each day from employers seeking answers to their HR questions.

In recent months, employers have been requesting clarification or seeking guidance on midyear benefits election changes, the U.S. Department of Labor's (DOL) new overtime rule, Affordable Care Act (ACA) eligibility, and specific leave of absence situations, including those under the Family and Medical Leave Act (FMLA). While questions surrounding these topics can vary based on locality, employer and individual circumstances, federal agencies offer guidance that can aid employers in addressing day-to-day challenges in the workplace.

This article explores questions and answers to common HR situations.

Can Employees Make Midyear Changes to a Cafeteria Plan?

Participant elections under an Internal Revenue Code Section 125 cafeteria plan must be made before the first day of the plan year or the date taxable benefits would currently be available, whichever comes first. Participant elections generally must be irrevocable until the beginning of the next plan year. This means that participants ordinarily cannot make changes to their cafeteria plan elections during a plan year.

Employers do not have to permit any exceptions to the election irrevocability rule for cafeteria plans. However, IRS regulations permit employers to design their cafeteria plans to allow employees to change their elections during the plan year if certain conditions are met.

Regulations issued by the IRS list the permitted events that may be cause for a midyear election change. Also, the IRS expanded the midyear election change rules in response to certain ACA provisions.

General Rules

Cafeteria plans may recognize certain events where an employee is entitled to make election changes during a plan year. The IRS recognizes three broad categories of midyear election change events:

1. Change in status events:
    - Change in employee's legal marital status (e.g., marriage, death of spouse, divorce, legal separation and annulment)
    - Change in number of dependents (e.g., birth, death, adoption and placement for adoption)
    - Change in employment status of employee, employee's spouse or employee's dependent (for example, a termination or commencement of employment, a strike or lockout, commencement of or return from an unpaid leave of absence, or a change in worksite)
    - A dependent satisfies or ceases to satisfy dependent eligibility requirements (including attainment of age, student status or any similar circumstance)
    - Change in place of residence of the employee, spouse or dependent
    - Commencement or termination of adoption proceedings for purposes of adoption assistance benefits

2. Changes in cost or coverage for the plan's qualified benefits (e.g., cost changes for the benefits package option, a significant curtailment of coverage, changes in coverage under another employer plan, or an addition or significant improvement of a benefits package option)
3. Other laws or court orders (e.g., COBRA qualifying events, HIPAA special enrollment rights, entitlement to Medicare or Medicaid, FMLA leave and Health Insurance Exchange enrollment)

Although a Section 125 cafeteria plan may not be more generous than the IRS permits, it may choose to **limit to a greater extent** the election change events that it will recognize. An employer who recognizes one or more midyear election change events allowed by the IRS should:

- Review its plan document to confirm that it addresses the permitted election changes (employers with fully insured plans should also confirm that any permitted election change events are consistent with the rules of the underlying insurance policy).
- Be aware that some midyear election change events only apply to certain qualified benefits. For example, not all of the IRS' midyear election change events apply to elections for health flexible spending accounts.

For More Information

For more information, please review the following resources:

- IRS regulations on midyear election changes
- IRS Notice 2014-55 and IRS Notice 2022-41, which expanded the midyear election change rules in response to the ACA and the ACA Exchanges
- IRS Notice 2004-50, which explains that the irrevocable election rules for cafeteria plans do not apply to health savings accounts (HSAs)

Does the New Overtime Rule Apply to Nonprofits?

On April 23, 2024, the DOL announced a final rule to amend current requirements employees in white-collar occupations must satisfy to qualify for an overtime exemption under the Fair Labor Standards Act (FLSA). The final rule took effect on **July 1, 2024**.

Overview of the Overtime Rule

The FLSA requires employers to pay employees overtime pay at a rate of 1.5 times their **regular rate of pay** for all hours worked over 40 in a workweek unless the employees qualify for an exemption under the FLSA. The FLSA provides several exemptions from the overtime pay requirements, the most common of which are the "white-collar" exemptions. These exemptions apply primarily to executive, administrative and professional employees (EAPs) but also to some individuals in outside sales and computer-related occupations and certain highly compensated employees (HCEs).

To qualify for most white-collar exemptions, an employee must satisfy the following tests:

- The **salary basis test** requires that the employee is paid a predetermined and fixed salary that does not fluctuate based on the quality or quantity of work.
- The **salary level test** requires that the employee meets a minimum specified amount to qualify for the exemption. The current salary threshold is $844 per week ($43,888 per year) and $132,964 per year for HCEs ($43,888 of which must be earned on a salary basis). However, outside sales personnel and certain other professions, including doctors, lawyers and teachers, are not subject to the salary level test.
- The **duties test** requires that an employee's actual work responsibilities match the description the FLSA assigns to the exemption. HCEs are subject to a less restrictive duties test.

The DOL's final rule amends current requirements employees in white-collar occupations must satisfy to qualify for an FLSA overtime exemption. To qualify for this exemption under the final rule, white-collar employees must satisfy the new standard salary level tests.

Under the final rule, effective **July 1, 2024**, the DOL updated the standard salary level. HCE's total annual compensation requirements using existing methodology from the 2019 final rule (i.e., setting the standard salary level at the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region and the HCE total annual compensation threshold at the annualized weekly earnings of the 80th percentile of full-time salaried workers nationally) and current data as follows:

- The salary level increased from $684 per week to **$844 per week** (equivalent to **$43,888 per year**).
- The HCE total annual compensation threshold increased from $107,432 to **$132,964**.

Then, on **Jan. 1, 2025**, the DOL will implement the new salary methodology, setting the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region and the HCE total annual compensation threshold at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally. This will result in the following changes:

- The salary level will increase from $844 per week to **$1,128 per week** (equivalent to **$58,656 per year**).
- The HCE total annual compensation threshold will increase from $132,964 to **$151,164**.

The final rule introduces a mechanism to regularly update the standard salary level and HCE total annual compensation thresholds, including an initial update to reflect earnings growth, which will be on **July 1, 2024**. This update will be followed by triennial updates in the future that will apply updated earnings data to the methodologies in effect at the time of the updates. The next three-year update will take place on **July 1, 2027**. **At least 150 days** before the date of a scheduled update to the standard salary level and the HCE total annual compensation requirement, the DOL will publish a notice with the new earnings levels in the Federal Register. However, the DOL may temporarily delay a scheduled update for 120 days where unforeseen economic or other conditions warrant.

Nonprofit Eligibility

The FLSA covers many nonprofit organizations. The final rule may impact nonprofit organizations with an annual volume of sales or business of at least $500,000. In determining coverage, only activities performed for a business purpose are considered. Charitable, religious, educational or similar activities of organizations operated on a nonprofit basis where such activities are not in substantial competition with other businesses are not considered. Employees of employers who are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce.

The DOL's EAP regulations have never had special rules for nonprofit or charitable organizations, and employees of these organizations are subject to the EAP exemption if they satisfy the same salary level, salary basis and duties tests as other employees.

How Do I Tell if Our Business Is Covered Under the ACA?

The ACA requires applicable large employers (ALEs) to offer affordable, minimum-value health coverage to their full-time employees or pay a penalty. This employer mandate is also known as the "employer shared responsibility" or "pay-or-play" rules.

To qualify as an ALE, an employer must employ, on average, at least 50 full-time employees, including full-time equivalent employees (FTEs), on business days during the preceding calendar year. All employers who employ at least 50 full-time employees, including FTEs, are subject to the ACA's employer shared responsibility rules, including for-profit, nonprofit and government employers.

A full-time employee is an individual who works, on average, 30 or more hours of service each week. For this purpose, **130 hours in a calendar month** is treated as the monthly equivalent of 30 hours of service per week. Hours worked by employees with fewer than 30 hours per week must be counted—and then divided by 120 per month—to determine the number of FTEs. The number of FTEs is then added to the actual full-time employee count.

Employers determine each year, based on their current number of employees, whether they are considered an ALE for the next year.

For More Information

The following resources from the IRS further detail ACA shared responsibility requirements:

- On Feb. 12, 2014, the IRS published final regulations on the ACA's employer shared responsibility rules.
- The IRS has also provided questions and answers for employers regarding employer shared responsibility rules.

Can One of My Employees on Workers' Compensation Use FMLA?

An employee's workers' compensation absence may be due to an on-the-job injury or illness that also qualifies as a serious health condition under the FMLA. In this scenario, the workers' compensation absence may be counted against an employee's FMLA leave entitlement if the employer properly notifies the employee.

Although an employer may offer the employee a light-duty position under workers' compensation rules, the FMLA does not require the employee to accept the light-duty position. If the employee declines, however, they may lose workers' compensation benefits as a result.

Frequently Asked Questions

Here are common questions on employee leaves that qualify under both the FMLA and state workers' compensation laws.

Does FMLA leave run concurrently with a workers' compensation absence?

An employee's FMLA leave may run concurrently with a workers' compensation absence when the injury meets the criteria for a "serious health condition" under the FMLA. Thus, an employee could receive workers' compensation benefits to replace lost wages while at the same time having health benefits maintained under the FMLA. However, if appropriate, the employer must designate this leave as FMLA-qualifying leave and give notice of the leave designation to the employee. Failing to designate this leave as FMLA leave may be a violation of the FMLA, and the employee may still be entitled to FMLA leave once the workers' compensation absence has ended.

Can an employer require an employee to substitute accrued paid leave if the employee is concurrently on workers' compensation and FMLA leave?

Under the FMLA, as a general rule, employees may elect or employers may require employees to substitute accrued paid leave, such as vacation or personal leave, for unpaid FMLA leave. Since the workers' compensation absence is already considered paid leave, the FMLA provision for substitution of the employee's accrued paid leave for unpaid FMLA leave does not apply. Consequently, if the employee has elected to receive workers' compensation benefits, the employer cannot require the employee to substitute any accrued paid leave for any part of the absence that is covered by the payments under a workers' compensation plan.

An employee is also precluded from relying upon the FMLA's substitution provision to insist upon receiving both workers' compensation and accrued paid leave benefits during such an absence.

However, where state law permits, employers and employees may agree to have paid leave supplement the workers' compensation benefits, such as when a plan only provides replacement income for two-thirds of an employee's salary. In addition, if workers' compensation benefits cease (for example, because an employee declines an employer's light-duty job offer), either the employee may elect or the employer may require the substitution of accrued paid leave.

What benefits is an employee entitled to while on concurrent workers' compensation and FMLA leave?

If an employee receiving workers' compensation benefits is also on FMLA leave, his or her employer must maintain the employee's group health plan coverage as if the employee had not taken the leave. Also, if the employer designates the workers' compensation absence as FMLA leave, then the employee is entitled to all employment benefits accrued prior to the date on which the leave commenced. The FMLA does not specifically entitle the employee to the accrual of any seniority or employment benefits during any period of FMLA leave or any right, benefit or position of employment other than that to which he or she would have been entitled had the employee not taken the leave.

Nevertheless, in addition to the group health benefits guaranteed under the FMLA, an employee on FMLA leave may be entitled to additional benefits while absent, depending on the employer's established policy for providing such benefits when employees are absent on other forms of leave.

How may an employee on concurrent workers' compensation and FMLA leave pay for group health coverage? For other nonhealth benefits?

An employee who is receiving payment as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. Employers should make sure payment arrangements are in place in advance of the leave or shortly after the leave begins. Likewise, an employer will also want to make prior arrangements for employee payment of other non-health benefit premiums when an employee is receiving payment as a result of a workers' compensation injury and is simultaneously taking unpaid FMLA leave.

As a general rule, if an employee does not return to work after the end of an unpaid FMLA leave, an employer may recover its share of health plan premiums. However, because workers' compensation leave is not unpaid leave within the meaning of the FMLA, an employer may not

recover its share of health plan premiums when employees on concurrent FMLA and workers' compensation leave do not return to work at the end of FMLA leave.

What may an employer do if it questions the adequacy of a medical certification?

When FMLA leave is taken because of an employee's own serious health condition, an employer may require the employee to provide a medical certification form from a health care provider to verify the leave. If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions. That is, the employer may have direct contact with the employee's health care provider in the manner in which the workers' compensation statute provides. The employer may then use this information in determining the employee's entitlement to FMLA leave.

Furthermore, the FMLA regulations provide that an employer can contact an employee's health care provider to authenticate or obtain clarification of the medical certification, so long as the employer has first given the employee a chance to cure any deficiencies.

Is an employee required to return to a "light-duty" job when it is not the same job or is not equivalent to the job the employee left?

If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light-duty job, the employee may decline the employer's offer of a light-duty job if it is not the same or is not an equivalent job to the job the employee left. However, as a result of turning down this light-duty job, the employee may lose workers' compensation payments but is entitled to remain on unpaid FMLA leave until the FMLA entitlement is exhausted. Additionally, when the workers' compensation benefits cease, the employee may elect or the employer may require the substitution of accrued paid leave.

If the employee accepts the light-duty position in lieu of FMLA leave or returns to work before the FMLA leave entitlement ends, the employee retains the right to the original or to an equivalent position. However, the period of time employed in a light-duty assignment cannot count against FMLA leave entitlement. The right to restoration is suspended during the period of time the employee performs a light-duty assignment. That right is not unlimited and ceases at the end of the applicable 12-month FMLA leave year. Restoration under the FMLA is dependent on the employee's ability to perform the essential functions of the same or an equivalent position at the end of FMLA leave.

What happens to an employee on concurrent workers' compensation and FMLA leave once the FMLA leave entitlement has run out?

If the employee is unable to return to work or is still in a light-duty job after the FMLA leave entitlement has run out, the employee no longer has the protections of the FMLA and must look to the workers' compensation statute or to the federal Americans with Disabilities Act (if the employee is a "qualified individual with a disability") for any further relief or protections.

For More Information

The following resources from the DOL further explain the intersection between FMLA and workers' compensation:

- The DOL's FMLA regulations address the interplay between the FMLA and state workers' compensation laws.
- The DOL has issued an FMLA Employer Guide to help employers understand their obligations under the FMLA.

Employers should note that compliance requirements vary by locality, and they should contact local legal counsel for legal advice. We'll continue to keep you apprised of noteworthy updates on these topics. For resources on any of these topics discussed, contact us today.

HR Hotline can provide general guidance but cannot provide tax advice or review plan documents for compliance.