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DON'T LET YOUR LOAS LEAVE YOU DOA: PART II – STATES SPEAK UP!

This article is a follow-up to the author's article "Don't Let Your LOAs Leave You DOA" in the May 2017 issue of the Self-Insurer.

Remember that scenario from Spring of 2017 where an employer was attempting to do right by an employee and offered a continuation of coverage during an employer-approved leave of absence? If not, let's quickly refresh our memories.

An employer's long-time trusted employee had a stroke of bad luck and was diagnosed with stage four cancer after being relatively asymptomatic and having never been diagnosed with cancer previously. As the employee's treatment plan became more aggressive, the employee ultimately needed to take a leave of absence – but leave under The Family and Medical Leave Act (FMLA) was exhausted due to the employee's recent addition of a new baby.

The employer subsequently continued to provide coverage, pursuant to 2016 guidance issued by the United States Equal Employment Opportunity Commission regarding employer-provided leave in accordance with The Americans with Disabilities Act (ADA)[1].

Although the employee ended up making a miraculous recovery, the claims poured in, and the employer soon realized there was a "gap" between the plan document and the employer's decision to provide ADA leave, such that the plan document did not actually allow this continued coverage.

Of course, the employer was free to provide whatever leave it saw fit – but the employer's stop-loss carrier was not keen on reimbursing these claims, since this continued coverage was not contemplated when the carrier underwrote the policy. The employer was facing stop-loss reimbursement denials and potentially skyrocketing renewal rates for the upcoming plan year.

Part I of the story ended as a cliffhanger: the employer's bank account looked bleak, and the employer was scrambling to figure out how to continue offering benefits to its employees without going bankrupt. "How did I end up here? All I wanted was to take care of my employees and give them the best benefits possible. Where did I go wrong?"

As you may recall, we put ourselves in the shoes of employers. It's intuitive to think that a health-related leave of absence from employment is coupled with a continuation of health plan coverage. Unfortunately, though, plan documents and employee handbooks are as prone to "gaps" as any other two documents, if not more; you'd be amazed at how antiquated some employee handbooks can be, and even when they're updated, it occurs to alarmingly few employers that the two documents must be harmonized.

Similar to "surprise billing" legislation, the last year or so has seen a boom in state legislation that is designed to protect employees, and much of the legislation focuses on – you guessed it – leaves of absence and continuation of coverage. Some state laws address whether or not leave must be paid, others address whether benefits must be continued while on leave, and others still address both issues. Two interesting recent examples are California and New York.

California's leave laws have been in place for decades, but have undergone various changes, including revisions in 1999, 2004, 2011, 2012, and most recently, 2017. California Senate Bill No. 63 implemented the New Parent Leave Act (NPLA) as of January 1, 2018.

Affording protected leave to employees of employers with 20 or more employees, this marked a significant change from the state's previous requirement laws that applied only to employers with 50 or more employees. Employers subject to California law must consider the interaction of all state and federal leave laws, including the NPLA, FMLA, California Family Rights Act (bonding leave), and Pregnancy Disability Leave (PDL).

Unlike California's law, which expanded an existing law, New York passed a brand new leave law, and it happens to be the most generous paid leave law in the United States to date. Effective January 1, 2018, New York's Paid Family Leave Benefits Law (PFLBL) is being phased in over four years with full implementation in 2021.

The law requires privately-owned employers to provide paid leave to employees in three situations: (1) for a father or mother to bond with a new child (birth, adoption, or foster); (2) to care for a close relative with a serious health condition; or (3) to care for a close relative when another close relative has been called to active military service.

The length of leave in 2018 has been limited to eight weeks, but will increase over time to become 12 weeks upon full implementation in 2021. Interestingly, in addition to creating the requirements, the law requires employee handbook modifications, conspicuous posting of specific information (similar to FMLA), the need to coordinate with paid time off and FMLA, and of course the tax treatment of the benefits.

I don't know about you, but my head is spinning. For employers subject to a myriad of laws such as FMLA, the various state leave laws, and ERISA, it's no surprise that complying with all of them simultaneously is a serious headache, and sometimes details are overlooked.

Now, wait a minute. If a self-funded ERISA plan is protected by ERISA, aren't state laws like these inapplicable? The short answer is no. The longer answer is no way. At a high level, ERISA protects a health plan from being subject to state insurance laws – but laws such as paid leave and continuation of coverage laws have been found to not actually be insurance laws, but employment laws, and therefore ERISA can't shield anyone from compliance with such laws.

As an attorney, I can tell you that following state and federal laws is crucial to the viability of a health plan and the employer's business. As a health care professional, I can tell you that full compliance is not an easy task. Laws that protect employees tend to have intricate details and nuances; we've picked on California and New York,

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but five other states and the District of Columbia have introduced legislation to offer or expand leave laws.

Those states include Washington, New Jersey, Rhode Island, New Hampshire, and Maryland. Although most federal and state laws do not currently require a continuation of coverage, we may soon see an upheaval in the status quo.

In the absence of applicable state laws, employers can choose whether or not to provide the benefit of continued coverage – but of course an employer's generosity must be spelled out in the plan document, not just the employee handbook, in order to avoid stop-loss denials. Ultimately, the interaction of applicable state laws, FMLA, and any other type of employer-sponsored leave of absence will need to be assessed on case-by-case basis to determine the rights of an individual employee in any particular circumstance. As with everything else in the self-funded world, if the relevant documents aren't kept up-to-date and compliant, how can an employer expect to be able to solve the compliance Rubik's Cube?

The alarming reality is that many gaps between plan documents and employee handbooks are only discovered once a disaster has already ensued. All it takes is one catastrophic event to discover that the various documents aren't airtight, and may not even align with the employer's intent.

In sum, employers need to do their homework on a regular basis. As we enter renewal season, now is the perfect time for employers to look at their plan documents and the employee handbooks.

Do the two documents reference the same types of leave? Do the documents clearly indicate under what circumstances, and for how long, coverage under the health plan is maintained during a leave? Has the employer assessed the need to comply with a new or revised state law? Are the employer and employee obligations and coverage options laid out clearly? Do the terms of these documents meet the intent of the employer? What does the stop-loss policy say about eligibility determinations? Can the handbook be used to document eligibility in the health plan? Do changes need to be made to minimize or eliminate gaps?

Don't let your LOAs leave you DOA. Do the leg work now, and figure out what needs to be done to avoid being caught by surprise. ■

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References

1 https://www.eeoc.gov/eeoc/publications/ada-leave.cfm