TERMINATING EMPLOYEE BENEFITS: THE WORKERS' COMPENSATION DILEMMA
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Employers often ask whether they can stop providing health coverage for an employee who has been out of work on an extended workers' compensation leave. This creates a problem because, even if an employee is required to pay all or part of the coverage cost, there is no paycheck from which to take premium deductions. As a result, the employer inevitably pays the full premium itself, sometimes for years. This leads to the common question: Can the employee's health benefits be terminated without incurring liability?

The cautious answer once was "No." Under former workers' compensation rulings, terminating an employee's benefits - even during a long-term leave - violated California Labor Code section 132a. Section 132a prohibits discrimination against an employee based on workers' compensation claim status.

The answer now for many employers is a cautious "Yes." Several years ago, the Workers' Compensation Appeals Board finally recognized that claims relating to employee medical benefits are preempted by the federal Employee Retirement Income Security Act ("ERISA"). ERISA is the federal law governing private employers' pension and healthcare benefits. In a case titled Navarro v. Workers' Compensation Appeals Board, the Board finally held that an employer may terminate health coverage so long as the plan terms limit coverage to employees working a minimum amount each week or month.

An employer's health plan must satisfy several requirements to fall under the Navarro case. First, it must be covered by ERISA; it must be established or maintained by a private employer to provide certain benefits (such as medical, dental, death and disability coverage) to employees. Second, the plan itself must limit participation to employees actually working while covered. Many plans, for example, require that an employee be "actively at work" (such as 30 hours per week) to continue participating. Finally, the employer must show that it treats all workers the same way. An employer who does not terminate coverage for employees on other types of leaves (such as personal leaves of absence), but does so for a worker on an occupational leave, may be liable for discrimination under Labor Code section 132a.

Employers must also consider whether other laws require continuation of benefits for a certain period of time. Employers with fifty or more employees, for example, may be required to provide twelve weeks of benefit continuation under the Family and Medical Leave Act and the California Family Rights Act. Employees on workers' compensation leaves are covered by these laws as well.

Many lawyers (including me) still believe that all claims relating to ERISA-governed plans are preempted by federal law. While the Workers Compensation Appeal Board has not gone that far, it now at least recognizes that, when a plan limits coverage to
employees who are actively working, state law cannot require more. And in almost all cases, employees will be entitled to elect Cal-COBRA or COBRA continuation coverage. This of course means that employers should carefully review the terms of their plans and ensure that they perform any COBRA notice duties that apply. Failure to provide COBRA notice, or to administer COBRA coverage properly, is a trap for the unwary employer as well.

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