



## Episode 57: “Medical Plan Coverage During a Leave of Absence,” With Art Marrapese

Speakers: Ari Kwiatkowski and Art Marrapese, Barclay Damon

**[Ari Kwiatkowski]:** Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hi, everyone. Welcome to “Medical Plan Coverage During a Leave of Absence.” Today, we are going to tell you everything you need to know in the benefits space in terms of employees taking leaves, the types of leaves. And really, we’re going to get a good breakdown of what you should be keeping in mind as an employer or manager during that period of time. I am thrilled to welcome Art Marrapese to the podcast. Art is a partner in our Buffalo office. He has extensive experience drafting employee benefit plan documents. He regularly advises plan sponsors, insurers, and health plan service providers on issues about ERISA, COBRA, and I think he’s the perfect person to kind of demystify these topics for us. So, Art, welcome.

**[Art]:** Thank you. Thank you, Ari. Appreciate it.

**[Ari]:** Happy to have you. So, you know, I think, Art, as you know better than me with these types of issues, I think our clients, business owners, HR people are getting a little bit confused, understandably. And we really need you to kind of help us and break it down. So let’s dig right in. Art, I think it will be helpful if you could talk a little bit about the types of leave that that come up in the context of this conversation just to kind of give our listeners a primer.

**[Art]:** Right. Thanks, Ari. So the questions that you’ll be asking, I would imagine, and the issues I’m going to address during the course of this have to differ depending on the type of leaves that that the employee is taking. Obviously, and I think most of our people know—our clients that the Family Medical Leave Act as it is a federally protected job protected Leave Act. So we’ll be talking about the rules that apply for FMLA leaves. Then we have in New York, New York paid family leave again, job-protected leave under New York state law. There are health coverage issues associated with that type of leave as well. And if you have employees in other states, there may be other state law mandates similar to that you’re going to have to consider, you know, in connection with your leave policies. And then finally, you know, the “other” what I will call “other” company-approved leave, which are not job protected leaves. They can come up in different ways. For example, the employer is not subject to the FMLA, for example. It doesn’t have enough employees or the employee is not eligible for FMLA at the time. You know, the leave begins. Maybe they’ll leave extends beyond the protected period. This is not uncommon. Employers often do that where we’re federally or state mandated, job protected leave ends and they continue to administer the plan as if the employee were actively employed after the end of the mandated leave. Or other company sponsored leave leaves that as we’ve discussed, for example, the most common I think that I run into is educational leaves. So those are the types of leaves we are going to be addressing. All right.

**[Ari]:** Perfect. Thanks, Art. And could you give our listeners just a little bit more context and I think advice why should we care about this topic? Why is this an issue for employers? Because I think when employees go out on these, the types of leaves you mentioned, Art, it can be confusing in terms of, you know, what to do.

**[Art]:** Okay. Well, first of all, federal law ERISA that you mentioned at the beginning requires plan documents, summary plan descriptions. And most clients and the welfare, health and welfare space have what we call RAP documents, you know, should be addressing this, you know, so that employees know what their rights are. I mean, that's a big push you know, under federal law, make sure employees know what their rights are at any given time. But it's also critically important and I'll indicate where this applies throughout the course of, you know, our discussion for COBRA purposes. It's really important to know which type of leave you're on. And it's important to know that in particular, if you're self-insured, because of stop loss and consideration, and I'm not going to get into that. I think people have self-insured plans and they know what stop loss insurance is, but you want to make sure that you're not doing something contrary to COBRA in your leave of absence administration, because you could, in that case, prejudice your right to recover from the stop loss carrier if you have an employee that is, you know, accumulating, you know, excessive claims. So it's important for employee expectations. It's important to be uniform, to treat every employee who is similarly situated in a uniform fashion. And it's important because you need to make sure that if you're doing something that's not a default, if you will, you need to make sure your carrier insurance carrier is on board and in particular, stop loss carrier.

**[Ari]:** Great. Thanks, Art. I think that's helpful. And I'm glad you're kind of demystifying these topics for us. So, Art, let's kind of start at the beginning. You know, let's say that we have an employer, an employer has an employee who is who was taking a leave. Can you kind of just walk us through what that process looks like from the benefits side of things and what the employer needs to do and keep in mind?

**[Art]:** All right. Well, one of the key questions there are a number of key questions that come up when an employee, you know, is about to go on a leave. First of all, does the employee have the right, you know, to continue active coverage during the leave? I mean, the same coverage that the employee had before or as of the day before the leave? And the answer really very simply is yes if the leave is job protected. So FMLA leave New York State paid family leave. Employers are required to offer coverage on the same terms and conditions to employees and those kinds of leaves as they... in both situations where it's job protected. This means that the employer can't, for example, be required to pay more. Okay. It's also ...now if the leave is not protected, the employer has a couple of options. All right. The employer can say that coverage is lost at that point, the employee's no longer eligible. And this is a typical default requirement for stop loss carriers. You know, they recognize that once an employee is no longer actively employed, they're entitled to COBRA. Then you need to put them on COBRA. Most employers don't do that, okay? They don't put people on COBRA at the beginning of a leave, even if it's not job protected.

**[Ari]:** Right.

**[Art]:** So and that's the other option. Obviously, you would treat believe the same way you would treat a job protected leave and continue it for a period of time or throughout the term of the leave and the same terms and conditions as if the person was still actively employed. But if you do that and this is what I said at the outset, you need to make sure that your insurance carriers are on board with that. You know, most carriers will permit it. So it's not an issue. But if you don't allow for it, if you don't communicate that, if you don't get a buy in by the carrier, like the stop loss cure. You know, you don't want to be in a situation where claims are denied... because you're extending COBRA in that case. So you've got the period of the leave where they're not working. If they don't return from the leave, then COBRA applied. And so your plan documents need to cover that. That's when, you know, at the end of the leave is when in that case it's not job protected that you give the notice and that the election rights come up and that the 18-month or 36-month period begins. So you can see that you're obligating your plan to pay in a situation... in a leave of absence situation a lot longer period of time of coverage than what would otherwise be the case under law in a not job protection, in a non job protected leave.

**[Ari]:** Yep. I think that's really a really helpful explanation because I think, you know, asking those kinds of questions and thinking about those issues before the employee's going to take leave right at the outset probably prevents a lot of issues down the road, as you mentioned.

**[Art]:** Right, right. And the key is documentation. As I mentioned, in your SPDs, to make sure whatever scenario you choose for a leave that is not job protected is specified, you know, in your documents. I'm now... I guess another question that comes up, Ari, a lot. Do employees have the right to drop health care coverage during the leave period? And if it's job protected, the answer is yes, but it's not necessarily the case for leaves of absence that are not job protected. So those will depend on the cafeteria plan and the circumstances of the leave. So that's really all I should need to say about that. It can get fairly involved in that situation in a non job protected leave scenario, not because of the cafeteria plan rules, but again, the short answer is if it's a protected leave, yes, they can drop coverage. If it's not, depends on the cafeteria plan.

**[Ari]:** Got it. So, Art, can you walk us through termination of coverage generally under these situations?

**[Art]:** Sure. Sure. Well, I guess one way to start that discussion is, you know, what happens during a leave if it's continued in terms of payment of premiums.

**[Ari]:** Right.

**[Art]:** Can that be a failure to pay? Can that result in the cancellation of coverage? And there are really, I think, three ways that employers handle premium payments during leave of absence. If it's job protected, you can do prepay. So everybody pays upfront, pretax, out of some final paycheck before leave or they pay as you go, you know, or they catch up. You know, many employers do that where the employer fronts, you know, the employer contribution and the employee contribution during the period of leave. And so one of the question that that comes up around termination most often is what if an employee fails to pay, you know, during the course of the leave and the employers in any case, whether it's protected or job or non-job protected, can cancel coverage. Okay. You always are required to pay your premium if you have a share of premium. And that's the, you know, that's the payment method the employer's using. So it can terminate at that point now for for job protected leaves though, you can't terminate it unless you meet certain notice requirements. So for example under FMLA, you know, you got you know, typically the late date is 30 days, you know, late, but you also have to provide a written notice that has to specify the date that the coverage terminates. And that has to be given at least 15 days before the termination date. So that's something to keep in mind under FMLA. And it's best practice obviously, for leaves that are not protected. So I would say always advance notice of when coverage is going to terminate and for job protected leave, 15 days in advance of that date. Now, the... so I think that's what happens during the leave and how coverage can terminate at that point. What happens if an employee doesn't return from the leave? I think that's an important question regarding termination. Well, clearly, at that point, if the leave is protected, then... and the employee doesn't return, which an employee is considered to return if the employee returns and is an employee for at least 30 days. But if they don't, most cases, they'll, you know, they'll you'll know they're not coming back then active coverage for protected leave terminates on the last day of the leave. Okay. Or the end of that month. All right so for a job protected leave, that's the end date of coverage. That's when COBRA applies or runs from that date. So you give your notice at that point, at the end of the leave. Now, if it's not a job protected leave and the coverage was continued, okay, again, the COBRA qualifying event date would be from the end of that leave. But remember what I said before, if you're using that option, in other words, if it's not a job protected leave but you continued coverage anyway, then then you need to get that consent of your carrier because the 18 months is not running from the start of the leave. It's running from the end of it and it's not job protected.

**[Ari]:** Right.

**[Art]:** Okay. So that's a key point. And if at that point the employee owes money because you've used the you know, you've advanced the premium, well, in that case, you can recoup it, you know, potentially out of, you know, PTO or other pay, subject to applicable law. Again, I'm not an employment lawyer, so I'll leave that up to you.

**[Ari]:** Yes.

**[Art]:** I'll do that. But it is allowed under FMLA if it's allowed, for example, under state law, how can you collect it? And that's an issue when someone doesn't return and their coverage is terminated. So... when. Well, let's talk about, I guess, what happens if someone does return from a leave of absence, you know, whether it's a protected leave or a non-protected leave, if it's a return from a protected leave, it's on time. Okay. The employee has the right to be reinstated in coverage. So we talked about you know, the coverage being terminated.

**[Ari]:** Right.

**[Art]:** You know, during the leave, for example, because they don't pay the premiums. That that can happen. But if it's protected. But, you know, coverage needs to be reinstated when they're reemployed with no waiting periods basically in the same coverage they had before. And that's true, too. If the employee selected to drop coverage at the beginning of it protected leave again, they can jump back in, you know, at the end of the leave right now, having to wait, for example. If the leave is not protected, there's no automatic right to reinstatement if they declined coverage or coverage is terminated during the leave. And then generally in that case, you know, if they're on COBRA, they're on COBRA. But if the coverage continued and they don't return from the leave, you know, then they can be you know... they don't have any... necessarily have any election right until the next open enrollment or some other change in status of that.

**[Ari]:** Right. All right. Thank you so much. I think that's such a that was such a great rundown of, you know, the issues we mentioned at the beginning of the call as it relates to the types of leave. You know, one thing I wanted to ask you about, and you and I were talking offline and it comes up pretty often, is how these issues kind of interplay with the ADA. So can you kind of talk about a little bit about that? Because I know you get a lot of questions about that.

**[Art]:** Yeah, we do get a fair number of questions regarding the ADA. As you know, we've talked about mandated... laws that mandate and to protect jobs and that mandate health coverage.

**[Ari]:** Right.

**[Art]:** ADA does not. Okay. Even though there are requirements obviously, that you need, you know, accommodations that need to be made in certain situations. But the granting of health coverage, unless it's mandated by federal law, FMLA or state law, for example, New York Paid Family Leave, then there is no requirement to offer coverage. Now, there could be issues with the Affordable Care Act...

**[Ari]:** Right.

**[Art]:** We didn't get into that. That's a whole podcast in itself.

**[Ari]:** True.

**[Art]:** You know what you need to do to avoid potential penalties. But beyond that, there's nothing that mandates, you know, coverage... well ADA, for example. So that's the question, you know, that we get. And that's my answer.

**[Ari]:** Okay. Art, I'm glad you hit on that, because I think that that definitely comes up quite a bit. Well, thank you so much. I think this was a great concise summary of some of the issues that come up and things that employers and business owners need to be aware of. But before we go Art, do you have any last words of wisdom we'll call it or are parting wisdom this morning?

**[Art]:** Yeah, yeah, I think what I want to emphasize and I have said this already throughout the course of the podcast: your rules need to be in writing. Okay. That's under federal law, under ERISA. It needs to be either separate leave policies that address benefit continuation, including not just medical but all other types of

leave benefits. And those can be incorporated into your summary plan description or you write them directly into your summary plan description. So documentation is important and it's also particularly important to document and to get the advanced approval of your insurance carriers, in particular for self-insured employers, their stop loss carriers. If you're doing something that grants more rights to employees than what they are eligible for under federal or state law. Okay. Because a... stop loss carriers as a prime example, you're either mandated, in which case they must cover you from a stop loss standpoint because coverage was required to, you know, to be continued under certain circumstances. Or if it's optional, then they need to approve the optional method you want to use to provide coverage during leave of absence.

**[Ari]:** Right. So documentation has to be in order or your plan documents and you have to be very wary and keep track of the notice requirements, it sounds like.

**[Art]:** Yeah, the notice requirements for your carriers.

**[Ari]:** Yes.

**[Art]:** Because you don't want them to. You know, I have maybe a short, short story about this. And you can. Yes. You know, you can take it for whatever it's worth. But early, I'd say a few years ago, maybe probably eight or nine years ago, we had a situation where an employer kept a seriously disabled employer on their health plan. Okay. The employer actually turned out to be terminal. They had cancer and they didn't keep them on the health plan through COBRA. So this was an employee who was hasn't... hadn't been actively employed in much in racked up, as you can imagine, a huge amount of health care claims.

**[Ari]:** Right.

**[Art]:** And when we when the employer submitted for reimbursement of the health care claims they had paid above the stop loss limit. Okay. The carrier initially denied it. Why? Because the carrier said this person should have been on COBRA, not carried forward as if he were he or she well, actually he in that case, was an active employee. And that was scary because it was about a half a million dollars.

**[Ari]:** Right.

**[Art]:** We ended up convincing the carrier to cover it anyway, and all the technical support was based on an interpretation of their plan document, which was ambiguous but which was good. So that's an example of it can happen. It's not likely to happen. I'm not trying to fearmonger. Right. However, you know, that's what we do as lawyers. We help people manage companies, manage risks.

**[Ari]:** Yes.

**[Art]:** That is one.

**[Ari]:** Yes. And that's I think that story illustrates our, you know, the exposure that there could be if you're not taking the proper steps, because, you know, what, if \$500,000 is a lot, that's a cost.

**[Art]:** It was a big chunk. And then like I said, we ended up getting the employer reimbursed, you know, for those claims.

**[Ari]:** Great

**[Art]:** Losses. But it was scary for a period of time, for sure.

**[Ari]:** Well, thank you so much. I really appreciate you joining us today. And I know that our listeners

appreciate it, too, because, you know, this topic can be a little bit, I think, intimidating, which is understandable in my opinion, as a non-benefits lawyer. But thank you so much again. We really appreciate it.

**[Art]:** Thank you, Ari. Appreciate it. And if any of the folks out there want, you know, additional information or more in-depth coverage of it, they should let you know. And maybe we can do something in the form of a webcast.

**[Ari]:** Absolutely. Sounds good. To our listeners, thanks so much. We'll see you in a couple of weeks.

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