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COVID-19 AND HEALTH INSURANCE ELECTION CHANGES

In response to the COVID-19 pandemic, many states have adopted legislation or regulations requiring fully-insured health carriers and health plans maintained by the state government or a political subdivision of the state to provide coverage for treatment of novel coronavirus, including medical care and prescription drugs, without cost-sharing. Such coverage enhancements are optional for self-insured health plans maintained by private employers (who are subject to ERISA rather than state mandates). Stop-loss carriers and TPAs may also offer self-funded sponsors the same opportunity to amend their plans at this time. Many health plans, whether fully-insured or self-funded, are also allowing limited mid-year enrollment opportunities for individuals who previously waived coverage.

Plan sponsors adopting these coverage enhancements have asked whether such changes to an employer's group health plan would permit employees electing new coverage to contribute their share of the premium cost on a pre-tax basis under the employer's cafeteria plan. Our answer, at this point, is "maybe."

Under the cafeteria plan election rules, an employee's pre-tax election is generally irrevocable for the entire plan year. Mid-year changes to pre-tax elections are allowed only when the employee experiences a status change event consistent with any new mid-year election. Based solely on the fact that major medical plans will permit an open enrollment opportunity mid-year for eligible individuals who previously waived group health coverage, we do not believe current HIPAA special enrollment or status change rules would override existing irrevocable election rules and permit a change to an employee's pre-tax election.

However, if the group health plan is amended to eliminate employee cost-sharing for treatment of COVID-19, the plan sponsor (employer) may view this as an improvement of a benefit package, which could potentially permit pre-tax election changes under the Section 125 status change rules. Note, however, that any election change under the group health plan would NOT be a status change for purposes of the employee's health FSA. Under Internal Revenue Code §1.125-4 (the permitted election change rules):

> *"(iii) Addition or improvement of a benefit package option. If a plan adds a new benefit package option or other coverage option, or if coverage under an existing benefit package option or other coverage option is significantly improved during a period of coverage, the cafeteria plan may permit eligible employees (whether or not they have previously made an election under the cafeteria plan or have previously elected the benefit package option) to revoke their election under the cafeteria plan and, in lieu thereof, to make an election on a prospective basis for coverage under the new or improved benefit package option."*

The Code does not specifically define a "significant" improvement. Absent further guidance from the Internal Revenue Service, there is some question as to whether reducing or eliminating employee cost share for treatment of only one specified health condition is a significant enough improvement to permit a mid-year election change. Examples in the §125 status change regulations contemplate an across-the-board reduction in co-payments and deductibles:

> *"Example (1).*
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> *(i) A calendar year cafeteria plan is maintained pursuant to a collective bargaining agreement for the benefit of Employer M's employees. The cafeteria plan offers various benefits, including indemnity health insurance and a health FSA. As a result of mid-year negotiations, premiums*

for the indemnity health insurance are reduced in the middle of the year, insurance co-payments for office visits are reduced under the indemnity plan by an amount which constitutes a significant benefit improvement, and an HMO option is added.

(ii) Under these facts, the reduction in health insurance premiums is a reduction in cost. Accordingly, under paragraph (f)(2)(i) of this section, the cafeteria plan may automatically decrease the amount of salary reduction contributions of affected participants by an amount that corresponds to the premium change. However, the plan may not permit employees to change their health FSA elections to reflect the mid-year change in co-payments under the indemnity plan.

(iii) Also, the decrease in co-payments is a significant benefit improvement and the addition of the HMO option is an addition of a benefit package option. Accordingly, under paragraph (f)(3)(ii) of this section, the cafeteria plan may permit eligible employees to make an election change to elect the indemnity plan or the new HMO option. However, the plan may not permit employees to change their health FSA elections to reflect differences in co-payments under the HMO option."

What this means is that employers can treat an improvement as significant so long as there is a reasonable, good faith basis for claiming the change being made to the plan significantly improves the coverage/benefits provided under the plan or coverage option, and it is clear that the change is not a subterfuge for getting around the irrevocable election rule. If the only change being made to the plan is that cost-sharing for the diagnostic testing of COVID-19 is being waived, we think it is a closer call and may depend on the facts and circumstances (i.e., what would participants be required to pay for COVID-19 testing under the prior terms of the plan).

Plan sponsors who wish to apply a conservative approach do have the option to allow for plan entry on a post-tax basis. However, for those employers that do not currently allow for post-tax payment of benefits, this could be administratively burdensome.

There might be a smidgen of clarity on the horizon, though, in the form of proposed legislation introduced in the Senate but not yet enacted. The Senate's Care for COVID-19 Act (S. 3442) introduced March 11, 2020, would amend the Public Health Services Act to require coverage for group health plans to cover diagnostic services, supportive care, vaccines and inpatient and outpatient hospital and physician services for treatment of COVID-19. The Bill also provides for a special enrollment period for individuals who have received a positive or presumptive positive diagnosis for COVID-19, which would apply to both group health plans and individual plans on the Marketplace (Exchange). What the proposed legislation fails to address, however, is the coverage change question for individuals who have not been diagnosed with COVID-19.

Hopefully, we will either see further legislative action or regulatory (IRS) guidance that will resolve the issue once and for all. In the interim, plan sponsors considering permitting pre-tax salary reduction election changes based on the coverage change should first consult with their legal or tax advisor.

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