COMPLIANCE ALERT

EPIC Insurance Brokers & Consultants

COVID-19 SPECIAL ENROLLMENT PERIOD RAISES COMPLIANCE QUESTIONS

April 1, 2020

QUICK FACTS

- Due to the COVID-19 health emergency, many health insurers and third party administrators (TPA) are extending the ability to offer to certain employees a special enrollment period (SEP) – a new chance to enroll in a medical plan midyear.
- The Internal Revenue Code section 125 election change regulations, which govern pre-tax cafeteria plan elections, do not clearly permit employees to make midyear elections due to a this type of SEP.
- Employers that want to implement COVID-19 SEPs may decide to make the coverage available outside of the cafeteria plan – on an after-tax basis – to avoid conflict with the Section 125 election change rules.
- If and when the IRS issues guidance that election changes during COVID-19 SEPs is a permitted event, withholdings could be adjusted to reverse payroll taxes on employee contributions.

SPECIAL COVID-19 ENROLLMENT PERIODS

Due to the COVID-19 (aka novel coronavirus) health emergency, many health insurers and third party administrators (TPA) are extending to policyholders and employers the ability to offer to certain employees a special enrollment period (SEP) – that is, a new chance to enroll in a medical plan midyear. In the case of insured plans, it appears that some health insurers will automatically apply a SEP, and in others cases, policyholders are not required to adopt the SEP. For employers sponsoring self-insured health plans, some TPAs are offering similar SEP opportunities, but at the discretion of the employer (pending approval by the stop-loss carrier). In other words, for employers with self-insured plans, offering the SEP is purely optional. The SEP applies only to medical and pharmacy coverage.

Health insurers and TPAs appear to have structured the SEP so that the enrollment opportunity is available only to employees who previously waived the coverage or declined coverage for eligible family members. Existing covered employees may not change their current election to elect another plan option.

The windows to enroll during the SEPs may be very short – in most cases the SEPs began in late March and will end in early April. The SEPs for the various insurers and TPAs generally provide that if timely elected, coverage will begin on or around April 1, 2020.

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SECTION 125 CAFETERIA PLAN ELECTION CHANGE ISSUES

These new SEPs raise questions about the Internal Revenue Code (IRC) section 125 cafeteria plan election change regulations, which apply to employee pre-tax contributions for health benefits, and whether any existing Section 125 rules permit pre-tax midyear election changes for these COVID-19 SEP elections.

Under IRC section 125, cafeteria plan elections are generally irrevocable during a plan year except when a permitted midyear change in status event occurs. Many of the cafeteria plan rules condition an election change on the loss of, or gain of, eligibility for coverage. For example, a permitted midyear change events occurs when an employee who has a change in employment status, such as transferring from full-time to part-time loses eligibility for coverage. That is not the case with the COVID-19 SEP, because such employees have not lost eligibility for coverage due to a change in employment status – they remain eligible for coverage.

The one election status event rule that could arguable apply to a COVID-19-related election change is the rule that allows changes due to a "significant change in coverage". Whether the COVID-19 coverage mandates under the recently enacted Families First Coronavirus Response Act (such as screening and testing) are "significant" is debatable. However, some employers may decide to take the position that the new mandates that require health plans to cover COVID-19 testing at no charge constitute a significant change in coverage, and employees would therefore be allowed to pay pre-tax for the newly elected coverage under that rule (if adopted by the plan).

SECTION 125 ELECTION CHANGE RULES AND OTHER COVID-19-RELATED EVENTS

The COVID-19 crisis has prompted employers and employee to consider whether employees may change their benefit elections due to employment and other life events resulting from the crisis. Existing IRC section 125 cafeteria plan election rules permit employees to change their benefit elections for a wide variety of events, provided certain conditions have been met (such as impact on eligibility for benefits). Examples include layoff, leaves of absence, moving from full-time to part time employment status, and loss of eligibility under another employer's plan.

The Section 125 rule that permits election changes due to significant changes in coverage or cost permit employees to revise Dependent Care Flexible Spending Account elections if dependent care is no longer available (e.g., day care center is closed), a new option becomes available, or the cost of coverage changes. Health Flexible Spending Account elections may be changed due to employment changes that effect eligibility for coverage under the Health FSA.

Employers should review their cafeteria plan documents to understand under what circumstances employees may or may not change their elections under existing rules that are not specific to COVID-19 events, but may apply nonetheless.

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PLAN DOCUMENTATION

In order to allow employees to pay contributions for health plan coverage on a pre-tax basis, an employer must have a cafeteria plan in place. Under the Section 125 regulations, the cafeteria plan must be established in writing – otherwise there is no cafeteria plan, and pre-tax contributions are not permitted.

Cafeteria plan regulations indicate that if there is no written cafeteria plan or the written plan document does not comply with the terms of the plan, then the plan is not a cafeteria plan and employees' pre-tax elections will result in gross income to the employee. Further, this results in additional payroll taxes for the employer.

The cafeteria plan document must include certain content, including any Section 125 election change rules that the plan sponsor has adopted. If a plan sponsor wants to permit the special COVID-19 enrollment period, the plan should be amended to include such a provision. The regulations provide that tax consequences will result if a cafeteria plan is not operated in accordance with the terms of the plan document.

TIP! Plan sponsors are often unaware of, or lose sight of, the cafeteria plan document requirement. Often, the document cannot be located, or the document has not been finalized or signed. However, employers with flexible spending accounts (FSAs) can generally obtain a cafeteria plan document from their FSA administrators. Those documents usually, but not always, include provisions that address pre-tax premium contributions. If the FSA documents do not include the pre-tax premiums provisions, it should be revised to include them. Also, if the employer does not sponsor FSAs but offers pre-tax premium contributions, the employer should put a premium only plan (POP) in place.

HIPAA SPECIAL ENROLLMENT RULES

Title I of the Health Insurance Portability and Accountability Act (HIPAA), established many years ago, provides its own set of statutory special enrollment rules. These rules require group health plans – generally, medical plans – to allow eligible employees to enroll in the plan immediately, outside of annual enrollment, upon the occurrence of certain events.

Under HIPAA, employees may enroll themselves (if not enrolled), and their new spouses and children, that are acquired through marriage, birth, adoption or placement for adoption. The rules also require group health plans to allow spouses and dependents that lose other group health plan coverage to enroll immediately. Employees or dependents that gain or lose eligibility for Medicaid or the Children's Health Insurance Program are also provided special enrollment rights. It is important to note that excepted benefits such as stand-alone, limited scope vision and dental coverage are not subject to the HIPAA special enrollment rules.

The HIPAA special enrollment rules are unrelated, from a statutory standpoint, to the IRC section 125 rules, which are tax regulations. HIPAA does not address whether employees may or may not pay for coverage on a pre- or after-tax basis. However, the Section 125 election change rules permit employers to allow midyear changes to pre-tax elections due to HIPAA special enrollment events.

As a final matter, the HIPAA special enrollment rules do not currently include COVID-19-related events in the special enrollment provisions. Thus, use of the term "special enrollment" related to COVID-19 by carriers should not be confused with the mandatory HIPAA special enrollment rules.

WHAT'S AN EMPLOYER TO DO?

Because the Section 125 election change rules do not clearly allow pre-tax election changes due to these new, insurer and TPA-created COVID-19 SEPs, the most conservative approach for employers that want to implement COVID-19 SEPs is to handle the contributions for coverage outside of the cafeteria plan. That is, require employees to make contributions on an after-tax basis. If and when the IRS issues guidance that midyear enrollment under COVID-19 SEPs is a permitted event under Section 125, the cafeteria plan can be amended and, depending on the effective date of any IRS rules, withholdings can be adjusted to reverse any payroll taxes on employee contributions. That said, some employers may take a more aggressive approach, particularly in light of the overarching public policy objective to address the COVID-19 pandemic, and allow cafeteria plan election changes on account of these COVID-19 SEPs. We recommend that any such decision be reviewed in advance with legal counsel.

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