As a result of the ongoing COVID-19 pandemic, we are observing all sorts of never-before-seen changes in the fully-insured group health plan space. Many insurers are liberally waiving their normal rules to accommodate the continuation of coverage to employers and employees in their time of need. Although the accommodations are welcome, employers need to exercise caution before allowing employees to take full advantage of the changes. There are ERISA and tax law implications to consider that are often left out of the insurer announcements related to coverage enhancements, and employee communications of legal mandates are key.

**Special Enrollment Event**

Some insurers are treating the COVID-19 pandemic as a special enrollment event and are permitting employers to enable employees to enroll in group health plan coverage during a limited mid-year window. However, for employers that offer group
medical plan benefits to employees on a pre-tax basis, the tax rules under Section 125 of the Internal Revenue Code need to be considered.

**The Current Tax Law:** Section 125 does not permit employees to change their coverage elections due to a pandemic. Instead, the current tax law requires a permissible election change event to allow a change to pre-tax benefit elections, and the employer’s Section 125 plan needs to include that election change rule.

Permissible election change events, which have been firmly established by the IRS for years, include employment changes, such as a commencement of or return from an unpaid leave of absence or a change in the worksite, but only if the change is because of and corresponds with a change in status that affects eligibility for coverage under an employer’s plan. This established definition might fit for the COVID-19 related changes some employees are experiencing, but not all. Insurers are proposing to allow even active employees who have experienced no employment change to enroll in coverage.

The Section 125 plan election change rules also allow changes in the case of “significant” coverage changes. However, absent further guidance, it is unclear whether the IRS would view the group health plan coverage changes mandated by the Families First Coronavirus Response Act or other future legislation as “significant.”

**Actions for Employers:** If the Section 125 regulations serve as an impediment to what an employer wants to do, it is possible to implement coverage elections outside of Section 125 plans. This means that employees who enroll in a plan during the special COVID-19 enrollment window would need to pay the employee portion of the premiums for coverage with after-tax dollars. Before pressing “go,” note:

- Many payroll systems are not set up to accommodate both pre-tax and post-tax group medical plan deductions. This question must be resolved in consultation with payroll teams or providers before this opportunity is offered.
- Most employees do not expect their group medical insurance premiums will be subject to taxation. Communicating with employees about the taxation aspects of this enrollment decision at the same time the opportunity is presented to employees is key to setting employee expectations and avoiding future conflict.
- Other employee benefit plan documents, including wrap plans, need to be reviewed and amended, as needed, to effectuate this unique coverage offering.

**Waiver of Eligibility Conditions**

Other insurers are waiving active service and hours of service eligibility conditions. However, remember that, under ERISA, the terms of the plan control benefit entitlements. Thus, even though insurance carriers will not enforce their rights to cancel coverage when the plan terms are not followed, employers still need to be vigilant in ensuring that their plan documents reflect the coverage being offered. Employers should seek amendments to policies and plans to reflect the leniencies extended by insurers. And employers should seek written confirmation (including detailed definitions of important terms such as “furlough” and “temporary leave of absence”) of any changes in an insurer’s eligibility conditions.