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What Employers Need to Know

Deadline for Compliance = July 1, 2007

Elizabeth M. Adler and Nancy L. Perlman

July 1, 2007 is the deadline for compliance with certain aspects of “An Act Providing Access to Affordable, Quality, Accountable Health Care” (the Act), which Massachusetts passed into law approximately one year ago. The Act impacts not only individuals, but also employers. Recently the Commonwealth Health Insurance Connector Authority (the “Connector”) and the Division of Unemployment Assistance (“DUA”) issued regulations relating to employer mandates. Employers need to be aware of upcoming deadlines and the steps they must take in order to comply with these new requirements. This Alert summarizes these imminently effective employer mandates; **please note that** some of them require action by July 1, 2007.

EMPLOYER MANDATES

The Act imposes the following employer mandates, all of which are effective July 1, 2007:

A. The “Fair Share” Premium Contribution

Employers of at least 11 or more full-time Massachusetts employees must make a “fair and reasonable” contribution towards the cost of their employees’ health insurance, or face a fee (up to \$295) per full-time (35 hours or more per week) employee. An employer is determined to have made a fair and reasonable contribution if it satisfies either the Primary Test or the Secondary Test.

The Primary Test: Under the Primary Test, an employer is deemed to make a fair share contribution if 25% or more of its full-time Massachusetts employees are enrolled in (not merely eligible for) the employer’s Group Health Plan. For purposes of the Primary Test, a “full-time employee” is an employee who works at least 35 hours per week. Part-time employees are excluded. Also excluded from the definition of full-time employees are independent contractors, seasonal^[1] and temporary^[2] employees. The extent of premium contribution, if any, is irrelevant under the primary test.

To demonstrate compliance with the Primary Test, the percentage of participation is calculated by dividing (i) the total payroll hours of full-time enrolled employees by (ii) the total payroll hours of all full-time employees^[3]. The calculation period is October 1 through September 30 of each year. Payroll hours include not only regular hours worked but also vacation time, sick leave, FMLA leave, short term disability and long term disability leaves, overtime, and holiday payroll hours. The hours worked by independent contractors, seasonal employees, and temporary employees are not considered.

The Secondary Test: If an employer cannot pass the primary test, it can still be deemed to make a fair share contribution if the employer pays “at least 33% of the premium cost of any Group Health Plan offered by the Employer to its Full Time Employees that were employed at least 90 days during the period from October 1, 2006 [through] September 30, 2007.” ^[4]

B. Cafeteria/Section 125 Plan

What is a Section 125 Plan? A Section 125 cafeteria plan allows employees and employers to pay for health insurance coverage on a pre-tax basis. Employers also benefit because they are not required to pay payroll taxes on earnings used by employees to pay for premiums.

Who Must Comply? Employers with 11 or more full-time employees working in Massachusetts must establish and maintain a Section 125 cafeteria plan in accordance with the rules and regulations of the Connector and file a copy of the plan with the Connector. *This is true regardless of whether the employer offers health insurance to his or her employees.* The Section 125 cafeteria plan requirement does not apply to employers who pay 100% of the cost of medical care coverage for all employees.

The initial determination period for counting full-time employees is April 1, 2006 through March 31, 2007. Thereafter, the determination period will run from July 1 through June 30, each year, with 151F Employer status effective the following October 1.

What are the Penalties for Non-Compliance? Failure to provide a plan and file it may subject the employer to the Free Rider Surcharge (see below). The employer will be assessed a surcharge equal to 10% to 100% of the state’s cost of care, with the first \$50,000 exempted.

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What Must be Included in the Plan? The plan must be in writing and it must include the following:

- A specific description of the benefits available under the plan;
 - The plan's eligibility rules;
 - The plan year on which the cafeteria plan operates;
 - The procedures governing participant elections;
 - How employer contributions (if any) are to be made into the plan;
- and
- The maximum amount of employer contributions (if any) into the plan.

The cafeteria plan regulation makes clear that the plan need only contain a premium-only feature (and may, but need not, include other features, such as flexible spending accounts). The plan must offer access to two or more "medical care options" which may be available through the Connector. Employers need not contribute to the cost of health care coverage options.

Because employers may now be required to make premium payments to the Connector, employers with existing Section 125 cafeteria plans should either amend their existing plan to expand eligibility or establish a second plan for employees not covered by the Group Health Plan.

May certain employees be excluded from the plan? Yes. Under the regulation, the following employees may be excluded:

- Employees less than 18 years of age;
- Temporary employees;
- Part-time employees working on average less than 64 hours per month per employer;
- Certain wait staff, service employees or service bartenders who earn, on average, less than \$400 in monthly payroll wages;
- Student employees (interns or co-op students); and
- Seasonal international workers on US J-1 student visas or H2B visas enrolled in travel health insurance.

All employers should review their Section 125 cafeteria plans for compliance with Connector requirements.

C. Free Rider Surcharge

What is it? The Act's Free Rider Surcharge is aimed at employers who do not provide health insurance and whose employees use state-funded care. A surcharge will be imposed on employers with 11 or more full-time Massachusetts employees to recover a portion of state-funded health care costs provided by Massachusetts to the employer's employees.

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Who does the Surcharge apply to? An employer is subject to the surcharge if:

- (i) The employer is a “non providing employer”^[5]; and
- (ii) Any of its employees are “state-funded employees”^[6]; and
- (iii) The employer’s state-funded employees receive state-funded health services that total at least \$50,000 in a fiscal year.

How Much? The surcharge will range from 10% to 100% of the state’s costs of services provided to the employee. The first \$50,000 of costs will be exempted, and the actual percent level of surcharge will be determined by the Division of Health Care Finance and Policy (“DHCFFP”). DHCFFP will notify employers who are subject to the Free Rider Surcharge at the end of each hospital fiscal year.

Important Note: An employer who establishes and maintains a Section 125 cafeteria plan will automatically be exempt from the Free Rider Surcharge.

D. Health Insurance Responsibility Disclosure (HIRD)

Employer Form: Massachusetts employers of more than 11 employees must submit an Employer HIRD form annually to the State.^[7]

Employee Form: The law requires that all employees who work for a Massachusetts employer of 11 or more employees sign an Employee HIRD form if they either reject enrollment in the employer-sponsored plan and/or they reject participation in the Section 125 plan. Employers must collect and keep the signed employee HIRD form for 3 years.

Note: The HIRD form has not yet been established, and it appears possible that the July 1, 2007 date for compliance will be pushed back. Employers should still have employees who decline coverage or decline participation in a Section 125 plan execute a form indicating as such. The form should include (a) employee’s name; (b) employer’s name; (c) employee’s alternative health coverage; and (d) employee’s acknowledgement of the individual mandate and penalties for non-compliance.

E. Discrimination Rules (Insurer Mandate)

While this mandate applies to Insurers, it will have an impact on employers. Effective July 1, 2007, an employer may not make different premium contributions for employees based on the employee’s rate of pay. In other words, the employer may not discriminate against lower paid employees in regard to percentage contribution toward the premium payment. This rule applies only to fully insured group plans.

There are some exceptions to this rule. Employers may (a) have different percentage contributions or fixed dollar contributions for different plan choice (as long as the contributions made do not differ based on salary level); (b) contribute differing amounts based on longevity (as long as there is a written plan that has been in place since January 1, 2007); (c) contribute different amounts for non-Massachusetts residents; and (d) contribute greater amounts for employees who participate in company sponsored health and wellness programs.

Practical Effect: The practical effect of this requirement is that fully insured health care plans offered only to top level management must be revised. An employer may no longer contribute a higher percentage of monthly premiums for its senior employees than it pays for its lesser paid employees.

Penalty: There is currently no penalty for non-compliance.

If you have any questions regarding the Act or the mandates, or need assistance, please call Nancy Perlman at 617-951-2800 or email nperlman@lgllp.com.

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[1] A seasonal employee is an employee whose employment does not exceed 16 weeks per year.

[2] A temporary employee is an employee who works either full-time or part-time, whose employment is explicitly temporary in nature, and who does not work for more than 12 consecutive weeks during the period from October 1 through September 30.

[3] The numerator does not include employees who receive health care from other parties (i.e., a spouse's health plan).

[4] 114.5 CMR § 16.03(1)(b).

[5] A "non providing employer" is one that fails to adopt and maintain a Section 125 cafeteria plan in accordance with the rules of the Connector.

[6] A "state-funded employee" is an employee or dependent of any employee (i) with more than three State-Funded admissions or visits during a Fiscal Year; or (ii) of an Employer whose employees or dependents make five or more "state-funded admission" or visits during each October 1 through September 30 of a fiscal year.

[7] Regulations that describe how to calculate the number of employees have not yet been published. They are anticipated shortly.

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