Update on Massachusetts Healthcare Reform Act's New Responsibilities for Employers

UPDATE ON MASSACHUSETTS HEALTHCARE REFORM ACT'S NEW RESPONSIBILITIES FOR EMPLOYERS

by Jennifer M. Bombard and Daniel S. Field

Last year, Massachusetts enacted "An Act Providing Access to Affordable, Quality, Accountable Health Care," commonly known as the Massachusetts Healthcare Reform Act (the "Act").[1] While much of the public's attention to this law has been focused on the individual mandate requiring that virtually all Massachusetts residents obtain health insurance coverage, the Act also imposes significant new responsibilities on employers doing business in Massachusetts.

The Act impacts employers having 11 or more full-time-equivalent employees in five different ways.[2] A summary of each requirement, along with key filing deadlines,[3] is listed below for convenience:

(1) **Section 125 Plan and the Free Rider Surcharge**: Perhaps one of the most remarkable changes set forth by the Act is the requirement that employers with 11 or more full-time equivalent employees must adopt and maintain a Section 125 Cafeteria Plan ("Section 125 plan") in accordance with the regulations of the Commonwealth Health Insurance Connector (the "Connector")[4] and IRS Code Section 125. Even employers currently offering health insurance coverage to their employees are obligated to comply with both federal law and the new Massachusetts Act.[5]

Section 125 plans are a vehicle by which employees can pay for health insurance coverage and other benefits on a pre-tax basis, without being subject to state and federal taxes or federal FICA withholding taxes. Employees electing to pay for their medical care coverage premiums through their employers' Section 125 plan agree to have their regular compensation reduced on a pre-tax basis by the amount of their premium payment. These pre-tax dollars can then be used by employees to purchase healthcare coverage (and additional benefits options, if offered by the employer) approved by the Connector.[6]

The Connector does not require employers to contribute toward the cost of health insurance coverage through their Section 125 plans; contributions may be made solely by employees. Moreover, employers are obligated to offer only

the basic premium-only Section 125 plan, which enables employees to use pre-tax dollars to pay for the cost of their health insurance premiums – it does not provide any additional benefits to employees.

Employers must adopt and maintain a Section 125 plan in accordance with federal and state law by the date in which they determine that they have 11 or more full-time-equivalent employees. The Connector's regulations state that "an employer with 11 or more employees during the initial determination period…shall [adopt and maintain a Section 125 plan] effective July 1, 2007."[7]

Employers are also obligated to file a copy of their Section 125 plan with the Connector by October 1, 2007, although the Connector will not accept Section 125 plan filings prior to September 1, 2007. The manner of filing Section 125 plans has not yet been prescribed by the Connector.

Failure to adopt and maintain a Section 125 plan will cause employers to be subject to the "free rider surcharge." This fee is assessed against non-complying employers and will be used to help fund the Uncompensated Care Trust Fund (also known as the "free care pool") or the Health Safety Net Trust Fund, which provides free care to the uninsured.[8] Employers liable for this surcharge will be notified at the end of each hospital fiscal year, which runs from October 1 to September 30.[9]

Exceptions: Employers who pay the full monthly cost of medical coverage for *all* of their employees (and all covered dependents *if* dependent coverage is available under the employer's plan) are not required to adopt a Section 125 plan. "All employees" does not include those classes of employees that an employer may, at its discretion, decide to exclude from eligibility in its Section 125 plan (see below).

Excluded Classes of Employees[10]: Employers may, at their discretion, exclude specified classes of employees from eligibility to participate in their Section 125 plan:

a. Part-time employees working, on average, fewer than 64 hours per month. Part-time employees who average 64 or more hours of work per month may not be excluded from eligibility to participate in their employer's Section 125 plan. To simplify, employers may adopt an hourly threshold for part-time, excludable employees falling below the 64-hour per month criterion (i.e., 32 hours per month).[11]

b. Employees less than 18 years of age

c. Temporary employees

d. Wait staff, service employees or service bartenders

e. Student interns and student cooperative employees

f. Seasonal employees who are international workers and have travel health

insurance.

(2) **Health Insurance Responsibility Disclosure ("HIRD") Form for Employers**: Employers with 11 or more full-time-equivalent employees must complete and submit the Employer HIRD Form to the Connector by November 15, 2007. This form enables employers to report whether or not they offer a Section 125 plan and other health benefits to their employees. Employers must complete this form even if they currently offer their employees health insurance. The HIRD form is the primary means by which the Connector will verify an employer's compliance with the Healthcare Reform Act and levy the Fair Share Contribution against an employer. This form is not yet available online.

(3) **Health Insurance Responsibility Disclosure (HIRD) for Employees**: Employers with 11 or more full-time-equivalent employees must distribute this form to all employees refusing to enroll in the employer's sponsored health insurance plan *or* Section 125 Plan. The employee declining coverage under either plan is required to complete and sign this form. Employers must collect and retain the Employee HIRD form for a period of three years. This form is available online at http://www.mahealthconnector.org.

(4) **Fair Share Contribution**: Employers with 11 or more full-time-equivalent employees employed at locations in Massachusetts[12] who do not make a "fair and reasonable" contribution on behalf of their employees' health insurance premiums will be subject to a fee called the "Fair Share Contribution." The exact amount of this fee has not yet been determined, but at a maximum, the employer will be required to pay $295.00 per uninsured employee per year. The purpose of assessing this fee is to help fund health insurance plans for individuals without access to health insurance from their employers, which are currently subsidized by the Commonwealth through the Uncompensated Care Pool ("free care pool").

The regulations set forth two scenarios in which an employer *will* be found to have made a "fair and reasonable" contribution:

a. If at least 25 %[13] of the employer's full-time employees[14] participate in the employer's group health insurance plan; or

b. If the employer contributes at least 33 % of the health insurance premium costs (for single coverage) for all of its full-time employees who are employed more than 90 days (during the period from October 1, 2006 to September 30, 2007).[15]

If an employer satisfies the criteria in either (1) or (2) above, it will be exempt from paying the Fair Share Contribution. Employers not meeting any of the above requirements will be liable for paying the Fair Share

Contribution.[16]
(5) **Non-Discrimination**: All Massachusetts employers, regardless of the number of employees on their payroll, must offer the same benefits to all full-time Massachusetts employees. This means that employers are prohibited from discriminating against lower-wage full-time employees by making contributions to their health insurance premiums that are lower than those contributions made to premiums for the employer's higher-paid full-time employees. In some circumstances, however, employers may offer greater contributions to employees based on their length of service. The Connector's regulations specifically prohibit insurers from entering into contracts with employers failing to comply with this non-discrimination rule.[17]
For additional information concerning the Connector's rules and regulations, or if you would like to discuss this topic further, please contact Jennifer Bombard or Daniel Field by telephone at (617) 523-6666, or via e-mail at jbombard@morganbrown.com or dfield@morganbrown.com.
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[1] Chapter 58 of the Acts of 2006; M.G.L. c. 151F; M.G.L. c. 176Q, § 16 and 956 CMR 4.00 *et seq.*
[2] The regulations create a set of rules for the purpose of calculating an employer's total number of full-time-equivalent employees during a given determination period. For Section 125 plan purposes, the initial "determination period" is from April 1, 2006 to March 31, 2007. To calculate the number of full-time-equivalent employees, employers must follow these steps: First, look at the determination period and add up the total number of payroll hours – including regular, vacation, sick, FMLA absence, short-term disability, long-term disability, overtime and holiday hours – for all employees paid during that time period – including all full-time, part-time, temporary and seasonal employees (individuals employed for less than month are excluded from this calculation). The maximum number of hours for any one employee during the determination period should not exceed 2,000

hours. Next, take the sum of the total payroll hours and divide this figure by 2,000. If the result is greater than or equal to 11, then the employer's obligation to adopt and maintain a Section 125 plan is triggered.
For purposes of determining whether an employer has 11 or more full-time-equivalent employees and is subject to the Fair Share Contribution and responsible for completing the Health Insurance Responsibility Disclosure (HIRD) forms, perform the exact same calculation as detailed above, but use the payroll year from October 1, 2006 to September 30, 2007 as the initial determination period.
After this year, the 12-month period for the Section 125 plan rules will change to coincide with the period used for the Fair Share Contribution and HIRD forms. See Commonwealth Connector Frequent Asked Questions, at http://www.mahealthconnector.org.
[3] State regulators have extended deadlines during the last twelve months without prior notice.
[4] The Connector is the independent entity responsible for administering the new Massachusetts Healthcare Reform Act.
[5] Employers currently offering a Section 125 plan may choose to amend or restate their current plan to extend eligibility to classes of employees now deemed eligible to participate by the Act. In the alternative, and for administrative ease, employers may choose to maintain their current Section 125 plan and create a new plan to encompass those employees not previously eligible to participate.
[6] Healthcare plans approved by the Connector are not offered through the employer's Section 125 Plan, are not endorsed by the employer, and are not part of the employer's benefits package. Eligibility for healthcare coverage is determined by the Connector and the individual insurance carrier selected by the employee.
[7] See 956 CMR 4.06(3)(a).
[8] The deadline for paying the free rider surcharge has not yet been established. The amount of this surcharge assessed against employers will vary based upon the employer's number of employees, their utilization of the "free care pool," total state-funded costs and the percentage of employees enrolled in the employer's health care plan.
[9] An employer is not subject to the free rider surcharge for its employees covered by certain collective bargaining agreements or who participate in the state's Insurance Partnership program.
[10] See 956 CMR 4.07 (3)(b).
[11] See 956 CMR 4.06; Administrative Information Bulletin 02-07 (June 29, 2007).

[12] Full-time employees who are not Massachusetts residents but work at Massachusetts locations are included in an employer's total number of full-time employees.
[13] For more information on calculating the participation percentage of enrolled employees, please visit http://www.mahealthconnector.org or review 114.5 CMR 16.03 (1)(a).
[14] Full-time employees are employees who work 35 hours or more per week. Independent contractors, seasonal employees and temporary employees are not full-time employees under this law.
[15] See 114.5 CMR 16.03 (1)(a)-(b)
[16] Assessment of the Fair Share Contribution will be based on an employer's information from the October 1, 2006 to September 30, 2007 time period. The deadline for employers to pay this fee has not yet been determined.
[17] This rule does not apply to self-insured employers. In addition, employers are permitted to provide different premium contributions for employees covered by collective bargaining agreements.