

## Massachusetts Proposes New Regulations on Employer Health Care Mandates

On June 30, 2006, the Massachusetts Division of Health Care Finance and Policy (DHCFP) released proposed regulations that offer guidance on the provisions of the “Act Providing Access to Affordable, Quality, Accountable Health Care” (the “Act”) that govern required employer contributions and documentation.

The proposed regulations, which would become effective on October 1, 2006, address certain of the Act’s employer mandates, which, among other things, require employers to make a “fair share contribution” to the cost of employee coverage and to pay a “free rider” surcharge to reimburse the Commonwealth for the cost of uncompensated health care services received by uninsured employees. In order to ensure compliance with these mandates, the Act also requires employers and certain employees to complete and submit a “Health Insurance Responsibility and Disclosure Form” (the “HIRD”).

The DHCFP is planning to hold a series of public hearings on the regulations and is encouraging interested parties to file written comments as well. Information regarding the hearings and the submission of comments appears at the end of this alert.

### Fair Share Contribution (114.5 CMR 16.00)

The Act requires employers with eleven or more full-time employees (those working more than 35 hours per week) to provide a “fair and reasonable contribution” to the health insurance costs of those employees or to pay a per-employee “fair share contribution.” The fair share contribution will be calculated by the DHCFP annually, but cannot by law exceed \$295.

The DHCFP has developed a two-step test for determining whether an employer’s contribution meets the “fair and reasonable” standard. An employer need only meet one prong of the test to avoid paying the fair share contribution.

- **Primary test.** An employer who enrolls 25% or more of its full-time employees in its group health care plan has met its obligation to provide a fair and reasonable contribution, regardless of whether the employer makes a financial contribution to the cost of the employees’ participation. An employer determines its enrollment percentage by dividing the total annual payroll hours of full-time employees enrolled in its coverage by the total annual payroll hours of all full-time employees.
- **Secondary test.** In recognition that employees may decline coverage for reasons beyond the employer’s control, the regulations provide a “secondary test” for employers who fail to meet the 25% enrollment requirement. Under this test, employers who offer to pay at least 33% of the premium cost toward an individual health plan for full-time employees employed at least 90 days during the year will also be deemed to have made a fair and reasonable contribution.

In determining its number of full-time employees for purposes of the primary and secondary tests, employers may exclude independent contractors, and seasonal employees and temporary employees who do not work more than 16 weeks or 90 days, respectively, during the period from October 1 to September 30 each year.

*Note:* On July 20, 2006, the United States District Court for the District of Maryland struck down Maryland’s “Fair Share Health Care Fund Act” as preempted by the federal Employment Retirement Income Security Act of 1974 (“ERISA”). The Maryland law required for-profit employers of a certain size to spend up to 8% of the total wages paid to their Maryland employees on health insurance costs or to remit the difference to the state. Only a few employers were subject to the legislation, all of whom, with the exception of Wal-Mart, met the 8% threshold. The Maryland decision, which has been appealed to the Fourth Circuit Court of Appeals by the Maryland Attorney General, highlights the difficulties states face under ERISA in passing and implementing legislation governing the offering and financing of and the access to employer-based health care coverage. However, the differences between the Massachusetts Act, which is an attempt to effect a comprehensive overhaul of the Commonwealth’s health insurance system, and the more targeted Maryland legislation lead us to conclude that this decision is not likely to be a good predictor of the success of any ERISA preemption challenge to the Act, or of whether such a challenge will be brought at all.

### **“Free Rider” Surcharge (114.5 CMR 17.00)**

Under the Act, non-providing employers, which are defined as employers of state-funded employees that employ more than ten employees and who do not offer to contribute toward or arrange for the purchase of health insurance for their employees and do not maintain a cafeteria plan,<sup>1</sup> are required to pay a “free rider” surcharge to the Commonwealth once their employees and their dependents have used a threshold amount of state-funded health care services. While some have advocated that an employer should be considered to have arranged for the purchase of health insurance for purposes of avoiding the free rider surcharge merely by adopting and maintaining a “cafeteria plan,” the proposed regulations do not directly address this. What exactly it means for an employer to “arrange for” the purchase of insurance will, it is hoped, be clarified once DHCFP promulgates final regulations.

According to the regulations, an employer is not subject to the surcharge unless its state-funded employees and their dependents, in the aggregate, receive more than \$50,000 in state-funded health care in the fiscal year, which is defined as October 1 through September 30. A state-funded employee is defined as an employee, or the dependent of an employee, (i) who accesses state-funded health care three or more times in a fiscal year or (ii) who works for an employer whose total employee population and their dependents access state-funded health care five or more times in a fiscal year. Employers who are parties to a collective bargaining agreement governing the terms and conditions of employment or who participate in the Commonwealth’s Insurance Partnership Program are not subject to the surcharge, even if meeting the foregoing two criteria.

Under the regulations, the free rider surcharge will vary from employer to employer, based on a number of factors including the employer’s total number of employees, its employees’ usage of state-funded health care services during the fiscal year, the employer’s compliance with the HIRD filing requirements, described below, and the employer’s compliance with the cafeteria plan requirements. The surcharge that the Commonwealth can impose ranges from 10% to 100% of the cost of state-funded health care used by employees.

The regulations also address how the surcharge will be collected, how employers may challenge a determination that a surcharge is due, the penalties to which employers are subject if they fail to comply with any filing or payment obligations, and the right of employees to be free from employer discrimination for, among other things, receiving free care.

### **Health Insurance Responsibility Disclosure (114.5 CMR 18.00)**

In order to ensure that employers and individuals are adhering to its mandates, the Act requires employers and employees to complete and file a HIRD. The regulations require employers to complete and file an initial HIRD form on or before

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<sup>1</sup> The DHCFP’s comments accompanying the proposed regulations state that a non-providing employer is one that, among other things, does not offer to contribute toward or arrange for the purchase of health insurance for its state-funded employees or maintain a cafeteria plan (emphases added). Presumably, the final regulations will clarify the definition.

May 15, 2007 with respect to each person that it employs (including full-time, part-time, seasonal, and temporary employees, but excluding independent contractors) as of April 15, 2007. Employers with fifty or more employees will be required to submit updated HIRD forms for new and terminated employees on a quarterly basis. All other employers will be required to submit updated forms on an annual basis.

The regulations indicate that the initial HIRD form, though not yet published, will require employers to provide certain identifying information about themselves and their employees, as well as information about the arrangements the employer has made to provide its employees with access to coverage. Specifically, employers will be required to report whether they offer an employer-sponsored health plan, whether the plan is self-insured, and, if no such plan is offered, whether they otherwise arrange for their employees to purchase insurance (including maintaining a cafeteria plan).

With limited exception, the Act also requires every resident of Massachusetts to obtain health insurance coverage. The regulations provide that the HIRD will be used to enforce this mandate as well. Employers are therefore required to report whether employees who were offered access to health insurance through an employer-sponsored plan or other arrangement accepted or declined such coverage. Employees who are not offered coverage or who decline coverage are required to sign an Employee HIRD Form that contains identifying information about the employee and whether he or she has alternative coverage. In addition, the employee must sign an acknowledgement of the Act's individual mandate and associated penalties and, if the employer did not offer or arrange for the purchase of a health insurance plan, an authorization for the DHCFP to share, presumably with the employer, information about the state-funded services the employee received for purposes of calculating the employer's surcharge liability. Employers are responsible for distributing, collecting and submitting the Employee HIRD Form.

## Public Hearings and Opportunity for Comment

The DHCFP will hold public hearings on the proposed regulations at the times and locations indicated below. *The DHCFP has advised interested parties who would like to testify at the hearings to notify them by 5:00 pm on August 7, 2006 to ensure that all parties are afforded an opportunity to speak.*

Fair Share Contribution                      August 8, 2006 from 9:00 am to 12:00 pm at the Campus Center of the University of Massachusetts at Boston.

Employer Surcharge                      August 8, 2006 from 1:00 pm to 4:00 pm at the Campus Center of the University of Massachusetts at Boston.

HIRD    August 15, 2006 at 10:00 am at DHCFP, Two Boylston Street, Boston, MA 02116.

In addition, the DHCFP is encouraging interested parties to submit written comments on the regulations. These comments should be submitted to the DHCFP no later than 10 calendar days following the close of the public hearing for each regulation. Written comments for the Fair Share Contribution and Employer Surcharge are, therefore, due by August 18 and written comments for the HIRD are due by August 25.

The full text of the regulations and the address to which written comments should be sent can be found on the Division of Health Care Finance & Policy website at <http://www.mass.gov/dhcfp>.

## Conclusion

While there continue to be questions about many facets of the Act, including how various provisions will be implemented, there appears to be a growing consensus among the business, insurance and consumer advocacy communities that this legislation should be given a chance to work before any substantial changes are made or alternatives pursued.

## Contact Information

We will keep you apprised of any significant developments. If you have any questions about the proposed regulations or other aspects of the Act, please contact:

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