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Management Alert

The Massachusetts Health Care Reform Act Revisited: Proposed Regulations Help Fill in the Gaps

At the end of June, the Massachusetts Division of Health Care Finance and Policy released three proposed regulations clarifying certain obligations that the new Massachusetts health care reform act (the Act) imposes on employers doing business in Massachusetts, as reported in the Seyfarth Shaw May 2006 Management Alert. In that Alert, we discussed four key employer mandates set forth in the Act. The proposed regulations provide guidance on the health information disclosure form, the free rider surcharge and the fair share contribution, but offer no guidance on the content or form of the cafeteria plan contemplated by the Act. Moreover, they remain "works in progress": hearings on the proposed regulations will occur this year on August 8 (fair share contribution (morning) and free rider surcharge (afternoon)) and August 15 (disclosure requirement), after which the Massachusetts Legislature will review, and perhaps revise, the regulations. The legistlature may factor into the balance the recent court decision concerning Maryland's "fair share" statute, as discussed in this Alert.

The Proposed Regulations:

Employer Disclosure Form

The proposed regulation on Health Insurance Responsibility Disclosure provides guidance about the filing deadlines and the content of the Health Insurance Responsibility Disclosure (HIRD) form required under the Act.

Every Massachusetts employer (even those with self-insured plans) must submit an initial HIRD form to the Division of Health Care Finance and Policy (the Division) by May 15, 2007. The initial HIRD form will contain information about both the employer and its employees. The names and Social Security numbers of all employees as of April 15, 2007 (full-time, part-time, seasonal and temporary) must be disclosed on the initial HIRD form, as well as whether the employer offered each employee access to or offered to arrange for the purchase of health insurance, and whether such insurance was accepted (must specify if individual or family) or declined (specifying alternative coverage

available). Employers must also disclose information about their employee benefit programs, including whether they maintain a cafeteria plan or a self-insured health plan or both.

Each year, employers must update the information provided to the Division since their last HIRD form was submitted, including information about new and terminated employees. The annual HIRD update will be due on May 15 of each year. Quarterly HIRD forms are required for those employers with 50 or more employees. These quarterly forms will be used to update any of the required HIRD information and will be due 45 days after the end of each quarter.

If an employer does not offer an employee access to, or does not offer to arrange for the purchase of health insurance, or if an employee declines the employer's offer, the employee must sign an employee HIRD form, on which the employee must provide his or her name, Social Security number, employer's name and the employee's alternative insurance coverage, if any. Employees must also acknowledge their awareness of the individual mandate and authorize the Division to share certain information about the state-funded health costs for which their employers may be liable under the free rider surcharge. Employers will be required to distribute, collect and submit the employee HIRD form to the Division.

Although the Act itself does not spell out a penalty for non-compliance with the HIRD requirements, the proposed regulation expressly provides that employers must make all employer filings required by the Act "under the pains and penalties of perjury." Moreover, failure to comply with the HIRD requirements could increase any applicable free rider surcharge.

Free Rider Surcharge

The Act mandates that "non-providing" employers pay a surcharge equal to a portion of the state's cost of providing health benefits to an employer's "state-funded employees" who receive free health services, but only if (i) one uninsured employee (or dependent of an employee) receives free health services more than three times in a single fiscal year or (ii) the employer has five or more instances in a single fiscal year of uninsured employees (or their dependents) receiving free health services. The first $50,000 of free care in any single fiscal year remains exempt from the free rider surcharge.

The proposed regulation on the free rider surcharge clarifies that an employer with more than 10 employees will be considered a "non-providing" employer subject to surcharge only if the employer does not offer to contribute toward or arrange for the purchase of health insurance and fails to maintain a cafeteria plan in accordance with the rules of the Commonwealth Health Insurance Connector. An employer is also exempt from the surcharge if it participates in the Insurance Partnership Program or is a signatory to a collective bargaining agreement addressing terms and conditions of employment.

Unfortunately, the proposed regulation does not clarify what is meant by "offer to" or "arrange for" the purchase of health insurance. However, the regulation does appear to elevate the importance of maintaining an Internal Revenue Code Section 125 cafeteria plan. Not only does the Act require the maintenance of a cafeteria plan, but also failure to do so could subject the employer to the free rider surcharge.

Under the Act, the free rider surcharge would range from 10-100% of the state's cost of services provided to the employees or their dependents. The proposed regulation gives employers the formula needed to determine what percentage applies to them. The Division assigns each employer subject to the

surcharge to one of four categories based upon the number of persons employed by the employer:

Category 1: 11-20 employees;
Category 2: 21-35 employees;
Category 3: 36-50 employees;
Category 4: > 50 employees.

A percentage is then applied to each category of employer based upon the number of admissions or visits by state-funded employees during the fiscal year. This percentage may then be adjusted upward if the employer does not comply with the HIRD requirements or is a repeat offender of the surcharge provisions. The product of the amount of the state-funded costs and the applicable percentage will be reduced by the employer's percentage of enrolled employees as determined under the proposed regulation on the fair share contribution.

For example, under the chart provided in the proposed regulation, if an employer falls into Category 2 and has one state-funded employee with seven to 14 admissions or visits during the year, the Division will assess a 25 percent surcharge for the state-funded health costs attributable to the employer. This calculation may be (i) reduced by the percentage of employees who have accepted and enrolled in the employer's group health plan and/or (ii) increased if the employer has failed to comply with the HIRD form requirements or is a repeat offender of the surcharge provisions.

Employer Fair Share Contribution

Under the Act, a Massachusetts employer with 11 or more full-time equivalent employees that fails to pay a "fair and reasonable premium contribution" toward its employees' health insurance costs must pay a "fair share contribution" no greater than $295 per employee, unless the employer is exempt under one of two tests.

The primary test delineated in the fair share contribution regulation for such an exemption from the fair share contribution is based on the percentage of full-time employees (those who work at least 35 hours per week) enrolled in the employer's group health plan.

To determine the applicable percentage of such "enrolled employees," the total number of payroll hours for enrolled full-time employees is divided by the total payroll hours for all full-time employees. An employer with an enrolled employee percentage of at least 25% is exempt from the fair share contribution. For purposes of determining the percentage, part-time employees, seasonal employees (unless they work more than 16 weeks during the year), temporary employees (unless they work more than 90 days during the year), and independent contractors are not counted. It is unclear from the proposed regulation whether employees who obtain health insurance coverage through other sources (e.g., from a spouse's employer) will be included in the determination of full-time employees enrolled in the group health plan. If these employees are not included in the numerator but are included in the total full-time payroll hours in the denominator, it could negatively impact the ability of the employer to pass this test.

An employer who fails to satisfy the primary test may still be exempt from the fair share contribution assessment if it meets the secondary test. Under that test, if the employer offers to pay at least 33% of the premium cost toward an individual health plan for employees that were employed for at least 90 days during the year (Oct 1, 2006-Sept. 30, 2007), the employer will be exempt from the fair share contribution assessment. The proposed regulation does not specify what constitutes an acceptable individual health plan.

An employer that fails both tests must pay an annual fair share contribution to Massachusetts. This amount will be the lower

of (i) $295 per employee or (ii) an amount determined with respect to the per capita cost of individuals using the Uncompensated Care Pool.

The Maryland Decision

On July 19, a federal district court in Maryland found the Maryland "fair share" statute [also described in the earlier Alert] preempted under the Employee Retirement Income Security Act (ERISA) because, in the court's view, the statute interfered with a national employer's uniform national administration of its ERISA-governed health care benefits plan. *Retail Industry Leaders Association v. Fielder et al.* The court recognized that many other states and localities were considering such "fair share" statutes of varying percentages of contribution and reasoned that a national employer with employees in Maryland "must segregate a separate pool of expenditures for its Maryland employees and structure its contributions – and employees' deductibles and co-pays – with an eye to how this will affect the [Maryland] Act's spending requirement." Noting that other states had proposed percentages ranging from 5-10%, the court believed that a patchwork quilt of differing obligations would impair the national uniform administration of plans. In order to find a "connection to" ERISA plans, the court presumed, based upon affidavits from the affected national employer, that an employer would increase its contribution to its employees' ERISA plans, rather than pay the State of Maryland, because, as one "friend-of-the-court" brief stated: "[i]t makes better business sense to spend on benefits to one's own employees rather than to pay a tax into a general fund for low-income residents' health care."

Although the Maryland Secretary of Labor argued that the statute offered employers the choice of paying a sum of money to the state or offering an equal sum of money to their employees in the form of health care, the court observed that "the Secretary does not offer a single reason why an employer would pay the State rather than generate good will with its work force by increasing its employees' benefits. The 'choice' here is a Hobson's choice." Unlike the Maryland statute, which requires large employers to pay 8% of their Maryland payroll to the state or to their Maryland employees in the form of health care benefits, the Massachusetts Act does not require such a high percentage of contribution to the health care costs of an employer's Massachusetts work force. The proposed regulations clarify that the "annual fair share contribution" is capped at $295 per Massachusetts employee for employers not exempted from that contribution under either of the two tests described in the "fair share" regulation discussed below. Nonetheless, the Massachusetts Legislature may well consider the impact of the Maryland decision in determining whether, and to what extent, to revise the proposed regulations to effect legislative intent.

Next Steps

It is not at all clear that a court in Massachusetts would find the Massachusetts Act preempted. Until such time, if ever, that a court so holds, employers should begin the process of reviewing the eligibility provisions of their health plans to determine if they are at risk of triggering a free rider surcharge or becoming subject to a fair share contribution assessment. Data necessary for the completion of the HIRD forms should also be collected. Employers should consult with their benefits counsel regarding the type of cafeteria plan they should undertake and the anti-discrimination rules applicable to such plans and to other employer-sponsored plans.

Employers should consider submitting written comments to the Division or attending the public hearings on the regulations to urge the Division to provide employers with clear and specific guidance in order to meet the demands of the new health care law.

If you have questions about state mandated benefits or "play or pay laws," please contact the Seyfarth Shaw Employee Benefits Group attorney with whom you work or any Employee Benefits attorney listed on the website at www.seyfarth.com.

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