

One Minute Memo[®]



No Veto: Fair Share Repeal Proceeds Despite ACA Delay

On July 11, 2013, Governor Patrick reported that he will not block repeal of the Massachusetts Employer Fair Share Contribution pursuant to M.G.L. c. 149, § 188, despite the Obama Administration's announcement that implementation of the large employer mandate under the Affordable Care Act will be delayed for a year, until January 1, 2015. Since its historic passage in 2006, the Fair Share Employer Contribution under § 188 required employers with more than ten Massachusetts workers to make a timely offer of subsidized health insurance to "full-time" employees or pay a \$295 penalty per full time equivalent. The similar ACA employer mandate requires employers with 50 or more employees to provide affordable coverage within particular timeframes to certain employees in order to avoid more significant penalties of \$2,000 or \$3,000. Our discussion the ACA's employer mandate can be found in our Health Care Reform Management Alert Series, issues [45](#), [48](#), [58](#) and [67](#) and available on our ACA Resource Center highlighted [here](#). In a surprise announcement by a Treasury department official on July 2, 2013, implementation of the ACA employer mandate was delayed. This announcement followed by one day the Massachusetts Senate's passage of the repeal of § 188 Fair Share Employer Contributions, effective immediately, in connection with the Commonwealth's 2014 Budget. The Governor signed the Budget Friday, July 12, 2013.

On January 11, 2013, we reported [here](#), that the Patrick Administration sponsored the bill calling for Fair Share repeal, in part due to the recognition that the ACA's similar employer mandates would render employer compliance with the dual schemes onerous, and potentially result in duplicative penalties. It was anticipated that the repeal would result in a modest window - between July 2013 and January 2014 - during which the employer mandate to offer health insurance was eliminated. That period now stretches through January 2015.

As a result of the ACA employer mandate delay, employer shared responsibility payments will not be assessed for 2014 (but other components of ACA implementation scheduled to take effect in 2014 are expected to move forward, see issues [67](#) and [69](#)). Discussing his decision not to veto despite the ACA delay, the Governor expressed his belief that in Massachusetts, where there is near-universal coverage already, employers who have adopted health insurance programs after half a dozen years of robust regulatory enforcement - in lieu of paying Fair Share Contributions and as a tool to attract and retain employees - will maintain these insurance offerings until the federal employer mandate's new effective date despite the absence of the preexisting regulatory requirements. In the face of pressure from certain constituencies that sought to reinstate Fair Share following the announcement of delay in federal implementation and enforcement, Governor Patrick confirmed that he stands behind this revocation of § 188, which served in some ways as a precursor to federal reform. Discussing the repeal, the Governor pointed out that the Medical Security Program, which covers individuals receiving unemployment compensation in Massachusetts, remains in place until January. A per employee surcharge will remain thereafter, in the form of an "employer responsibility contribution" to subsidize health insurance.

Employers should note that the legislation that repealed § 188 makes clear that the Division of Unemployment Assistance, to which the Fair Share Unit (FSU) has reported over the years, will retain authority to collect any outstanding fair share employer contributions established pursuant to § 188 for obligations arising prior to July 1, 2013. The FSU will remain in place to account for employer liabilities through June 30, 2013 and collection of these amounts will be conducted in accordance with previously promulgated regulations. Accordingly, employers should expect DUA to continue enforcement activity, pursue audits, and seek to collect liabilities for filing quarters through DUA's Q3 2013 filing period.

By: *Kristin McGurn*

Kristin McGurn is a partner in Seyfarth's Boston office. If you would like further information, please contact your Seyfarth Shaw LLP attorney or Kristin McGurn at kmcgurn@seyfarth.com.