

Retail Detail



Massachusetts Fair Share: Retailers Beware

The Massachusetts Department of Unemployment Assistance (“DUA”) and its Fair Share Contribution Unit (“FSC Unit”) have significantly increased enforcement activity against employers under the Massachusetts health care reform laws. Enacted in 2006 by then-Governor Mitt Romney, the laws (i) mandate that individuals obtain health insurance or pay a penalty, (ii) require employers to provide health insurance to certain employees within 90 days or suffer a penalty, and (iii) create a health care exchange through which individuals can purchase health insurance (the “Commonwealth Connector”). Employers with operations in Massachusetts must promptly make a premium contribution toward health insurance for their full-time employees or pay a per-employee assessment (“fair share employer contribution”) to the Commonwealth Care Fund.

We prepared a detailed blueprint of compliance highlights in the [attached article](#) but the following are some practical tips for Retail Employers so you can avoid running afoul of the Massachusetts Fair Share law, suffering a time-consuming audit, or incurring significant penalties:

- 1. File Accurately and On Time.** Employers who do not file their fair share contribution reports on time, or who made past filing errors, are at increased risk for enforcement activity. Employers who make mistaken, inconsistent or tardy filings, or pose questions to the agency, are more likely to be targets of time consuming and costly audits.
- 2. Ensure that the Agency Can Contact You.** Make sure the address on file with the FSC Unit is current and carefully selected so the proper people in your organization receive and respond timely to mailings from the agency. In some cases, employers miss the short agency-established response windows because critical mailings (audit requests, determination notices, pre-lien and levy notifications) are misdirected or sent to old addresses, or to locations and people who cannot respond quickly. Be aware that the FSC Unit maintains both a “legal address” for communications with the DUA as well as an address for “FSC Communication.” Create protocols and designate the people who will respond to agency correspondence and update the agency as soon as this information changes.
- 3. Take Audit Requests Seriously.** Often, the first contact an employer receives from the FSC Unit is a notification of audit through which the agency seeks to verify that the information self-reported in on-line filings is accurate. Sometimes the audit is a first step in enforcement activity. Contact the FSC Unit immediately when you receive an audit notice to negotiate a reasonable time frame to submit your response, and confirm in writing any agreement you reach.
- 4. Document Your Process and Dealings With the Agency.** Agency representatives are trained to document their dealings with you. Develop the habit of doing the same. Dealings with the DUA may be protracted, memories may fade, and the substance may become critical at a hearing or on appeal. Keep records that demonstrate your responsiveness and compliance, and retain the back-up support for your on-line filings.
- 5. Gather What the Agency Wants.** Typically, during an audit the agency asks to see weekly payroll records, group health plan documents and payment records, employee enrollment lists, benefit eligibility criteria, coverage offers,

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HIRD forms, federal tax filing forms, Form 1099s, and employee work schedules, among other things. Employers must assemble this information quickly, carefully and comprehensively in response to an audit notification.

- 6. Respond Promptly.** Prior to November 5, 2012, applicable regulations provided that an employer who disputed a liability determination or assessed contribution had to file an appeal of that decision within ten (10) days of its mailing. Employers who failed to appeal within the prescribed time frame had to establish “good cause” for their delay, or would lose the right to appeal. The legislature recently amended the Act to allow employers to appeal within sixty (60) days as prescribed by the DUA. Adhere to the time frames established by DUA to avoid unnecessary procedural battles and preserve appellate rights.
- 7. Begin Documenting Alternate Coverage.** As of July 1, 2013, employers can exclude from their headcount all employees who have qualifying health insurance coverage from a spouse, parent, veteran’s plan, Medicare, or retirement or disability plan. Employers will be required to maintain documentation to establish this alternative coverage. Begin tracking this information on revised HIRD forms or elsewhere.
- 8. Determine Who Your full-Time Employees Are.** If your employees work on a fluctuating schedule, or work variable hours during weeks or quarters, you must properly analyze payroll hours and schedules before you make quarterly filings. Once an employee is “generally” considered “full-time,” you must provide him an offer of subsidized health coverage within 90 days of such designation. The DUA has not publicly endorsed a one-size-fits-all methodology for determining when an employee is full-time, or the date from which the 90-day period begins for current employees whose status changes from part- to full-time. This leaves many unanswered questions. Err on the side of offering the employee a subsidy. Be aware that, to date, DUA’s position on how employers should calculate “full-time” differs markedly from recent guidance issued by the IRS for PPACA purposes.
- 9. Penalties Sting.** When the FSC assesses a “fair share employer contribution,” it is calculated based on the number of employees you have, and not on the number of full-time employees to whom you did not give a timely subsidized coverage offer. Liability assessments add up quickly. Recent amendments to the Act now make it clear that the agency has discretion to waive the interest penalty but, if they do not waive it, the interest penalty runs from the date you owe the liability.
- 10. Get Help and Move Quickly.** Fair Share compliance is complicated. It is difficult to interpret and keep abreast of changing regulations and filing instructions. National employers with operations in Massachusetts may need some local help to deal with, and respond timely to, nuanced and amended regulations.

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