

Management Alert



Fair Share: Be Aware

When, in 2006, then-Governor Mitt Romney signed into law an act designed to ensure access to health care for Massachusetts residents it became something of a model for the federal Patient Protection and Affordable Care Act. Many continue to scrutinize the success of the Massachusetts healthcare reform experience in search of lessons learned as we prepare for further PPACA implementation. Components of Massachusetts reform mandate that individuals obtain health insurance or pay a penalty, establish employer obligations to provide health insurance to certain employees or suffer a penalty, and create a health care exchange through which individuals can purchase health insurance (the Massachusetts Health Connector). Under the Act, employers with operations in Massachusetts must 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 Trust Fund. In recent years, the Department of Unemployment Assistance and its Fair Share Contribution Unit significantly increased enforcement activity against employers they consider to be out of compliance with obligations under the Act.

Given the vigor of this recent enforcement activity, and the nation's focus on preparing for PPACA compliance, we recommend that employers take immediate steps to review their compliance with the Massachusetts Act. In subsequent alerts in this series, we will explore the anticipated interplay between PPACA implementation and Massachusetts Fair Share.

The Basics: Fair Share Requirements

The Fair Share Act currently requires employers with more than 11 full-time employee equivalents¹ to make a "fair and reasonable" contribution to their full-time employees' health insurance or pay the Commonwealth a contribution of \$295 for each full-time employee (less certain exclusions). In order to be considered a "contributing employer," and thus exempt from this payment, employers with 50 or more employees must:

1. provide group health coverage to at least 25% of its full-time employees [the "Primary Contribution Standard"]; and
2. offer to contribute at least 33% of the cost of a group health plan to all of its full time employees no more than ninety days after the date of hire [the "Premium Contribution Standard"].
3. An employer also will be considered a contributing employer if the employer's percentage of full-time employees enrolled in its Group Health Plan is at least 75%.

For purposes of the Act, a "full-time employee" is an employee who works the lower of (i) 35 or more hours per week, or (ii) the number of weekly payroll hours to be eligible for the employer's full time health plan benefits. Accordingly, for Fair Share purposes, employers must focus on the number of hours employees actually work, not simply whether employees are classified at hire as full-time. Employers are expected to make a timely offer of subsidized coverage to all employees who "generally" work full-time in a quarter.

¹ The FSC Unit calculates full-time equivalents by taking the sum of total payroll hours for all employees (maxed at 500 hours per employee) divided by the number of employees. As of July 1, 2013, the Act will exclude employers with fewer than 21 full-time equivalents.

Employers must self-report through quarterly filings with the DUA. These filings are due approximately six weeks after the end of each quarterly filing period. If an employer is liable to make a Fair Share Employer Contribution in any particular quarter, the Commonwealth expects to receive payment on or before the applicable filing date. If an employer fails to pay amounts due (or is later found to owe an unpaid contribution), the agency assesses an interest penalty of 12% per annum on the overdue amount from the date due until the date paid. Employers may appeal liability determinations and request administrative hearings, which are conducted by a neutral DUA Review Examiner. If dissatisfied with the Review Examiner's decision, employers may petition for judicial review with the Superior Court. Employers also may seek a refund of improperly collected assessments.

Practical Tips for Compliance

1. File Accurately and On Time. Employers who fail to timely file their fair share contribution reports or seek to correct past filing errors increase their risk of being assessed, or triggering enforcement activity by the FSC Unit. Mistakes, inconsistent or tardy filings, or filing questions posed to the agency, may render an employer a likely target for audit.² As described below, these audits are time consuming, protracted, and require the compilation and production of extensive documentation designed to demonstrate compliance. While employers may be scrutinized based on any self-reported figures, filing carefully and on time decreases that risk.

2. Ensure that the Agency Can Contact You. Make sure the address on file through the Fair Share's website is up to date and carefully selected so that the proper people in your organization will receive and respond timely to mailings from the agency. In many cases, enforcement activity becomes significantly more complicated because critical mailings (audit requests, determination notices, pre-lien and levy notifications) are misdirected or sent to defunct addresses, or to locations ill-equipped to expeditiously respond. Employers are afforded only brief prescribed time periods to respond to agency requests, so timely receipt of, and attention to, all communications from the agency is critical. Be aware that the FSC Unit maintains both a "legal address" for purposes of communications with the DUA as well as an address for "FSC Communication." Employers are advised to align these addresses, regularly confirm the accuracy of contact information on the web-site, and designate protocols and a particular person or department to receive and respond to agency correspondence. Be sure to update this information with any changes.

3. Take Audits 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 upon receipt of any notice of audit to discuss a reasonable time frame to submit responsive information, and confirm in writing any agreement reached.

4. Document Your Process and Dealings With the Agency. The FSC Unit and DUA representatives are trained to document their dealings with you. Develop the habit of doing the same. These dealings may be protracted, memories may fade, and the substance may become critical at hearing or on appeal, may bear on the timing or scope of documentation to be provided during audit, or may directly impact liability determinations. Keep a paper trail. Similarly, employers involved in an audit or hearing must affirmatively demonstrate compliance with fair share obligations. If an employer is unable to corroborate its filing process, the auditor or Review Examiner may find the employer liable to make the Fair Share Employer Contribution on behalf of all of its full-time employees (and assess 12% interest). Keep records that demonstrate compliance and back up self-reported filings.

5. Understand What the Agency Wants to See. Typically, during an audit the agency will expect an employer to provide weekly payroll records, group health plan documents and payment records, employee enrollment lists, benefit eligibility criteria, coverage offers, HIRD forms, federal tax filing forms, and Form 1099s, among other things. Employers must assemble this information quickly, carefully and comprehensively in response to an audit notification. Consider seeking counsel prior to submitting any documentation in response to an audit notice. Failure to timely provide the type of documentation required by the FSC Unit, or providing inconsistent or incomplete data, may lead to a liability determination.

² Recent amendments to the Act prohibit the DUA's help center staff from requesting identifying information from employers who seek assistance through the FSC helpline and from sharing any information obtained through the helpline with DUA's audit department staff. Chapter 238 of the Acts of 2012, Section 51(i).

6. Respond Promptly. Prior to November 5, 2012, applicable regulations provided that an employer who disputed a liability determination, or the amount of an assessed contribution, had to file an appeal of that decision within ten (10) days of the mailing of the determination. 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. Some employers became embroiled in litigation challenging the DUA’s finding that they lacked good cause for a “late” appeal, a considerable burden, before ever reaching the merits of the liability determination. Recognizing the inadequacy of the ten-day time frame, 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. Due to those recent regulatory amendments, 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 HIRD forms or elsewhere.

8. Who is full-time? Employers whose employees enjoy a fluctuating schedule, choosing to work variable hours during weeks or quarters, should take care to properly analyze payroll hours and schedules when making quarterly filings. Employers must determine whom DUA will consider to have worked “full-time” in the quarter, and thus entitled to a timely offer of subsidized coverage. In this regard, the current filing instructions state that for purposes of the percentage and premium contribution standards “an employer must include all employees that generally work full-time.” Once an employee is determined to be full-time, he must receive an offer of subsidized health coverage within 90 days. The DUA has not publicly endorsed an acceptable one-size-fits-all methodology for determining when an employee “generally” works full-time or the date from which the 90-day period begins for current employees whose status changes from part- to full-time, leaving some employers with unanswered questions. Many employers wisely are focusing now on determining full time equivalent counts, and identifying full-time employees, for purposes of assessing the cost of possible penalties under PPACA, and setting look-back and stability periods for compliance. 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 a “fair share employer contribution” is deemed to be owed, the assessment is derived from the number of employees, not the number of full-time employees to whom an offer of subsidized coverage was not timely made. Liability assessments can add up quickly. In addition, the DUA formerly took the position that the interest penalty could not be waived. 430 CMR 15.08(1). The recent amendments to the Act now make it clear that the agency has discretion to waive the interest penalty. Chapter 238 of the Acts of 2012, section 51(f).

10. Get Help and Move Quickly. Fair Share compliance is complicated. Large and small employers can become befuddled trying to interpret and follow changing regulations and filing instructions. National employers with operations in Massachusetts who may be less familiar with its state-specific compliance obligations may find compliance uniquely challenging and have a harder time responding promptly to correspondence mailed from the agency across the country to corporate headquarters. Seek capable counsel for advice when needed, and move with haste. Recall that penalties run from the date the liability is presumed to be owed, and an interest waiver is not assured.

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