

in this issue:

MARCH 2007

As the one-year anniversary of Massachusetts' sweeping health care reform law approaches, employers should be taking action to ensure they are prepared to comply with the law's complex requirements, many of which take effect on July 1.

East Coast Edition

A Littler Mendelson East Coast-specific Newsletter

Massachusetts Health Care Reform Law Update

By *Martha M. Walz*

As the one-year anniversary of Massachusetts' health care reform law approaches, the state is well on its way to full implementation of the law's many and complex provisions. With critical deadlines on the horizon, employers should be taking steps now to ensure they are ready to meet their obligations. Various state agencies will continue to issue regulations and other interpretive information throughout the spring, so employers should monitor the situation closely.

The Individual Mandate

As of July 1, 2007, all residents of Massachusetts age 18 or over are required to have health insurance if an affordable plan based on their income is available. This is known as the individual mandate. With some exceptions, individuals who cannot show proof of health insurance coverage on their 2007 state income tax return will lose their personal income tax exemption for 2007. When filing a state income tax return for 2008 and beyond, an individual without health insurance coverage will be fined for each month he or she is without coverage. The fine will be equal to 50% of the least costly available insurance premium. See below for information on the minimum insurance coverage that individuals must have as of January 1, 2009 in order to comply with the individual mandate.

Many adults in the Commonwealth continue to be unaware of the individual mandate. Employers may wish to remind their employ-

ees of this requirement during upcoming open enrollment periods. Employers may also wish to discuss with their health plans the possibility of having a special open enrollment period in June as a way to help employees obtain coverage by the July 1 deadline. A special open enrollment such as this is not required by the law.

The Fair Share Contribution

Employers with 11 or more full-time equivalent employees¹ in Massachusetts must make a "fair and reasonable" contribution to the cost of their full-time employees' health insurance. Employers that fail to do so will be required to pay an annual fee of up to \$295 per full-time employee, with the amount being pro-rated for part-time employees.² This fee is called the Fair Share Contribution and is used to help fund state-subsidized health plans that are available to low-income people who do not have access to employer-sponsored health insurance.

The state has established two different ways for employers to meet the "fair and reasonable" contribution test:

- **Primary Test:** During the period October 1 to September 30, at least 25% of the employer's full-time employees in Massachusetts participate in the employer's group health plan that the employer pays for in whole or in part.
- **Secondary Test:** The employer offers to contribute at least 33% of the premium

¹ The regulations that describe how to calculate the number of full-time equivalent employees will be published by the state's Division of Unemployment Assistance.

² The Division of Unemployment Assistance will collect this fee based on data from October 1 to September 30. The 2007 due date for payment of the fee has not been determined.

cost of any group health plan it offers to its full-time employees in Massachusetts who are employed more than 90 days during the period from October 1 to September 30.

If an employer passes either test, it does not have to pay the Fair Share Contribution.

Some key points:

- A full-time employee is one who works 35 hours or more per week.
- Independent contractors are not considered employees if they meet the definition of independent contractor set forth in M.G.L. chapter 149, section 148B. Employers should note that this definition is far stricter than ones used in other states or by the Internal Revenue Service.
- Seasonal and temporary employees are also not considered full-time employees. A seasonal employee is one whose employment does not exceed 16 weeks, and a temporary employee is one who does not work for more than 12 consecutive weeks during the period October 1 to September 30. Employees who work a greater number of weeks are considered regular full-time employees and are factored into the above calculations.
- A worker who comes to an employer from a temp agency or staffing company is not an employee of the client company and is, therefore, not counted in the above calculations.
- When doing these calculations, employers must count all full-time employees at their Massachusetts locations, without regard to where the employees reside.
- Employers that have a waiting period for their health insurance plans should note that they will fail the Secondary Test if the waiting period is more than 90 days. Employers that meet the Primary Test may have a waiting period of any length.

Section 125 Plans Are Required

To help make health insurance more affordable, employers with 11 or more full-time equivalent employees in the Commonwealth are required to have a Section 125 cafeteria plan as of July 1, 2007 (this is a change from the original date of January 1, 2007). A Section 125 plan allows employees to pay for their health insurance coverage on a pre-tax basis, and the premium payments are not subject to state and federal income taxes or FICA.

An employer is exempt from the law's free rider surcharge³ if it: (1) has a Section 125 plan that complies with the regulations issued by the state and (2) files a copy of the plan with the Health Insurance Connector. On March 20, the Health Insurance Connector approved detailed regulations about Section 125 plans that can be found at www.mass.gov/connector.

Minimum Creditable Coverage

Massachusetts is poised to become the first state in the nation to establish minimum coverage standards for health insurance plans. The Health Insurance Connector has issued draft regulations containing a definition of "minimum creditable coverage." The definition specifies the minimum level of insurance coverage that individuals must have as of January 1, 2009 in order to comply with the individual health insurance mandate.

If approved, the new standard is not effective until 2009, so those who have insurance through plans that do not meet the minimum standard have nearly two years to switch into a compliant plan. Individuals enrolled in plans that do not meet these standards will be deemed to be uninsured as of January 1, 2009 and will, consequently, be in violation of the requirement to have health insurance. The requirement to have some form of health insurance by July 1, 2007 remains unchanged.

Employers should determine whether their plans, including their self-funded plans and ERISA plans, meet this minimum standard

because plan participants will not be able to satisfy the individual mandate if their employers' plans fall short of the required minimum coverage. To ensure that employees have the required minimum coverage by January 1, 2009, employers whose plans do not meet the minimum standard should consider revising their plans in time for open enrollment in 2008.

While the draft definition of minimum creditable coverage may change somewhat during the public comment period, it is unlikely to be radically revised, so employers should begin reviewing their plans to determine if they provide the following minimum coverage:

- Comprehensive health benefits that include preventive and primary care, emergency services, hospitalization benefits, ambulatory patient services, prescription drugs, and mental health services.
- No annual or per illness annual benefits maximum. A lifetime benefits maximum is permitted.
- Medical deductible for in-network services does not exceed \$2,000 for individual coverage and \$4,000 for family coverage. If there is a separate deductible for drug coverage, the deductible may not exceed \$250 for individual coverage and \$500 for family coverage.
- If there is an upfront deductible, the plan must allow at least three preventive care visits per individual and six per family before the deductible applies. These preventive care visits may be subject to cost-sharing (i.e., co-payment or co-insurance).
- For health insurance plans that include a deductible and/or co-insurance, the maximum out-of-pocket spending for in-network services may not exceed \$5,000 for an individual and \$10,000 for a family.

High deductible health plans linked with a health savings account are exempt from these requirements and are deemed to meet mini-

³ The law imposes a free rider surcharge on employers with more than 10 employees that do not have a Section 125 cafeteria plan and whose employees receive medical care without paying ("free care"). Effective July 1, 2007, the surcharge is triggered when an employee meeting certain income requirements and/or a dependent receives free care more than three times a year or if an employer has five or more instances of employees and/or their dependents receiving free care in a year.

mum creditable coverage standards.

As the draft regulations contain important details about minimum creditable coverage, employers should review them carefully. See www.mass.gov/connector for the draft regulations. The Connector is expected to give final approval to the rules in June 2007.

Health Insurance Responsibility Disclosure Forms

Effective July 1, 2007, the law requires two Health Insurance Responsibility Disclosure forms, one for employees and one for employers. Neither form is available yet, and the state has not determined the dates by which the forms need to be completed. The forms will be available at www.mass.gov/connector.

Employee HIRD Form

Each employee of a Massachusetts employer with more than 10 employees must sign an Employee Health Insurance Responsibility Disclosure Form if he or she: (a) declines to enroll in an employer-sponsored health plan or (b) declines to participate in the employer's Section 125 plan. When completing the form, the employee must indicate whether he or she has an alternative source of insurance coverage. Employers are not subject to penalties if their employees decline insurance coverage or decline to participate in a Section 125 plan.

Employers are responsible for distributing and collecting the forms. They must retain the Employee HIRD form for three years and should file it with other confidential employee records.

Employer HIRD Form

All Massachusetts employers with more than 10 employees must submit an Employer HIRD form to the state annually. The Division of Health Care Finance and Policy will issue regulations that set forth the form's content and the time and manner for the form's submission. The form is likely to include information such as the number of full-time and part-time employees, whether the employer offers to pay a portion of the premiums for employees' health insurance, and whether the employer has a Section 125 plan.

Annual Health Insurance Coverage Statements

Starting in January 2008, employers, including those with ERISA plans and those that are self-insured, must provide a written coverage statement to each individual who resides in the Commonwealth to whom it provided health insurance in the previous calendar year. The coverage statement must be provided annually, on or before January 31 of each year. The statement must include:

- the name of the carrier or the employer
- the name of the covered individual and any covered dependents
- the insurance policy or similar number
- the dates of coverage during the year
- other information as required by the Commissioner of Revenue

Plan participants will use the information in the coverage statement to complete the section of their state income tax form that establishes their compliance with the individual mandate.

Employers may contract with service providers or insurance carriers to meet this obligation. In addition, all employers must provide the state with a separate report verifying the statements given to plan participants. The state has not further specified the content or format of these statements.

Employers Should Revise Their Non-Discrimination Policies

Employers are prohibited from discriminating against an employee based on a number of factors set forth in the health care reform law. Employers should revise their anti-discrimination policies, employee handbooks, and employment applications to include these new factors.

Employers are prohibited from discriminating against an employee because of the employee's receipt of free care; the employee's reporting or disclosure of his or her employer's identity and other information about the employer (which the state uses to assess the free rider surcharge); the employee's completion of a Health Insurance Responsibility Disclosure form; or

any facts or circumstances relating to the free rider surcharge assessed against the employer if the employee receives free care.

Expanded Definition of Dependent

Fully insured plans in Massachusetts must include a new definition of dependent. Effective January 1, 2007, insurance carriers must make coverage available for people through the earlier of their 26th birthday or two years following the loss of their dependent status according to federal tax rules. The date on which a person loses dependent status is December 31 of the last federal tax year for which the person was claimed as a dependent on another person's federal income tax form.

As with other aspects of dependent coverage, employers are not required to verify the information provided by employees when enrolling people in a health insurance plan. Carriers are required to offer coverage during open enrollment periods or upon a qualifying event in the same manner that all other eligible dependents are offered coverage.

Employers should be mindful that an employee may have imputed income as a result of enrolling a child who otherwise falls outside the definition of dependent for federal income tax purposes. The treatment of the imputed income in these circumstances is the same as the treatment of imputed income for employees with domestic partners who are enrolled in a company-sponsored plan and for married gay and lesbian employees whose spouse is enrolled in an employer's health insurance plan.

Employers with self-insured plans or ERISA plans are not required to alter their definition of dependent. Employers may choose to include the expanded definition in their plans even when not required so they do not create an incentive for employees to switch plans when their children would otherwise lose coverage. Employers may also wish to modify their plans so they are not at a competitive disadvantage with companies that offer insurance to their employees' young adult children.

Equivalent Employee Contribution Percentages

Beginning July 1, 2007, health insurance

companies may offer fully insured health care plans to Massachusetts employers only if: (1) the coverage is offered by that employer to all full-time employees who live in Massachusetts and (2) the employer does not discriminate against lower paid employees in establishing its percentage of contribution toward the premium payment.

Employers may have different percentage contributions for different plan choices, as long as the contributions made with respect to each plan do not differ based on the salary level of the employees who earn less than others. Employers are permitted to pay a smaller percentage of the premiums for their more highly compensated workers.

The practical effect of this requirement is that fully insured health care plans offered only to senior executives must be modified. An employer may no longer pay a higher percentage of the monthly premiums for its senior executives than it pays for its lower paid employees.

The Insurance Partnership

The Insurance Partnership is a state program that helps small employers pay for health insurance. The health care reform law changed the eligibility criteria for this program.

The Insurance Partnership gives a subsidy to the employer sponsoring a health insurance plan and to each employee who participates in the plan. The exact amounts of the subsidies depend upon the type of plan in which the employee is enrolled.

An employer is eligible for the program if it: (1) has 50 or fewer full-time employees; (2) offers comprehensive health insurance to its employees; and (3) contributes at least 50% of the cost of employer-sponsored health insurance.

An employee is eligible for the program if he or she: (1) is between the ages of 19 and 64; (2) is a resident of Massachusetts and meets certain citizenship requirements; (3) has not been offered health insurance by his or her current employer in the past 6 months and has not been eligible for health insurance through his or her spouse's employer in the past 6 months; and (4) has a family income that is at or below 300% of the Federal Poverty Level.

Additional information can be found at www.insurancepartnership.org.

Commonwealth Care and Commonwealth Choice

Commonwealth Care is a health insurance program for low-income residents of Massachusetts. Commonwealth Choice is a health insurance program for Massachusetts residents who do not qualify for Commonwealth Care and for small employers. Both programs are administered by the Health Insurance Connector.

Commonwealth Care

This is a subsidized program for uninsured individuals whose family income before taxes is below 300% of the Federal Poverty Level. The Connector helps eligible individuals choose and enroll in a health plan, and, once enrolled, individuals become members of the health plan they select.

Commonwealth Choice

Individuals whose family income before taxes is above 300% of the Federal Poverty Level are eligible to choose from a variety of private health insurance plans if, subject to some exceptions, they do not have access to employer-sponsored insurance. The premiums are not subsidized by the state.

Employers with 50 or fewer employees are eligible to participate in Commonwealth Choice. They will contribute to their employees' health insurance plans through the Connector or allow for pre-tax premium deductions for their employees' health insurance.

Employers with more than 50 employees are eligible to participate if they want to offer insurance to part-time, temporary, and seasonal employees.

The Connector will help eligible individuals and employers choose and enroll in a health plan, and, once enrolled, individuals will become a member of the health plan they select.

Enrollment in Commonwealth Choice will begin on May 1, 2007 for coverage beginning July 1, 2007.

The Connector will be providing more information on the Commonwealth Choice plans during the spring of 2007.

Young Adults Plan

The Health Insurance Connector will also offer a Young Adults Plan to 19 to 26 year-olds who are uninsured. The Young Adults Plan will be sold on an individual basis starting May 1, 2007, with coverage beginning July 1, 2007.

Martha M. Walz is Of Counsel in Littler Mendelson's Boston office. She also is a member of the Massachusetts House of Representatives. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Walz at mwalz@littler.com.
