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East Coast Edition

A Littler Mendelson East Coast-specific Newsletter

Updated Guidance for Employers About the Massachusetts Health Care Reform Law

By Martha M. Walz

All employers with employees in Massachusetts, including employers with ERISA plans, have obligations under the state's new health care reform law. While implementation of the law is well underway, the state continues to issue new regulations and forms. Some important deadlines are on the horizon. This newsletter contains new information on what employers should be doing to ensure compliance with the law.

Final Section 125 Plan Requirements

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, 2007.¹ 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. Employers must meet this requirement even if they are self-insured.² Nearly all employers that offer health insurance to their employees already have a Section 125 Plan in place. They must either amend that plan or implement a separate plan for their non-benefits eligible employees who enroll in the Commonwealth Choice health insurance plans offered through the Commonwealth Health Insurance Connector

Authority. At present, employees may not pay their Commonwealth Care premiums through a Section 125 Plan.

The Connector Authority has written a Section 125 Plan Handbook for Employers that contains sample plan documents and forms. Five documents are particularly important:

- The Plan Document
- The Adoption Agreement
- The Plan Description (distributed to eligible employees)
- The Employee Waiver/Election Form
- The Employee Revocation/Change in Status Certification

At present, employers are required to file their Section 125 Plan(s) with the state by October 1, a postponement from the July 1 deadline. As of this newsletter's publication, the state legislature is considering a bill that would eliminate this filing requirement. The bill is likely to become law, and employers will simply be required to confirm in the Employer Health Insurance Responsibility Disclosure Form that they have a Section 125 Plan. This form is described below.

Employers that have not yet done so should register with the Connector Authority so they

¹ Employers that do not adopt and maintain a Section 125 Plan may be assessed the so-called Free Rider Surcharge (a surcharge on an employer if its employees or their dependents receive health care paid for by the state's uncompensated care pool, formally known as the Health Safety Net Trust Fund).

² Employers are not required to have a Section 125 Plan if they provide medical care coverage to and pay the full monthly cost of such medical care coverage (both individual coverage and any dependent coverage to the extent elected by an employee) for all of its employees who are not otherwise excludable from a Section 125 Plan. In addition, employers that provide benefits through a multi-employer plan are not required to offer a Section 125 Plan to covered bargaining unit employees.

are prepared to make these pre-tax deductions when an employee seeks to enroll in a Commonwealth Choice plan offered through the Connector. Employers must have an account with the Connector Authority before they may remit premium payments on behalf of their employees. Information on how to register is available on the Connector Authority's website, www.mahealthconnector.org

Employee Health Insurance Responsibility Disclosure Form

In late June, the state issued emergency regulations concerning the Employee Health Insurance Responsibility Disclosure (HIRD) Form.

An employee of a Massachusetts employer with 11 or more full-time equivalent employees must sign the Employee HIRD Form if he or she: (1) declines to enroll in an employer-sponsored health plan; or (2) 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.

The state has provided a sample form, which may be found on the Connector Authority's website. The form states that employers may "recreate" their own version of the form. The form further states, however, that all of the information on the state-provided form must be included "with the same wording and order, and the sequence and numbering of the [q]uestions must be exactly as it appears on the version provided by the Commonwealth of Massachusetts."

The emergency regulations allow an employer to collect the required information and acknowledgement from employees in any form or manner, including any electronic or other media.

An employer must obtain a signed Employee HIRD Form upon the earlier of:

- 30 days after the close of each open enrollment period for the employer's health insurance;
- 30 days after the close of each open enrollment period for the employer's Section 125 plan; or
- September 30.

If an employee who is enrolled in an employer's health insurance plan terminates his or her participation in the plan, the employee must sign an Employee HIRD Form within 30 days of the date participation terminated. Employers must obtain the signed Employee HIRD Form from new hires within 30 days of the applicable open enrollment period.

If an employer's open enrollment period for 2007-2008 ended before July 1, 2007 and an employee has signed an employer's form acknowledging that he or she was offered and declined employer-sponsored insurance, the employee is not required to sign an Employee HIRD Form until the next applicable open enrollment period. The employer must retain the form signed by its employee until July 1, 2009.

Employers are responsible for distributing and collecting the forms. They must retain the Employee HIRD form (or its electronic equivalent) for three years and should file it with other confidential employee records. Employers must provide a copy of each signed Employee HIRD Form to an employee.

If an employee refuses to comply with an employer's request to complete and sign the Employee HIRD Form, the employer must document its diligent efforts to obtain the form and maintain that documentation for three years. The regulations also require employers to retain for three years documentation that an individual employee was not required to sign the Employee HIRD Form. The regulations do not specify what type of documentation this must be, so employers have discretion on what records will satisfy this requirement.

Employer Health Insurance Responsibility Disclosure Form

An employer with 11 or more full-time equivalent employees must report certain information on an Employer HIRD Form. The state has determined that this form will be consolidated with the form employers must file with the Division of Unemployment Assistance in connection with the Fair Share Contribution.

Required Filing to Establish Compliance with Fair Share Contribution

The state issued regulations in Fall 2006 providing guidance for determining whether an employer makes a fair and reasonable contribution to the health care costs of its employees. An employer with 11 or more full-time equivalent employees that does not make a fair and reasonable contribution is required to pay a per employee Fair Share Contribution (FSC) of up to \$295 annually. See Littler's March 2007 *ASAP Massachusetts Health Care Reform Law Update* for more information.

The determination of an employer's liability for payment of the FSC is based on data from the period October 1 to September 30 each year.³ Employers liable for the FSC may make such contribution in a single payment or in equal amounts semi-annually or quarterly.

The Division of Unemployment Assistance (DUA), which is responsible for administering this program, is working to implement the necessary filing and payment procedures for employers. The filing must be done electronically between October 1 and November 15 of each year. DUA will provide additional information in the Fall about how to make this filing, but employers should be aware that DUA may not send them a notice directing them to file.

In addition, employers using a payroll service should be aware that filing must be done on an employer-by-employer basis for 2007. DUA will not have the capacity initially to accept bulk electronic files from payroll services. Consequently, employers should consult with

³ Thus, when employers file their first annual report by November 15, 2007, they will be using employment and health insurance data from October 1, 2006 to September 30, 2007.

their payroll service companies to determine how the filing requirement will be met.

Equivalent Employee Contribution Percentages

Beginning July 1, 2007, health insurance companies may offer insured group 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 full-time employees in establishing its percentage of contribution toward the premium payment.⁴

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.

Minimum Creditable Coverage

With only limited exceptions, Massachusetts residents age 18 and older are required to have health insurance ("creditable coverage") as of July 1, 2007.⁵ A variety of insurance plans satisfy this mandate, including student health insurance plans, the Young Adult and Commonwealth Care plans offered by the Connector Authority, Medicare Part A or Part B, Medicaid, and a plan that meets the definition of "minimum creditable coverage."

To ease implementation of the law, the state has determined that coverage under most health care plans from July 1, 2007, to December 31, 2008, will be sufficient to satisfy the individual mandate. Beginning on January 1, 2009, residents must have insurance that meets the

definition of minimum creditable coverage or they will be considered to be uninsured. While this is an obligation imposed upon individuals, employers should determine if their plans (whether insured or self-insured) meet the minimum standards. If an employer's plan does not, participating employees will not be able to satisfy the mandate for insurance coverage. The definition of minimum creditable coverage may be found at 956 CMR 5.03(2).

Each employer should compare its plan(s) with the required minimum standards. If a plan falls short, an employer should consider upgrading the plan prior to the 2007 or 2008 open enrollment period. By offering a plan that meets the minimum standard during the upcoming open enrollment period, employers will ensure that participating employees will have insurance that satisfies the definition of minimum creditable coverage by the January 1, 2009 deadline.

Annual Health Insurance Coverage Statements

Starting in January 2008, employers, including those with self-insured plans, must provide a written coverage statement to each individual who resides in Massachusetts 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 Department of Revenue 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.

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⁴ This provision does not apply to an employer that establishes separate contribution percentages for employees covered by collective bargaining agreements.

⁵ The law contains a six month grace period. The state will assess the penalty for not being insured only against those people who remain uninsured on December 31, 2007.