



ML Strategies Advisory

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2011-2012 Massachusetts Legislative Session

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The formal legislative session for 2011-2012 concluded on July 31st. The session was defined by landmark legislation in healthcare cost containment, economic development, energy, and consumer protection. The Legislature will continue to meet in informal sessions through the end of the calendar year. ML Strategies will report noteworthy developments through the remainder of the session. The following is a summary of legislative accomplishments to date.

Health Care

“Containing Costs While Improving Care”

Legislators overcame differences between the House and Senate versions of their respective healthcare cost containment measures. In the final hours of the session they sent a compromise bill to the Governor's desk, which he promptly signed. The bill purports to save the Commonwealth \$200 billion over the next 15 years by tying the rate of health care cost inflation to the state's general economic growth. Through various regulatory measures and the creation of new bureaucratic organizations, the bill aims to reduce costs and improve care by focusing on efficiency and preventative health measures. It promotes transparency in the quality and price of care. Additionally, the legislation sponsors programs that look to develop alternative methods of reimbursement for medical practitioners and new methods of care deliverance such as so-called [Patient Centered Medical Homes](#). Implementation through the promulgation of regulations and the formulation of the various commissions established by the bill will continue well into the coming legislative session. We anticipate that a technical corrective piece may emerge early in the coming session, if not sooner.

Please see our [MLS Alert](#) for a more complete description of the bill and its impact.

“Amendments to the Pharmaceutical and Medical Device Manufacturers Marketing Code of Conduct”

The budget for fiscal year 2013 includes amendments to the marketing code of conduct for pharmaceutical and medical device manufacturers by limiting or eliminating provisions that were considered to be overly proscriptive. Instead of prohibiting equipment manufacturers from paying medical providers for device training, the law now permits reasonable expenses for technical training, as well as modest meals. It is worthy of note that the House sought the repeal of the entire statute. It is possible that the issue may resurface in the coming legislative session.

Please see our [MLS Alert](#) for a more complete description of the changes.

“Co-pay Assistance and Prescription Drug Coupons”

A separate provision of the fiscal year 2013 budget authorizes the use of co-pay assistance and discount programs in Massachusetts to aid in the purchase of prescription drugs and certain qualified biological products. The law is designed to improve patient access. The language includes a study of the impact of the change as well

as a five-year sunset. Massachusetts was the last state to adopt such a measure.

Please see our [MLS Alert](#) for a more complete description of the budget items.

“Fair Share Employer Contribution for Health Insurance”

The major health legislation, *“An Act Improving the Quality of Health Care and Reducing Costs through increased Transparency, Efficiency and Innovation,”* changes the fair share employer contribution measurement in a small but significant manner. It raises the fair share contribution threshold, the point at which employers becomes subject to fair share assessment laws, from eleven to twenty-one full time employees. Additionally, it no longer counts employees who have health care coverage through a spouse, government program, or elsewhere, towards an employer’s fair share contribution. The rules go into effect on July 1, 2013.

Additional changes to the fair share law were made in the Economic Development bill, which will take some pressure off of employers who are found out of compliance with the fair share contribution requirements. Under the new law, the Massachusetts Department of Unemployment Assistance (DUA) must allow an employer 60 days, rather than 10, to appeal a finding of non-compliance. The DUA cannot remove funds from an employer’s bank account while an appeal is pending. Under prior law, an employer would accrue 12 percent interest on what it owed to the fair share contribution from the day it was issued a finding by the DUA. The new law forbids this practice while the appeal is pending, but may impose the interest if the appeal fails. Finally, the DUA must issue a written decision on the amount an employer must pay within 90 days of its final decision for companies with more than 50 employees and within 30 days for those with 50 or fewer.

Please see the [Mintz Levin advisory](#) for a more complete description of how this affects employers.

“Consent for HIV Screening”

Massachusetts no longer requires a patient’s written consent before a medical practitioner can test him for HIV. Verbal consent will suffice. Advocates hope that this will expand the number of people who are screened for HIV and bring Massachusetts in line with other states.

“Reforming the Ability of Municipalities to Control Health Insurance Plans”

This legislation, included in the fiscal year 2012 budget, reforms the municipal health insurance system by making it easier for municipalities to alter their existent health care plans or transfer their municipal health insurance subscribers to the state’s Group Insurance Commission. It will assist towns in dealing with rising costs by allowing municipalities to alter design features of health care plans without the approval of their workers’ unions, so long as at least twenty five percent of the savings realized go back to the employees. The vast majority of communities have accepted this change, despite union resistance, resulting in greater savings than initially projected.

“Allowing Nurse-Midwives More Independence”

By allowing certified nurse-midwives to practice in Massachusetts without the consent of a physician, legislators aimed to make health care for pregnant women more accessible in areas with fewer physicians. Nurse-midwives now have the freedom to write prescriptions and order tests without the constant oversight of a physician, which will reduce delays in care and make the practice more efficient.

“Monitoring the Prescription of Certain Medications to Help Prevent Drug Abuse”

In early August, the Legislature passed a prescription drug monitoring bill that requires dentists, doctors and other practitioners to conduct drug history screens on all new patients. Additionally, the top thirty percent of prescribers of drugs having higher addiction rates would be automatically enrolled in the state’s Prescription Monitoring Program. All others will be phased-in over three years. License renewal will trigger automatic enrollment in the program.

“Improving Tiered Health Networks”

Building on a 2010 law that established limited and tiered health networks, the Legislature introduced “smart-tiering,” which allows health plans to establish varied tiers of health coverage based not only on facility in which care takes place, but on the service itself. Additionally, patients with serious medical conditions, such as cancer,

cannot lose health care coverage during the course of their care if a disruption would cause them harm, even if their network changes.

“Updating the Uniform Anatomical Gift Act”

In an effort to streamline the organ donation process between the states of New England, the legislation updates the Massachusetts Uniform Anatomical Gift Act so that the Commonwealth’s regulations and requirements for organ donations more closely match those of neighboring states. The intent was to remove regulatory barriers from interstate organ donation, which would simplify the process for New England’s sole organ procurement organization.

Economic Development

Labor and Employment

“Right to Repair”

Massachusetts became the first state to adopt legislation that will open the market for diagnostic repair information to independent mechanics. Compromise legislation emerged as an alternative to a November statewide ballot question. The bill includes language sought by auto manufacturers that would protect intellectual property rights while making available for purchase the codes needed to facilitate the repairs at independent auto repair shops. These tools are now required to be purchasable at a fair price. Some describe the bill as having potential for a national model.

“Evergreen Clause”

This legislation restores the ability of public sector unions and management to include so-called “evergreen clauses” in collective bargaining agreements. Such provisions extend the terms of public-sector collective bargaining agreements even after they expire while unions and employers decide the terms of new agreements. The bill had originally been filed in response to an October 2010 ruling by the Massachusetts Supreme Judicial Court which held that these contracts were limited to three years under existing collective bargaining law. The legislation was made retroactive, except with respect to specific matters that were pending or adjudicated within a certain time frame.

“Temporary Employment”

The Legislature enacted Temporary Workers’ Right to Know legislation. The law amends provisions on temporary staffing by requiring staffing agencies to provide much greater detail about new assignments to its employees, including the applicable wages, the duration of the assignment, and any risk to personal safety; prohibits staffing agencies from certain fraudulent practices; and requires staffing agencies to reimburse their employees’ transportation on days where no employment actually existed. Certain professional employees are exempt.

“Fraud in Publicly Opened Contracts”

This legislation defines what constitutes fraud in relation to public construction bid laws. “Fraud” is defined as a statement, act or omission relating to a material fact that (i) has the natural tendency to be relied upon by or to influence the average person, (ii) is knowingly false or misleading or is in reckless disregard of its truth or falsity and (iii) is intended to mislead, regardless of whether the statement, act or omission is actually relied upon. This levels the playing field for contractors who do not make false representations when bidding for a job.

“Unemployment”

This legislation extends unemployment benefits to ensure that workers who were unemployed through no fault of their own did not lose their federal benefits at the end of March 2011. Also, unemployment insurance rates were frozen for the third consecutive year in 2012 to avoid a scheduled increase that would have cost Massachusetts businesses an additional \$228 per employee.

“Workers’ Compensation Insurance”

This legislation allows the Attorney General to prosecute delinquent companies who fail to pay workers' compensation and encourages employers to comply with the law. The legislation is designed to address a statutory discrepancy that has resulted in felony charges for an employer with workers' compensation insurance who violates the law, while an employer without insurance could only be charged with a misdemeanor.

“Domestic Violence Employment Leave”

This legislation provides protection to victims of domestic violence and their immediate family members by guaranteeing leave from their jobs. Employers with 50 or more employees are required to allow victims up to 15 days of leave with or without pay, in any twelve-month period.

Legislation that was considered, but not ultimately enacted into law, includes efforts to mandate paid sick leave; bills that would curtail or negate entirely the protections of non-compete agreements, and an attempt to amend the current definition of “independent contractor” that has been problematic. We expect that these issues will be reconsidered in the coming session.

Gaming

“Expanded Gaming Bill”

This legislation permits a Gaming Commission to award up to three resort casino licenses in separate regions of the state as well as one slot license. Under the law, the state would receive a 25 percent tax on gross gaming revenues and a 40 percent tax on the slot facility revenues. Licensing fees that the state would also collect would be at least \$85 million for each casino and \$25 million for the slot facility license. The legislation also provides protection to local businesses by requiring the gaming facilities to negotiate agreements to level the playing field in terms of entertainment and other culture-related events.

“Gaming Compact”

Massachusetts has submitted its gambling compact with the Mashpee Wampanoag tribe for federal approval as of August 31, 2012. This legislation ratified the Tribal Gaming Compact between the Governor and the Mashpee Wampanoag Tribe. The compact is subject to a 45-day federal approval process and if approved, will pave the way to an exclusive casino license in the Southeast region of Massachusetts. The legislation requires the tribe to return 21.5 percent of future gambling revenues to Massachusetts.

Retail

“Beer and Wine in Supermarkets”

This legislation allows beer and wine to be sold at more supermarkets and other large retailers by incrementally raising the cap on the number of licenses that a corporation is permitted to own. A similar measure in the form of a ballot question had been defeated in 2006.

“EBT Reform”

This legislation restricts the types of purchases that may be made with electronic benefit cards to prevent improper spending of cash assistance.

“Item Pricing”

Legislation was passed that eliminated the requirement for price stickers on individual products in grocery stores. The use of price scanning devices will allow stores to better allocate resources and ultimately benefit the consumer. Massachusetts was the last state to approve this legislation.

“Sales Tax Holiday”

The Legislature enacted the annual sales tax holiday in each year of the two year session. The tax break applies to all purchases under \$2,500 and excludes vehicles, motorized boats, tobacco, meals, and utilities.

Energy, Environment and Clean Technology

“Energy Bill Expands Incentives and Increases Competition for Renewable Power”

The Legislature updated the historic Green Communities Act of 2008 (GCA) to address rising costs of electricity in the state, which many Massachusetts business leaders and lawmakers partially blame for the continued slow pace of economic recovery. The updates change the structure of the GCA’s long-term contract program to require competitive bidding for renewable energy power contracts with utilities. Starting in 2016, retail suppliers will be required to purchase seven percent of their peak-hour usage from renewable sources. The bill also doubles the overall net metering cap in an effort to promote more household and business use of distributed renewable power.

As the regulations and methods of implementation take shape for this bill, it remains to be seen whether its expanded incentives for development of renewable energy can overcome the obstacles to project development created by regional capacity surpluses, low natural gas prices and the uncertain future of federal tax benefits for renewable energy.

Please see our [MLS Alert](#) that describes the renewable energy portions of the bill in more depth.

“Strengthening Utilities Responses to Outages from Storms”

In response to a series of storms, such as Hurricane Irene and a heavy October snow that left numerous Massachusetts residents without power for extended periods of time, the Legislature enacted a bill that holds utility companies responsible for more quickly restoring power to customers. During a power outage, utilities will now have to provide customers with twice daily estimates of when power will be restored.

“Bottle Bill Stalls in Study”

The “bottle bill,” which would require customers to pay a five cent redeemable deposit on iced tea, water and juice bottles in addition to soda, did not succeed even though it made it through the Senate and had the support of Governor Patrick and environmentalists. Opponents of the proposed deposit fee argued that better ways exist to address solid waste issues such as enhanced recycling measures because of the high percentage of citizens who make use of curbside recycling pickup.

Other unsuccessful environmental bills:

- *E-Waste Disposal*
 - Would have required manufacturers to take responsibility for proper disposal of old electronics
- *Banning plastic checkout bags*
 - Would have eliminated the use of disposable plastic bags used at retailers
- *Transitioning power plants away from the use of coal*
 - Did not want the pursuit of clean coal factories by utilities
- *Public Lands Protection Act*
 - Aimed to slow the use of public land for gathering natural resources
- *Regulation of natural gas obtained from “fracking”*
 - Hoped to ensure that the increased recovery of natural gas through this method would be environmentally safe

Education

“Community Colleges”

The state’s fifteen community colleges were centralized to ensure a cohesive system of education and skills

training responsive to the needs of local employers.

“Education Collaboratives”

This legislation is designed to improve financial oversight and accountability and require that the collaboratives be governed independently from any related non-profit.

“Proprietary School”

The oversight of private occupational schools known as “proprietary schools” has been transferred from the Mass Department of Elementary and Secondary Education (DESE) to the Division of Professional Licensure (DPL) beginning on August 1, 2012. The bill also removes the cap on security that may be required from schools to ensure that students receive refunds on their tuition if a school were to suddenly close.

“Stand for Children”

A new evaluation system to promote effective teaching has been implemented in Massachusetts public schools. This legislation requires the Department of Elementary and Secondary Education to provide performance data collection training to ensure that the Department’s evaluation system is being properly implemented.

“Transitional Educators”

This legislation will provide training for licensed special education teachers and rehabilitation counselors so that they may assist students with disabilities and special needs with the transition from secondary school to the next stage in their lives.

Judicial System

“Three Strikes Bill for Violent Offenders”

Although Governor Patrick signed this bill into law, he did so with noted reservations. Known as Melissa’s Bill, after a substitute kindergarten teacher who was raped, kidnapped and murdered by a repeat offender in 1999, the bill makes criminals with three convictions of specific violent crimes ineligible for parole and forces them to serve a life sentence if they had previously received one. The Legislature rejected a so-called “safety-valve” amendment that would have allowed for more judicial discretion in sentencing. Additionally, the bill reforms sentencing practices for non-violent offenders to make it less likely that they end up in jail and cost the state millions per year.

“Closing a Loophole in Drunk Driving Laws”

In the fiscal year 2013 budget, lawmakers closed a loophole in the drunk driving laws exposed by a Supreme Judicial Court ruling in May. The loophole allowed a defendant to escape the suspension of his license after a second arrest for operating under the influence because he did not did not plead guilty to his first, but only admitted to sufficient facts for a finding of guilt. The new law mandates license suspension for repeat offenders, regardless of how they plead.

“Improving the Indigent Defense System”

This bill revamped the Massachusetts system of indigent defense by reducing the number of private contract lawyers with whom the state works annually. It will also decrease the number of misdemeanors for which offenders need a lawyer present. The Committee on Public Counsel Services is in the midst of implementing a series of reforms and hiring more public defenders to address this issue, but progress is slow.

“Restructuring the Way Massachusetts Handles Children in Need of Services”

Legislators updated the thirty-eight-year-old Children in Need of Services (to be renamed the Families and Children Engaged in Services) and required the state to establish a network of family resource centers. Additionally, the Department of Elementary and Secondary education must develop truancy prevention programs for at-risk children who are continuously in trouble or run away from home.

“Reorganizing the Administration of the Court System”

This legislation aims to improve the efficiency and cost-effectiveness of courts by splitting the duties of the Chief Justice for Administration and Management of the courts into two separate people; a civilian court administrator and the Chief Justice of the Trial Court.

“DNA Evidence”

Massachusetts was one of only two states to prohibit previously convicted felons from obtaining and testing DNA evidence when seeking a retrial. This law will allow convicted felons who meet certain criteria to use DNA evidence to qualify for the possibility of a retrial. Additionally, a law that would require the collection of DNA from all those arrested for felony charges was not successful.

“Human Trafficking”

Taking a tough approach to human trafficking, especially in cases of sexual servitude, Massachusetts has enacted some of the most forceful laws against this practice. Traffickers would face long jail sentences, including life for the trafficking of minors, and heavy fines that could exceed \$1 million even for a first offense. There is no longer a statute of limitations for trafficking crimes and those convicted of sex trafficking would be placed on the sex offender registry.

“An Interstate Compact on the Placement of Children”

This legislation updates the interstate compact for foster children, which was adopted in 1960. It creates an Interstate Commission with one representative from each state so that a more efficient and effective foster system can be created. It awaits House action. This pact can only become fully effective once thirty-five states have achieved ratification of it. To date, only twelve have done so.

“Reforming the State Alimony Program”

This bill generally reforms the state’s alimony laws based on the recommendations of a special task force. It categorizes alimony in a clear way and includes short-term marriages (those that lasted fewer than five years) as appropriate for receiving alimony. It encourages more settlements and less litigation. Reformers believe this will allow judges more discretion. It became effective on March 1, 2012.

“Protecting the Rights of Transgender People”

Continuing in the Massachusetts tradition of supporting the rights of minorities ahead of the national curve, this legislation, which took effect on July 1, extends the protections of civil rights to transgender individuals and includes them among the class of protected minorities. It also defines “gender identity” as related to how a person views himself, his appearance and/or behavior, rather than on the person’s physiology or biological appearance. Public accommodations provisions were absent from the final legislation.

Transportation

“Bond Bill”

The bond bill includes approximately \$1.4 billion to support new projects designed to maintain and repair the state’s aging infrastructure and to provide jobs. The legislation also allows the state to borrow \$683 million for existing projects.

“Chapter 90 Funding”

For the second year in a row, the Chapter 90 local road program will be funded at \$200 million. This funding is provided for road and bridge repair throughout the Commonwealth.

“MBTA Reforms”

This legislation is an emergency funding package that will allow the Massachusetts Bay Transportation Authority (MBTA) to close its budget deficit for the 2012 fiscal year. The legislation also increases fair evasion penalties and

requires that MassDOT develop a long-term transportation financing plan for the state by December 31, 2012.

Housing

“Preventing Unlawful and Unnecessary Foreclosures”

In an effort to crackdown on the number of foreclosures in the state and to improve how banks treat those in foreclosure, the legislature took steps to prevent either unnecessary or unlawful foreclosures. The bill, *“An Act Preventing Unlawful and Unnecessary Foreclosures,”* offers substantial protections for borrowers by requiring a number of steps before a bank can enter into a foreclosure procedure. Banks and other lenders must offer loan modifications before they foreclose on citizens and ensure that lenders prove that they legally hold the mortgage or mortgage note before beginning a foreclosure process.

Please see our [MLS Alert](#) for a more complete description.

“Funding Low-Income Housing”

The legislature passed a pair of key measures to help low-income citizens secure their housing situations. A supplemental budget bill raised the cap on the state’s Low Income Housing Tax Credits by \$20 million, which will allow the Department of Housing and Community to fund twenty-five new affordable housing developments. There was a fifteen percent increase in the Rental Assistance for Families in Transition Program. Additionally, a bill to ensure the coordination of state agencies to maximize efficiency and remove any barriers to the creation of permanent supportive housing was passed by the Legislature and signed by the Governor.

Government Reforms

“Vendor Contracts”

This law enhances the Auditor’s ability to access all grants, contracts, or agreements between the Commonwealth and vendors. The law requires that any contract or agreement between suppliers of goods and services and the Commonwealth must include a clause granting the Auditor access to such entities’ accounts, books, records and any activities related to the agreement.

“Pension Reform”

The pension reform legislation is a comprehensive effort intended to end abuses and close loopholes to create a sustainable public pension system. The bill, Chapter 176 of the Acts of 2011, *“An Act Providing For Pension Reform and Benefit Modernization”* is projected to save the Commonwealth \$5 billion over 30 years.

The bill includes anti-salary-spiking provisions, which prevent inappropriate salary hiking by increasing the career “look back” period from 3 to 5 years in order to more accurately reflect an employee’s career earnings and provide a more equitable calculation of retirement benefits; by calculating the average annual rate for retirement compensation; and by mandating that regular earnings in any year cannot include pay that exceeds the average earnings from the previous two years by 10 percent or higher.

Additionally, the bill expands upon legislation from two years ago that eliminated the so-called “Section 10” loophole allowing elected officials to claim a termination allowance based on the failure to be nominated or re-elected. The bill declares for all new employees that a retirement benefit cannot be received until the individual has reached the minimum retirement age.

Another major and controversial component of the bill increases the retirement age for all new employees, reconciling the fact that people are living and working longer than when the retirement age was set in the Commonwealth’s law in the late 1950s and early 1960s.

A Look Ahead

The upcoming 2013-2014 session will include reconsideration of previously filed legislation that was unsuccessful, continued focus on the work accomplished in the current session, as well as new priorities. Our fiscal challenges and the need to promote job growth and economic development will continue to demand much attention.

Lawmakers and the Administration will continue the work of implementing the healthcare cost containment legislation through the promulgation of regulations and the appointment of various commissions and focus groups. We anticipate that both the Legislature and the Administration will build upon the foundation laid by the Tax Expenditure Commission by scrutinizing the myriad credits, deductions and other tax breaks currently on the books or under consideration. Transportation has been identified as a high priority. There is a sense of urgency to address our infrastructure needs statewide as well as the fiscal challenges facing the MBTA. We expect that a bill designed to implement long-term funding solutions will emerge early in the upcoming session.

ML Strategies will monitor the progress of notable legislation throughout the remainder of the informal session. We will also review the thousands of bills that will be filed by January 18, 2013, for consideration in the coming session.

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