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ALERT

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DHCFP Issues Guidance under Mass. Health Care Reform Act's Fair Share Contribution Requirement on the Treatment of Multiemployer Plans

Under the Massachusetts Health Care Reform Act (the "Act"), the Division of Health Care Finance and Policy (DHCFP) of the Commonwealth of Massachusetts Executive Office of Health and Human Services was given, among other tasks, the job of determining which employers were "non-contributing" employers—*i.e.*, those employers who must pay an annual, per-employee fee because they fail to offer some minimum prescribed level of employer-subsidized health insurance coverage for their full-time employees. (This requirement is generically referred to as the Fair Share Contribution or FSC requirement.)

On October 1, 2006, the DHCFP issued final regulations implementing the fair share premium requirement. On September 14, 2007, DHCFP issued an administrative bulletin further clarifying, among other things, the application of the "primary" test as applied to multiemployer (*i.e.*, union-sponsored) health plans. In a recent administrative bulletin, the DHCFP addressed the treatment of multiemployer plans under the FSC "secondary" test.

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Background

The FSC requirement is applied in the following four steps:

1. **Threshold Coverage.** Does the employer have 11 or more full-time equivalent employees? (This step takes into account all of the employer's employees—full-time, part-time, seasonal and temporary.) If the answer is no, then the FSC requirement does not apply. If the answer is yes, then the FSC rules apply.
2. **The Primary Test.** If the employer offers subsidized coverage of any sort (this does not need to rise to the level of “minimum creditable coverage” for purposes of the Act's individual mandate), do at least 25% of the employer's full-time employees accept the employer's offer of coverage? (A full-time employee for this purpose generally means an employee who works 35 or more hours per week). If so, the employer is not required to make a Fair Share Contribution.

Example 1

Employer A has 12 full-time employees and 90 part-time employees. A offers a subsidized mini-med plan to its full-time employees but offers no coverage to part-time employees. Three of A's employees elect to purchase the mini-med coverage. Employer A passes the primary test, and is not subject to the FSC contribution for the year.

3. **The Secondary Test.** Does the employer offer to pay at least 33% of the cost of individual coverage to full-time employees who were employed at least 90 days during the fiscal year from October 1st to September 30th? If so, the employer is not required to make a Fair Share Contribution.

Example 2

Same facts as example 1, except A offers to pay 33% of the cost of individual coverage under the mini-med plan, but no full-time employee accepts the offer. Employer A passes the secondary test, and is not subject to the FSC contribution for the year.

- 4. Payment of Contribution.** If the employer is unable to satisfy either test, it is subject to the Fair Share Contribution, which is calculated taking into account all of the employer's employees—full-time, part-time, seasonal, temporary, etc.

The DHCFFP final regulation was silent as to the treatment of collective bargaining unit employees for purposes of the primary and secondary tests. It was in the September 14, 2007 Administrative Bulletin that DHCFFP clarified that, in completing the primary test, an employer that makes a contribution to a multiemployer health benefit plan on behalf of a full-time employee may include that full-time employee in the number of employees enrolled in the health plan. In addition, employers that are required to pay employee benefits in accordance with federal contracting requirements may also include affected employees in the number of employees enrolled in the health plan.

The DHCFFP Clarifications

In its most recent bulletin, the DHCFFP addressed the treatment of full-time employees covered under a multiemployer health plan for purposes of compliance with the secondary test. Specifically, employers that contribute to a multiemployer health plan (or make contributions pursuant to federal contract requirements) are subject to the following rules:

- If the employer contributes to both an employer-sponsored group health plan and a multiemployer health plan under a collective bargaining agreement, or makes contributions

pursuant to federal contract requirements, the employer must complete the secondary test information based on the employer's percentage contribution to the employer-sponsored health plan.

- If an employer contributes only to a multiemployer plan that is not related to a collective bargaining agreement or to a federal contract, and if the employer makes different percentage contributions for different employee groups, the employer must report the lowest premium percentage contribution for purposes of the secondary test.
- If an employer contributes to an employer-sponsored group health plan and also contributes to a multiemployer plan that is not related to a collective bargaining agreement or to a federal contract, the employer must report the lowest premium percentage contribution for purposes of the secondary test.

Conclusion

As employers and the regulators get to the particulars of FSC compliance, the details of the rules are taking on added importance. The clarifications in this latest bulletin are narrowly focused, but they are important nevertheless. And they also form a part of the larger compliance process, *i.e.*, the implementation of the range of requirements and mandates that constitute the novel social experiment referred to as the Massachusetts Health Care Reform Act.

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If you have any questions concerning the information discussed in this alert or any other employee benefits topic, please contact one of the attorneys listed below or your primary contact with the firm who can direct you to the right person. We would be delighted to work with you.

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