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Employee Benefits Advisory: Division of Health Care Finance and Policy Issues New Regulation Implementing Fair Share Contribution Requirement

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The Massachusetts health care reform act (the "Act")[1] imposes health-care-related requirements on individuals, providers, insurers, and employers. While there are a series of employer mandates, it is the "fair share contribution" or "FSC" requirement—under which an employer must either make a fair share premium contribution to a group health plan or pay an annual assessment of $295 per full-time-equivalent employee—that has attracted the most attention. The Massachusetts Division of Health Care Finance and Policy (DHCFP) issued a proposed regulation some time ago that would make compliance with the FSC requirements more difficult. In a recently issued final regulation (the "final regulation"), the DHCFP adopted the essential features of the proposed rule, with some changes. Recent supplemental budget legislation[2] also changed the frequency of the FSC reporting and payment period from annual to quarterly. This change is reflected in the final regulation.

This client advisory explains the key features of this newly minted final regulation. Please see *An Employer's Guide to the 2006 Massachusetts Health Care Reform Act* for a comprehensive explanation of the provisions of the Act affecting employers with employees at Massachusetts locations.

Background

Nothing in the Act requires any employer to provide any health-care coverage to anyone, but it does require that employers with 11 or more full-time-equivalent employees make pre-tax coverage available under a cafeteria plan to all employees irrespective of whether the underlying coverage is provided by the employer or some other source. If an employer does not provide coverage to some or all of its full-time employees, it may be required to pay an annual fee of $295 per full-time-equivalent employee to a state trust fund (this is the FSC requirement). Only "non-contributing employers" must pay the FSC contribution. The Act caps the contribution at $295 per full-time-equivalent employee per year. Full-time equivalency was originally determined for this purpose on the basis of 2,000 payroll hours per year.

Before the final regulation, an employer was deemed to be a contributing employer—and thus not required to make the FSC contribution—if it could pass either of two separate tests, designated as the *primary* test and the *secondary* test. The primary test is based on the employer's "take-up" rate. If 25% or more of the employer's full-time employees accept its offer of health care coverage, the employer passes. The coverage must be provided under a "group medical plan" (this includes a limited benefit or "mini-med" plan) to which the employer contributes something. If the employer could not pass the primary test, it could avoid paying the FSC penalty by passing the secondary test, which is design-based. To satisfy this test, the employer must offer to pay 33% of the individual coverage for each full-time employee after 90 days of employment.

Changes under the Final Regulation

Before December 31, 2008, the current rules remain in force, except that compliance testing is done quarterly on the basis of 500 full-time-equivalent hours instead of annually on the basis of 2,000 full-time equivalent hours. Thus, an employer satisfies the FSC requirement if

- the percentage of full-time employees enrolled in its group health plan is 25%; *or*
- it meets the "premium contribution standard."

While the final regulation has abandoned the terms "primary" and "secondary," the substance of these requirements has not changed. The 25% test is the same as the primary test; and the premium contribution standard is the same as the secondary test.

From and after January 1, 2009, compliance with the FSC requirement varies depending on the size of the employer.

Employers with 50 or Fewer Full-Time-Equivalent Employees

An employer with 50 or fewer full-time-equivalent employees will satisfy the FSC requirement based on the pre-2008 criteria set out above. Thus, these employers will satisfy the FSC requirement for any quarter if the percentage of full-time employees enrolled in its group health plan is 25% *or* it meets the premium contribution standard.

Employers with More Than 50 Full-Time-Equivalent Employees

An employer with more than 50 full-time-equivalent employees will satisfy the FSC if:

- The percentage of full-time employees enrolled in its group health plan is 25% *and* it meets the premium contribution standard; *or*
- The percentage of its full-time employees enrolled in the employer's group health plan for the quarter is at least 75%.

As a result, employers with more than 50 full-time-equivalent employees will be required to meet both the 25% test and the premium contribution test (*i.e.*, the old "primary" and "secondary" tests) or have enrolled in their group health plan 75% of their full-time employees. For purposes of both tests, full-time equivalency is based on a 500-hour quarter.

The balance of the FSC regulation is largely unchanged. The definitions and exclusions under the prior regulation generally continue to apply. Thus, certain seasonal and temporary employees can be excluded in connection with the compliance testing process.

Conclusion

The changes to the FSC regulations are revenue driven. The DHCFP expects that this new final regulation will generate $30 million in revenue annually, compared to $7.5 million under the prior rules. While these revenue estimates may prove accurate, the burdens of the changes under the final regulation will not fall on all employers equally. Employers with fewer than 50 employees are spared, as are larger employers with stable workforces and a history of providing benefits, *e.g.*, financial services (since they will likely be able to pass the new 75% participation test). But mid-sized employers—*e.g.*, restaurants and retailers—will find compliance more difficult, as will staffing firms, since their demographics are not well suited to the FSC testing contours.

Endnotes

[1] An Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Acts c. 58, 2006 Mass. Adv. Legis. Serv. 58 (LexisNexis), *amended by* An Act Relative to Health Care Access, 2006 Mass. Acts c. 324; An Act Further Regulating Health Care Access, 2006 Mass. Acts c. 450; and An Act Further Regulating Health Care Access, 2007 Mass. Acts c. 205; *and* An Act Making Appropriations for the Fiscal Year 2008 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects, 2008 Mass. Acts c.

302.

[2] 2008 Mass. Acts c. 302, §§ 18, 19.

If you have any questions concerning the information discussed in this advisory 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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