Employee Benefits Advisory: Massachusetts Division of Health Care Finance and Policy Issues Guidance Clarifying Application of the Fair Share Contribution Requirement under the Massachusetts Health Care Reform Act

8/26/2009

Chapter 58 of the Acts of 2006 (the "Act")—a.k.a. the Massachusetts Health Care Reform Act—requires employers with 11 or more employees at Massachusetts locations to (among other things) make a "fair and reasonable" contribution to the health care premium costs of its employees or, alternatively, pay an annual "fair share contribution" to the Commonwealth of $295 per employee. Enforcement of the FSC rules is split between two agencies: the Division of Health Care Finance and Policy (DHCFP) establishes rules relating to what constitutes a fair and reasonable contribution, and the Division of Unemployment Assistance (DUA) oversees compliance.

On August 13, 2009, DHCFP issued a proposed revision to the FSC testing rules. (For a copy of the proposed rules, click here.) The proposed rules leave much of the current FSC testing structure intact. They do, however, make some important clarifications relating to the employer's burden of proof. While DHCFP did not explain its reasons for making these changes, the changes appear to respond to two particular positions that the DUA is taking on audit—positions which, in our view at least, appear to lack support. In addition, for the first time the proposed rules expressly recognize that a group health plan may consist of a premium reimbursement arrangement. This client advisory explains the key features of the DHCFP's proposed rules and their likely consequences if adopted.

FSC Testing

The FSC requirement is applied in three steps:

1. Threshold Coverage

Does the employer employ 11 or more full-time equivalent employees in the Commonwealth for the relevant quarterly testing period? If the answer is no, then the employer is not subject to the FSC requirement. Therefore, the employer is not required to pay an annual fair share employer contribution. The application of the coverage test requires employers to identify and count "full-time equivalent" employees. "Full-time equivalent" for this purpose means 500 payroll hours in the aggregate during a calendar quarter, but it excludes workers employed fewer than 150 hours

during the 12-month period ending with the last day of the applicable quarterly reporting period. The 150-hour exclusion is applied for the purpose of determining who is a "full-time equivalent" employee; not for determining who is a "full-time" employee.

2. FSC Testing

Before December 31, 2008, the FSC tests were applied annually on the basis of 2,000 full-time equivalent hours. This changed as of January 1, 2009. Testing is now done quarterly on the basis of 500 full-time-equivalent hours. There are two FSC tests: a "primary" or "percentage contribution" test and a "secondary" or "premium contribution" test. Before 2009, if an employer passed either the primary or the secondary test, then it was not liable for the fair share contribution. From and after January 1, 2009, employers with more than 50 full-time equivalent employees must pass either a "75% percentage test" or both the primary and secondary tests. (The "75% percentage test" is satisfied if 75% or more of the employer's full-time employees elect to participate in a group health plan to which the employer contributes.) As was the case before 2009, employers with 50 or fewer full-time equivalent employees may avoid liability for the fair shate contribution by passing either the primary or secondary test.

The primary and secondary tests work as follows:

- **Primary/percentage contribution test.** Does the employer offer a "group health plan" to which the employer makes some (any) contribution, and do 25% or more of the employer's full-time employees participate? (This test was originally referred as the "primary" test, and it was later re-named the "percentage contribution" test.)
- **Secondary/premium contribution test.** Does the employer offer to make a premium contribution of at least 33% of the cost of individual coverage under an employer-sponsored group health plan that is available to all of its full-time employees no more than 90 days after the date of hire? (This test was originally referred as the "secondary" test, and it was later re-named the "premium contribution" test.)

These tests are applied to "full-time" employees. "Full-time" for this purpose is the lower of the number of weekly payroll hours to be eligible for full-time health plan benefits, or 35 or more payroll hours per week. "Full-time health plan benefits" means the equivalent level of employer contribution to the employer's health plan that is offered to full-time employees. The primary test computation begins with all "full-time" employees and excludes from both the numerator and denominator of the testing fraction the following categories of employees:

i. employees whose employment is explicitly temporary in nature and does not exceed 12 consecutive weeks

ii. part-time employees who did not work enough hours to be eligible for full-time health plan benefits

iii. seasonal employees (but only those where DUA has certified those positions as "seasonal")

iv. independent contractors (based on Massachusetts and *not* federal tax rules).

3. Calculation and Payment

If an employer passes some combination of the primary and secondary tests described above, then it has no obligations to make any payments to the Commonwealth. Otherwise, it must make a per-employee fair share contribution not to exceed $295, pro-rated for FTE status based on a 2,000-hour year for years commencing before October 1, 2008, and based on a 500-hour quarter for years commencing after September 30, 2008.

DUA Enforcement Issues

The DUA has established a Web-based enforcement mechanism that piggy-backs on the Commonwealth's unemployment compensation reporting system. Helpfully, the system integrates compliance with the employer HIRD form requirement, so a separate filing is not required. Compliance is based on the "employing unit" (which corresponds to the number assigned by the DUA for unemployment insurance purposes). There are instances where a single employer will include more than one employing unit. In the process of enforcing the FSC rules, the DUA has taken two controversial positions, which have caused employers to fail the tests on audit in instances where they might otherwise comply.

1. Signed Waiver Requirement under the Secondary Test

Recall that, under the secondary test, an employer must *offer* to make a premium contribution of at least 33% of the cost of individual coverage under an employer-sponsored group health plan that is available to all of its full-time employees no more than 90 days after the date of hire. Here, the DUA has insisted the employer produce a signed waiver (*e.g.,* a signed HIRD form) for each employee who declines coverage. This requirement does not appear in any published guidance.

2. Basing Eligible Hours on the Underlying Insurance Contract

Both the primary and secondary tests require the employer to identify "full-time" employees. Some insurance contracts include a provision under which employees who are regularly scheduled to work fewer than a certain number of hours per week (*e.g.*, 20 hours) are not eligible. This is an underwriting requirement. The DUA has taken this contract term as the full-time threshold, even where the employer has made it clear that for its group health plan purposes full-time means, say, 35 hours per week. To assert that full-time means 20 hours in instances such as this is to confuse the group health plan with the underlying contract of insurance. The two are not the same.

The DHCFP Proposed Rule

Under the proposed rules, to satisfy FSC testing the employer must "adopt and maintain a written Group Health Plan document, and maintain written documentation with employees about the plan and employer contribution." For purposes of the secondary test, the offer must be "documented in writing." While a signed HIRD from would clearly meet this requirement, the import of this requirement is that other types of evidence (such as compliance with the ERISA disclosure requirements) will suffice.

While the proposed rules contain no express cross-reference to ERISA, the provisions requiring plan documentation and communication can be interpreted to import the ERISA plan document and summary plan description requirements into the FSC testing rules. Even if this requirement does not precisely parallel ERISA, it is nevertheless a high bar. Many employers, small employers in particular, treat the materials provided by their insurance carrier, together with a few lines about plan eligibility in an employee handbook or employment contract, as their "plan." This proposal appears to require something more. By complying with this requirement, however, the plan sponsor should be able to (i) establish with certainty that the group health plan (and not the underlying insurance contact) governs eligibility (for purposes of both the primary and secondary tests) and (ii) demonstrate that it has made the requisite "offer" for purposes of the secondary test.

Also welcome is an employer's ability to use a premium reimbursement arrangement to comply with the FSC testing rules. A premium reimbursement arrangement for this purpose is "an arrangement under which an employer offers in writing to reimburse its employees for a portion of the premium expense of an individual health plan." Under such an arrangement, the employee pays the monthly premium cost directly to the carrier and submits documentation of the premium expense to the employer for reimbursement up to the monthly limit established by the arrangement. The proposed regulation is silent as to what the monthly limit should be.

The public comment period for the proposed regulation ends Friday, September 18, 2009. (To access a copy of the DHCFP comment period notice, click here.)

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

BOSTON

Alden Bianchi
(617) 348-3057
AJBianchi@mintz.com

Tom Greene
(617) 348-1886
TMGreene@mintz.com

Addy Press
(617) 348-1659
ACPress@mintz.com

Patricia Moran
(617) 348-3085
PAMoran@mintz.com

NEW YORK

David R. Lagasse
(212) 692-6743
DRLagasse@mintz.com

Gregory R. Bennett
(212) 692-6842
GBennett@mintz.com

Jessica Catlow
(212) 692-6843
JCatlow@mintz.com