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ALERT

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Massachusetts Health Insurance Connector Authority Issues Additional Cafeteria Plan Guidance

Among the mandates imposed on employers by the Massachusetts health care reform act—Chapter 58 of the Acts of 2006, *An Act Providing Access to Affordable, Quality, Accountable Health Care*¹ (the “Act”)—is a requirement (the “section 125 cafeteria plan requirement”) that certain employers with employees at Massachusetts locations adopt a cafeteria plan to permit employees to pay their employee-provided health care premiums with pretax dollars. The Act’s cafeteria plan requirement, as implemented by the Commonwealth Health Insurance Connector Authority’s (the “Connector”) final regulation, took effect July 1, 2007.

In a recently issued administrative bulletin ([Administrative Bulletin 03-07](#)), the Connector announced a handful of important changes and clarifications to the section 125 cafeteria plan requirement. For an overview of this requirement, please see our prior client advisories:

- [Complying with the Massachusetts Cafeteria Plan Requirement \(Aug. 21, 2007\)](#);
- [Connector Delays Filing Requirement and Clarifies Part-Time Employee and Other Exceptions under the Massachusetts Health Care Reform Act’s Section 125 Cafeteria Plan Mandate \(June 29, 2007\)](#);
- [Connector Issues Emergency Rule Implementing Cafeteria Plan Requirement under Massachusetts Health Care Reform Act \(Mar. 23, 2007\)](#).

The Cafeteria Plan Filing Requirement

The Connector has formally dispensed with the section 125 cafeteria plan filing requirement, substituting in its place a requirement that each

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employer subject to the filing requirement (a so-called “151F Employer”) submit a copy of its section 125 cafeteria plan(s) to the Connector within seven business days of the Connector’s request. The bulletin also makes clear that cafeteria plans maintained by 151F Employers that are not available to any employees employed at a Massachusetts location are not subject to the filing requirement.

Exclusion of Certain Student Employees

The Connector’s final section 125 cafeteria plan regulation establishes a list of categories of employees—*e.g.*, employees who work less than 64 hours in a month—that are not required to be offered cafeteria plan coverage. Administrative Bulletin 03-07 expands this list as follows:

Students who are employed part-time as Employees of the educational institution they attend and who, as a condition of attending that educational institution, participate in a qualifying student health insurance program . . . or a qualifying student health insurance program of another state[] or in a health plan with comparable coverage, as required by state law.

Definition of Independent Contractor

The federal tax code and the Massachusetts section 125 cafeteria plan final regulation do not define the term “independent contractor” in the same way. (Actually, the Internal Revenue Code nowhere defines the term, but it distinguishes employees from self-employed individuals to the same effect.) The federal rules apply a multifactor test to ascertain the level of direction and control a service recipient has over a service provider. Many state workers’ compensation and other laws adopt a narrower approach. (For Massachusetts purposes, the services must be “performed either outside the usual course of the business for which the services are performed or . . . performed outside of all the places of business of the enterprise for which the services are performed.”) The key difference is that, for most state purposes, a worker providing services to a service recipient is generally treated as an employee if the services he or she performs relate to the employer’s core business.

Example

Company X manufactures widgets. During peak season, it requires additional assistance and reaches out to contractor A, who comes to work at X’s principle place of business. For federal tax purposes, whether A is an employee or an independent contractor depends on the application of a multifactor test. Contractor A, for example, might be considered the “go to” person in the widget

industry with a special expertise in alleviating backlogs. He might even have an advertisement in various widget trade journals to that effect and have a reputation as a much sought-after freelancer. But whatever the outcome for federal tax purposes, A will be an employee for Massachusetts purposes because he is performing services in the usual course of X's business at X's place of business.

A service provider could therefore be an employee for Massachusetts purposes but not for federal tax purposes, which poses a problem when trying to comply with the federal tax rules governing cafeteria plans. For federal tax purposes, cafeteria plans must cover employees and only employees (determined by applying the multifactor test). Thus, an employer runs the risk of complying with the Massachusetts rules only to find that it has violated the federal rules. In response to this conundrum, the administrative bulletin revises the definition of "independent contractor" in the final section 125 cafeteria plan regulation to include:

an individual who provides services not deemed to be employment for federal employment tax and wage withholding purposes in accordance with Internal Revenue Code sections 3121 and 3401 [dealing with employment taxes and wage withholding at the source, respectively] and with the 20-factor test established by Internal Revenue Service Rev. Rul. 87-41 [*i.e.*, the multi-factor test].

By mirroring the federal standard, the Massachusetts Section 125 cafeteria plan rules can now operate consistently with the federal rules.

The administrative bulletin took effect immediately upon its publication.

¹ As amended by Chapter 324 of the Acts of 2006, *An Act Relative to Health Care Access* and Chapter 450 of the Acts of 2006, *An Act Further Regulating Health Care Access*.

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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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