

Employee Benefits Advisory: Massachusetts "Fair Share Contribution" Filing Requirements Modified--Again

1/15/2009

Under a key feature of the Massachusetts health care reform act (the "Act"), employers with 11 or more full-time-equivalent employees at Massachusetts locations are subject to a "fair share contribution" (FSC) requirement. Covered employers must make a fair share premium contribution to a group health plan or pay an annual assessment of \$295 per full-time-equivalent employee. We explain the recent changes to the FSC requirement in our October 3, 2008 and October 21, 2008 advisories. 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

Before 2009, 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:

- the percentage test (formerly known as the primary test); or
- the premium contribution test (formerly known as the secondary test).

The percentage test is based on the employer's "take-up" rate. Under the rules in effect before 2009, 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" to which the employer contributes something. If the employer could not pass the percentage test, it could avoid paying the FSC penalty by passing the premium contribution 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.

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 will satisfy the FSC requirement based on the pre-2009 criteria set out above. Employers with more than 50 full-time-equivalent employees, however, are subject to more stringent rules. These employers will satisfy the FSC test if:

- the percentage of full-time employees enrolled in its group health plan is at least 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%.

From and after October 1, 2008, reporting, in each case, is required on a quarterly basis.

Recent Change

Based on data compiled by the Division of Unemployment Assistance (DUA) in connection with 2007 and 2008 FSC reporting, it became clear that the majority of Massachusetts employers were either not subject to the FSC rules or were able to pass the applicable tests. Specifically, out of 37,000 employers required to submit an FSC filing, fewer than 1,500 are expected to fail the FSC test for the quarter ending December 31, 2008. As a consequence, the new quarterly reporting rules appear unnecessarily burdensome.

Responding to industry requests, the DUA in a recent notice advised that, while all covered employers will be required to submit a quarterly filing no later than February 15, 2009 covering the fiscal quarter beginning October 1, 2008 and ending December 31, 2008, subsequent quarterly filings for the balance of the reporting period beginning October 1, 2008 and ending September 30, 2009 will be required only of employers that fail to pass in the first quarter or "are at risk of becoming liable for payment in future quarters." (The DUA's notice is silent as to how to determine whether an employer is "at risk" for failing the FSC testing requirement.) Once an employer is liable for payment, it must file for each ensuing quarter of the year.

The DUA plans to notify employers of their filing requirements, but employers should know that, if they incur liability for FSC in any quarter, they must file even if not notified to do so by DUA. Also, beginning January 2010, all employers filing for the first quarter of the filing year, who were not required to file each quarter of the previous filing year, will be required to retroactively certify their compliance for the previous quarters not filed.

Separately, commencing in 2009 the DUA will navigate employers to the Division of Health Care Finance and Policy web site to complete the employer Health Insurance Responsibility Disclosure (HIRD) filing requirement. The employer HIRD filing will only be required when an FSC quarterly filing is required.

Conclusion

This change is welcome news to many Massachusetts employers, and it represents a major reduction in the overall FSC compliance burdens. It is hoped that the DUA and other agencies charged with administering the Act will continue to seek ways to ease the burdens on employers while at the same time meeting their obligations to implement the will of the Legislature.

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

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