

To our clients and friends:



## EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION ADVISORY

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## DHCFP Issues Emergency Rule Implementing the Massachusetts Health Care Reform Act's "HIRD Form" Requirement

The Division of Health Care Finance and Policy (DHCFP) of the Massachusetts Executive Office of Health and Human Services recently issued two long-awaited regulations implementing certain features of the Massachusetts Health Care Reform Act—Chapter 58 of the Acts of 2006, *An Act Providing Access to Affordable, Quality, Accountable Health Care* (“Act”)<sup>1</sup>—relating to the Health Insurance Responsibility Disclosure (HIRD) form and the Surcharge for State-Funded Health Costs (the so-called “free rider surcharge”). This Advisory explains the HIRD form regulation; a separate advisory will discuss the free rider surcharge. (Click [here](#) to access our *Employers’ Guide to the Massachusetts Health Care Reform Act*, which describes all of the Act’s employer-related provisions.)

The Act directs DHCFP to promulgate a HIRD form that provides information necessary to administer and enforce the Act’s individual insurance mandate, the fair share contribution requirement, and the free rider surcharge. The HIRD requirements become effective July 1, 2007. On December 29, 2006, DHCFP issued an emergency regulation providing guidance on the implementation of the HIRD form requirements, but it later withdrew the regulation. On June 20, 2007, DHCFP issued a new emergency HIRD form rule, 114.5 CMR 18.00, which retains the basic form of the December 29, 2006 rule but includes some welcome refinements.

### Applicability of the HIRD Form Rules

The HIRD form requirement applies to Massachusetts employers with 11 or more full-time equivalent employees. The period for measuring full-time equivalent status is the fiscal period beginning October 1st and ending September 30th (the “determination period”), and “full-time” means up to 2,000 hours—*i.e.*, hours in excess of 2,000 worked by a

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particular employee are not counted. The emergency regulation refers to the employers subject to the HIRD form rule as “reporting employers.” The mechanics of the calculation work as follows: If “the sum of total payroll hours for all Employees” during the determination period divided by 2,000 is equal to or greater than 11, then it is a reporting employer. Payroll hours include all hours for which an employer paid wages, including regular, vacation, sick, FMLA, short-term disability, long-term disability, overtime and holiday hours. Payroll hours of independent contractors are not counted.

### **The Employer HIRD Form**

Reporting employers must submit an “Employer HIRD Form” based on information as of July 1st of each year. The method of submitting the form and the due date for submission will be established at a later time pursuant to an administrative bulletin. Newly established employers must register with the DHCFP at the same time that they register with the Division of Unemployment Assistance.

The Employer HIRD Form is required to include the following information:

- employer’s legal name;
- employer’s DBA name;
- employer federal employer identification number;
- Division of Unemployment Assistance account number;
- whether the employer adopts and/or maintains a Section 125 cafeteria plan in accordance with the requirements of the Connector;
- whether the employer contributes to the premium cost of a group health plan for its employees;
- if the employer contributes to the premium cost of a group health plan for its employees:
  - the employer contribution percentage for each employee category if the percentage varies by category;
  - the total monthly premium cost for the lowest priced health insurance offered for an individual plan and a family plan;
  - the total monthly premium cost for the highest priced health insurance offered for an individual plan and a family plan; and

- if the employer offers an employer sponsored group health plan, the open enrollment period of the employer sponsored plan.

### **Special Leasing Company Rule**

The emergency HIRD form rule contains special provisions that apply to “employee leasing company” arrangements. An “employee leasing company” is defined in 114.5 CMR 18.02 as:

[a] sole proprietorship, partnership, corporation or other form of business entity whose business consists largely of leasing Employees to one or more Client Companies under contractual arrangements that retain for such Employee leasing companies a substantial portion of personnel management functions, such as payroll, direction and control of workers, and the right to hire and fire workers provided by the Employee Leasing Company; provided, however, that the leasing arrangement is long term and not an arrangement to provide the Client Company temporary help services during seasonal or unusual conditions.

The emergency regulation defines the term “client company” as a “person, association, partnership, corporation or other entity that uses workers provided by an Employee Leasing Company pursuant to a contract.” This definition is not the same as the definition of “client company” under the fair share premium regulations, which requires a co-employment relationship. Since “co-employment” is a feature of Professional Employer Organizations (PEOs) but is not usually associated with traditional staffing arrangements, these employee leasing company provisions apply to both PEOs and staffing firms.

Under the HIRD form employee leasing company rules, the client company is the employer with respect to itself and employees covered by the leasing arrangement, but the parties are free to change this result by written agreement. The employee leasing company’s failure to adhere to such an agreement, however, does not relieve the client company from liability. Where the employee leasing company undertakes to file a HIRD form on behalf of its client companies, separate forms are required for each client company.

### **Employee HIRD Form**

Reporting employers are required to furnish an “Employee HIRD Form” to each employee who either declines to enroll in an employer sponsored group health plan or (in the case of an employee who is not eligible for employer subsidized coverage) who declines access to other

coverage (*e.g.*, through the Connector) through the employer's Section 125 cafeteria plan. These employees must sign an Employee HIRD Form and return it to the employer. If an employee fails to comply with the employer's request to return the signed form, the employer must document its "diligent" efforts to obtain the form, and it must retain the documentation for three years.

The Employee HIRD Form must contain the following information:

- employee name;
- employer name;
- whether the employee was informed about the employer's Section 125 cafeteria plan;
- whether the employee declined to use the employer's Section 125 cafeteria plan to pay for health insurance;
- whether the employee was offered employer subsidized health insurance;
- whether the employee declined to enroll in employer subsidized health insurance;
- if the employee declined employer subsidized health insurance, the dollar amount of employee's portion of the monthly premium cost of the least expensive individual health plan offered by the employer to the employee;
- whether the employee has alternative insurance coverage; and
- the date the employee completes and signs the HIRD form.

As a part of the Employee HIRD Form, the employee must also acknowledge that:

- he or she has declined to enroll in employer sponsored insurance and/or has declined to use the employer's Section 125 cafeteria plan to pay for health insurance;
- if he or she declines an employer's offer of subsidized health insurance, he or she may be liable for his or her health care costs;
- he or she is aware of the individual mandate and the penalties for failure to comply with the individual mandate;
- he or she is required to maintain a copy of the signed Employee HIRD Form and that the form contains information that must be reported in the employee's Massachusetts tax return; and

- by his or her signature, he or she acknowledges the truthfulness of his or her answers.

Employers must retain, and make available to the DHCFP on request, signed Employee HIRD Forms for a period of three years. The employer must also retain documentation that an individual employee was not required to sign the Employee HIRD Form for a period of three years—*i.e.*, that the employee either enrolled in the employer’s plan or he or she accessed other coverage under the employer’s Section 125 cafeteria plan. Lastly, the employer must provide a copy of a signed Employee HIRD Form to each employee for use in filing his or her Massachusetts tax return.

Employers must obtain signed Employee HIRD Forms upon the earliest of:

- 30 days after the close of each open enrollment period for the employer’s health insurance;
- 30 days after the close of each open enrollment period for the employer’s Section 125 cafeteria plan; or
- September 30th of the reporting year.

Where an employee terminates participation in the employer’s group health plan, the employee must sign an Employee HIRD Form within 30 days of the date of his or her termination. In the case of newly hired employees, the employer must obtain the signed Employee HIRD Form from each new employee who either declines employer sponsored health insurance coverage or declines to access other coverage through the employer’s Section 125 cafeteria plan within 30 days after the close of the applicable enrollment period.

The emergency rule imposes on any employer that knowingly falsifies or fails to file any information required by the DHCFP a fine of not less than \$1,000 or more than \$5,000.

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<sup>1</sup> 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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