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

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The Massachusetts Health Care Reform Act (the 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" (FSC) 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.

Effective October 1, 2009, the DHCFP issued a revised final FSC testing rule (the "final rule") that was originally proposed on August 13, 2009. (To review the final rule, click here.) Please see ***An Employer's Guide to the 2006 Massachusetts Health Care Reform Act*** for a comprehensive explanation of the impact of the Act on employers with employees at Massachusetts locations.

The final rule makes a handful of modest, though potentially important, changes to the FSC testing rules. After providing a brief summary of the FSC testing regime, this client advisory explains the key features of the newly issued DHCFP final rule and its consequences.

Summary of the FSC Testing Rules

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 twelve-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 the purpose of 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 standards or tests: the "percentage contribution" standard, which was formerly called the "primary test," and the "premium contribution" standard, which was formerly called the "secondary test." Before 2009, if an employer passed either standard, 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 standard" or **both** the percentage and premium contribution standards. (The "75% percentage standard" 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.) The percentage and premium contribution standards work as follows:

- **Primary test/percentage contribution standard.** (i) Does the employer offer a "group health plan" to which the employer makes some (any) contribution, and (ii) do 25% or more of the employer's full-time employees participate?
- **Secondary test/premium contribution standard**. 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?

These standards are applied to "Full-Time" employees. "Full-Time" for this purpose is the lower of (i) the number of weekly payroll hours needed to be eligible for full-time health plan benefits or (ii) 35 or more payroll hours per week. "Full-time health plan benefits" generally 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:

1. employees whose employment is explicitly temporary in nature and does not exceed 12 consecutive weeks
2. part-time employees who did not work enough hours to be eligible for full-time health plan benefits
3. seasonal employees (but only in positions that DUA has certified as "seasonal")
4. independent contractors (based on Massachusetts and not federal tax rules)

At its discretion, an employer may also exclude employees covered under a multi-employer health plan, federal contracts and prevailing wage contracts.

3. Calculation and Payment. If an employer passes some combination of the percentage and premium contribution standards described above, then it has no obligation 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.

Changes under the DHCFP October 1, 2009 Final FSC Testing Rule

The DHFCP's final rule made the following changes:

1. Full-Time Employees. The final 2008 FSC testing rule contained a provision intended to help employers determine who was a full-time employee and who was a part-time employee. It read:

An Employer shall include all Full-Time Employees employed at Massachusetts locations, whether or not they are Massachusetts residents. An Employee that works both full-time and part-time during a calendar quarter is a Full-Time Employee if he or she worked "Full-Time" a majority of his or her time during the quarter.[1]

While well-intentioned, the 2008 rule appears to have been the source of confusion. The final regulation dispenses with it, which may not be good news. Without an express standard, employers are left to their own devices to make this call under the default "good faith compliance" standard.

Separately, the 2009 final rule contains a minor clarification in the definition of "Full-Time Employee." Under the newly issued rule, "Full-Time Employee" is defined as follows (changes in italics):

"A Full-Time Employee is an Employee that works the lower of (1) 35 or more hours per week or (2) *at least* the *minimum* number of weekly payroll hours *required for any employee* to be eligible for the Employer's Full-Time Health Plan Benefits."

While it's not clear whether any substantive change was intended, the DHCFP at least seemed intent on conveying that it really means it this time. There are instances where an employer might provide full-time benefits to a particularly valuable part-time employee. This is no longer possible without risking an FSC violation.

2. Documentation. In order to demonstrate compliance with the FSC testing rules, employers must now "adopt and maintain a written Group Health Plan document, and maintain written documentation with employees about the plan and employer contribution." Also, for purposes of the premium contribution standard, the offer must be "documented in writing." The particulars of the rule require the employer to maintain documentation about its group health plan and premium contributions including, but not limited to:

- A written plan description for each plan, including a description of benefits; eligibility requirements, and amount of employer contribution; and evidence that the plan was in place during the quarter for which eligibility is determined
- Copies of employee handbooks or other written communications to employees about the plan or plans, including plan benefits, eligibility requirements, and the employer's contributions

Clearly, compliance with the ERISA plan document/summary plan description requirements will satisfy this standard. On the other hand, sole reliance on benefits and summaries produced by insurance carriers will not do (unless these have been customized to include plan eligibility and related information).

NOTE: What is not clear is whether the DUA will, on audit, rely on this requirement and not insist on signed waivers (as it has in some instances) in order to establish the requisite "offer" under the premium contribution standard.

Many employers, small employers in particular, treat the materials provided by their insurance carrier, together with a few lines in an employee handbook or employment contract about plan eligibility, as their "plan." This final rule requires 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 and (ii) demonstrate that it has made the requisite "offer" for purposes of the premium contribution standard.

3. Premium Reimbursement Arrangements. The final rule establishes a new way to comply with the FSC testing rules through the use of a "Premium Reimbursement Arrangement." The final rule defines the term "Premium Reimbursement Arrangement" to mean:

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. The employee pays all of the monthly premium cost directly to the carrier. The employee submits documentation of the premium expense to the employer for reimbursement up to the monthly limit established by the arrangement.

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. Of course, the employee would have to be able to pay the balance of the premiums with pre-tax dollars by virtue of the cafeteria plan requirement. While the final rule is silent as to what the monthly limit should be, as a practical matter it must be at least 33% to pass the premium contribution standard.

Endnotes

[1] 114.5 CMR 16.03(3)(a)(1).

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