MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

# Employee Benefits Advisory: Recent Developments under the Massachusetts Health Care Reform Act Affecting Employers

8/26/2008

The Massachusetts healthcare reform act[1] (the "Act") imposes healthcare-related requirements on individuals, providers, insurers and employers. When signed into law in April 2006, the Act was generally regarded—by supporters and detractors alike—as an audacious experiment, and it has since served as a model for other states and even some nascent Federal proposals. From the outset, the Act's long term financial health was a matter of speculation, and it was understood that changes would be required.

This advisory explains the following recent developments under the Act as they affect employers, either directly (in the case of the fair share contribution requirement) or indirectly (in the case of the definition of "minimum creditable coverage"):

- Changes to the timing of payments under the Act's fair share contribution (FSC) requirement made in a supplemental budget bill;
- A recent proposed regulation issued by the Division of Health Care Finance and Policy, which modifies the determination of which employers are subject to the FSC requirement; and
- Changes to the definition of "minimum creditable coverage" (MCC) recently proposed by the Commonwealth Health Insurance Connector Authority (the "Connector").

Click here for a copy of *An Employer's Guide to the 2006 Massachusetts Health Care Reform Act*, which provides a comprehensive explanation of the provisions of the Act affecting employers with employees at Massachusetts locations.

## Background

### *The FSC Requirement*

Nothing in the Act requires any employer to provide any health care coverage to anyone, but it does require that employers make pre-tax coverage available under a cafeteria plan to all employees irrespective of whether the underlying coverage is provided by the employer or some other source (*e.g.*, the Connector). If an employer does not provide coverage to some or all of its full-time employees, it may be required to pay an annual fee of $295 per full-time equivalent employee to a state trust fund (this is the FSC requirement). Only "non-contributing employers" must pay the FSC contribution. The Act caps the contribution at $295 per full-time equivalent employee per year. Full-time equivalency is determined for this purpose on the basis of 2,000 payroll hours/year.

Under current guidance, an employer is deemed to be a contributing employer, and thus not required to make the FSC contribution, if it can pass either of two separate tests, designated as the *primary* test and the *secondary* test. The primary test is based on the employer's "take-up" rate. If 25% or more of the employer's full-time employees accept its offer of health care coverage, the employer passes. The coverage need not rise to the MCC level required for purposes of the individual mandate, as described below. All that is required is that the coverage be under a "group medical plan" (this includes a limited benefit or "mini-med" plan) and that the employer contribute something. If the employer cannot pass the primary test, it can avoid the FSC penalty by passing the secondary 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.

### *The Individual Mandate*

The Act's "individual mandate" requires all residents of the Commonwealth age 18 or older to obtain and maintain a minimum level of health insurance coverage, *i.e.*, MCC. The purpose of the MCC requirement is to ensure that individuals purchase comprehensive, major medical coverage that includes prescription drug coverage with strict limits on co-pays and deductibles. An individual who fails to satisfy this requirement is subject to a tax. The Act delegates to the Connector the power to determine what coverage does and does not constitute MCC. Under guidance issued by the Connector in 2007, virtually any group health coverage would suffice before 2009. Beginning in 2009, however, the requirements for MCC were made far more prescriptive.

The individual mandate does not apply to employers, *i.e.*, an employer can pass the FSC test by offering coverage that is not at the level of MCC. But employees enrolled in a plan that does not provide MCC will be subject to a tax penalty. Therefore, if for no other reason than for the maintenance of peaceful employee relations, employers may want to offer coverage that satisfies the MCC requirements.

## Timing of FSC Payments

It was originally assumed that the Act's fair share contribution requirement would yield annual revenues in excess of $30 million, but the actual number has been closer to $7 million. The Governor, in submitting a supplemental budget request for State Fiscal Year 2008,[2] included a proposal to increase the cap on per full-time-equivalent employee contributions from $295 to the amount that would be required to produce annual revenues of $38 million. According to one estimate, the FSC contribution under this proposal would rise to just under $1,000 per full-time-equivalent employee. This provision was dropped when the final supplemental budget was enacted.[3]

The supplemental budget bill also changes the frequency of the FSC reporting and payment period from annual to quarterly. Similarly, the determination of the number of full-time-equivalent employees is based on a 500-hour quarter rather than a 2,000 hour year.[4]

## FSC Testing: Primary and Secondary Tests

Under a recently proposed regulation, the Division of Health Care Finance and Policy would, if adopted, require that employers pass both the primary *and* the secondary tests described above in order to avoid liability for the FSC contribution. This means that 25% or more of the employer's full-time employees must accept its offer of health care coverage, and the employer must also offer to pay 33% of the individual coverage. If this change is adopted in the final regulation, it will increase the number of non-contributing employers that will be required to pay the FSC amount. While many large, established employers will not feel the impact of these changes, small business—restaurants and retailers in particular—will be hard hit.

## Changes to the Minimum Creditable Coverage Rules

The Connector has proposed to modify the post-2008 MCC rules in a handful of important respects, which include the following:

Requiring that plans cover a "broad range of medical benefits," which, at a minimum, include:

- Ambulatory surgery, including anesthesia;
- Diagnostic imaging and screening, including x-rays;
- Diagnostic laboratory services;
- Emergency services;

- Hospitalization, including at a minimum inpatient acute care services;
- Maternity and newborn care;
- Medical and surgical care, including preventive and primary care;
- Mental health services;
- Prescription drugs; and
- Radiation therapy and chemotherapy.

Expansion of the basic definition of "health benefit plan" to include insured plans issued in any state other than Massachusetts.

Modification of the rule's preventive care visit standards to include a schedule of frequency that meets nationally recognized standards.

Guidance on what constitutes a "broad range of medical benefits" that a health plan must cover in order to satisfy the MCC standard.

Clarification that coverage may be provided under more than one health benefit plan, so long as coverage in the aggregate satisfies the MCC requirement.

Beginning in 2010, high-deductible health plans that are paired with Health Savings Accounts must include a broad range of medical benefits.

A requirement that health benefit plans that do not utilize a network of providers (*e.g.*, traditional indemnity plans) must meet the MCC "in-network" standards relating to such features as deductibles and out-of-pocket maximums in order to satisfy the MCC requirements, and any indemnity fee schedules must be based on reasonable and customary charges or other contractual arrangements between providers and the health plan.

Clarification that while overall annual and per illness limits are not permitted, limits on services that are not considered "core services" are allowed.

Expansion of the list of "safe harbor" MCC coverages to include health coverage provided by the US Veterans Administration and health plans offered to members of the AmeriCorps National Service Network and National Civilian Community Corps.

The issue of what constitutes MCC is particularly important where self-funded plans of multi-State employers are concerned. Most such plans already provide comprehensive major medical coverage. The proposed MCC changes should generally ease compliance burdens on this score, but the provisions relating to HDHP/HSA arrangements will make it more difficult to maintain consumer-driven health care programs.

## Conclusion

These changes and proposals serve to reinforce the notion that the Act remains a work in progress. That they are being made or proposed at all underscores that the Act is not about to be repealed in its entirety any time soon (as some had originally hoped). Health care reform is an idea whose time has come, and the market-based reforms along the lines first conceived in Massachusetts are the preferred approach, at least for now. As a consequence, while we can expect further changes and modifications at the margins, the Act's essential structure appears sound.

---

**Endnotes**

[1] An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58 of the Acts of 2006, 2006 Mass. Adv. Legis. Serv. 58 (LexisNexis), *amended by* An Act Relative to Health Care Access, ch. 324 of the Acts of 2006; An Act Further Regulating Health Care Access, ch. 450 of the Acts of 2006; and An Act Further Regulating Health Care Access, ch. 205 of the Acts of 2007.

[2] An Act Making Appropriations for the Fiscal Year 2008 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects, 185th Gen. Court §30 (Mass. 2008) (filed July 13, 2008).

[3] *See* H. 5022, signed by the Governor with an accompanying message dated August 8, 2008, with certain items not relevant to this discussion vetoed.

[4] *See* H. 5022 cited above, §§18, 19.

---

*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.*

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

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

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

**Pamela Fleming**
**(617) 348-1664**
PBFleming@mintz.com

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

---