

# Labor and Employment



## Massachusetts Health Care Law: A Checklist

Since our [May 2007 briefing](#) on An Act Providing Access to Affordable, Quality, Accountable Health Care (the Act) was issued, the Division of Health Care and Finance (the Division) has released final emergency regulations on both the Free Rider Surcharge and the Health Insurance Responsibility Disclosure Form. Moreover, the Commonwealth Health Insurance Connector (the Connector) has issued revised final regulations on the Internal Revenue Code (the Code) Section 125 rules. Employers should carefully review the following checklist to ensure that they are in compliance with the Act and these new regulations.

### Free Rider Surcharge

Effective July 1, 2007, in order to ensure exemption from the Free Rider Surcharge, an employer with 11 or more full-time equivalent employees at a Massachusetts location must have a Code Section 125 cafeteria plan in place that:

- Satisfies the following Connector requirements:
  - Is at least a premium-only plan that offers access to two or more “medical care coverage options” (not defined in the regulations)
  - Sets forth in writing the eligibility requirements
  - Does not provide for a waiting period longer than (i) any waiting period for enrollment in medical care coverage options available under the plan, provided the employer makes contributions toward such coverage; or (ii) two months, if the employer makes no contribution toward the applicable medical care coverage options (for those employers subject to this requirement effective July 1, 2007, the eligibility waiting period for those employed on July 1, 2007, may be extended to no later than September 1, 2007)
  - Offers participation to an eligible employee during any applicable election periods without regard to whether the eligible employee was previously eligible or had previously waived participation during any prior election period

- Does not exclude any employees from participation in the plan other than the following permitted categories:
  - Employees who are under 18 years of age
  - Temporary employees (as defined in the regulations)
  - Part-time employees working, on average, fewer than 64 hours per month for an employer (whether an employee works, on average, fewer than 64 hours per month is determined based on a 180-day look-back period with special rules for new hires)
  - Employees who are considered wait staff, service employees or bartenders and who earn, on average, less than \$400 in monthly payroll wages
  - Student employees who are employed as interns or as cooperative education student workers
  - Employees whose employer is required to contribute to a Multiemployer Health Benefit Plan (a health benefit plan to which more than one employer is required to contribute pursuant to a collective bargaining agreement that was the subject of good faith bargaining) based on their employment
  - Seasonal employees (as defined in the regulations) who are international workers with either a US J-1 student visa, or a US H-2B visa and who are also enrolled in travel health insurance
- Satisfies all the requirements of Code Section 125 and includes the following provisions in a written plan document:
  - A specific description of each of the benefits available under the plan, including the period during which the benefits are provided (may be incorporated by reference to other documents)
  - The plan’s eligibility rules regarding participation
  - The procedures governing participant elections under the plan (including the period during which elections may be made, the extent to which elections are irrevocable and the periods with respect to which the elections are effective)

- The manner in which employer contributions may be made to the plan
- The maximum amount of elective employer contributions available to any participant under the plan—either by stating the maximum dollar amount or maximum percentage of compensation that a participant may contribute or by stating the method for determining the maximum amount or percentage
- The plan year
- Is adopted by the employer (and any affiliate/participating employers) in accordance with its own internal governance procedures and clearly states the effective date in the written plan documentation

If an employer does not have a Code Section 125 plan in place that meets the requirements described above because, for example, it excludes part-time employees who work fewer than 20 hours per week, then the employer is exposed to a possible Free Rider Surcharge unless it does one of the following:

- Amends its Code Section 125 plan to include part-time workers who work, on average, 64 hours or more per month (and amends the related group health plan if necessary to permit these employees to participate)
- Amends its Code Section 125 plan to include these formerly excluded employees and directs them to the Connector for health plan coverage
- Establishes a separate Code Section 125 plan for these formerly excluded participants and directs them to either the employer's group health plan or the Connector for health coverage (a model cafeteria plan adoption agreement and plan document is available on the Connector's [website](#))

**Code Section 125 Filing Requirement:** The Connector's filing requirement for Code Section 125 cafeteria plans has been postponed to October 1, 2007, from the original date of July 1, 2007. Moreover, the Connector will not accept Code Section 125 cafeteria plan documents prior to September 1, 2007. However, during this time, employers must furnish a copy of their Code Section 125 cafeteria plan to the Connector upon request.

**Using the Connector:** If an employer directs any of its employees to the Connector for health coverage and at least one of them accepts such coverage, then the employer must contact the Connector and create an employer account with the Connector. As part of this process, the employer will complete an employee census that provides the Connector with information about employees opting for coverage through the Connector and sign a form outlining terms

and conditions governing the relationship between the employer and the Connector. Once the employees enroll in one of the Connector's health plans, the Connector will inform the employer of the monthly premium payment amount to be withheld from each employee. The employer will send the Connector the premium payment, and the employee's coverage becomes effective on the first of the month following receipt of payment.

### **Health Insurance Responsibility Disclosure (HIRD)**

A Massachusetts employer with 11 or more full-time equivalent employees must complete an Employer HIRD form. According to the website for the Division of Unemployment Assistance (the DUA), this form will be part of a joint filing between the Division and the DUA in order to encompass both the Employer HIRD information and the Annual Fair Share Contribution information. Employers will be notified about the method for submitting the form and the due date for submission by administrative bulletin. The Employer HIRD form will contain the following information as of July 1 of each reporting year:

- Name of the employer, DBA name, the employer's FEIN and the DUA Account Number
- Whether the employer adopts and/or maintains a Code Section 125 plan in accordance with Connector rules
- Whether the employer contributes to the premium cost of a group health plan for its employees (if so, the employer contribution percentage for each employee category, if it varies by category, and total monthly premium cost for lowest- and highest-priced health insurance offered for an individual and family plan must also be recorded)
- Open enrollment period of employer-sponsored plan

Each Massachusetts employer with 11 or more full-time equivalent employees must provide an Employee HIRD form for completion and signature by each employee that declines to enroll in employer-sponsored insurance or declines to use the employer's Code Section 125 cafeteria plan to pay for health insurance. The [Employee HIRD form](#) may be used, or the employer may use its own form so long as it contains the following information:

- The employee's and employer's names
- Whether the employee was informed about the employer's Code Section 125 plan
- Whether the employee declined to use the employer's Code Section 125 plan
- Whether the employee was offered employer-subsidized health insurance and whether the employee declined to enroll in such insurance

- If the employee declined subsidized health insurance, the dollar amount of the 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
- Acknowledgements that the employee has declined to enroll in the employer-sponsored insurance plan and/or has declined to use the employer's Code Section 125 plan to pay for health insurance; that the employee may be liable for health care costs; that the employee is aware of the individual mandate under the Act and the penalties for failure to comply with such mandate; that the employee is required to maintain a copy of the signed Employee HIRD form and that the Employee HIRD form contains information that must be reported in the employee's Massachusetts tax return; and that the employee has answered truthfully

The Employee HIRD form must be obtained for each such employee by the earlier of 30 days after the close of the applicable open enrollment period for the employer's health insurance and/or its Code Section 125 cafeteria plan, or September 30 of the reporting year. If an employer's open enrollment period for 2007–2008 ended prior to July 1, 2007, and an employee has signed an employer form acknowledging that employer-sponsored insurance was offered and declined, such employee is not required to sign an Employee HIRD form until the next applicable open enrollment period occurring on or after July 1, 2007.

For new employees who must complete the Employee HIRD form, the form must be collected by employers within 30 days of the applicable open enrollment period.

If an employee enrolled in an employer-sponsored health insurance plan subsequently terminates participation in the plan, the employee must sign an Employee HIRD form within 30 days of the date participation was terminated.

The Employee HIRD form must be retained by the employer for three years. If the employee does not comply with the employer's request to return the signed form, the employer must document diligent efforts to obtain the form and maintain that documentation for a period of three years.

The employer must provide a copy of each signed Employee HIRD form to the employee.

### Fair Share Contribution

For the calculation period beginning October 1, 2006, and ending September 30, 2007, in order to avoid paying an annual Fair Share Contribution to the state, employers with 11 or more full-time equivalent employees who perform services within Massachusetts must determine whether at least 25% of the employer's full-time employees are enrolled in the employer's group health plan; or the employer pays at least 33% of the premium cost of any group health plan it offers to its full-time employees. If either of these tests is passed, the employer will be exempt from the Fair Share Contribution.

In order to track whether employers are subject to the Fair Share Contribution, the DUA is developing an Annual Fair Share Contribution form that must be filed by employers by November 15, 2007. The DUA states that it will incorporate the Employer HIRD form into the Fair Share Contribution form. According to the DUA's website, this will make it possible for employers to satisfy two required reports in one online filing.

#### FOR MORE INFORMATION ON THIS OR OTHER LABOR AND EMPLOYMENT MATTERS, PLEASE CONTACT:

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