

# Labor and Employment



## Massachusetts Health Care Law: The Impact on Employers

On April 12, 2006, Governor Mitt Romney signed into law An Act Providing Access to Affordable, Quality, Accountable Health Care (the Act). Since its enactment, two technical amendments to the Act have been approved.<sup>1</sup> The Act changes the landscape of health care in Massachusetts not only for individuals, but for employers, as well. The purpose of this briefing is to summarize the employer mandates in the Act. **Some of these new mandates will require action by July 1, 2007.**

### Free Rider Surcharge

Most Massachusetts employers have to pay a Free Rider Surcharge to the state if their employees or dependents of those employees receive a certain amount of free health care unless the employer sponsors an Internal Revenue Code (the Code) Section 125 cafeteria plan.

*When is the Free Rider Surcharge effective? July 1, 2007.*

*What guidance has been issued on the Free Rider Surcharge?* Section 44 of the Act, final regulations issued by the Division of Health Care and Finance (the Division) and later withdrawn, and the Division's Bulletin for Employers issued in January 2007 (the Bulletin).

*What employers are subject to the Free Rider Surcharge?* A Massachusetts employer (whether sponsoring a fully or self-insured health plan) with more than 10 employees will be subject to the Free Rider Surcharge if (1) it is a **non-providing employer**, (2) any of its employees are **state-funded employees**, and (3) its **state-funded employees** receive **state-funded health services** that total at least \$50,000 in a fiscal year. However, employers participating in the state Insurance Partnership Program or whose employees are covered by a collective bargaining agreement are exempt from the Free Rider Surcharge.

- The withdrawn regulations and the Bulletin make clear that a **non-providing employer** is one that does not comply with the Act's requirement to offer a Code

Section 125 cafeteria plan in accordance with the rules of the Commonwealth Health Insurance Connector (the Connector). Thus, Massachusetts employers subject to the Free Rider provisions will avoid the Surcharge by merely making a Code Section 125 cafeteria plan available to employees.

- A **state-funded employee** is an employee or a dependent of an employee (1) who has more than three state-funded admissions or visits during a fiscal year, or (2) of an employer whose employees or dependents have five or more state-funded admissions or visits during a fiscal year.
- **State-funded health services** are services paid from the Uncompensated Care Trust Fund or the Health Safety Net Trust Fund.

*How much is the Free Rider Surcharge?* If an employer is subject to the Free Rider Surcharge, the amount will be determined each year by the Division according to a formula. Factors considered include the number of employees of the employer, the total number of admissions and visits for each state-funded employee, the total amount of free care services provided to the state-funded employees, and the percentage of employees for whom the employer provides health insurance.

**Step 1:** Employers are assigned to one of four categories based upon the number of employees:

- Category 1: 11–20 employees
- Category 2: 21–35 employees
- Category 3: 36–50 employees
- Category 4: >50 employees

**Step 2:** The Division will determine the percentage of state-funded health services to be assessed against the employer using the following chart for 2007 (as set forth in the withdrawn regulations, which are not expected to be changed significantly):

Year	Category 1	Category 2	Category 3	Category 4
4–6 admissions or visits by one state-funded employee or 5–10 visits for all state-funded employees	10%	15%	20%	25%
7–14 admissions or visits by one state-funded employee or 11–20 visits for all state-funded employees	20%	25%	30%	35%
more than 15 admissions or visits by one state-funded employee or more than 21 visits for all state-funded employees	30%	35%	40%	45%
non-compliance with HIRD requirement or employer subject to Free Rider Surcharge for second successive year	40%	45%	50%	55%

**Step 3:** The Division will multiply the amount of state funded costs by the appropriate surcharge percentage chart. The product of this calculation will be reduced by the employer’s percentage of Enrolled Employees determined for purposes of the Fair Share Contribution. However, in no case will the reduction be greater than 75%.

### Cafeteria Plan Requirement

Certain employers must establish and maintain a Code Section 125 cafeteria plan in accordance with the rules and regulations promulgated by the Connector and file a copy of the plan with the Connector. Initially, the Free Rider Surcharge and Cafeteria Plan requirements were two separate mandates. However, the withdrawn Free Rider Surcharge regulations, the Bulletin and the Section 125 Handbook for Employers make clear that the adoption of a Code Section 125 cafeteria plan, which satisfies Connector rules, will allow employers to avoid the Free Rider Surcharge. Thus, the two distinct mandates have collapsed into one—sponsorship of a Code Section 125 cafeteria plan kills two birds with one stone.

*When is the Cafeteria Plan mandate effective?* **July 1, 2007.**

*What guidance has been issued on the Cafeteria Plan mandate?* Section 48 of the Act, regulations issued by the Connector effective July 1, 2007, and the Section 125 Plan Handbook for Employers (published by the Connector).

*What employers are subject to the Cafeteria Plan mandate?* Employers with more than 10 full-time equivalent employees at Massachusetts locations (other than nonprofit entities “that are exclusively staffed by volunteers” and sole proprietors), whether they maintain a fully or self-insured health plan and whether the underlying health coverage is provided through the Connector or not. Such employers are referred to in the cafeteria plan regulations as “151F Employers.” The initial determination period for counting full-time equivalent employees is April 1, 2006, though March 31, 2007, with 151F Employer status effective July 1, 2007. Thereafter, the determination period will run each year from July 1 through June 30 with 151F Employer status effective the following October 1. Employers that provide medical coverage to all employees and pay the full monthly cost of that medical coverage for all employees are not 151F Employers.

*What requirements must the Code Section 125 cafeteria plan satisfy?* According to the Connector regulations, the plan must (1) satisfy certain requirements established by the Connector (the Connector Requirements), (2) satisfy all the requirements of Code Section 125 and include certain provisions in a written plan document (the Cafeteria Plan Requirements), (3) be adopted by the employer (and any affiliate/participating employers) in accordance with its own internal governance procedures and clearly state the effective date in the written plan documentation, and (4) be filed with the Connector on or before the effective date of the employer's 151F Employer status in a form and manner to be specified by the Connector.

To satisfy the Connector Requirements, the cafeteria plan must:

- at least be a premium-only plan that offers access to two or more “medical care coverage options” (not defined in the regulations) which may be options available through the Connector;
- set forth in writing the eligibility requirements;
- not provide for a waiting period longer than any waiting period for enrollment in medical care coverage options available under the plan; however, in no event may such waiting period exceed two months (for those employers with 151F Employer status effective July 1, 2007, the eligibility waiting period for those employed on July 1, 2007, may be extended no later than September 1, 2007); and
- offer 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.

Aside from complying with Section 125 of the Code, to satisfy the Cafeteria Plan Requirements, the cafeteria plan document must contain:

- 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;
- 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; and

- the plan year.

*May any employees be excluded from the cafeteria plan?* Yes, the Connector Requirements permit employers to exclude the following classes of employees:

- employees who are less than 18 years of age;
- temporary employees;
- part-time employees working fewer than 64 hours per month on average for an employer;
- 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; and
- seasonal employees 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.

Employers may adopt more than one cafeteria plan. For example, one plan could simply cover those employees excluded from the employer's existing cafeteria plan who must be covered by a cafeteria plan to satisfy the Connector Requirements (e.g., part-time employees working fewer than 20 hours per week but at least 64 hours per month). This cafeteria plan would offer those employees health plan coverage provided through the Connector.

*Is there a model cafeteria plan document available?* Yes, the Section 125 Plan Handbook for Employers published by the Connector on April 23, 2007, contains a model cafeteria plan document.

*What are the penalties for noncompliance?* The employer could be subjected to the Free Rider Surcharge.

### Fair Share Contribution

Most Massachusetts employers will have to pay an annual Fair Share Contribution to the state unless either a specified percentage of their full-time employees working in Massachusetts participate in the employer's group health plan or they pay a specified percentage of the premium cost for employees.

*When is the Fair Share Contribution mandate effective?*

**October 1, 2006.**

*What guidance has been issued on the Fair Share Contribution?* Section 47 of the Act, final regulations issued by the Division, the Bulletin, and proposed regulations issued by the Division of Unemployment Assistance (the DUA).

*Who is subject to the Fair Share Contribution mandate?* Each employer with more than 10 full-time equivalent employees who perform services within Massachusetts, whether that employer sponsors a fully insured or self-insured health plan.

*What are employers required to do?* Unless described below, every employer subject to these provisions must make an annual contribution no greater than \$295 per employee (prorated for part-time employees) to the state. The employer may choose to pay quarterly, semi-annually or annually.

*How can this annual contribution be avoided?* An employer that is subject to these provisions but is a “contributing employer” will not be required to make the annual contribution.

- A **contributing employer** is an employer that makes a **fair and reasonable premium contribution** to a **group health plan**.
- A **group health plan** is defined as a plan (including a self-funded plan) that (1) provides medical services for the diagnosis, cure, treatment or prevention of a disease, and (2) is (a) either “sponsored and paid for, in whole or in part, by an employer, or (b) is sponsored by a self-employed person or an employee organization.”
- If the employer meets one of the following two tests, then a **fair and reasonable premium contribution** is deemed to have been made:

**Primary Test<sup>2</sup>** : If at least 25% of the employer’s **full-time employees** are enrolled in the employer’s **group health plan**, the employer will be exempt from the Fair Share Contribution. The calculation period for this determination is from October 1 through September 30. The formula for determining the percentage is as follows:

Total payroll hours of **enrolled full-time employees** divided by total payroll hours of **full-time employees**.

- **Full-time employees** are those who work 35 hours per week for at least 12 consecutive weeks during the year in any Massachusetts location regardless of residence.
- Independent contractors, seasonal employees (generally work less than four months in seasonal employment) and temporary employees (employment is explicitly temporary in nature and does not exceed 12 consecutive weeks) are not **full-time employees**.
- **Enrolled employees** are those employees who have accepted and enrolled in the employer’s **group health plan**.
- An employee who claims an exemption from the

individual mandate provisions of the Act because of sincerely held religious beliefs and who has filed an affidavit in accordance with the Act is not counted under the Primary Test.

**Secondary Test:** If an employer pays at least 33% of the premium cost of any **group health plan** offered by the employer to its full-time employees, the employer will be exempt.

*Do special rules apply to leasing companies?* Yes, the Division’s final regulations, the Bulletin and the DUA’s proposed regulations provide special rules for leasing companies. The Division’s final regulations use definitions for leasing company and client company which reference entities having a co-employment relationship (which would seem to cover professional employer organizations but not the typical staffing company/employer relationship). The leasing company is responsible for collecting and remitting the Fair Share Contribution on behalf of its client companies under the Division’s final regulations, but the client company retains the liability for the Fair Share Contribution. In contrast, the DUA’s proposed regulations do not reference a co-employment relationship in the definition of “employee leasing company,” and the client company is responsible for remitting the Fair Share Contribution. Hopefully, final regulations will clarify this discrepancy.

*When is the Fair Share Contribution due?* The DUA’s proposed regulations specify that the Fair Share Contribution may be paid in a single payment, or in equal amounts on a semi-annual or quarterly basis. The due dates are as follows:

Single Payment: November 15

Semi-Annual Payments: November 15 and May 15

Quarterly Payments: November 15, February 15, May 15 and August 15

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

Most Massachusetts employers will have to complete a disclosure form annually, providing certain information about their group health plans. In addition, certain employees will have to complete a disclosure form.

*When is the HIRD mandate effective?* **July 1, 2007.**

*What guidance has been issued on the HIRD mandate?*

Section 42 of the Act, final regulations issued by the Division and later withdrawn and the Bulletin.

*What employers are subject to the Employer HIRD mandate?* Massachusetts employers with more than 10 employees must complete the Employer HIRD form whether that employer sponsors a fully insured or self-insured health plan.



*What information must be provided in the Employer HIRD form?* Employers should be aware of the provisions in the withdrawn regulations as it is expected that the new regulations will look substantially similar (aside from the previous effective date of January 1, 2007, and the amount of information requested in the Employer and Employee HIRD forms). The withdrawn regulations outlined what the Employer HIRD form would contain: the name of the employer, the employer's FEIN, the number of full- and part-time employees, whether employees were offered subsidized health insurance, and whether the employer offers a Code Section 125 cafeteria plan.

*When is the Employer HIRD form due?* The Employer HIRD form will be based on information as of September 30 of each year. It is due on November 15 of each year. The first employer HIRD form will be due November 15, 2007 (this date is subject to change when final regulations are issued).

*What are the penalties for noncompliance?* Penalties for noncompliance range between \$1,000 and \$5,000.

*Which employees must complete the Employee HIRD form?* Each employee of a Massachusetts employer with more than 10 employees that either declines employer-sponsored insurance or the employer's offer to arrange for the purchase of insurance must sign an Employee HIRD form. (The Bulletin states that the new regulations will provide that only employees that have declined to enroll in employer-sponsored insurance or to participate in a Section 125 cafeteria plan will be required to sign an Employee HIRD form.) The Employee HIRD form must contain the employee's name, the name of the employer, whether the employee has alternative insurance coverage and an acknowledgement that the employee is aware of the individual mandate and the penalties for failure to comply with the individual mandate.

*When must the Employee HIRD form be obtained?* The Employee HIRD form must be obtained for each such employee by the earlier of 15 days after the close of the open enrollment period for the employer's health insurance, or by July 1 of the reporting year (these dates are subject to change when final regulations are issued). For new employees who must complete the Employee HIRD form, the form must be collected by employers within 15 days after the employee declines coverage. 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.

### Dependent Coverage (An Insurance Company Mandate)

Although this mandate applies to insurers, it will have an impact on employers. Carriers with insured health benefit plans (excluding stand-alone dental products and Medicare Supplemental plans) that provide for dependent coverage must make coverage available for persons through the earlier of age 26, or two years following loss-of-dependent status under the Code.

*When is the Dependent Coverage mandate effective?*  
**January 1, 2007.**

*What guidance has been issued on the Dependent Coverage mandate?* Sections 53, 56 and 58 of the Act and Bulletin 2007-01 issued by the Division of Insurance on January 18, 2007 (the Dependent Bulletin).

*To what types of plans does this mandate apply?* Fully insured health insurance policies issued in Massachusetts.

*Who qualifies as is a dependent?* The Dependent Bulletin establishes a two-part test to determine dependent status—an individual (1) must satisfy the Code criteria for dependent status, and (2) must have been claimed as dependent on a subscriber's federal income tax form as permitted by federal tax rules (special rules apply in the case of divorced/separated spouses or married couples filing separate returns).

*When does an individual lose dependent status under the Code?* According to the Dependent Bulletin, the Division will follow the Code's calendar year designation. Thus, the date on which a person loses dependent status is December 31 of the last federal tax year for which that person was claimed as dependent on another person's federal income tax form.

*What is the impact on employers?* Anytime a health plan covers individuals who do not qualify as spouses or dependents under federal tax law, the fair market value of that coverage is taxable income to employees. Thus, plan administrators will have to determine the cost to an employee of covering a dependent who is not a dependent under federal tax law.

### Nondiscrimination Requirements (An Insurance Company Mandate)

Corporations that contract to sell group nonprofit hospital service contracts, medical service corporations and HMOs can only enter into contracts with employers that (1) offer their group insurance agreements (excluding those which provide stand-alone dental services) to all full-time employees who live in Massachusetts, and (2) have the same contribution percentage for all **full-time employees** (except those covered by a collective bargaining agreement).

*When are the Nondiscrimination Requirements effective?*

**July 1, 2007** (however, according to Notice 2007-04, any contracts that health carriers enter into prior to July 1, 2007, that go into effect on or after that date are not subject to these provisions until they are renewed).

*What guidance has been issued on the Nondiscrimination Requirements?* Sections 50, 52, 55, and 59 of the Act and Notice 2007-04 issued by the Division of Insurance on April 6, 2007 (Notice 2007-04).

*To what types of plans does this mandate apply?* Fully insured health insurance policies issued in Massachusetts.

*What employees may be excluded?* Employers are not required to offer the insured group health benefit plan contract to retirees, part-time, temporary or seasonal employees. According to Notice 2007-04, the terms **full-time employees, part-time employees, temporary employees, and seasonal employees** will be consistent with provisions within the Fair Share Contribution regulations.

*What types of contracts will satisfy the Nondiscrimination Requirements?*

- Fixed dollar amount contributions to premiums regardless of salary for all full-time employees living in Massachusetts
- Different percentage contributions or fixed dollar contributions for different plan choices, so long as the contribution made with respect to each plan on behalf of full-time employees living in Massachusetts does not differ based on the salary level of the full-time employees living in Massachusetts
- Greater contribution levels for increasing lengths of service as long as the schedule of contribution levels is part of a formal employee benefit plan and is designed

as a reward for longevity rather than as a pretext for providing better health insurance contributions to more highly paid employees

- Greater contribution levels for employees who participate in company-sponsored health and wellness programs
- Contribution levels for dependents of covered full-time employees living in Massachusetts that differ from the contribution levels for full-time employees, provided that the contribution level is the same for all dependents of said full-time employees living in Massachusetts and does not differ based on the salary level of the corresponding full-time employees

*What is the penalty for noncompliance?* The Act provides for no penalties for failure to comply with these provisions.

### Action Steps

All Massachusetts employers should carefully review their group health plans and Section 125 cafeteria plans to determine if they are compliant with the mandates outlined above. In particular, employers should ensure that their Section 125 cafeteria plans comply with the Connector Requirements by July 1, 2007, or else they could be subject to the Free Rider Surcharge.

<sup>1</sup> Unless otherwise noted, references to the Act in this briefing series include the two technical amendments.

<sup>2</sup> Under proposed regulations issued by the DUA on or about April 20, 2007, an employer that fails the Secondary Test even if the Primary Test is passed will be subject to the Fair Share Contribution. This does not comport with the language in the Division's final regulations or the Act itself. It is hoped that final regulations will clarify this issue.

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

**Laura Sanborn**    [laura.sanborn@wilmerhale.com](mailto:laura.sanborn@wilmerhale.com)    +1 617 526 6889

**William Schmidt**    [bill.schmidt@wilmerhale.com](mailto:bill.schmidt@wilmerhale.com)    +1 617 526 6946

**Linda Sherman**    [linda.sherman@wilmerhale.com](mailto:linda.sherman@wilmerhale.com)    +1 617 526 6712