Employee Benefits Alert

Willis

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Employer Responsibility under Massachusetts' Health Care Reform Law

Last spring, Massachusetts Governor Mitt Romney (R) signed important health care legislation into law. The legislation requires every resident in the state to obtain health insurance, either on his or her own, or through another entity, by July 1, 2007. A failure to do so will result in the forfeiture of individual state tax exemptions, as well as fines.

Provisions of the law create an ambitious plan to be rolled out over the next three years that will reduce the number of uninsured. Key elements of the plan include the following:

- Insurance coverage in the state will be increased in phases to include 90 to 95 percent of the uninsured in the state through an insurance requirement for individuals,
- Creation of a private, subsidized health plan for people that cannot afford coverage, and assessments against employers not covering their workers.

The controversial "employer assessment," which was one of the most contentious issues in the bill, requires companies to pay an annual assessment of $295 per employee for not providing health coverage to their workers. This provision, known as the "Fair Share Assessment," was one of the eight provisions vetoed by the Governor. (State law gives the Governor line-item veto powers.) Massachusetts lawmakers, though, have overridden the Governor's veto of the Fair Share Assessment provision. Specific details of the law, particularly about the assessment, have finally been released in the form of proposed regulations.

Fair and Reasonable Contribution Defined

Effective October 1, 2006, an employer who has eleven or more full-time equivalent employees performing services within the Commonwealth of Massachusetts will become subject to the assessment *unless* that employer makes a "fair and reasonable" premium contribution to the health insurance costs of its employees. The determination of whether the employer has made a fair and reasonable contribution is based on the percentage of employees enrolled in the employer's group health plan. An employer that has at least 25 percent of its employees enrolled in the employer-sponsored group health plan will be exempt from the assessment.

Exemption

Each year, employers must calculate the percentage for the period from October 1 to September 30. To calculate the employee enrollment percentage, the regulations provide a "primary" test and a "secondary" test.

- *Primary test*: The primary test takes the total payroll hours of *enrolled* full-time employees and divides it by the total payroll hours of all full-time employees. The employer then calculates the total payroll hours for which both wages were paid and the employee was enrolled in the health plan. The sum of the payroll hours for each employee enrolled in the plan is the total payroll hours of enrolled employees. The employer must also calculate the total payroll hours of all full-time employees.

- *Secondary test*: This test provides that, if the percentage is less than 25 percent, the employer will be exempt from the assessment if it offered to pay at least 33 percent of the premium cost toward an individual health plan for employees that were employed at least 90 days during the period from October 1, 2006 to September 30, 2007.

Other considerations

A full-time employee is defined as an employee that works at least 35 hours per week. If an employee works both part-time and full-time during the year, only the payroll hours of the period in which the employee was full-time should be included in the calculation. A seasonal employee is not a full-time employee unless the seasonal employee works for the employer more than sixteen weeks during the year. A temporary employee is not a full-time employee unless such employee works for the employer more than 90 days during the year. An independent contractor is not a full-time employee.

Annual Assessment Amount

The annual assessment (fair share employer contribution) is the lower of the following:

- $295 per employee, or
- The sum of the fair share employer contribution and the per-employee cost of uncompensated physician care.

Uncompensated physician care refers to those services provided to non-elderly, uninsured Massachusetts residents. The sum of the fair share employer contribution and the per-employee cost of uncompensated physician care is the annual fair share contribution. The contribution amount will be determined annually.

The contribution will be pro-rated for part-time and seasonal employees. According to the law, the per-employee contribution:

> "Shall be pro-rated by a fraction which shall not exceed one, the numerator of which is the number of hours worked in a year by all of the employer's employees who worked for the employer for at least one month, and the denominator of which is the product of the number of employees employed by an employer during that year for at least one month multiplied by 2,000 hours."

Filing Requirements

The law imposes filing requirements upon employers and employees. Employers must complete the *Health Insurance Responsibility Disclosure* (HIRD) form. Each employer must file information about its employees' health insurance status — including whether each employee was offered employer-sponsored insurance, whether the employer offered to arrange for the purchase of health insurance and whether the employee accepted or declined such insurance or such arrangement.

Employees not offered health insurance, or who decline the employer's offer of health insurance or the offer to arrange for the purchase of health insurance are required to submit an employee HIRD form. The employer will be required to distribute, collect and submit the employee HIRD Form.

Important Compliance Dates

The initial HIRD form, which will contain information about employees employed as of April 15, 2007, must be submitted by May 15, 2007. Employers with fifty or more employees must submit, on a quarterly basis, information about changes to its general employer information, new employees, employees who are no longer employed with the employer, whether new employees were offered access to insurance, whether the employees accepted insurance, and whether such insurance was an individual or a family plan. The quarterly HIRD is due 45 days after the end of each quarter. The same information contained in the quarterly HIRD must be provided by all employers on an annual basis. The annual notice is due on May 15th of each year.

Employer "Free Rider" Surcharge

Effective October 1, 2006, employers with eleven or more employees who do not offer to contribute toward or arrange for the purchase of health insurance will be assessed a special surcharge for any state-funded health costs incurred for employees or their dependents if the costs of such services received total at least $50,000. The surcharge is generated when an employee or the employee's dependents receive state-funded care more than three times or when a company has five or more instances of employees or their dependents receiving state-funded care in a year. To determine the actual surcharge amount, the state will consider the number of the employer's employees, the number of admissions and visits by each employee and his or her dependents, the total services provided to all of the employer's employees, and the percentage of employees for whom the employer provides health insurance.

Section 125 Plan

The law also requires employers with more than ten employees to adopt and maintain a Section 125 cafeteria plan so that employees can fund their benefits on a tax-free basis. The plans must be offered to all employees, including part-time and seasonal workers and must also satisfy the Section 125 rules set forth under the tax code.

Conclusion

Although this new Massachusetts law has stirred up considerable media attention, it is important to note the limited effect this law is likely to have on employers due to the operation of ERISA's preemption power. Although the mandate on individuals would not be preempted by ERISA, the employer mandate is another matter. Self-funded plans are unlikely to be affected because states do not have the power to directly mandate benefits. Even insured plans would appear to have an argument that, to the extent the new law represents a direct mandate (as opposed to an insurance requirement), it would be preempted by ERISA. As a result, it seems probable that any provision in the Massachusetts statute that directly imposes a duty on ERISA plans to deliver a health benefit will face legal challenge and eventually find itself struck down by the courts.

This result seems like a reasonable possibility given the recent decision by a federal court to overturn Maryland's *Fair Share Health Care Fund Act*. This law would have required companies with more than 10,000 employees in Maryland to either: (1) spend at least eight percent of payroll on health care; or (2) contribute the difference to the Maryland Medicaid Fund. The court ruled that such a mandate was in violation of ERISA. Additional information about the federal court's decision on the Maryland law can be found in *Willis EB Alert #74.*

U.S. Benefit Office Locations

Anchorage, AK (907) 562-2266	Atlanta, GA (404) 224-5000	Austin, TX (800) 861-9851	Baltimore, MD (410) 527-1200
Birmingham, AL (205) 871-3871	Boise, ID (208) 340-0645	Boston, MA (617) 437-6900	Cary, NC (919) 459-3000
Charlotte, NC (704) 376-9161	Chicago, IL (312) 621-4700	Cincinnati, OH (513) 762-7661	Cleveland, OH (216) 861-9100
Columbus, OH (614) 766-8900	Dallas, TX (972) 385-9800	Denver, CO (303) 218-4020	Detroit, MI (248) 735-7580
Eugene, OR (541) 687-2222	Farmington, CT (860) 284-6137	Florham Park, NJ (973) 410-1022	Ft. Worth, TX (817) 335-2115
Grand Rapids, MI (616) 954-7829	Greenville, SC (864) 232-9999	Houston, TX (713) 625-1023	Jacksonville, FL (904) 355-4600
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