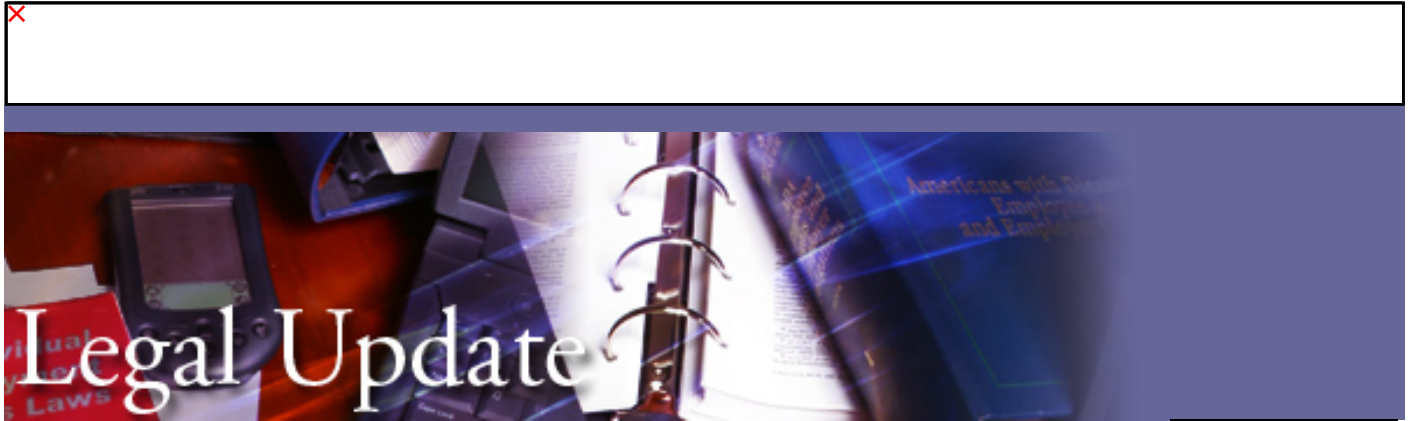


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JULY 11, 2007

Employee Benefits & Compensation

Massachusetts Issues Additional Guidance and Forms on Health Care Reform

Massachusetts state regulators recently issued new rules applicable to the employer's requirements under the Massachusetts Health Care Reform Act. Specifically, information has been issued relating to:

- the postponement of the July 1st filing deadline for Section 125 Cafeteria Plan documents;
- the ability to establish online accounts for the Commonwealth Choice Health Plans with Commonwealth Health Insurance Connector Authority ("Connector");
- clarification on certain classes of employees that may be excluded from participation in an employer's Section 125 Cafeteria Plan;
- Health Insurance Responsibility Disclosure (HIRD) reporting; and
- the Employer Surcharge for failure to adopt and maintain a Section 125 Cafeteria Plan.

Section 125 Cafeteria Plans

Filing Deadline Update:

The Connector announced that it has postponed the deadline until October 1 (previously it was July 1) and that it will begin accepting submissions of Section 125 documents no earlier than September 1, 2007. In the meantime, the Connector has advised all employers that during the postponement period between July 1 and October 1, it reserves the right to request a copy of the employer's Section 125 Cafeteria Plan documents in the time and manner specified by the Connector. Note that there was a July 1 deadline to update or adopt Section 125 Cafeteria Plans to comply with the Massachusetts rules.

Connector Accounts:

Employers subject to the Section 125 Cafeteria Plan requirement in Massachusetts are required to allow employees who are otherwise ineligible to participate in any employer sponsored health insurance the ability to make pre-tax premium contributions towards the Commonwealth Choice Health Plans. Employers have the responsibility for establishing a Connector account for the purposes of forwarding employee premium's to the Connector. Based on guidance provided by the Connector, it appears that such accounts may be established by submitting paperwork directly to the Connector, or may be established through the new online system available on the Connector website.

Clarification of Certain Classes of Employees Excluded from the Section 125 Requirements

Excludable Employees for Purposes of Calculations:

The guidance issued by the Connector has clarified that when determining whether an employer is subject to the Section 125 Cafeteria Plan requirement (an employer with 11 or more employees during the applicable determination period), that for purposes of counting the number of employees, an employee shall not include an individual employed less than one month.

Part-time Employees Excludable for Eligibility Purposes:

In addition, the Connector has clarified that with respect to eligibility to participate in the employer's Section 125 Cafeteria Plan, employers may exclude one, none, or any combination of the classes of employees that may be excluded as specified in the regulation and still be in compliance with the law.

The guidance issued by the Connector clarifies how to determine whether or not an employee is a part-time employee. Generally, this guidance looks at the prior 180 days of employment to determine an employee's status.

Employer and Employee HIRD Forms

HIRD Reporting Requirements:

The Division of Health Care Finance & Policy (Division) issued emergency regulations pertaining to both the Employer and Employee HIRD filing requirements and also made available the Employee HIRD form.

Employee HIRD Form:

Under the HIRD reporting requirements, employers are required to provide the Employee HIRD form to all employees who decline to participate in either employer sponsored health insurance or the Section 125 Cafeteria Plan, or both. Employers should obtain these forms during any situation where coverage is declined, such as open enrollment, new hires, and employees dropping employer coverage. Employers need to obtain a signed form from each employee declining coverage, and retain it for three years. In addition, employers must also retain documentation that an employee was not required to sign a HIRD form for a period of three years. The Employee HIRD Form is available through the Connector at www.MAhealthconnector.org, by clicking the employer the link.

Employers will need to obtain the Employee HIRD forms by the earlier of 30 days after the close of the applicable open enrollment period for the employer sponsored health insurance and/or the Section 125 Cafeteria Plan, or the September 30 of the reporting year. Each new employee who either declines employer sponsored health insurance or declines participation in the Section 125 Cafeteria Plan, will need to complete the HIRD form within 30 days of the applicable enrollment period. An employee who is enrolled in the employer sponsored health insurance plan and subsequently terminates participation in the plan will need to sign the HIRD form within 30 days of the date participation ceases.

Employers are required to provide copies of signed HIRD forms to the employee, and must make copies available to the employee upon request for the purpose of filing the employee's Massachusetts state tax return.

Employer HIRD Filing:

Under the Employer HIRD reporting requirements, each reporting employer must disclose whether the employer has adopted and maintains a Section 125 Cafeteria Plan. Additionally, if the employer contributes toward the premium cost of a group health plan, the employer must report the employer contribution percentage and the total monthly premium cost for individual and family coverage, as well as the open enrollment period of the employer sponsored health plan. The employer will be responsible for such reporting based on information as of July 1 of each year. The guidance issued indicated that there

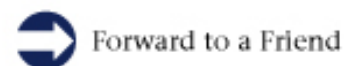
will be no separate Employer HIRD Form. The Employer HIRD reporting requirement will be combined with Fair Share Contribution Reporting, and must be filed by November 15, 2007. The Division of Health Care Finance & Policy will notify employers about the method of submitting the HIRD report, and it appears an on-line filing system is being developed for such purposes.

Employer Surcharge for State-Funded Health Costs

The Division also issued emergency regulations pertaining to the surcharges assessed on employers who fail to adopt and maintain a Section 125 Cafeteria Plan. In determining the applicable surcharge, the Division will take into account the employer's workforce size, the state-funded health services provided to the employer's employees and their dependents, and the percentage of employees with employer sponsored health insurance. The surcharges can range from \$10,000 up to \$150,000 depending on the determination factors.

Recent Federal Court Decision on ERISA Preemption

Although many portions of the Massachusetts Health Care Reform Act contain specific mandates affecting employer-sponsored health plans, only the courts can decide whether the law is preempted by ERISA. However, a recent decision issued by the Federal District Court in Massachusetts, which determined that the application of the Massachusetts sexual orientation nondiscrimination law to an employer's health plan is preempted by ERISA, may provide some insight as to how the courts might rule if presented with an ERISA-preemption challenge of the Health Care Reform Act. In its holding the court stated that "[t]he purpose of ERISA preemption is to allow employers to construct one national pension and benefit plan, which can control the payment of benefits to beneficiaries across several states. It is not for [an organization], or even a state, to tell plans who and must be beneficiaries. If courts allowed such results, differing state laws could quickly make it difficult to administer a fair, uniform plan. Accordingly, any state law which directly controls who an ERISA plan may specify as a beneficiary is potentially preempted. *Partners Healthcare Sys. Inc. v. Sullivan*, D.Mass., No. 06-11436-JTL, 6/25/07. Given the actions that employers need to take in order to comply with the Massachusetts Health Care Reform Act, the same court could reach a similar conclusion with respect to whether ERISA preempts the Massachusetts Health Care Reform Act.



If you have questions about the information contained in this e-News, please contact [Bruce Barth](#), chair of the Employee Benefits and Compensation Group at 860-275-8267 or R&C Employee Benefits and Compensation Group attorneys [Catherine Reuben](#) at 617-557-5916, [Cynthia Christie](#) at 860-275-8259, or [Karen McDonough](#) at 860-275-8231. Visit our website at www.rc.com.

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