

Looming Employer Deadlines for Massachusetts Health Care Reform Act

June 6, 2007

It has been a little over a year since then-Governor Mitt Romney signed the Massachusetts Health Care Reform Act (the Act) and the effective date of significant portions of the Act—July 1, 2007—is right around the corner.

While the Act has been changed twice since last year, and related regulations are proposed, revised, and sometimes withdrawn at a bewildering speed, there are a number of obligations that employers should be aware of and be prepared to react to over the remainder of 2007. There are also many other new rules focused on mandatory medical insurance for Massachusetts residents (effective July 1, 2007) and insured medical plan mandates, but such rules are beyond the scope of this LawFlash.

Fair Share Contribution Requirement

The first inquiry for any employer is to determine whether it has 11 or more full-time employees in Massachusetts and, if so, whether it is subject to the annual Fair Share Contribution requirement.

The Fair Share Contribution requirement, which began last October, forces an employer with 11 or more Massachusetts employees to either make a \$295 “Fair Share” contribution to the state for each Massachusetts employee, or show that either 25% of its Massachusetts full-time employees are enrolled in its medical plans or that it offers to pay at least 33% of the premium cost of its medical plan benefits for its Massachusetts full-time employees. Given the low participation threshold and the low required employer subsidy, many employers easily pass one or both of these tests and do not have to make a Fair Share Contribution.

Free Rider Surcharge/Cafeteria Plan Exception

Beginning July 1, 2007, employers with more than 10 Massachusetts employees will be subject to a Free Rider Surcharge calculated on the basis of the employer’s size and how many times its employees or their dependents receive free care (at, for example, a hospital emergency room). In 2007, this surcharge can be as high as 45% of the cost of the free care.

In order to avoid the surcharge, an employer can adopt and maintain a cafeteria plan for employees who work 64 or more hours per month (there are other limited exceptions). This cafeteria plan can take the form of permitting employees to purchase employer-provided medical coverage on a pretax basis or simply allowing employees to pay for Commonwealth Connector medical plan coverage on a pretax premium basis through a stand-alone pretax premium plan specifically designed for and limited to Massachusetts residents. No employer contributions are required for the stand-alone pretax premium plan, nor must the plan contain a medical expense reimbursement account. This week's Connector Board meeting revised the maximum permissible waiting period for cafeteria plan coverage to align with the waiting period for the underlying medical plan (if the employer makes contributions towards the cost of the coverage) or to require a maximum two-month waiting period for employee-pay-all coverage. A discussion of the cafeteria plan requirement and a sample pretax premium plan can be found at: http://www.mass.gov/Qhic/docs/section125_handbook.pdf.

All employers subject to the cafeteria plan requirement will have to file a copy of their cafeteria plan with the Connector by July 1, 2007. The format for the filing, and the address to which to send the plan, have not yet been determined but are expected to be posted on the Connector site by July 1.

Employers that will offer pretax premium payments for Connector coverage should begin discussions with their payroll departments about file formats and interfaces with the Connector.

It is unclear whether an employer that already offers a cafeteria plan may permit Massachusetts employees to opt into coverage effective July 1, 2007 without violating the cafeteria plan change in status restrictions.

Employee HIRD Requirement

In order to help enforce the July 1, 2007 employee health insurance mandate, employers with more than 10 Massachusetts employees will have to begin collecting and reporting data on Massachusetts employees who opt out of employer-provided or pretax premium medical coverage. Proposed (and now withdrawn) regulations directed employers to collect a Health Insurance Responsibility Disclosure (HIRD) Form from each employee who declines employer-provided medical coverage or who declines to pay for Connector coverage on a pretax premium basis. The HIRD form should be collected at the time of hire and at annual open enrollment and is expected to contain the employee's name, the employer's name, whether the employee has alternative medical coverage, and an acknowledgement of the Massachusetts individual mandate and the penalties for failure to comply. Employers are expected to retain the form for three years.

Employers should begin preparing to collect the signed HIRD form (or ensure that their health plan administrator is aware of the requirement) on July 1 for newly eligible employees and during the 2008 open enrollment process. One possible administrative approach is to default employees into medical coverage unless they return a signed HIRD form or complete an electronic equivalent during the new hire or open enrollment process.

Employer HIRD Requirement

Employers with more than 10 Massachusetts employees will have to report each September 30 on a number of data points, including the following:

- The employer's identifying information;
- The number of the employer's Massachusetts employees;
- Whether the employer offers subsidized medical coverage;
- Whether the employer offers a cafeteria plan; and
- Whether the employer filed the cafeteria plan with the state.

This data must be filed with the state by December 15, 2007 and annually thereafter. Employers should begin to determine whether they or their health plan administrator can supply the requested data as of each September 30.

Future Developments

This month should see additional detail regarding the HIRD forms and where employers must file their cafeteria plan document. Employers can monitor these developments at <http://www.mass.gov/?pageID=hichomepage&L=1&L0=Home&sid=Qhic>.

Additional detail about employer obligations under the Act can be found at: http://www.mass.gov/Qhic/docs/Handbook_v10_adobe.pdf.

Finally, employers should examine the design and operation of their medical plan in 2008 in order to determine whether their plan will meet the 2009 standards applicable to creditable individual coverage. While employer plans are not technically subject to the individual creditable coverage rules, employers will likely receive pressure from Massachusetts employees to ensure that coverage offered in 2009 satisfies the individual health insurance mandate.

ERISA Preemption?

As employer obligations under the Act come into sharper focus, the breadth and scope of the obligations will begin to frustrate employers' desires for a uniform nationwide self-insured benefit program. It appears that the cafeteria plan requirement, the HIRD filing obligations, and the 2009 creditable coverage rules are increasingly susceptible to an ERISA preemption argument. Time will tell whether employers raise this issue, and whether a federal court agrees that parts of the Massachusetts Health Care Reform Act are preempted by the current ERISA rules designed to promote uniform benefits plan design and administration.

Morgan Lewis attorneys have helped many Massachusetts employers determine how the Act applies to their Massachusetts workforce. We would be happy to help you examine the details of the Act and how you can prepare to comply with the Act.

For more information on the Act, please contact one of the following Morgan Lewis attorneys:

Chicago

David Ackerman	312.324.1170	dackerman@morganlewis.com
Andy R. Anderson	312.324.1177	aanderson@morganlewis.com
Brian D. Hector	312.324.1160	bhector@morganlewis.com

Dallas

Riva T. Johnson	214.466.4107	riva.johnson@morganlewis.com
John A. Kober	214.466.4105	jkober@morganlewis.com
Heath Miller	214.466.4118	hmillar@morganlewis.com
Erin Turley	214.466.4108	eturley@morganlewis.com

New York

Craig A. Bitman	212.309.7190	cbitman@morganlewis.com
Gary S. Rothstein	212.309.6360	grothstein@morganlewis.com

Philadelphia

Robert L. Abramowitz	215.963.4811	rabramowitz@morganlewis.com
I. Lee Falk	215.963.5616	ilfalk@morganlewis.com
Robert J. Lichtenstein	215.963.5726	rlichtenstein@morganlewis.com
Joseph E. Ronan, Jr.	215.963.5793	jronan@morganlewis.com
Steven D. Spencer	215.963.5714	sspencer@morganlewis.com
Mims Maynard Zabriskie	215.963.5036	mzabriskie@morganlewis.com

Pittsburgh

John G. Ferreira	412.560.3350	jferreira@morganlewis.com
Lauren Bradbury Licastro	412.560.3383	llicastro@morganlewis.com
R. Randall Tracht	412.560.3352	rtracht@morganlewis.com

San Francisco

Mark H. Boxer	415.442.1695	mboxer@morganlewis.com
Eva P. McComas	415.442.1249	emccomas@morganlewis.com

Washington, D.C.

Jessica R. Bernanke	202.739.5447	jbernanke@morganlewis.com
Althea R. Day	202.739.5366	aday@morganlewis.com
Margery S. Friedman	202.739.5120	mfriedman@morganlewis.com
Gregory L. Needles	202.739.5448	gneedles@morganlewis.com

About Morgan, Lewis & Bockius LLP

Morgan Lewis is a global law firm with 1,300 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend in emails, please see <http://www.morganlewis.com/circular230>.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **ATTORNEY ADVERTISING** in some states.
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2007 Morgan, Lewis & Bockius LLP. All Rights Reserved.

