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Employee Benefits

A Littler Mendelson Newsletter

New Massachusetts Health Care Legislation Imposes Obligations on All Employers in the State

By *Martha M. Walz*

As national headlines recently proclaimed, Massachusetts has passed a health care reform law that aims to cover 95% of the state's more than half million uninsured residents within three years. The law's underlying principle is that the government, employers, and individuals all share responsibility for contributing to the cost of expanded health insurance coverage.

All employers in the state will face new recordkeeping requirements and nondiscrimination obligations, while all but the smallest companies must pay penalties if they do not offer subsidized insurance to their employees. The key provisions of the law include:

- A first-in-the-nation mandate that every resident of the state have health insurance by July 1, 2007.
- Employers with 11 or more employees must have a section 125 cafeteria plan so their employees can purchase health insurance on a pre-tax basis.
- A "fair share contribution" to the state by employers with 11 or more full-time equivalent employees that do not offer subsidized health insurance.
- A "free rider surcharge" assessed against employers with 11 or more employees that do not provide health insurance when their employees and/or dependents use the state's free care system.
- The Commonwealth Health Insurance Connector will connect individuals and small businesses with private health insurance plans.

- More residents will participate in the state's Medicaid program, and low wage workers will receive state subsidized insurance.

The Individual Mandate

Starting July 1, 2007, every resident of the state age 18 or over must obtain health insurance if affordable plans are available. If insurance companies are not offering what are deemed affordable plans, measured on a sliding scale of affordability based on income, an individual is not required to obtain insurance.

Residents will confirm insurance coverage on state income tax returns, and the state will verify the coverage. The Department of Revenue will enforce the mandate with financial penalties beginning with the loss of the personal exemption for tax year 2007. For 2008, the penalty will be up to half of what an individual would have paid for a premium.

The law contains a variety of ways to satisfy this mandate. Residents with the lowest incomes will benefit from an expansion of MassHealth, the state's Medicaid program, and lower income workers who are not eligible for MassHealth will be eligible for subsidized health insurance if they earn less than 300% of the federal poverty level (\$28,000 for individuals and \$48,000 for a family of three). To the extent they are now receiving health insurance through their employers, employees who are eligible for these subsidized plans may shift from their employer-provided plans.

Christian Scientists and others will be exempt from this mandate if they have a sincerely held religious belief that leads them to refuse to maintain health insurance coverage.

Employer Responsibility for Health Insurance

To expand the number of people who obtain health insurance through their jobs, employers with 11 or more full-time equivalent employees are expected to offer health insurance to their employees and make a “fair and reasonable” contribution to its cost. By October 2006, the state will determine what it considers to be fair and reasonable. On October 1, 2006, if these employers do not make a fair and reasonable contribution to the cost of their employees’ health insurance, the state will assess a “fair share contribution” estimated to be \$295 per full-time employee per year. This contribution will be pro-rated for employers with seasonal or part-time employees. Businesses with 10 or fewer employees are exempt from this requirement.

The law imposes a “free rider surcharge” on employers that do not provide health insurance and whose employees use hospitals without paying (“free care”). This should minimize the likelihood that employers with 11 or more employees will pay \$295 rather than provide health insurance. The surcharge will be triggered when an employee meeting certain income requirements and/or a dependent receives free care more than three times a year or if a company has five or more instances of employees and/or their dependents receiving free care in a year. The surcharge will range from 10% to 100% of the state’s cost of services provided to these employees and dependents, with the first \$50,000 per employer exempted. To avoid the risk of incurring huge expenses if employees and their dependents receive free care, many businesses may elect to offer health insurance.

To make health insurance more affordable, employers with 11 or more full-time employees are required to offer employees the ability to pay for their insurance with pre-tax dollars by establishing section 125 plans (commonly known as cafeteria plans).

In addition, some employers may be more likely to offer subsidized insurance as a way to

recruit and retain workers who need to satisfy the individual mandate. The obligations imposed on individuals and employers should work in combination to create a system in which nearly all workers receive insurance through their jobs.

Health Insurance Responsibility Disclosure Form

Every employee and employer doing business in the state must complete and sign under oath a Health Insurance Responsibility Disclosure form. The form will indicate whether the employer has offered to pay for or arrange for the purchase of health care insurance, whether the employee has accepted or declined such coverage, and whether the employee has an alternative source of health insurance coverage. The form will contain a statement that an employee who chooses to decline health insurance coverage offered by an employer is legally responsible for his or her health care costs, if any, and may be subject to sanction for failing to comply with the individual mandate.

The law does not establish a date by which the form will be available or when employees and employers must sign it. Employers should retain this form with other confidential human resources records.

Non-Discrimination Obligation

Employers should plan to revise their anti-discrimination policies, employee handbooks, and employment applications to include provisions set forth in the new law.

Employers will be prohibited from discriminating against an employee because of the employee’s receipt of free care, the employee’s reporting or disclosure of his or her employer’s identity and other information about the employer, the employee’s completion of a Health Insurance Responsibility Disclosure form, or any facts or circumstances relating to free rider surcharges assessed against the employer.

A violation of this non-discrimination obligation is a per se violation of the state’s consumer protection law, chapter 93A, which allows treble damages for willful or knowing violations of the law.

The Commonwealth Health Insurance Connector Will Help Small Businesses Provide Affordable Insurance

To make it easier and cheaper for small businesses to offer health insurance, the state will create the Health Insurance Connector, a new state authority that will connect businesses with 50 or fewer employees and individuals with health insurance. Private insurers will offer and operate the plans. Whether these insurers will, in fact, offer affordable health care products is perhaps the biggest unanswered question about the new law.

The Connector will certify the plans as being of good value and high quality, provide information about them to individuals and small businesses, and collect premium payments. Participating employers will have the ability to determine the eligibility criteria for their employees (e.g., employees must work at least 25 hours per week) and the amount of the employer contribution, if any.

It is too soon to know what the monthly premiums will be for the plans certified by the Connector. Early indications are that premiums for individual plans could range from \$300 to \$400 per month. The law does not permit insurers to offer stripped down plans, although it does authorize high deductible plans if they are linked with Health Savings Accounts. In addition, employees will be able to buy insurance through the Connector using pre-tax dollars, which further lowers the cost of the plans.

The Connector allows for portability of insurance as individuals move from job to job and permits more than one employer to contribute to the cost of an employee’s health insurance premium. This allows companies to more easily provide insurance to part-time workers, and it permits those who hold two or more jobs to combine premium contributions from multiple employers.

The open enrollment period will run from March 1 to May 31, 2007. To give eligible participants an incentive to enroll, an insurance carrier may not impose pre-existing condition or waiting period provisions for anyone who enrolls during this period.

An Expanded Insurance Partnership Program To Help Small Companies

The law expands the number of employees who are eligible for the Insurance Partnership program, which will lead to greater subsidies to small businesses. Currently, businesses with up to 50 employees that offer comprehensive health insurance and pay at least 50% of the cost qualify for a state subsidy for the cost of providing insurance to low-income employees age 19-64. The law increases the employee income standard from 200% to 300% of the federal poverty level (for individuals from \$18,600 to \$28,000 and for a family of three from \$31,300 to \$48,000).

Subsidized Insurance for Low Wage Workers Will be Offered Through the Commonwealth Care Health Insurance Program

The law also creates a subsidized insurance program called the Commonwealth Care Health Insurance Program. Those who earn less than 300% of the federal poverty level and who are ineligible for the state's Medicaid program will qualify for coverage. Premiums for the program will be set on a sliding scale based on household income. The Connector will operate the program.

Employers who are currently contributing to an employee's health insurance premium will be required to continue making this contribution for their employees who enroll in this program. Some employees may shift from their employer-provided plan to the Commonwealth Care plan, but an employer may not offer financial incentives to its employees to decline the employer's subsidized insurance and enroll in the Commonwealth Care program.

The Hardest Part of All

Implementing these changes to an already complicated health care system may prove to be even more difficult than the breakthrough required to pass the law. The legislature acknowledges that many details remain to be

fleshed out in regulations and that the law may need to be revised as unanticipated problems arise. In addition, the question of whether ERISA preempts some of the law remains unanswered.

Employers do not need to take immediate action in response to the new law. Once the state issues regulations on what employers must do to comply with the law, Littler will update our clients on what steps they should take to meet their obligations.

Martha M. Walz is Of Counsel in Littler Mendelson's Boston office. She also is a member of the Massachusetts House of Representatives. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Walz at mwalz@littler.com.