

**Massachusetts Healthcare Reform Act
July 1 Deadline for Massachusetts Employers –
Proper 125 Plan Required**

There is an imminent deadline for Massachusetts employers. As of July 1, 2007, Massachusetts employees are required to have health insurance if an affordable plan (based on their income) is available to them. The new law phases in mechanics for individuals to become responsible for their own health insurance, and utilizes employers in the process. To implement this mandate, employers with eleven or more “full time employees” (“FTE’s”) in Massachusetts must make a “fair and reasonable” contribution to the cost of FTE’s health insurance, or face a fine of up to \$295 per FTE (an amount that could increase in the future) for failing to do this. Out-of-state employers who have FTE’s in Massachusetts (regardless of the employees’ residence) above the threshold number must comply with the new law.

We want to alert you to a crucial July 1, 2007 deadline for employers. These are two basic and easy to do actions to take by July 1. These should be done for basic risk management. Employers with eleven or more FTE’s in Massachusetts must do the following by July 1, 2007:

1. ***Adopt a Proper 125 Plan.*** A 125 plan (referring to Internal Revenue Code Section 125) allows employees to pay for health care costs using pre-tax dollars. A proper Section 125 Plan under the new law (“125 Plan”) must allow all employees on the payroll (including FTE’s and part-time employees) to pay for their health insurance using pre-tax dollars. If you already have a 125 Plan, you need to confirm whether it complies, or whether you need to amend it or adopt a new plan. Some employers may have more than one 125 Plan to provide the proper scope. The 125 Plan is supposed to be filed with the state, but the state is uncertain how to handle this. Information about the requirements for a 125 Plan can be found at www.mass.gov/connector. While form 125 Plans are available from the Massachusetts “Connector” website, we urge you to speak with your advisors before actually adopting a plan.

Adopting a proper 125 Plan by July 1, 2007 allows an employer to avoid the “free rider” surcharge. This surcharge requires an employer to pay

100% of the healthcare costs if employees (meeting certain income requirements) and/or their dependents receive more than a minimum amount of free medical care (more than three times per year), or if the employer has five or more instances of employees or their dependents receiving free care in a year. Just one instance of care above this threshold (such as from a serious car accident) can cost the employer significant – and potentially unlimited – amounts. Having a proper 125 Plan in place by July 1, 2007 eliminates that exposure. Given the downside, adopting a 125 Plan is a must.

2. **Obtain Health Insurance Responsibility Forms.** Effective July 1, 2007, the law requires two forms be used by employers with more than ten employees. One form is for employees and one is for employers. The forms are not yet available – the best we can do is alert you to be ready to use them once available. The forms are expected to be posted at www.mass.gov/connector.

Employee form. Each employee needs to sign an employee Health Insurance Responsibility Disclosure (“HIRD”) form if he/she (i) declines to enroll in an employer-sponsored health plan, or (ii) declines to participate in the employer’s 125 Plan. Employees will have to indicate whether they have an alternative source of insurance coverage. Employers must distribute and collect these forms from employees, and retain them for three years (there is a fifteen-day grace period for

new hires). The employer should place the form with the employees’ confidential records.

Employers need to make a fair and reasonable attempt to secure this form. To avoid situations where an employee fails to return the form, we suggest that you (i) prepare a cover sheet (attached to the form) that is signed and dated by the employee confirming that the form was delivered, or (ii) place a memo into the employee’s confidential file that the employee failed to sign and return the actual form.

Employer form. All employers must submit annually an employer-HIRD to the state. The content, time and place for filing have yet to be specified, but the form is expected to cover some basic information such as number of full and part time employees, whether the employer has a 125 Plan, and whether the employer offers to pay a portion of employees’ health insurance premiums.

Taking the above two actions are basic requirements *you need to take now* to protect yourself. There will be additional action items as the new program unfolds.

Looking Ahead.

Two other items that deserve your attention now are: (i) making certain that you do not “discriminate” against an employee based on a number of health-related factors, and (ii) identifying the upcoming open enrollment periods for your health insurance plans to allow employees to elect in – or for you and them

to arrange for other coverage. Going forward, all employees (no matter at what level) must receive the same coverage options and premium support within the plan available to them. Further, it will be essential to provide the proper notices to your employees to allow you and them to comply with the requirements of the new law.

As of July 1, 2007, if you are subject to the new law but do not have an open-enrollment period, then your employees will need to secure their own insurance (which is now available from the Connector website). You will need to be ready to give the employees the necessary notice.

Importantly, employers cannot escape the new law by calling personnel "independent contractors." Since 2004, Massachusetts has had the strictest independent contractor law in the country, as there is now a presumption (almost impossible to rebut) that an individual helping in your line of business is an employee. This means that you cannot simply label personnel as contractors to avoid the eleven or more FTE thresholds. Importantly, seasonal and temporary employees have to be looked at as there is a fairly low threshold in the new law before they are counted toward the FTE threshold. Basically, employers need to review their labor pool very carefully under the new rules.

You can access a tremendous amount of information and learn about available insurance products at www.mahealthconnector.org. We expect to send further alerts as specific action item deadlines approach. In the meantime, if you have any questions, we invite you to contact Michael Radin, Esq. at 617-218-2035 or mradin@tbhr-law.com.



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