Massachusetts Health Care Reform Law Will Impact Law Firms and Impose Substantial Compliance Obligations

On April 12, 2006, the Commonwealth of Massachusetts ("Commonwealth") enacted legislation requiring most state residents to carry health insurance either through their employers or individually. The goal of the legislation is to "provide access to affordable, quality, accountable healthcare" to everyone in the state, while reducing the percentage of uninsured residents to as close to 0% as possible. The reform law maintains employer sponsored health insurance as the primary source of coverage for Commonwealth residents. While beneficial to employees, employers are faced with new obligations and the financial burdens of providing health benefits to employees. Employers that fail to provide health insurance to their employees may be subject to a surcharge of $295 annually per employee plus additional penalties.

The new law imposes several obligations on employers, even if they are already offering health insurance coverage to their employees. The five (5) most significant obligations are:

- Adopting and maintaining a compliant premium conversion plan;
- Demonstrating the employer's Fair Share Contribution;
- Filing Employer Health Insurance Responsibility Disclosure ("Employer HIRD") Forms with the Division of Health Care Finance and Policy;
- Collecting Employee Health Insurance Responsibility Disclosure ("Employee HIRD") Forms; and
- Providing Certificates of Creditable Coverage.

Adopting and Maintaining a Compliant Premium Conversion Plan

By July 1, 2007, all employers doing business in the Commonwealth must adopt and maintain a premium conversion (also known as a Code Section 125 or cafeteria) plan that allows employees to pay their share of health care premiums with pre-tax dollars. Such premium

conversion plans also must allow employees who obtain health insurance through the Commonwealth's newly-created Health Insurance Connector Plan ("Connector") to pay their Connector Plan premiums with pre-tax contributions. Employers will be required to file a copy of their premium conversion plans with the Commonwealth when regulations are issued. In response to the new premium conversion plan obligations, covered employers will need to amend their section 125 or Cafeteria plans to include the Connector Plan option or adopt separate Connector Plan to comply with the new law.

Penalties for Failure to Adopt a Connector Compliant Plan

Employers that do not establish a premium conversion plan will face substantial penalties. Effective July 1, 2007, an employer with more than ten (10) full-time equivalent employees that does not conform to the premium conversion plan rules can be assessed a "free rider surcharge". This surcharge will be applied if (a) its employees or their dependents receive state funded care five (5) or more times in a year, or (b) any single employee or his or her dependents uses state-funded care more than three (3) times in a year. The regulations issued on December 22, 2006 have been repealed. However, the repealed regulations do provide some insight regarding how the Division of Health Care Finance and Policy (the "Division") will implement the Free Rider Surcharge.

Under the now repealed regulations, the surcharge would range from 10% to 55% of the Commonwealth's cost for these services. However, the first $50,000 of health care provided to the employer's employees would be exempt from the surcharge. The surcharge would be based on services provided **after** June 30, 2007. Under the repealed regulations, each employer would have been required to file or make available information required by the Division to calculate and collect the surcharge. If an employer failed to provide information within two weeks after

receiving written notice or falsified information, the employer would have been subject to a civil penalty of not more than $5,000 for each week on which such violation occurred or continued.

Demonstrating the Employer's Fair Share Contribution

Under the new law, Commonwealth employers with more than ten employees are required to make a "fair and reasonable" contribution to their employees' health insurance or to pay a "fair share contribution" of up to $295 per employee per year with the funds going towards the Commonwealth Care Trust Fund. The "fair and reasonable" contribution can be met by the employer in one of two ways. First, the employer may show that at least 25 percent of its full time employees (35 hours or more per week) are enrolled in the employer's health plan, whether or not they are Massachusetts residents, for the period from October 1 through September 30 of each year. Alternatively, the employer may show that it pays at least 33 percent of the employee insurance plan's premium cost for all of its Commonwealth employees who are covered by employer provided insurance, regularly scheduled to work at least 35 hours per week and who work at least 90 days during the period October 1, 2006 through September 30, 2007. Under the final regulations, each employer will have to file or make available information that would enable the Division to calculate the Fair Share Contribution. The Fair Share determination rules became effective October 1, 2006, and the initial reporting obligation is for the period ending on September 30, 2007.

Filing Employer Health Insurance Responsibility Disclosure ("Employer HIRD") Forms with the Division

Effective July 1, 2007, employers with more than ten employees doing business in the Commonwealth will be required to file information with the Division about the health coverage they provide to their employees on an employer HIRD Form. Emergency regulations

implementing this requirement were issued on January 1, 2007 and have since been repealed. New proposed regulations should be issued shortly.

The emergency regulations described below, however, do provide insight regarding the information employers may be required to file. The emergency regulations would have required employers to report the following information each year:

- Employer's legal name, employer's d/b/a name, federal employer identification number and Division of Unemployment Assistance account number;
- Number of full-time employees (includes seasonal and temporary employees, but not independent contractors);
- Number of part-time employees (includes seasonal and temporary employees, but not independent contractors);
- Whether the employer offers subsidized health insurance to full-time employees;
- Whether the employer offers subsidized health insurance to part-time employees; and
- Whether the employer offers a premium conversion plan and has filed the plan with the Commonwealth.

Although the regulations were repealed, employers should take steps to determine how to capture the information which will be required for the HIRD Form. Furthermore, employers should consider designating a responsible individual authorized to verify and certify the accuracy of the information submitted in the employer HIRD Form. The Division will conduct data matches with the Division of Unemployment Assistance and the Department of Revenue to verify the accuracy of the information filed on employer HIRD Forms. Under the repealed regulations, employers that knowingly falsified required information would have been subject to a penalty of not less than $1,000 and not more than $5,000.

Collecting Employee Health Insurance Responsibility Disclosure ("Employee HIRD") Forms

The emergency regulations also would have required each Commonwealth employer who files an employer HIRD Form also to collect a signed employee HIRD Form from each employee who declines:

- employer-sponsored health coverage;
- employer-arranged health coverage (i.e., through the Connector plan with pre-tax dollars); or
- participation in the employer's premium conversion plan.

Under the repealed regulations, employers would have been required to obtain signed employee HIRD Forms within 15 days after the close of the open enrollment period for the employer's health insurance, or if earlier, July 1 of the reporting year. New hires would have been required to sign the employee HIRD Form within 15 days of their date of hire. If an employee failed to return the signed HIRD Form, the employer would have to document diligent efforts to obtain the signed employee HIRD Form and maintain the documentation for three years.

Employers also would have been required to maintain signed employee HIRD Forms for at least three years and make them available to the Division upon request.

Providing Certificates of Creditable Coverage

The final obligation of covered employers is the issuance of creditable coverage certificates. Effective January 1, 2008, employers (and insurers) must issue certificates of creditable coverage similar to those required by the portability provisions of the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Failure to provide the certificates could result in penalties of $50 per individual up to $50,000 per year.

Connector Plan Options

Those individuals who do not obtain insurance through their employer may purchase it through the Connector, which will have the task of connecting individuals and small groups with insurers. These individuals and groups may be combined by the Connector in an effort to reduce costs. Individuals may receive a subsidy for heath insurance coverage. Those who are under the federal poverty level will receive health coverage at no cost, while those who earn up to 300% of the poverty level will have subsidized coverage. For 2007, 300% of the federal poverty rate is approximately $29,400 for an individual and $60,000 for a family of four.

On their 2007 state income tax returns, individuals will have to affirm that they have health insurance coverage. Those that do not have health insurance can lose their state personal income tax exemption. If uninsured in subsequent years, penalties will be assessed based on the cost of individual coverage.

Unresolved Issues of ERISA Preemption

The new health care law was written in an effort to extend health coverage to the majority of Commonwealth residents. The law imposes several new obligations on employers. It also imposes penalties on individuals who, while having incomes above the poverty level, simply do not have the means to pay for mandatory insurance. There are many questions that remain to be answered.

A major issue yet to be determined is whether and to what degree the Commonwealth law will be preempted by ERISA. In general terms, ERISA "preempts" (that is, negates) any state law that "relates to" or "has a connection with or reference to" an ERISA-covered plan. Some employers have argued that the Commonwealth law, in practice, forces employers to create an ERISA-covered plan; dictates, to a certain extent, the level of employer contributions that are required for the plan; and, through the cafeteria plan requirements, interferes with the

administration of an ERISA-covered plan. Therefore, they argue, ERISA preempts the Commonwealth law.

The ERISA preemption issue must ultimately be resolved in the courts, likely the United States Supreme Court. However, many, if not all, of the new law's provisions are likely to be in effect before it can be tested in the courts. Consequently, employers should be prepared to comply with the Commonwealth law's provisions, at least for the next few years, and possibly on a permanent basis.

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