

State and Federal Government Move to Enforce Employer Health Care Assessments

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On Tuesday, November 7, 2017, the Massachusetts Executive Office of Labor and Workforce Development issued proposed regulations to implement the Employer Medical Assistance Contribution (EMAC) supplemental assessment that was signed into law by Governor Baker this summer. At nearly the same time, the Internal Revenue Service announced that it would begin enforcement of the employer mandate enacted as part of the federal Affordable Care Act. Employers and human resources managers should pay close attention to these developments.

The Massachusetts law increases the existing EMAC contribution and implements a temporary supplemental contribution. It applies to wages paid beginning January 1, 2018 and, as of now, is scheduled to expire at the end of 2019. The Affordable Care Act imposes a penalty on employers that fail to offer health insurance or that offer health insurance that is not affordable or that does not offer minimum value. The penalty is triggered when at least one employee receives a subsidy for a health plan purchased on an Exchange.

Massachusetts Supplemental EMAC Contribution

The Baker Administration and Massachusetts Legislature acted to impose the supplemental EMAC contribution because of an observed increase in public health insurance coverage (especially MassHealth) and a concomitant decline in employer-based health insurance coverage at a time when the economy is stable and unemployment is low. Earlier this year, Governor Baker proposed a package of reforms to the MassHealth program, the Connector, and the employer health insurance market to address this increase in publicly-sponsored coverage. (For more details, see our July 11, 2017 blog post and client alert.) Governor Baker's proposed Medicaid reforms are currently under review by the U.S. Department of Health and Human Services.

Under the new state law, the existing EMAC contribution, first enacted in 2014 and imposed on employers of more than five employees, will increase from 0.34% of the first \$15,000 in wages to 0.51%. This will result in a maximum cost to employers of \$77 per employee. In addition, a new supplemental assessment will apply to employers of more than five employees if at least one of those employees receives coverage through MassHealth or the Connector for a period of more than 14 consecutive days. The supplemental assessment is equal to 5% of the first \$15,000 in wages, for a maximum assessment of \$750 per employee.

The new regulations implement the supplemental assessment. Employers are exempt from the assessment on behalf of any individual who has coverage under MassHealth based on a disability. In general, nonprofit organizations and governmental agencies are subject to the supplemental assessment. The regulations also create an appeals process if the Division of Unemployment Assistance (DUA) issues a determination that an employer is subject to the supplemental assessment. Appeals must be filed within 10 days. Final agency action adverse to the employer gives the employer the right to seek review of the determination in Massachusetts Superior Court. Failure to pay the assessment will result in the imposition of interest on employers, calculated in the same manner as interest on unpaid unemployment insurance assessments. In addition, penalties are imposed for failure to comply with the assessment.

The regulations create an information sharing mechanism between MassHealth, the Connector Authority, and DUA in order for DUA to be able to enforce the supplemental assessment. This information can be shared by DUA with an employer for purposes of the employer's ability to review or appeal the assessment. Employers are required to keep this information confidential and are prohibited from retaliation against any employee who is receiving publicly-assisted health care coverage.

Public Comment Process

DUA is holding a series of five public listening sessions on the proposed regulations that will be held between November 13 and November 28 in Boston, Springfield, Worcester, Lawrence and Cape Cod (West Barnstable). The regulations are available [here](#).

Comments can be submitted to EMACSupplement@massmail.state.ma.us.

The supplemental assessment shares some similarities with the employer assessment enacted as part of the federal Affordable Care Act (ACA) in 2010 and codified at section 4980H of the Internal Revenue Code. Unlike the ACA employer assessment, however, which is only imposed on employers who either do not offer coverage or whose employees obtain coverage through an Exchange, the EMAC assessment is imposed on employers whose employees obtain coverage through Medicaid (MassHealth). This is an important distinction from federal law and in that sense, treats Massachusetts employers differently than other employers in the country.

IRS Enforcement of the Employer Mandate

Also last week, the Internal Revenue Service announced that it would begin to enforce the § 4980H assessment under federal law. The IRS had previously explained that its procedures for assessing the employer mandate would occur through the issuance of Letter 226J. This letter will contain information on the assessment, a table listing the proposed payments due by month, a response form, a list of employees that received coverage through an Exchange, and the actions that an employer should take when responding to the letter. According to the IRS, it intended to begin sending out Letter 226J in late 2017. *See* [FAQ 55 – 58](#), available [here](#). Those letters began going out last week. A form copy of the letter is available [here](#).

Employers that receive the letter should review it closely and be prepared to respond quickly. Generally, the IRS explains that a response to the letter is due within 30 days of the date on the letter. Employers that do not respond by this date will have the assessment proposed in the letter imposed and the IRS will issue a notice for demand and payment. Employers that do respond will have appeal rights within the IRS and, ultimately, through the federal court system in the same manner as other tax assessments can be appealed.

Foley Hoag attorneys have been monitoring developments in this area closely since the first IRS regulations on the topic were published in December of 2012. Employers that receive a 226J letter or that have questions about the new Massachusetts assessment should contact the firm's Health Care or Labor and Employment practices, or your regular Foley Hoag attorney.

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