



April 18, 2006

An Overview for Employers of the New Massachusetts Health Care Reform Law

On April 12, 2006, Governor Mitt Romney signed into law portions of a landmark piece of legislation on health care. The new law is intended to make health insurance available to the more than 500,000 Massachusetts residents who currently are uninsured. A hallmark of the new law is the creation of the Commonwealth Health Insurance Connector (“Connector”), a new state entity charged with making affordable health insurance available to the uninsured. The law also provides for tax penalties against individuals who can afford health insurance, but decline coverage.

We want to update you on this new law because it also has significant implications for employers. While media reports have focused on provisions directed at employers that do not provide health care coverage to their employees, the law imposes a number of obligations on all employers, not just those that do not offer health insurance.

Perhaps the most ominous provision, what has been dubbed the “Fair Share” tax on employers, has been vetoed by Governor Romney. However, it is expected that the legislature will override his veto and enact the Fair Share tax into law. This provision empowers the state Department of Labor to impose an annual surcharge of up to \$295 per full-time employee on any employer that has 11 or more full time employees and that is not a “contributing employer.” A “contributing employer” is one that offers a group health plan to its employees and “makes a fair and reasonable premium contribution.” This latter provision means that if the Commonwealth determines that the employer’s premium contribution is too low, the employer may be assessed the tax.

The Fair Share tax is not the only surcharge directed at employers. Under the new law, the Division of Health Care Finance and Policy is empowered to impose a “free rider” surcharge upon a “non-providing employer” who employs employees who receive free health services from the state. A “non-providing employer” is any employer of more than 10 employees that does not offer to contribute toward or arrange for the purchase of health insurance. The surcharge is

triggered if an employee or dependents of such employee receive free services more than 3 times in a year or if employees of a company or their dependents receive free health services 5 or more times per year in the aggregate. The division is authorized to charge the employer at least 10% but no more than 100% of the cost to the state for the free services provided to the employer's employee(s) and dependents. However, the surcharge only is assessed when the costs for an employer exceed \$50,000 in a given year.

Further, the law requires the Division of Health Care Finance and Policy to promulgate a form called the Health Insurance Responsibility Disclosure to be signed under oath by every employee and employer doing business in Massachusetts. The form will indicate whether the employer has offered to pay for or arrange for 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 also will notify employees who decline health insurance coverage that they are legally responsible for their health care costs.

The new law also includes a broad anti-discrimination provision. The law prohibits all employers from discriminating against an employee on the basis of (1) the employee's receipt of free health care from the state; (2) the employee's reporting or disclosure of his employer's identity; (3) the employee's completion of the Health Insurance Responsibility Disclosure form; or (4) "any other facts or circumstances relating to 'free rider' surcharges assessed against the employer in relation to the employee." Discrimination under this provision constitutes a *per se* violation of Chapter 93A, the state unfair competition law, which provides for a possible award of treble damages and attorneys' fees and costs.

The new law also regulates the contracts offered to employers by health insurance companies and health maintenance organizations. The employer must offer the group health insurance contract to all employees in the Commonwealth, and the employer's premium contribution on behalf of an employee may not be less than what it pays on behalf of other employees who earn the same or more hourly rate or salary. These rules do not apply to contracts for employees covered by a collective bargaining agreement. While there has been little discussion about these provisions, taken literally, they appear to prohibit employers from offering different health plans and making different contributions for different levels of employees in the Commonwealth, including corporate executives.

The new law also mandates that employers with more than 10 employees offer cafeteria plans to their employees. A cafeteria plan allows employees to make contributions toward health care costs with pre-tax dollars. The new law provides no explanation as to the funding source for such plans, except that the Connector is authorized to promulgate rules and regulations regarding a qualifying cafeteria plan.

Finally, small businesses, meaning those with less than 50 employees, may be eligible to offer their employees affordable health care insurance through the Connector.

The new law is an extensive and complicated piece of legislation, and the above represents only a summary of some of the provisions that relate to employers. Further, there are many unanswered questions regarding the intent and meaning of some of the provisions. We

anticipate further developments regarding the new law, including an override of Governor Romney's veto of the Fair Share tax and the promulgation of forms and regulations. We will keep you apprised of these developments.

This Bulletin was prepared by Robert Fisher of Foley Hoag LLP's Labor & Employment Law Department. If you would like additional information on this topic, please contact Mr. Fisher (rfisher@foleyhoag.com or 617-832-1235), or contact your attorney at Foley Hoag LLP. For "Alerts and Updates" on other topics, please visit the "Newsstand" link on our website at <http://www.foleyhoag.com/>.

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