

Employment, Labor & Benefits Advisory

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Massachusetts Health Care Reform Fair Share Law Amended by Economic Development Bill

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On August 7, 2012, Governor Deval Patrick signed into law an Economic Development Bill¹ that makes significant changes to the Fair Share Law,² particularly with respect to penalty collection and appeals.

Under the Fair Share law, almost all employers doing business in Massachusetts must either provide employees with health insurance that passes certain tests, or pay the Commonwealth \$295 per year per employee. For a more detailed discussion of these tests and the penalties, please see our previous alerts accessible here.

[New Massachusetts Health Care Reform Law Makes Important Changes to the "Fair Share Contribution" Rules Affecting Employer-Sponsored Group Health Plans, 8/10/2012](#)

[Massachusetts Health Care Reform – Fair Share Contribution Audit Survival Guide, 10/1/2010](#)

Current Fair Share Enforcement Practices

The Fair Share Law is enforced by the Massachusetts Division of Unemployment Assistance (DUA), which currently follows certain patterns of enforcement. The typical enforcement action begins with an audit of a company's Fair Share practices, during which the targeted employer must produce documents proving Fair Share compliance to the satisfaction of the DUA. If a targeted employer fails to convince the DUA of its Fair Share compliance, then such employer is issued a "Determination of Liability" detailing the reasons for noncompliance and setting forth a Fair Share contribution calculation, plus 12% interest from the date the employer was required to make its Fair Share filing for the audited period. The employer may appeal to a DUA hearing examiner by filing a written request for appeal within 10 days of the date of the Determination of Liability. The employer is then permitted to prove its compliance with the Fair Share Law (i.e., refute the DUA's findings) at the DUA hearing. If the DUA hearing examiner disagrees with the employer's position, the employer may then appeal to state court, pursuant to the state's statutory guidelines for reviews of adverse agency decisions.

Notably, under current law, the employer has no opportunity to seek a settlement with the DUA prior to exhausting all agency appeals and filing an action in state court. In addition, throughout the enforcement action, 12% interest continues to accrue and the DUA has the power to collect on owed Fair Share amounts.

Economic Development Bill Changes

The Economic Development Bill, which takes effect November 5, 2012 (90 days from enactment), will bring some welcome relief to employers struggling with these enforcement processes. In particular:

- The DUA will be permitted to mitigate an employer's Fair Share contributions, fines, interest and related fees.

Note: We do not know at this time how liberally the DUA will be willing to apply this new authority, or what companies, matters or liabilities the DUA may consider appropriate for mitigation.

- The DUA will not be permitted to accrue or collect interest, penalties or fees on the Fair Share contribution pending an appeal decision.

Note: While it is not entirely clear on the face of the law, it seems likely that an employer that exhausts all of its appeal options and is ultimately found liable will be required to pay interest, penalties, and fees that may have accrued during the appeal(s). Accordingly, employers will need to carefully consider whether an appeal is likely to yield a result favorable to the employer, as penalties may still be owed if an appeal is unsuccessful.

- Neither the DUA nor any entity of the Commonwealth will be permitted to take any funds out of an employer's bank account if the employer has filed a Fair Share appeal or is in the process of mediation and is awaiting a decision.

Note: This is welcome relief to employers who have a strong case and are waiting for a decision.

- The DUA's help center staff will not request identifying information from an employer that is seeking assistance from the DUA helpline, and DUA staff will not share customer information with the audit department staff. No information recorded by the helpline may be used in an audit proceeding or be used to initiate an audit.

Note: We are aware of instances where an employer has called the DUA seeking technical guidance, only to find itself subject to a DUA audit. This new rule will allow employers to reach out to the DUA and seek technical guidance anonymously and without the fear of an enforcement action.

- An employer aggrieved by a determination of the DUA with respect to its liability for the Fair Share employer contribution or with respect to the amount it is required to pay will be permitted to appeal such determination within 60 days and in the form and manner as specified by the DUA.

Note: As noted above, under current law, employers have only 10 days to file an internal appeal of an adverse decision. This is an extremely tight timeframe, especially considering that (1) the 10 day period runs from the date on the Determination of Liability, rather than the date of the employer's receipt, (2) the 10 day period is based on calendar, rather than business days, and (3) once received by an employer, several days may pass before a letter reaches a person with knowledge of the case and authority to act. The new 60 day timeframe is much more reasonable.

- Upon completion of a hearing on an appeal with respect to an employer's liability for the Fair Share employer contribution or to the amount it is required to pay, the DUA will render a written decision within 90 days for an employer with more than 50 full-time equivalent employees and within 30 days for an employer with 50 or fewer full-time equivalent employees.

Note: Prior to this requirement, the timing of a DUA hearing examiner's decision varied greatly, making it extremely difficult for employers to predict the timeframes associated with the appeals process. Because the DUA's hearing examiners will be held to a tight and consistent timeframe, employers can approach the appeals process with more certainty regarding timing and costs. Moreover, employers who seek to bring an action in state court will more quickly exhaust the internal agency process.

Relief for Pending Enforcement Actions?

At this time, it is unclear if or how these amendments will affect currently pending enforcement actions. Should the DUA interpret these changes as favorably to its interests as possible, cases in progress prior to the November 5, 2012, effective date are unlikely to be covered by the amendments. The DUA could also take the view that the new rules apply only to filing periods beginning after the November 5, 2012, effective date — i.e. January 1, 2013 — although this interpretation seems overly aggressive. Additional guidance from the DUA on its position would be most welcome.

Summary

While these changes provide welcome procedural relief, they are no help to an employer who does not comply with the underlying Fair Share law (or who cannot demonstrate compliance to the DUA). We continue to urge employers doing business in Massachusetts to carefully follow the Fair Share rules, timely file their quarterly Fair Share Filings, meticulously document compliance, and answer DUA correspondence promptly.

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Endnotes

¹ H. 4352: "An Act relative to infrastructure investment, enhanced competitiveness and economic growth in the Commonwealth."

² Section 188 of chapter 149 of the Massachusetts General Laws

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