

## Employment, Labor & Benefits Advisory

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### New Massachusetts Health Care Reform Law Makes Important Changes to the “Fair Share Contribution” Rules Affecting Employer-Sponsored Group Health Plans

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The Massachusetts Legislature recently passed, and Governor Deval Patrick signed into law, S. 2400, “An Act Improving the Quality of Health Care and Reducing Costs through increased Transparency, Efficiency and Innovation” (the “Act”). The Act is the third in a series of comprehensive health care legislative efforts in Massachusetts beginning with the 2006 enactment of the then historic Massachusetts health care reform law. For an overview of the Act, please see our [July 31, 2012 advisory](#).

While the Act’s principal purpose is to address issues of health care cost, quality, and transparency, it makes a minor though important change to the way that employers determine their liability under the “fair share contribution testing” rules, which form the core of the employer responsibility provisions of the Massachusetts health care reform law.

#### Background

Under the Massachusetts fair share contribution rules, if an employer does not provide subsidized health insurance coverage to some or all of its full-time employees (referred to in Act as “non-contributing employers”), it may be required to pay an annual fee of \$295 per full-time equivalent employee (\$73.75 per quarter) to a state trust fund designed to increase health coverage in the Commonwealth. The penalty is determined and assessed quarterly. Only non-contributing employers must pay the fair share contribution penalty. As was the case with prior law, the Act caps the contribution at \$295 per “full-time equivalent” employee per year. Full-time equivalency is determined for this purpose on the basis of 500 payroll hours/quarter. These rules are set out in 114.5 CMR 16.00, issued by the Massachusetts Division of Health Care Finance and Policy. The legislature separately delegated the power to prescribe rules for assessing and collecting fair share contributions from non-contributing employers to the Division of Unemployment Assistance, which issued rules on the subject at 430 CMR 15.00.

Under prior law, the fair share contribution rules were applied as follows:

#### ***Step 1 – Threshold Coverage***

Does the employer have 11 or more full-time equivalent employees working at a Massachusetts location? (This step takes into account all of the employer’s employees — full-time, part-time, seasonal and temporary.) If the answer is no, then the fair share contribution requirement does not apply. If the answer is yes, then the fair share contribution rules apply.

#### ***Step 2 – the Premium Contribution Standard (formerly, the “primary” test)***

If the employer offers subsidized coverage of any sort, do at least 25% of the employer’s full-time employees accept the employer’s offer of coverage? (A “full-time employee” for this purpose generally means an employee who works 35 or more hours per week.) For employers with fewer than 50 full-time employees, no fair share contribution is required if the premium contribution standard is met. For those

small employers that fail this test, and for employers with 50 or more employees, proceed to step 3.

Note: Under an alternative test, if 75% or more of an employer's full-time employees accept the employer's offer of coverage, then the employer is deemed to be a contributing employer without any need for any further testing.

### **Step 3 – the Percentage Contribution Standard (formerly, the “secondary” test)**

Does the employer offer to pay at least 33% of the cost of individual coverage to full-time employees after 90 days of employment? If so, the employer is not subject to the fair share contribution.

### **Step 4 – Payment of Contribution**

If the employer is a non-contributing employer based on the tests set out above, then it must make a fair share contribution, which is calculated on a full-time equivalent basis taking into account all of the employer's employees — full-time, part-time, seasonal, temporary, etc. The contribution is made as part of the employer's quarterly unemployment filing.

## The Act

The Act makes two important changes to the prior law rules. The first, which is set out in Act section 141, raises the threshold in Step 1 to 21 full-time equivalent employees from 11 full-time equivalent employees. The second changes the manner in which the premium contribution standard (step 2) is applied.

Before the Act, regulations implementing the premium contribution standard made no adjustment for employees with other coverage, e.g., through a spouse, separate retiree health coverage, or a government-run program such as Medicare. Act section 142, which adds new subsection (11) to 149 M.G.L. section 188(c), changes this result. It reads:

“In calculating the fair share assessment, employees who have qualifying health insurance coverage from a *spouse, parent, veteran's plan, Medicare, or a plan or plans due to disability or retirement shall* not be included in the numerator or denominator for purposes of determining whether an employer is a contributing employer, as defined by 114.5 CMR 16.02. The employer shall keep and maintain proof of their employee's insurance status, in a reasonable manner as defined by the authority.” (Emphasis added).

This change will make it easier for employers, especially small employers, to pass the premium contribution test. This is particularly true of employers with marginally more than 50 employees, who must pass both the premium and percentage contribution tests.

Passage or failure of these tests — for employers big or small — is no simple academic matter. The fair share rules are enforced by the Massachusetts Division of Unemployment Assistance, an agency equipped with full audit, investigation, and penalty powers. Since the fair share law's enactment in 2006, the Division of Unemployment Assistance has steadily and significantly increased its audit and enforcement activity in every employment sector. Division of Unemployment Assistance audits require production of exhaustive documentation in order to prove compliance, including weekly payroll information, a signed and dated “waiver” of coverage from employees who decline coverage, a compliant methodology for determining when an employee with fluctuating hours becomes “full time,” plan documents, and carrier bills. Employers who cannot produce requested documents, in the exact form requested, generally fail their audits. And non-contributing employers face a steep penalty: back payment of the \$295 per year fair share contribution, plus interest of 12 percent per year. These unlucky employers are left with limited recourse: either they must pay the penalty, or appeal the finding to the Division of Unemployment Assistance and then, if unsuccessful, to Massachusetts state court.

Based on these enforcement patterns, employers who plan to satisfy the premium contribution test by excluding employees with coverage from a spouse or other source must be prepared to present documentation of that other coverage from each applicable employee in the event of audit.

## Effective Date

The changes to the fair share testing rules described above take effect July 1, 2013.

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