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AMERICAN BAR ASSOCIATION -- SECTION OF TAXATION

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TITLE: Massachusetts Health Care Reform — The Impact of Ch. 58 of the Acts of 2006 on Employers and Employees

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ABA SECTION OF TAXATION
Employee Benefits Committee

Massachusetts Health Care Reform —
The Impact of Ch. 58 of the Acts of 2006 on Employers and Employees

October 20, 2006--Denver, Colorado

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Background—The Act's Goals

- Convert subsidies for the uninsured into subsidies for low income individuals to buy health insurance
- Goals:
  - Expand coverage
  - Increase choice
  - Stimulate competition
  - Reduce burden on taxpayers

Background: The Uninsured

- 520,000 Massachusetts residents without health insurance
- 87% of these are adults 19 to 34
- Others include low income, young adults and children
- 31% of employers offer no coverage
- 20% of underinsured qualify for Masshealth but fail to sign up

Background—Key Features

Medicaid expansion

- Insurance Reform
  - Individual/small group merger
  - Changes rating factors
  - Limits waiting periods
  - Special products for 19 to 26 year olds
  - HMOs can offer HDHPs (which can support HAS contributions)

Background—Key Features (Cont'd)

- Free care reforms
  - Eliminates uncompensated care pool
  - Establishes Health Safety Net Fund
- Quality standards and P4P
- Commonwealth Care Health Insurance Program (CCHIP)
  - >100 FPL no co-pays/deductibles
  - 100% to 300% FPL sliding scale subsidies

Background—The Connector (cont'd)

- Massachusetts employers with 50 or fewer employees can designate the connector as its group health plan
- Workers can then access the products from within the Connector of their choice
- Workers can switch offerings annually and they coverage is "portable"
- E.g., two income couple funding one plan with contributions from two employers

Background—The Connector

- State-chartered clearinghouse
- Available to individuals and workers in businesses with 50 or fewer employees
- Intended to work like a stock market
  - Connects buyers and sellers
  - Facilitates collection (which may be from multiple sources) and payment
- Subject to state insurance laws

Background—Market Approach

- Prior law approach (one-size-fits-all):
  - Create standardized products (there are currently only two in the non-group market), or
  - Establish a uniform set of minimum benefits
- The Act's approach:
  - Many different products to choose from
  - Insurers are free to design products within the limits of state insurance laws

Impact on Employers

- Act § 47: The “fair share” contribution
- Act § 44: The “free rider surcharge”
- Act § 48: The cafeteria plan mandate
- Act § 42: Disclosure form requirement
- Act §§ 52,55 and 59: Employer coverage and contributions (non-discrimination)
- Act § 53: Extended dependent coverage

Fair Share Contribution (cont’d)

- Effective October 1, 2006
- Final regulation issued Sept. 8, 2006
- Primary and secondary tests
  - Testing based on full-time employees only; part-time employees excluded
  - Full time means 35 hours
  - Seasonal employees excluded
  - Temporary employees excluded

Fair Share Contribution

- Applies to non-governmental employers with more than 10 FTEs who are not “contributing employers”
- Must pay a “fair share contribution” of up to $295 per employee
- A “contributing employer” is an employer that makes (i) a “fair and reasonable premium contribution” to (ii) a “group health plan”

Fair Share Contribution (cont’d)

- Definition of “group health plan”
  - *Reference to Code §5000(b), which refers to “medical care”*
  - *Also refers to Code § §213(d)(A) and (B), which includes medical treatments and transportation*
- Not the same as “creditable coverage”—i.e., this need not be major medical coverage

Primary Test

- 25% of full-time employees have accepted and enrolled in the employer's group health plan
  - Group health plan can be a mini-med plan, so long as employer makes some contribution
  - Test measures "take-up" rate only
- Test: total enrolled full-time employee hours over Total full-time employee hours

Leasing Company Special Rule

- Leasing company is defined to include staffing companies and PEOs
- Leasing companies must calculate and remit the fair share contribution
- Unclear whether workers are treated as leasing company employees, or whether common law worker classification rules apply

Secondary Test

- Employer must pay at least 33% of premiums of the cost of "any group health plan offered to full time employees
  - Test is based on employer contribution level
  - Not clear whether definition of full-time employee is the same as for primary test
- Note impact of non-discrimination rule

Free Rider Surcharge

- Effective on enactment, but some definitions apply October 1, 2007
- Threshold of $50,000 in any hospital fiscal year before assessment is applied
- Surcharge is equal to between 10% and 100% of the state's cost of care
- Deposited with the Commonwealth Care Trust Fund

Free Rider Surcharge (Cont'd)

- Applicable to a "non-providing employer"
  - Of an employee (or dependent) who receives free care more than 3 times in a hospital fiscal year, or
  - Whose employees (or dependents) access free care, in the aggregate, five times in a year
- Proposed regulation issued June 30, 2006

Free Rider Surcharge (Cont'd)

- Employers assessed a percentage of "state funded costs" based on
  - The number of employees (i.e., the employer's "Category"), and
  - Number of occurrences, the level of compliance with "HIRD" requirements, and the extent to which full-time employees are covered

Free Rider Surcharge (Cont'd)

- "Non-providing employer" does not include and employer that:
  - Contributes to or arranges for purchase of health insurance, including via the Connector
  - Is a signatory to bona fide collective bargaining agreement
  - Participates in the Insurance Partnership
  - Employs not more than "10" (FTEs? Individuals? Not specified)

Free Rider Surcharge (Cont'd)

- Categories
  - Category 1: 11 to 20 employees
  - Category 2: 21 to 40 employees
  - Category 3: 41 to 50 employees
  - Category 4: more than 50 employees

Free Rider Surcharge (Cont'd)

EXAMPLE: Category 3 employer with six admissions by one state-funded employee would be assed 20% of the state's costs provided that the employer was otherwise in compliance with the HIRD requirements, was not a repeat offender.

Cafeteria Plan Mandate (cont'd)

- Effective January 1, 2007
- Poses significant administrative issues
  - Tracking coverage (e.g., staffing firms)
  - Mid-year election changes (i.e., changes in family status; changes in cost-or-coverage)
- Is the mandate limited to premium-only coverage (appears to be the case), or does it include dependent care?

Cafeteria Plan Mandate

- Code § 125 "cafeteria" plans
  - *Fringe benefit plan under Code § 6039D*
  - *Choice between cash and non-taxable benefit*
- Employers with more than 10 employees must
  - *Adopt a cafeteria plan*
  - *File a copy with the Connector*
- Applies as well to "non-providing employers"
  - *Fully contributory arrangements*

Disclosure Forms

- "Health Insurance Responsibility Disclosure Form" propose regulation issued June 30, 2006 but withdrawn
- Signed by employers and employees
- Disclosures must include
  - Whether the employer has offered to arrange for, or pay for, coverage
  - Whether the employee has accepted
  - Whether the employee has other coverage

Disclosure Forms (cont'd)

- Effective upon enactment, but DHCFP must issue the form
- Frequency of required submission
  - Small employers—annually
  - Large employers—quarterly
- Employers must collect limited employee data under proposed regulation

Dependent Coverage

- Group health insurance policies providing family coverage must maintain coverage for dependents up to the later of
  - Up to age 25, or
  - 2 years following loss of dependent status under the provisions of the Internal Revenue Code (see, Code § 152(c)(3) (terminating dependent status of a qualifying child at age 19 or age 24 for students)

Non-Discrimination

- If group health coverage is provided to full time employees, then
  - All full time employees who live in Massachusetts must be included
  - Same premium contribution percentage for all employees (except those covered under CBA)
- Applies to BC/BS, PPOs and HMOs
- Does *not* apply to dental plans

Dependent Coverage (cont'd)

- Applies to
  - Blue Cross and Blue Shield of Massachusetts
  - Individual policies, including vision and dental
- Does not appear to apply to other group health policies (*see* Act §§ 53 and 58)
- Effective January 1, 2007

Taxation

- Treas. Reg. § 1.61-21(b)(1): value of (taxable) dependent benefit taxed to participant
- Mass definition of dependent is broader than Code § 152 (*see* Working Families Tax Relief Act of 2005) and excess is a taxable benefit
- FMV of taxable dependent coverage
  - *Single COBRA rate less 2%*
  - *Other actuarial measure*

Exceptions to Mandate

- Religious beliefs support in refusal to obtain coverage
- Connector can establish process for determining hardship relief
- Connector to issue certificates that no health plan found to be affordable for an individual
- Appeal right to Connector if individual "disputes determination of applicability or affordability"

Individual Mandate

- Effective July 1, 2007
- First reporting expected with CY 2007 state income tax returns filed in 2008
- Obligation is to obtain/maintain "creditable coverage"
- Connector to publish
  - Annual premium schedule
  - What constitutes creditable coverage

Penalties

- For 2007: Loss of personal exemption
- For 2008 and thereafter: up to 50% of "minimum insurance premium for creditable coverage" for each month without coverage
  - Penalty first paid via forfeiting tax refund
  - Then direct assessment for balance on the individual

ERISA Preemption

- Will the employer mandates survive a challenge based on ERISA?
- Does the law affect "plan structure or administration" (see the *Travelers* case)?
  - Imposition of a tax vs.
  - Mandating a plan
- Impact of (Wal-Mart 1; Maryland 0)

Other Predictions

- "Free Rider" surcharge: likely preempted
- Cafeteria plan mandate: likely not preempted (if fully contributory plans not subject to ERISA)
- HIRD: likely not preempted (under existing case law)
- Non-discrimination (toss up)
- Dependent coverage: saved

RILA v. Maryland

- Maryland "pay-or-play" law challenged by the Maryland Retail Industry Leaders Association
- Claim based on ERISA preemption—does the Maryland law "relate to" employee benefit plans: Court said it does
- According to a footnote, Massachusetts fair share requirement might pass muster

Questions and Answers

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