eActionAlert

For Employers with Employees in Massachusetts – The New Healthcare Reform Law is effective July 1, 2007

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If your company has employees within Massachusetts, a new state law, "An Act Providing Access to Affordable, Quality, Accountable Health Care" (the "Act") may affect your company, its cafeteria and/or group health plans effective July 1, 2007. This law applies whether your group health plan is insured or self-funded. Therefore, there is heated discussion as to whether this health care reform law is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). This Alert briefly discusses that issue and a few major provisions of the law.

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The Basic Problem

In a nutshell, your company and its ERISA counsel must decide whether they believe this law is preempted in whole or in part by ERISA. In addition, your company must decide what steps will be taken relative to compliance, if any.

Summary of Major Provisions

The Act requires all Massachusetts residents to acquire health care coverage, either through an employer group health plan, individual health insurance policies or the Commonwealth Health Insurance Connector Authority, a new state agency (the "Connector"). Individuals who do not obtain coverage by December 31, 2007, will be subject to financial penalties.

The Act provides several employer mandates including:

- The "fair share premium contribution" requirement;
- The cafeteria plan mandate; and
- The "free rider surcharge."

The Fair Share Premium Contribution Mandate

The Act says if you have 11 or more "full-time equivalent" employees working within the Commonwealth, your company must either (1) make a "fair and reasonable premium contribution" to the health coverage costs of its Massachusetts employees or (2) pay an annual amount, not to exceed $295 (current assessment) per each such employee into a trust fund maintained by the Commonwealth.

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The fair share premium contribution requirement is satisfied if either (1) the group health plan covers 25% or more of its Massachusetts full-time employees (who work at least 35 hours a week) or (2) the employer pays at least 33% of the employee-only premium (or cost) of any group health plan offered to the company's full-time Massachusetts employees who have worked for the company a minimum of two months.

The Cafeteria Plan Mandate

Under the cafeteria plan requirement, the employer must modify its current Section 125 plan or establish a new one in order to enable all of its Massachusetts employees to pay for health coverage provided through the employer's plan, an individual contract or the Connector. The statute applies to all employees including part-time, temporary and seasonal employees as well as those employees who are currently within the health plan's coverage waiting period.

The Free Rider Surcharge Mandate

If the employer does not satisfy the cafeteria plan mandate, it will be subject to a free rider surcharge. The surcharge is assessed if, during the year from July 1 through June 30, any uncovered individual Massachusetts employee and/or dependent receives medical care through the state's free care programs more than three times or if all such Massachusetts employees and/or their dependents receive free care five or more times. The surcharge is assessed if at least $50,000 of free care is provided to the company's Massachusetts employees within the year. The amount of the surcharge ranges from 10% to 100% of the state's cost of services (per schedules established by the state). Under certain circumstances, this could be substantial.

ERISA Preemption Issue

It is very unclear whether or not all or several portions of the Act are preempted by ERISA.

At M&A, we have spoken with several ERISA attorneys at prominent law firms. We have also reviewed several well written articles authored by such attorneys and by other recognized commentators, such as a law professor who had previously written about ERISA preemption. Our findings are that they have varying opinions and reasons as to whether the Act, if challenged in federal court, would be found to be preempted.

What this Means to You & M&A's Recommended Actions

As an employee benefits consulting and management firm, we believe that most of the employer mandates under the Act are preempted by ERISA. However some aspects of the employer mandates may not be preempted. For example, the requirement to cover certain employees and dependents may be viewed as not regulating an ERISA plan itself. Instead, the requirement may be seen as merely forcing an employer to decide whether to cover such individuals or pay a penalty tax to the Commonwealth.

Since this is a complicated legal issue, we recommend that you, together with your ERISA counsel, review the employer mandates under the Act as well as the preemption issue. Whichever position you and your counsel adopt, M&A remains committed to helping you implement your decision.

If you have any questions about this Alert, please contact Ed Chalé, Vice President, Compliance. Ed is located in our Springfield, Massachusetts office and his toll-free phone number is (800) 477-7303, Ext. 304. M&A is an employee benefits consulting and management firm and, as such, does not practice law.

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