THE MASSACHUSETTS HEALTH CARE REFORM ACT: COMING TO A STATE NEAR YOU?

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With building public pressure and a loss of federal funding looming, the Massachusetts state legislature, with bipartisan support, passed a landmark health care reform bill in April 2006. This "Act Providing Access to Affordable, Quality, Accountable Health Care" ("the Act") is revolutionary in its requirement that all Massachusetts citizens over the age of 18 be covered by health insurance. The new law also imposed new responsibilities on employers and insurance carriers with a goal of helping the uninsured find and afford health care coverage.

It has now been more than a year since the new statute passed. As the programs in the statute are gradually phased into effect—with some of the biggest changes effective July 1, 2007—the rest of the country has its sights trained on Massachusetts to see how this experiment will turn out. Several of those states are considering health care reform statutes of their own, and the issue of universal coverage is also getting renewed attention at the federal level. What new ideas does the Massachusetts law implement? What challenges does it face? What are other states considering in the realm of health care reform? Outlined here are some of the major changes mandated by the new law, as well as some of the potential snags that legislatures across the country will be keeping their eyes on and some information on how other states are already beginning to follow Massachusetts's lead.

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WHAT DOES THE ACT DO?: THE INDIVIDUAL MANDATE

The Act's individual mandate requires all residents of Massachusetts to obtain health care coverage by July 1, 2007. Individuals will be required to confirm that they have coverage on their 2007 and subsequent tax returns. Those without coverage will lose their personal tax exemption for the first year. In future years, those who are uninsured will have to pay a penalty of up to 50% of the monthly premium of the lowest cast health care plan available to them for each month they were uninsured.

The Act requires Massachusetts residents to purchase and maintain "minimum creditable coverage" (MCC), but does not define what that means.[1] Recently finalized regulations require products to include prescription drug coverage and mental health services, cover preventative doctor visits with no deductible, and place caps on deductibles and out-of-pocket expenses. [2] Plans may not impose a maximum annual benefit amount or a per illness maximum benefit.

One of the major difficulties in implementing the individual mandate has been striking a balance between what qualifies as MCC and what is affordable. The State is expected to soon finalize an affordability schedule for individuals, couples,

and families, with a monthly premium for each income bracket.[3] If a plan satisfying the MCC requirement is available for that monthly premium or less, it will be considered affordable. If there is no such affordable coverage available, the affected resident will be exempt from the individual mandate.

An appeals process will be made available for residents who cannot afford coverage because of financial hardship. The MCC requirement does not go into effect until January 1, 2009.

WHAT DOES THE ACT DO?: EMPLOYER MANDATES

In addition to the individual mandate, the Act creates new obligations for employers of Massachusetts residents. These include the so called "fair share contribution," the "free rider surcharge," the Section 125 cafeteria plan requirement, and reporting and record keeping requirements.

1. The Employer Fair Share Contribution

The Act requires that employers with more than 10 employees either pay a portion of the health insurance costs or pay a penalty of up to $295 annually per uninsured employee ("Fair Share Contribution").[4] The relatively modest penalty was established with an eye toward avoiding ERISA preemption as occurred with a recent Maryland statute. (See discussion below). However, there are serious questions as to whether this provision will encourage employers to offer health care coverage to employees or have the opposite effect.

In order to avoid paying the penalty, an employer with more than ten full-time employees must meet one of two tests set forth in proposed regulations. The simpler of the tests exempts the employer from paying a Fair Share Contribution if it has offered to pay at least 33% of the premium of the health insurance plans it offers to its full-time employees.[5] The other test requires that at least 25% of an employer's full-time employees be enrolled in an employer-sponsored health insurance plan.[6]

2. The "Free Rider Surcharge"

One of the policies behind the Act and the corresponding regulations thereunder is that an employer that fails to offer or arrange for insurance for its employees should have to pay at least a portion of the state's costs in providing health care to these employees. The Act thus imposes a "Free Rider Surcharge," or the Employer Surcharge for State-Funded Health Costs, on employers who do not make arrangements to help employees obtain healthcare ("Non-Providing Employers").[7] It is expected that the Division of Health Care Finance and Policy will interpret the Act in its regulations to require an employer, at a minimum, to establish a cafeteria-style plan allowing employees to buy insurance with pretax dollars. Having a Section 125 Plan, also referred to as a cafeteria plan, removes the employer from the definition of a Non-Providing Employer and from liability for the Free Rider Surcharge. An employer is also excluded from the definition of Non-Providing Employer if it pays 100% of the health care coverage costs of all its full-time employees.

When employees of a Non-Providing Employer take advantage of state-funded health care and these employees compile an aggregate of more than $50,000 in state-funded health care costs in a year, that Non-Providing Employer will be subject to the Free Rider Surcharge requiring it to pay a certain percentage of the state's costs. The percentage will be based upon the number of employees the employer has, the number of state-funded visits the employer's employees make, and whether the employer has been in compliance in previous years. Smaller employers could face a penalty of between 10% and 40% of the costs, but larger employers subject to the surcharge for the second straight year could face a surcharge of up to 55% of the state-funded cost.[8] The surcharge is reduced by the percentage of the employer's employees enrolled in the employer's health insurance plan, up to 75%.

There is also an exemption for employers with a bona fide collective bargaining agreement covering the employment conditions of state-funded employees and for employers who participate in the Insurance Partnership Program, which assists small businesses in providing health care coverage to their employees.[9]

The free rider surcharge is a significant penalty faced by employers under the Act. At present, however, as described below in Section 4, the employer need only institute a compliant Section 125 Cafeteria Plan in order to be free of the surcharge.

3. Health Insurance Responsibility Disclosure (HIRD) Forms

Under the Act, employers and some employees are required to fill out and file annual Health Insurance Responsibility Disclosure ("HIRD") forms.[10] These forms will be used to enforce the Free Rider Surcharge and the employer Fair Share Contribution and to identify employees who have been offered access to health care by

their employer, but have declined that coverage. Employers will have to include information about the number of employees, whether they offer health care coverage to full-time and part-time employees and whether they have a compliant Section 125 plan in place.

Only employees declining to enroll in employer-sponsored health insurance or declining health insurance through a cafeteria plan will be required to complete the employee HIRD. The employer has the duty to collect these forms each year and keep them on file for three years. Any employer with over 10 employees working in Massachusetts must file an employer HIRD by November 15 of each year, and the information on it must be accurate and current as of September 30 of that year.

4. Section 125 "Cafeteria Plans"

Many employers already sponsor Section 125 cafeteria plans that allow employees to pay for health care with pre-tax dollars. Such plans have the additional benefit for employers of reducing payroll taxes. The Act introduces yet another incentive to implement such a plan by imposing the Free Rider Surcharge on all employers who do not have the plan in place.[11] Employers with more than 10 employees in Massachusetts must implement and file a Section 125 plan by July 1, 2007, or face the consequences.[12]

Section 125 refers to Section 125 of the Internal Revenue Code, and these cafeteria plans must comply with both federal and state law in order to comply with the Act. Each covered employer must establish a qualifying Section 125 Cafeteria Plan by July 1, 2007. In order to qualify, the plan must have a written plan document outlining the details of the plan, the plan must offer at least one medical care coverage option, and the plan must be filed with the Connector by July 1, 2007. Note that the plan should allow externally purchased insurance including insurance purchased through the Commonwealth to be purchased through the cafeteria plan. There will be administrative issues for employers with irregular work hours and pay, such as per diem nurses, and for those on leave without pay.

5. Employer Non-Discrimination Provision

Under the Act, an employer may not discriminate against an employee because of that employee's receipt of free care.[13] In addition, the employer may not discriminate against the employee because he or she fills out a HIRD form or if for any reason the employer is subject to the Free Rider Surcharge because of the employee.[14]

WHAT DOES THE ACT DO?: INSURER REQUIREMENTS AFFECTING EMPLOYERS

1. Non-Discrimination

While the Act does not require employers to offer health insurance to their employees,[15] those employers who do offer insurance coverage must offer equal coverage to all full-time employees who live in Massachusetts and may not discriminate against lower paid full-time employees—i.e., an employer cannot contribute a higher percentage toward health care costs for higher paid employees than it does for lower paid ones. Differences in contribution rates are allowed if so provided in a collective bargaining agreement, based on seniority, or if between part-time and fulltime employees. Also, higher contributions are allowed for employees participating in employer sponsored wellness programs. Self-insured plans need not comply with the non-discrimination or parity rules.

2. Expanded Dependent Care

The Act requires insurance plans with dependent coverage to cover dependents up to the day before their 26th birthday or up to two years after they lose dependent status under federal tax law. The effect of this requirement on employers will mainly be an increased administrative burden, but it could also lead to higher group insurance costs.

WHAT ELSE DOES THE ACT DO?

The Act contains many other significant provisions not covered by this article. It also establishes the Commonwealth Care Health Insurance Program to connect eligible Massachusetts residents with affordable subsidized health plans. Residents with family income below 300% of the Federal Poverty Level ("FPL"), who are uninsured U.S. citizens/nationals or qualified aliens, aged 19 or over are eligible to participate in Commonwealth Care. The Act also creates the Health Care Connector to help residents find affordable unsubsidized health care through a program called Commonwealth Choice.

Additionally, the Act merges the small group and individual insurance offerings in an attempt to reduce the price of individual coverage. The Act requires that insurers give all eligible small businesses[16] access to all small group health plans that the insurer offers in Massachusetts.

WHAT CHALLENGES FACE THE ACT?

The Act has already succeeded in focusing discussion and attention on this important issue and in reducing the number of uninsured persons in the State. The long term success of the Act will depend on

how it meets the many economic, political and legal challenges it will face over the coming couple of years and beyond.

For example, initial estimates are that up to approximately 20% of the Commonwealth's uninsured may be exempt for the individual mandate, because even the lowest-priced insurance products available are likely to be too expensive for roughly 68,000 Massachusetts residents. This has prompted the Connector Board to consider expanding subsidies for low-income families beyond what has already been passed.[17] However, these expansions will require additional funding, further increasing the already substantial costs of the program bureaucracy created by the Act. Additional questions remain as to whether the Act will be affordable in the long run.

The Act is likely to face significant legal challenges, as well. One area where it is almost sure to be challenged is the question of whether one or more provisions in the Act are preempted by the Employee Retirement Income Security Act ("ERISA"), which preempts state laws affecting—i.e., having a connection or reference to—employee benefit plans. One of the original goals of ERISA's broad preemption provision was to exempt employers with employees in several states from having to comply with multiple and possibly conflicting state laws. Because statutes that regulate insurance are carved out from ERISA's preemptive scope, the Act's regulation of insurance is likely to withstand scrutiny.[18] However, the so-called employer mandates, especially the Free Rider Surcharge and Fair Share Contribution requirements, are susceptible to challenge. A Maryland law requiring large employers to provide health insurance or pay a penalty to the state was found earlier this year to be preempted by the Fourth Circuit Court of Appeals.[19]

Questions still unresolved about the implications of the Act include:

- whether the Act is susceptible to court challenges based on ERISA or other laws;
- whether employers are going to be encouraged to stop offering group health insurance and pay the fair share contribution instead;
- whether the fair share contribution could triple or quadruple over the short run;
- whether the administrative bureaucracy will be too onerous;
- whether the cost of minimum creditable coverage for individuals or the cost of the program to the state will become overwhelming;
- whether the anticipated funding gap will cause reconsideration of certain funding alternatives, such as increasing the cigarette tax, revisiting a substantial payroll tax, or increasing the penalty for employers whose workers use state-funded care; and
- whether medical facilities that get a disproportionate amount of their funding from Medicare and Medicaid reimbursements will be further penalized by a shrinking pool of reimbursement.

WHAT IS HAPPENING IN OTHER STATES?

In January 2007, California Governor Arnold Schwarzenegger introduced a proposal for health care reform with many similarities to the Massachusetts plan. This plan calls for an individual mandate and includes a fair share contribution from employers who do not provide a certain level of health care coverage to employees. This proposal is currently before the California state legislature. Recently, a coalition of large businesses in the state, known as the Coalition to Advance Health Care Reform, has announced that it is launching a lobbying effort in support for expanding health care coverage to all residents of California.

Other states have taken steps towards reform as well. New Mexico has established a panel to study whether the Massachusetts plan would be viable in that state. Maine has a plan in place to provide health care to all of Maine's uninsured by 2009 that includes employer contributions on premiums. Other states, such as Oregon and Arizona have debated universal health care.

CONCLUSION

The full implications of the Massachusetts Health Care Reform Act are still largely unrealized. What is clear is that other states are watching this Massachusetts experiment with an eye towards creating their own models for universal coverage and that the subject will be a major topic in the upcoming Presidential elections. It is vital that employers take an active role in the debate to ensure that the resulting plan is a viable one for employers of all sizes. A patchwork of varying approaches may provide an impetus for federal legislation. If that happens, all approaches, including single payer systems, could be back on the table.

NOTES

1. Mass. Gen. Laws ch. 111M, §§ 1-2.
2. Mass. Regs. Code tit. 956, § 5.03.
3. Currently, certain MCC plans for individuals are available through the Commonwealth Connector ("the Connector"), the new state agency in charge of helping residents obtain coverage, for premiums of under $200 per month.
4. Mass. Gen. Laws ch. 149, §§ 187-88.
5. Mass. Regs. Code tit. 114.5, §16.03(1)(b).
6. Mass. Regs. Code tit. 114.5, § 16.03(1)(a). In order to calculate this percentage, employers should divide the number of total payroll hours of enrolled full time employees by the total payroll hours of full time employees. A full time employee under this provision in the Act is one who works at least 35 hours a week. However, confusion has already arisen among employers due to the fact that the Act contains differing definitions of full time employees in other sections.
7. Mass. Gen. Laws ch. 118G, §§ 1-3, 5-6, 6D1/2, 18B.
8. Mass. Gen. Laws ch. 118G, §§ 1-3, 5-6, 6D1/2, 18B.
9. Mass. Gen. Laws ch. 118G, § 1 (giving the definition of as Non-Providing Employer).
10. Mass. Gen. Laws ch. 118G, §§ 6B, 6C.
11. See Mass. Gen. Laws ch. 151F; Mass. Gen. Laws ch. 118G; Mass. Regs. Code tit. 956, § 4.00 *et seq*.
12. Whether an employer is covered will be determined by dividing the sum of the total payroll hours for all employees by 2,000. If the figure is 11 or greater, then the employer has more than 10 employees for the purposes of these regulations and must establish a Section 125 Plan. Employers who do not qualify will have to perform this test again on an annual basis to determine if they have qualified over the previous year.
13. Mass. Gen. Laws ch. 118G, § 18B(j).
14. Mass. Gen. Laws ch. 118G, § 18B(j).
15. A state cannot institute a law requiring employers to provide health insurance to employees, because such a law would be preempted by federal law under ERISA.
16. Businesses with 50 or fewer employees.
17. Alice Dembner, "About 20 percent of uninsured would be exempted from state law", Apr. 11, 2007, at http://www.boston.com/yourlife/health/blog/2007/04/about_20_percen.html.
18. Congress recognized that insurance law was traditionally within the purview of the states and therefore, exempted state insurance laws from the preemption provision of ERISA. However, self funded employee benefit plans are not deemed to be insurance for ERISA preemption.
19. Retail Industry Leaders Ass' v. Fielder, 475 F.3d 180, 39 Employee Benefits Cas. (BNA) 2217, 153 Lab. Cas. (CCH) P 60332 (4th Cir. 2007).