

Testimony to the Division of Health Care, Finance and Policy
114.5 CMR 18.0 Health Insurance Responsibility Disclosure

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September 5, 2007

I respectfully submit these comments on the emergency regulations which were promulgated on June 20, 2007.

Our Massachusetts health care law is based on shared responsibilities of citizens, providers, insurers, regulators, and, most importantly, employers. If Massachusetts were not already a leader in providing insurance through the workplace¹, it's doubtful we would succeed in the goal of providing healthcare for all. There would just be too many uninsured persons for the numbers to work.

Massachusetts employers who provide insurance are a precious resource, and they should be encouraged to view healthcare reform as an asset, and not as a series of obstacles. The administration of the Employee HIRD Form requirement, as proposed, is an obstacle which is not necessitated by new Section 6C of M.G.L. chapter 118G. As a lawyer who represents many good employers, who provide insurance, I urge the Division to consider these comments and to simplify the process whenever possible. My comments today primarily address the Employee HIRD Form.

Bear in mind that employers who sponsor health insurance will also have to file Employer HIRD Form information as part of a DUA Fair Share Contribution report, distribute or arrange for distribution of MA 1099-HC forms, comply with the Chapter 151F requirements to document, administer, and file Section 125 plans, and distribute coverage booklets. They also must file federal Form 5500's, distribute employee annual reports (except for small insured plans), prepare and distribute a plethora of federal notices about HIPAA and Medicare Part D, and administer COBRA. They and their employees are already drowning in well-meant paperwork from regulators. So let's keep the Employee HIRD Form as simple as possible, and certainly not go beyond the requirements of Massachusetts law.

¹ The Conference Committee Report points out that we have a "strong base" of employers - 98% of those with more than 100 employees, and 65% of the remainder - who all contribute to health insurance.

1. Why does the Employee HIRD Form request information about whether an employee has declined to participate in a Section 125 arrangement?

As originally enacted, Section 6C of Chapter 118G would have required a single HIRD form. It would have included information as to whether an employee accepted or declined employer-sponsored health insurance, an employer arrangement (presumably a section 125 plan as required by Chapter 151F) to purchase insurance. Questions about Section 125 were fair game under this single HIRD form, meant to be signed by employers and employees.

However, as amended by Section 25, Chapter 450 of the 2006 Acts, Section 6C now calls for two HIRD forms. The Employer HIRD Form is to indicate whether an employer complies with Chapter 151F (i.e. has adopted a 125 plan). The reference to an employer "arrangement" to purchase insurance (i.e. Section 125 Plan), which was in Section 6C as originally enacted, has been omitted from amended Section 6C and its specifications for the Employee HIRD Form. Under the amended statute, the Employee HIRD Form should only request information about employer-sponsored health plans and not Section 125 arrangements:

"The division shall prepare a form, to be called the employee health insurance responsibility disclosure, on which an employee of employers with more than 10 employees who declines an employer-sponsored health plan shall report whether he has an alternative source of health insurance coverage. The form shall be completed and signed by the employee and shall be retained by the employer for 3 years. The division may request a copy of the signed employee form.

A Section 125 "plan" is not an employer-sponsored health plan, of course, under Massachusetts or federal law. Consider that:

- the Connector regulations, interpreting Chapter 151F at 956 CMR 4.08(3), make clear that: "A Section 125 Cafeteria plan is not an employee benefit plan under ERISA;" and

- the US Department of Labor has consistently held that premium payment only Section 125 plans are not ERISA benefit plans.²

If the Division properly concludes that the Legislature intentionally omitted “arrangements” from Section 6C, the Employee HIRD Form then becomes much simpler. It will then only ask employees whether they have declined an employer sponsored health plan. It will not be necessary for employers to pursue part-time employees (who are not benefits eligible for most employer-sponsored health plans) to complete HIRD Forms if they decline annual enrollment in an employer’s Chapter 151F section 125 plan.

This will be a huge step forward in simplifying the process for employers that have large part-time and semi-transient workforces, at minimal social cost. As of this date, we have installed cafeteria plans for employers with thousands of employees. Not one part-time employee has indicated a desire to use Section 125 to buy insurance through the Connector. It’s burdensome enough for employers to have to adopt plans that people don’t seem to use.³ Let’s not require them to obtain Employee HIRD Forms for such plans, when amended Section 6C clearly does not require that.

2. Why is the Employee HIRD Form in Q&A Format?

The human resource professionals I represent, who deal with workforces ranging from professors to custodians, tell me that some employees are not answering the questions correctly. Bear in mind that the typical person declining subsidized insurance is usually covered through another plan, and has already been inundated with other disclosure on health care. They are impatient, and fail to see

² DOL Advisory Opinion 96-12A (July 17, 1996) (“provision of this tax-favored treatment...is not the equivalent of provision of a benefit enumerated under [ERISA §] 3(1), and it does not appear that the [premium payment plan] itself provides any enumerated benefit. [The premium payment plan] is...part of the [employer’s] Group Health Plan inasmuch as it constitutes a mechanism by which the Group Health Plan, an ERISA welfare benefit plan (or plan), is funded with employee contributions.”); DOL Advisory Opinion 94-15A (Apr. 20, 1994) (“premium conversion” cafeteria plan is itself not an ERISA welfare benefit plan when offered “primarily so that [the employer’s] employees may gain certain tax advantages and...the premium conversion arrangement itself provides no ERISA-covered welfare benefits in addition to those” plans offered under the premium conversion plan).

³ For many employees, Section 125 is a very bad deal anyway. Paying premiums with Section 125 salary reduction reduces social security wages and, ultimately, social security benefits.

the relevance of an additional Form when they already have other insurance. So they get the answers wrong.

The problem may also stem from the fact that the questions are an exercise in multiple negatives, especially 2a, which deals with 125 plan availability. Hopefully, the Division will take my recommendation to heart and eliminate the 125 questions from the Employee HIRD Form. If it does not, please consider that a typical response to a question about Section 125 by a person who does not use it or understand it will be "No." However, the question requires a "Yes" answer if the person means "No, I don't use Section 125."

"If Yes, did you decline ...?" [Hint. Answer "Yes" if you mean you do not use a 125 plan.]

In addition to the administrative issues, a reason for concern about questions which elicit the wrong answer is that it's not exactly clear what these Employee HIRD Forms will be used for. Are they just to go in a box for three years, awaiting possible audit? Or will they be exhibit A if an uninsured person uses the Free Care Pool and the Division claims they were not offered a 125 plan, simply because the employee got the question wrong? This question about 125 plan availability on the Employee HIRD Form is a great concern, with potential liability for Free Care Pool expenses hinging on whether an employee could answer a complicated question correctly.

At a minimum, the question should be rephrased and employers should be advised that the Forms will not be used to attach Free Care Pool liability to them. There's an even better idea. Redesign the Form.

3. Redesign the employee version of the Form

The employee Form should be redesigned so that it accomplishes the stated goals of Section 6C.

A. Give the Employee better information

The five (5) Q&A's crowd out the important Employee Affidavit, which is reduced to tiny print and will simply be skimmed over by the average employee.

Although not required by the present version of Section 6C, isn't the real point of the Form to highlight to an employee that waiver of coverage can result in personal responsibility for healthcare expense and tax penalties? To be effective, the Employee Affidavit, rather than the Q&A's, must have a more dominant place on the Form.

B. Replace the Q&A's with affirmative disclosure by the employer

Section 6C does not require Q&A's, or even contemplate them. If the Division eliminates the Section 125 questions, the form could stay with a simple Q&A format: (1) Did you decline employer health insurance, and (2) Do you have alternate coverage?

However, if the 125 plan information is desired by the Division, although not called for, it would be much simpler if the Form listed the 4 types of coverage scenarios offered by employers, and if the employer, not the employee, checked off the one which was applicable to the employee.

1. Subsidized group health insurance
2. Subsidized group health with 125 pre-tax premium arrangement
3. Section 125 arrangement for non-group coverage,
4. No group coverage and no Section 125 arrangement

The employee would then only have to indicate whether he or she had other coverage and could sign the form. Based on a small real-life sample so far, it will save a great deal of processing time for an HR Department if it can check off the applicable coverage data on the Form, rather than having to spend time helping an employee (who probably has alternate coverage) to get the tricky Section 125 Q&A's right.

4. Simplify the distribution requirements of the Employee HIRD Form

A. Waivers before July 1, 2007 should not require a HIRD Form

I understand that Employee HIRD Forms are not required of persons who left employment before July 1, 2007. The Division should confirm that in writing. The Division apparently wants Employee HIRD Forms executed, however, for waivers going back as far as October 1, 2006, with a narrow exception if the employer obtained a pre-July 1, 2007 non-HIRD waiver. Considering that regulations and Forms were not available until late June, 2007, it's hard to see the reason for this. Why not make the regulation prospective as of July 1, 2007?

B. Eliminate the Employee HIRD Form requirement for persons who certify they have other insurance.

An employee should be allowed to execute a one-time waiver indicating that he or she has other insurance. The waiver should also advise the employee to contact the employer to execute a HIRD Form if that outside coverage ever lapses. This eliminates the redundant, annual HIRD Form process for the typical employee who turns down subsidized insurance. The regulations go way beyond Section 6C when they require a new Form after each open enrollment period.

C. Eliminate the "cost of coverage" entry on the Employee HIRD Form.

Putting cost of coverage on the Employee HIRD Form is not contemplated by amended Section 6C. Without further explanation to the employee, it is confusing information. It is fine for this entry to appear on the Employer HIRD FORM, as called for by the Emergency regulations of the Division. It would be more helpful for employees and government (for purposes of calculating penalties) if DOR required the information for the 1099-HC, which will be filed with the employee and the DOR annually.

5. Simplify the process for determining employer responsibility.

The Division approaches this differently than the Connector under its Section 125 regulations at 956 CMR 4.05. The Connector looks back to a previous 12 month period from October 1 through September 30. If the employer paid for 22,000 hours, it must offer a Section 125 plan in the following calendar year. For the July 1, 2007 effective date of the Connector regulations, April 1, 2006 - March 31, 2007 was a special look-back period. The Division, however, requires an employer to collect HIRD Forms for a 12 month period (October 1 - September 30) if it pays for 22,000 hours during that same period. For example, liability to collect Forms for HIRD events during the period from October 1, 2006 - September 30, 2007 depends on whether the employer paid for 22,000 hours during the same period.

The current Division rule is not practical. Employers may not know until late during a 12 month period whether they are covered or not. The Connector approach -- looking back to a completed 12 month period -- is easier to administer. Whatever the rule, the healthcare regulators should get together on this one so that their rules do not conflict.

Conclusion

Massachusetts healthcare reform is new for all of us. I offer these comments with the hope that the Division will look for ways to simplify the compliance requirements for Massachusetts employers. Each new requirement for Massachusetts employers is in addition to the federal requirements they also have to meet. The Employee HIRD Form, which will not be data processed and which will simply rest in a cabinet for 3 years, is a prime candidate for simplification. Eliminate unnecessary burdens on employers, and we get closer to the real goal of affordable coverage.