

Final FSC Rules



The Massachusetts' Division of Health Care Finance and Policy's (DHCFP) final Fair Share Contribution (FSC) regulation (114.5 CMR 16.00) has arrived. The final regulation was adopted late last week with an October 1, 2009 effective date. A copy is available at: http://www.mass.gov/Eeohhs2/docs/dhcfp/g/regs/114_5_16.pdf.

Although some of the text used in the final version of the regulation varies slightly from the text in the proposed regulation, the basic concept behind the revised compliance standards have not changed. The revisions are technical changes to clarify the compliance standards for the FSC requirement.

Here is a brief overview of the three major changes to the FSC compliance standards and what these changes might mean to you.

1. Removal of the Majority of Time Rule

The Change. The "majority of time" rule first appeared in DUA's FSC filing instructions for the November 2007 filing and was later adopted as part of DHCFP's October 1, 2008 FSC regulation. The rule was intended to help classify employees as full-time or part-time for quarterly testing purposes when such employees worked both full and part-time hours during the quarter.

What This Means. Employers are back to creating their own approach to determine who is a full-time employee on the last day of the quarter for employees working both full and part-time hours during the quarter.

- A conservative approach would be to include employees as FT for FSC purposes if they worked 35+ hours during the week inclusive of the end of quarter snapshot date. This approach will increase the number of FT employees included in the denominator of the FSC ratio without a corresponding increase in the number of enrolled FT employees in the numerator; thereby diluting/decreasing the take-up

rate. This may not be a problem for large employers with stable employment and high enrollment rates. However, such an approach could be problematic for smaller employers and those without stable employment and/or low enrollment rates.

- Less conservative approaches may include (a) treating employees as FT for FSC purposes only if the number of weeks they worked 35+ hours in the quarter made them eligible for the employer's FT health benefit as of the end of quarter snapshot date or (b) averaging the number of hours worked for the quarter.

2. Group Health Plan Documentation Requirement

The Change. The October 1, 2006 and October 1, 2008 DHCFP Fair Share Contribution regulations were silent as to how employers should substantiate the existence of a group health plan offered to their FT employees. The October 1, 2009 regulation clarifies what DHCFP considers proper group health plan documentation for purposes of both FSC tests. DUA will be looking for this documentation as part of any audits they perform, or in connection with any employer appeals of FSC Assessments made. Here is the new group health plan requirement (114.5 CMR 16.03(3)(a)):

"A contributing employer must maintain documentation about its group health plan and premium contributions including, but not limited to, the following:

- a written plan description for each plan, including a description of benefits, eligibility requirements, and the amount of employer contribution
- evidence that the plan was in place during the quarter for which eligibility is determined; and
- copies of the employee handbook or other written communications to employees about the plan or plans, including plan benefits, eligibility requirements and the employer contributions."

In a later portion of the regulation (114.5 CMR 16.03(3)(d)2.) relating to the Premium Contribution Standard (formerly the Secondary Test) the regulation requires the following:

- "For each quarter, the premium contribution percentage, the offer to employees, and the minimum number of hours that the Employer requires for an employee to be eligible for full time benefits must be documented in writing."

What This Means. The primary reason for the plan document requirement is that smaller employers (as well as restaurants and staffing companies) traditionally have very little in the way of formal plan documentation to prove that they have established and maintain a group health plan, what the eligibility rules for full-time benefits are and what the

employer contribution percentage is. Further, an SPD is almost unheard of in these circles. It seems that employers could satisfy the FSC written document requirement with an ERISA compliant SPD. Little or nothing will need to be done by those employers that are ERISA compliant; particularly if they have SPDs and open enrollment materials that identify the employer contribution percentage and eligibility for full-time health benefits.

However, those employers with low/nonexistent ERISA compliance (particularly smaller employers) will want to get their written documentation in order by the time the FSC filing for the 10/1/09 to 12/31/09 period comes due. What type of documentation? At the very least, a wraparound SPD should be considered (or revised if it currently exists) by those employers with 11+ FTEs by the end of the year. A wraparound plan document would be a bonus. This documentation is separate and distinct from any code section 125 cafeteria plan document required by the Internal Revenue Code and M.G.L. c. 151F (the cafeteria plan requirement under MA health care reform).

3. Recognition of Premium Reimbursement Arrangements as Group Health Plans

The Change. The regulation adds a new defined term: Premium Reimbursement Arrangement (PRA) (in which an employee enrolls in an individual health plan and is reimbursed by the employer for at least a portion of the premium expense), and clarifies that a PRA may qualify as a group health plan for FSC testing purposes only if the employer:

- designates in writing a specific insurance plan or plans for employee enrollment,
- communicates such designation, in writing, to its employees; and
- otherwise meets the written group health plan documentation criteria in the regulation.

What this Means. PRAs may help some smaller employers who need only pass one FSC test to pass the Premium Contribution Standard. PRAs will not be a factor for larger employers that must pass both FSC tests (25+% enrollment rate and 33+% contribution rate).

PRAs are nothing more than limited medical reimbursement plans that only reimburse employees for the cost of individual health insurance premiums. An employer would have to reimburse at least 33% of the cost of coverage to pass the Premium Contribution Standard. Given the cafeteria plan requirement here in Massachusetts, the employer would also have to offer reimbursement of the balance of the premium cost on a pre-tax basis. If you have trouble visualizing this, a PRA would operate like a dependent care assistance program for health insurance where the employer pays at least 33% of the cost and the employee salary reduces the balance and submits his monthly premium cost for reimbursement by the employer.

Please do not hesitate to contact us with any questions regarding these final rules.

Our special thanks to Rick Szczebak for writing this alert.

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