

## Benefit Advisors Network Smart Partners

# LEGAL ALERT

### Massachusetts Releases Proposed Regulations on EMAC Supplement; HIRD Form Returns

On August 1, 2017, Massachusetts Governor Charlie Baker signed [H.3822](#), which increases the existing Employer Medical Assistance Contribution (EMAC) and imposes an additional fee (EMAC Supplement) on employers with employees covered under MassHealth (Medicaid) or who receive subsidized coverage through ConnectorCare (certain plans offered through Massachusetts' Marketplace). The increased EMAC and the EMAC Supplement are effective for 2018 and 2019 and are intended to sunset after 2019.

On November 6, 2017, the Massachusetts Department of Unemployment Assistance (DUA) released [proposed regulations](#) on the EMAC. Also on November 6, Governor Baker signed [H.4008](#), which includes a provision that requires Massachusetts employers to submit a **health insurance responsibility disclosure (HIRD) form** annually.

The increased EMAC and the EMAC supplement are intended to be offset by a reduction in the increase of unemployment insurance rates in 2018 and 2019. The unemployment insurance relief is estimated to save employers \$334 million over the next two years.

The EMAC itself is relatively new, having been created in 2014 after the repeal of Massachusetts' "fair share" employer contribution. The EMAC applies to employers with six or more employees working in Massachusetts and applies regardless of whether the employer offers health coverage to its employees. Currently, the EMAC is .34% of wages up to \$15,000, which caps out at \$51 per employee per year. For 2018 and 2019, it will increase to .51%, or \$77 per employee per year. In 2018, the EMAC and EMAC Supplement are expected to raise \$75 million and \$125 million in revenue, respectively.

#### ***Proposed Regulations on EMAC Supplement***

The EMAC Supplement applies to employers with 6 or more employees in Massachusetts. Under the EMAC Supplement, employers must pay 5% of annual wages up to the annual wage cap of \$15,000, or \$750 per affected employee per year, for each non-disabled employee who obtains health insurance coverage from MassHealth (excluding the [premium assistance](#) program) or ConnectorCare.

An employer becomes subject to the EMAC Supplement beginning with the first calendar quarter of 2018 in which the employer employs six or more employees. The number of employees in a calendar quarter is calculated by dividing the total number of employees employed during the quarter by three. For these purposes, employees are included if they worked or received wages for any part of the pay period that includes the 12th of the month.

## ***Excluded Employees***

Employees must be covered under MassHealth or ConnectorCare for a continuous period of at least fourteen days in the quarter for the EMAC Supplement to apply in that quarter. The EMAC Supplement will not apply to any employee who has MassHealth coverage as a secondary payer because such employees are enrolled in employer-sponsored insurance.

Under ConnectorCare rules, only individuals with household incomes that do not exceed 300% of the Federal Poverty Level (FPL) may qualify for ConnectorCare. Therefore, employees with income between 300% – 400% FPL may be able to obtain tax credits for subsidized coverage through the Massachusetts Health Connector; however, they will not be eligible for ConnectorCare and thus cannot trigger an EMAC Supplement. In addition, employees are [not eligible](#) for ConnectorCare if they are eligible to enroll in an employer's affordable, comprehensive health insurance plan.

## ***EMAC Supplement Payments***

Any required EMAC Supplement payment owed will be added to an employer's Unemployment Insurance (UI) liability statement (but is not taken into account for purposes of determining the employer's Massachusetts UI contribution rate). After the EMAC Supplement has been calculated, the DUA will make information available online so employers can determine if the DUA's calculation of their EMAC Supplement payment matches their records. However, EMAC Supplement payments are not considered UI contributions for purposes of receiving credit under the Federal Unemployment Insurance Contribution Act (FUTA). Nor are they reported on the Form 940 worksheet as UI contributions for Massachusetts.

Employers will see the increased EMAC and any EMAC Supplement payments on their first quarter statements in April 2018. EMAC Supplement payments are due quarterly, by the last day of the month following the end of the applicable quarter.

Successor employers involved in a change in ownership, including without limitation, changes occurring due to acquisition, consolidation, partial transfer, or whole succession, during a calendar quarter, are liable for the EMAC Supplement payment for any applicable employee during that quarter and is not allowed credit for any EMAC Supplement paid by the predecessor employer.

## ***Appeal Process***

If an employer disagrees with the DUA's determination that the employer is liable for the EMAC Supplement, it may request a hearing with the DUA if it files a request within ten days after receiving notice of the determination. After the hearing, the DUA will issue a written decision affirming, modifying, or revoking the initial determination. Further appeal to Superior Court is available.

As part of the appeal process, the DUA may provide an employer with access to information pertaining to MassHealth and ConnectorCare beneficiaries, which is required to be kept confidential by the employer.

## ***Interest and Penalties***

Interest and penalties will apply to any EMAC Supplement obligation not remitted to the DUA and will be charged in the same fashion as for delinquent UI contributions.

Additional penalties, including fines and imprisonment, could apply to any employer who:  
willfully attempts to evade or defeat any contribution, interest, or penalty payment;

- knowingly makes any false statement or misrepresentation to avoid or reduce any financial liabilities;
- knowingly fails or refuses to pay any such contribution, interest charge, or penalty; or
- attempts to coerce any employee to misrepresent his or her circumstances so that the employer may evade payment of an EMAC Supplement.

## **Unemployment Experience Rate Schedule Changes**

To offset the EMAC increase and EMAC Supplement, Massachusetts has modified the unemployment insurance schedule, effectively reducing scheduled increases to employer contributions for 2018 and 2019. The previously scheduled automatic jump from Schedule C to Schedule F will be replaced with an increase to Schedule D for 2018 and Schedule E for 2019.

Non-profit organizations that choose to self-insure their unemployment benefits will not benefit from the reduction in scheduled premium increases but remain subject to the EMAC Supplement nonetheless.

## **Employer HIRD Form**

The new HIRD requirement differs from the prior version that was repealed in 2013, under which employers collected forms from employees who waived coverage. The new HIRD form requires employers with 6 or more employees in Massachusetts to annually complete and submit a form indicating whether the employer has offered to pay or arrange for the purchase of health insurance and information about that insurance, such as the premium cost, benefits offered, cost sharing details, eligibility criteria and other information deemed necessary by the DUA. The law directs the DUA to create a form for this purpose. Employers that knowingly falsify or fail to file the form may be subject to a penalty of \$1,000 – \$5,000 for each violation. It's likely that employers will first file the form toward the end of 2018 (or perhaps after the end of the year); more guidance on the form and when/how to file will be forthcoming.

## **Next Steps**

Based on the proposed regulations, employers have several avenues for reducing exposure to an EMAC Supplement payment. In general, employees earning in excess of 138% of the FPL (\$16,642 for an individual in 2017) are not eligible for MassHealth, and those earning over 300% of the FPL (\$36,180 for an individual in 2017) are not eligible for ConnectorCare. Employees eligible for affordable, comprehensive health insurance from their employer also are not eligible for ConnectorCare, and employees who receive MassHealth premium assistance toward their employer's group health plan do not trigger an EMAC Supplement.

Now that proposed regulations have been released, employers can better assess their exposure to an EMAC Supplement and begin to budget for it or make other eligibility or contribution changes.

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