

June 10, 2007

A Massachusetts comprehensive healthcare reform program that becomes effective on July 1, 2007 may require action by businesses with employees in the state. The Massachusetts program requires employers with 11 or more employees to take certain actions to confirm that they either provide healthcare coverage, or to allow employees to purchase healthcare coverage under the Massachusetts Health Insurance Connector Program (the "Connector Plan") on a pre-tax basis under a Section 125 Plan as well as comply with "fair share" mandates that the employer either pay a specified portion of the cost of employees health coverage or make fair share payments to the Commonwealth. An example of a letter explaining the program to businesses with operations in Massachusetts and some of the basic principles is available for review under the Law link at [CynthiaStamer.com](http://CynthiaStamer.com)). An update on the comprehensive healthcare reform proposal will be among the topics discussed at the "Health Plan Update In Texas" to be held July 19, 2007 in Dallas.<sup>i</sup>

The comprehensive reform program law generally dictates that all employers of more than 10 employees doing business in Massachusetts adopt and maintain a premium conversion cafeteria plan under Internal Revenue Code section 125 that allows employees to pay their share of health care premiums for coverage in the employer-sponsored plan or coverage obtained through the new Connector Plan with pre-tax dollars pursuant to the cafeteria plan. While many question the enforceability of the comprehensive reform program law in light of the preemptive provisions of Section 514 of the Employee Retirement Income Security Act of 1974, as amended (ERISA),<sup>ii</sup> to date no court has ruled on the question. Pending such a ruling, most employers with workers in the Commonwealth will want to take steps to comply with the new requirements.

Covered employers with employees in Massachusetts, whether based inside or outside the Commonwealth of Massachusetts, generally will need to take the following steps to comply with the new mandates:

- Amend (or adopt) cafeteria plans that allow for the payment of Connector premiums with pre-tax dollars (for individuals who waive or are not eligible for employer coverage);
- File an Employer Health Insurance Responsibility Disclosure ("Employer HIRD") Form their cafeteria plan with the Connector;<sup>iii</sup>
- Demonstrate the employer satisfies the "fair share contribution" mandates of the law by either covering at least 25% of its employees employed in Massachusetts locations who work at least 35 hours per week; or paying at least 33% of the premium cost for all of its Massachusetts employees who are regularly scheduled to work at least 35 hours per week. Employers who do not meet one of these requirements must pay an annual amount for each of their full-time employee up to \$295. The initial reporting obligation for the fair share determination rule is the period ending September 30, 2007;
- Providing a Certificate of Creditable Coverage, similar to a HIPAA Certificate;
- Collecting Employee Health Insurance Responsibility Disclosure ("Employee HIRD") Forms from individuals who decline employer-sponsored health coverage or participation in the employer's Section 125 Plan. Employers must retain the Employee HIRD Forms for a period of 3 years.
- Monitoring the Massachusetts health plan design requirements for compliance (although ERISA preemption issues exist).

Our firm is continuing to monitor the Massachusetts statute to determine its impact on employers. If you have any further questions regarding the statute, or if we may be of assistance with regard to any other employee benefit or employment matters, please do not hesitate to contact Cynthia Marcotte Stamer, P.C., Member, Glast, Phillips & Murray, P.C., 2200 One Galleria Tower, 13355 Noel Road, LB 48, Dallas, Texas 75240. Telephone (972) 419-7188. E-mail [cstamer@gpm-law.com](mailto:cstamer@gpm-law.com).

We hope that this information is useful to you. If you or someone else you know would like to receive future Alerts or other information about developments, publications or programs, please be sure that we have your current contact information – including your preferred e-mail – by providing that information to us through registration on our website at [Cynthiastamer.com](http://Cynthiastamer.com) or via telephone, fax or e-mail.

For other helpful resources and information about corporate compliance and human resources matters, go to [CynthiaStamer.com](http://CynthiaStamer.com) or contact Ms. Stamer.

**ABOUT CYNTHIA STAMER**

Board Certified In Labor and Employment Law by the Texas Board of Legal Specialization, attorney Cynthia Marcotte has nearly 20 years experience helping employers and business leaders design, implement, administer and defend human resources and other internal controls, outsourcing and other external services arrangements, employee benefit and compensation, and other human resources management and legal risk management practices. Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group and the ABA Real Property, Probate & Trust Section Welfare Plan Committee, she is widely recognized for her experience and knowledge on health and other employee benefit, insurance and human resources matters. Her practice focuses on working with businesses to manage their people and processes to help the business prevent and solve problems and designing employee benefit and other compensation programs, practices and products; and manage risks and costs.

Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal consultant, author and speaker, who regularly conducts management and other training on a wide range of employee benefit, human resources and internal controls, and other related risk management matters. She also serves in leadership positions in numerous human resources, corporate compliance, and other professional and civic organizations. For instance, in addition her many leadership roles in the American Bar Association, Ms. Stamer also serves the editorial advisory board of The Bureau of National Affairs, Inc. (BNA), Employee Benefits Library on CD

and various other editorial advisory boards, is a past Chair of the Dallas Bar Association's Executive Compensation and Employee Benefit Committee, is a former Board Member and Continuing Education Chair of the Southwest Benefits Association, a former member of the Society For Human Resources Management's Consultants Forum and Region IV Boards, on the Board of Directors of the National Kidney Foundation of North Texas, and in leadership roles in various other professional, charitable and civil organizations.

Ms Stamer is the author of 100s of publications on a host of human resources and related issues. Her writings have appeared in a variety of other publications, including works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, and Government Institutes, Inc. and others. For a listing of some of these publications, see [cynthiastamer.com](http://cynthiastamer.com). Her insights on human resources risk management matters also have been quoted in The Wall Street Journal, various publications of The Bureau of National Affairs and Aspen Publishing, the Dallas Morning News, Spencer Publications, Health Leaders, Business Insurance, the Dallas and Houston Business Journals and a host of other publications.

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<sup>i</sup> See [CynthiaStamer.com](http://CynthiaStamer.com) for registration information and other details.

<sup>ii</sup> State health care reform laws recently enacted by other states have been ruled preempted. See, e.g., *Retail Industry Leaders Association v. James D. Fielder, Jr., Maryland Secretary of Labor, Licensing, and Regulation, No. 06-316* (D. Md. July 19, 2006), *aff'd*, 2007 U.S. App. LEXIS 920 (4th cir. 2007) (holding that the pay-or-play mandate adopted by the State of Maryland was preempted by ERISA). Advocates of the Massachusetts comprehensive reform program argue that it is distinguishable from laws found to be preempted in that it only mandates that employers maintain a cafeteria plan allowing for the payment of pre-tax contributions, but does not dictate that the employer actually maintain a health plan or provide any particular health benefits.

<sup>iii</sup> Note that presently, Massachusetts has not issued guidance about how to file the required Employer HIRD Form with the Division of Health Care Financing and Policy. The HIRD Form has not been finalized. However, it is expected that employers will be required to disclose information such as the number of full-time employees, the number of part-time employees, whether the employer offers subsidized health coverage to full-time or part-time employees, and whether the employer maintains a Section 125 Plan. It is also expected that employers will be required to file the Employer HIRD form by November 15 of each year, based on information as of September 30 of that year, with penalties for a failure to file ranging from \$1,000 to \$5,000. If this comes to pass, most employers will want to coordinate this process with required distributions of required notifications mandated by the Medicare Part D creditable coverage rules.