

114.5 CMR: DIVISION OF HEALTH CARE FINANCE AND POLICY

114.5 CMR 17.00 EMPLOYER SURCHARGE FOR STATE-FUNDED HEALTH COSTS

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17.01 General Provisions

(1) Scope and Purpose. 114.5 CMR 17.00 governs the surcharge assessed on Employers that do not comply with the requirements of M.G.L. c. 151F to adopt and maintain a Section 125 Cafeteria Plan for payroll deductions for health insurance premiums in accordance with Commonwealth Health Insurance Connector regulations at 956 CMR 4.00. The surcharge is assessed for State Funded Health Costs incurred for its Employees or Employee Dependents not offered participation in the Employer's Section 125 Cafeteria Plan.

(2) Authority: 114.5 CMR 17.00 is adopted pursuant to M.G.L. c. 118G, § 18B.

(3) Effective Date. 114.5 CMR 17.00 is effective on July 1, 2007.

17.02 Definitions

Meaning of Terms: As used in 114.5 CMR 17.00, unless the context otherwise requires, terms have the following meanings:

Client Company. A person, association, partnership, corporation or other entity that uses workers provided by an Employee Leasing Company pursuant to a contract.

Commonwealth Care Trust Fund. The trust fund established under M.G.L. c. 29, § 2000.

Connector. The Commonwealth Health Insurance Connector established under M.G.L. c. 176Q.

Dependent. A spouse and any individual that meets the criteria defined in Title 26, Subtitle A, Chapter 1, Subchapter B, Part V, Section 152 of the Internal Revenue Code.

Division. The Division of Health Care Finance and Policy established under M.G.L. c. 118G or its designated agent.

Employee. An individual employed by any Employer at a Massachusetts location, whether or not the individual is a Massachusetts resident, for at least one month.

Employee Leasing Company. A sole proprietorship, partnership, corporation or other form of business entity whose business consists largely of leasing Employees to one or more Client Companies under contractual arrangements that retain for such Employee leasing companies a substantial portion of personnel management functions, such as payroll, direction and control of workers, and the right to hire and fire workers provided by the Employee Leasing Company;

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provided, however, that the leasing arrangement is long term and not an arrangement to provide the Client Company temporary help services during seasonal or unusual conditions.

Employer. An Employer with more than eleven full time equivalent Employees that is required by M.G.L. c. 151F to adopt and maintain a Section 125 Cafeteria Plan in accordance with the provisions of 956 CMR 4.06.

Fiscal Year. The period from October 1 through September 30, the fiscal year for the Uncompensated Care Trust Fund and Health Safety Net Trust Fund..

Free Care. Services eligible for payment from the Uncompensated Care Trust Fund under 114.6 CMR 11.00 and 114.6 CMR 12.00 and from its successor, the Health Safety Net Trust Fund.

Health Insurance Responsibility Disclosure (HIRD). The form that Employers and Employees are required to submit about health insurance status under M.G.L. c. 118G, § 6C and 114.5 CMR 18.00.

Health Safety Net Trust Fund. The trust fund established pursuant to M.G.L. c. 118E, 57.

Insurance Partnership Program. The premium assistance program established under M.G.L. c. 118E, § 9C.

Section 125 Plan. A cafeteria plan that meets the criteria defined in Title 26, Subtitle A, Chapter 1, Subchapter B, Part III, Section 125 of the Internal Revenue Code.

State-Funded Health Services. Services that are paid from the Uncompensated Care Trust Fund or the Health Safety Net Trust Fund as further defined in 114.5 CMR 17.03(4).

Uncompensated Care Trust Fund. The fund established pursuant to M.G.L. c. 118G, § 18.

17.03 Employers Subject to Surcharge.

- (1) General. An Employer is subject to surcharge if
 - (a) it is a Non-Providing Employer determined in accordance with 114.5 CMR 17.03(2); and
 - (b) any of its Employees are State-Funded Employees determined in accordance with 114.5 CMR 17.03(3); and
 - (c) its State-Funded Employees receive State-Funded Health Services that total at least \$50,000 in a fiscal year as determined in accordance with 114.5 CMR 17.03(4).
- (2) Non-Providing Employer. A Non-Providing Employer is an Employer of a State-Funded Employee as defined in 114.5 CMR 17.03 (3) that employs eleven or more full time equivalent Employees and is not in compliance with the requirement to adopt and maintain a Section 125 Cafeteria Plan for such State-Funded Employee.
 - (a) Number of Employees. An Employer has eleven or more full time equivalent Employees if the sum of total payroll hours for all Employees for the Fiscal Year divided by 2,000 is greater than or equal to 11. In calculating total payroll hours:

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1. For each Employee with more than 2,000 payroll hours for the Employer, the Employer shall include 2,000 payroll hours.
2. Payroll hours include all hours for which an Employer paid wages to an Employee including, but not limited to, regular, vacation, sick, Federal Medical Leave of Absence, short term disability, long term disability, overtime and holiday payroll hours.
3. An Employer that is determined to be a successor under M.G.L. c. 151A shall include the payroll hours of the predecessor's Employees during the applicable Fiscal Year.

(b) Certain Permitted Section 125 Cafeteria Plan Exclusions. An Employer is not a Non-Providing Employer with respect to a State-Funded Employee to the extent the Employee is excluded from eligibility to participate in the Employer's Section 125 Cafeteria Plan in accordance with 956 CMR 4.00.

(c) Exemptions. An Employer is not a Non-Providing Employer if it is a signatory to or obligated under a negotiated, bona fide collective bargaining agreement that governs the employment conditions of the State-Funded Employee; or participates in the Insurance Partnership Program.

(d) Employee Leasing Company Arrangements. If and to the extent there is an arrangement between Client Company and an Employee Leasing Company, the Client Company is the Employer for purposes of M.G.L. c. 118G and the determination of the Employer Surcharge under 114.5 CMR 17.00 with respect to itself and its Employees covered by the arrangement.

(3) State-Funded Employee. A State-Funded Employee is

(a) an Employee or Dependent of such Employee with more than three State-Funded admissions or visits during a Fiscal Year, or

(b) an Employee or Dependent of an Employee of an Employer whose Employees or Dependents make five or more State-Funded admissions or visits during a Fiscal Year.

(4) Determination of State-Funded Health Costs. The Division will determine the State-Funded Health Costs for a State-Funded Employee as follows:

(a) The Division will review all claims for State-Funded Health Services submitted for payment by hospitals and community health centers during a Fiscal Year.

(b) The Division will match claims to Employers, using all available data sources, including, but not limited to, the Employee's application form, the provider claim or Emergency Room Bad Debt Form, the HIRD form, Office of Medicaid data, and data from the Department of Revenue and Division of Unemployment Assistance

(c) For each Fiscal Year, the Division will determine State-Funded Health Costs by multiplying each provider's claims for State-Funded Health Services by its percentage of total Uncompensated Care Pool or Safety Net Care payments divided by its total charges for all State-Funded Health Services.

(d) The Division will determine the Employers of State-Funded Employee(s) as set forth in 114.5 CMR 17.03(3) and with \$50,000 or more in aggregate State-Funded Health Services.

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(e) The Division will determine if an Employer identified in paragraph 4 above is a Non-Providing Employer. The Division will make this determination using data from the HIRD form, the Connector, and data matches undertaken pursuant to an Interagency Service Agreement to the extent permitted by law with the Department of Revenue and the Division of Unemployment Assistance.

(f) FY2007. For FY2007, the Division will determine State-Funded Health Costs only for the period from July 1, 2007 through September 30, 2007.

(5) Monitoring: The Division may use data submitted by hospitals and community health centers to monitor uncompensated care usage during the fiscal year and may inform Employers if it determines that its State-Funded Employees have incurred State-Funded Health Costs in a fiscal year.

17.04 Determination of Surcharge Amount

(1) General. The Division will determine the Surcharge amount by taking into account

- (a) the number of Employees of the Employer;
- (b) the number of admissions and visits for each State-Funded Employee;
- (c) the total State-Funded Health Services attributed to the Employer's State Funded Employees as determined under 114.5 CMR 17.03(4); and
- (d) the percentage of Employees for whom the Employer provides health insurance.

(2) Employer Category.

(a) The Division will assign each Employer subject to surcharge to one of three categories as follows:

Category 1	11-25 Employees
Category 2	26-50 Employees
Category 3	>50 Employees

(b) The Division will determine the number of full time equivalent Employees using the best available data including data from the Department of Revenue and the Division of Unemployment Assistance.

(3) Assessment Percentage. The Division will determine the percentage of State-Funded Health Costs to be assessed in accordance with the Table in 114.5 CMR 17.04(4). The percentages in the Table are based on the number of Employees and the amount of State-Fund Health Costs incurred.

(4) Surcharge Determination. The Division will apply the surcharge in the chart below to an Employer's State-Funded Health Costs when (1) one State Funded Employee or his or her Dependents has 4 or more admissions or visits during the year, or (2) its State Funded Employees and/or their Dependents have 5 or more visits during the year.

The product of the State Funded Health Costs and the applicable percentage will be reduced by the Employer's percentage of Enrolled Employees as determined under 114.5 CMR 16.03 (a). However, in no case shall the reduction be greater than 75%.

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State Funded Costs	11-25 Employees	26-50 Employees	>50 Employees
\$50,000-\$75,000	20%	50%	80%
\$75,001-\$150,000	30%	60%	90%
Over \$150,000	40%	70%	100%

17.05 Collection of Surcharge

(1) Notification of Surcharge Liability. The Division will notify Employers subject to Surcharge at the end of each Fiscal Year. The Notice will contain the following information.

- (a) Employer name, FEIN, address
- (b) Name of State-Funded Employee. If Employee dependent, name of Employee
- (c) Name of provider that submitted claim
- (d) Dates of service
- (e) Provider charges
- (f) Amount of State-Funded Health Costs per State-Funded Employee
- (g) Total Amount of State-Funded Health Costs
- (h) Surcharge Amount determined in accordance with 114.5 CMR 17.04
- (i) Date payment is due
- (j) Remittance advice with directions to submit payment

(2) If a State-Funded Employee is employed by more than one Non-Providing Employer at the time State-Funded Health Services are delivered, the Division will assess a prorated Surcharge to each Employer based on the best available data. If an individual is a Dependent of two State-Funded Employees, the Division will assess a prorated Surcharge to each Employer.

(3) Review. An Employer may challenge the Division's determination only if it can document either that an individual identified as a State-Funded Employee was not its Employee or Dependent of one of its Employees; or that the Employer is not a Non-Providing Employer.

- (a) The Employer must notify the Division in writing within 14 days of the notice that it contests the Division's determination. The Employer must submit documentation to support its claim with its notification.
- (b) The Division will review the documentation and make a determination based on its review of the documentation submitted and any other available data. The Division will issue a written decision explaining its determination and any adjustment to the Employer Surcharge amount.
- (c) If the Division determines upon review that the Employer is not a Non-Providing Employer or is not otherwise responsible for the State-Funded Health Costs, no surcharge will be assessed.
- (d) If the Division does not adjust the Surcharge amount upon review, payment is due within seven days of the notification of the Division's decision. If the Division adjusts the Surcharge amount upon review, payment is due within fourteen days of the Division's decision.

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(4) Penalties for nonpayment or late payment by the non-providing Employer, including assessment of interest on the unpaid liability at a rate not to exceed an annual percentage rate of 18 per cent and late fees or penalties at a rate not to exceed 5 per cent per month.

(5) In the case of a transfer of ownership, a Non-Providing Employer's surcharge liability shall be assumed by the successor in interest to the Non-Providing Employer.

(f) All surcharge payments made under this Section shall be deposited into the Commonwealth Care Trust Fund, established by section 2000 of chapter 29.

17.06 Other Provisions

(1) No Employer shall discriminate against any Employee on the basis of the Employee's receipt of free care, the Employee's reporting or disclosure of his Employer's identity and other information about the Employer, the Employee's completion of a Health Insurance Responsibility Disclosure form, or any facts or circumstances relating to "free rider" surcharges assessed against the Employer in relation to the Employee. Violation of this subsection shall constitute a per se violation of chapter 93A.

(2) Reporting Requirements. Each Employer shall file or make available information which is required or which the Division deems reasonably necessary for calculating and collecting the Employer Surcharge.

(3) Notice Requirements. An acute hospital or community health center will include a notice in all written Collection Actions that the Division may provide information about state funded services to Employers and that Employers may be liable for services Employees receive.

(4) Penalties. If an Employer fails to file any data, statistics or schedules or other information required under this chapter or by any regulation promulgated by the division, the division shall provide written notice of the required information. If the Employer fails to provide information within 2 weeks of receipt of said notice, or if it falsifies the same, it shall be subject to a civil penalty of not more than \$5,000 for each week on which such violation occurs or continues, which penalty may be assessed in an action brought on behalf of the commonwealth in any court of competent jurisdiction.

(5) Administrative Information Bulletins. The Division may issue administrative information bulletins to clarify policies, update administrative requirements and specify information and documentation necessary to implement 114.5 CMR 17.00.

(6) Severability. The provisions of 114.5 CMR 17.00 are severable. If any provision or the application of any provision is held to be invalid or unconstitutional, such invalidity shall not be construed to affect the validity or constitutionality of any remaining provisions of 114.5 CMR 17.00 or the application of such provisions.

REGULATORY AUTHORITY

114.5 CMR 17.00 M.G.L. c. 118G.