



THE NEW MASSACHUSETTS HEALTHCARE LAW

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HIRD FORM PROCEDURES

Emergency Regulations were issued on June 20, 2007 by the Division of Healthcare, Finance and Administration (not the Connector). They explain how and when to get signed Health Insurance Responsibility Disclosure ("HIRD") Forms from employees who waive coverage in a Section 125 or group health plan. A model form has also been issued, in [PDF](#) and [WORD](#) formats.

I have requested clarification on a number of ambiguities, and will report to clients when I have answers. For purposes of this memo, I assume that employers are covered, meaning they have paid for at least 22,000 hours in a 12 month period from October 1 through September 30, with no more than 2,000 hours having to be credited to any individual. I also assume that they adopted a Section 125 plan, as required by the Connector (look [here](#) for the 125 regulations, and other MA health care guidance), to help part-time employees who want to purchase policies through the Connector on a pre-tax basis.

OBSERVATION: For employers who are on the cusp of the 22,000 hour HIRD Form requirement, one of the ambiguities in the "emergency" regulations is which 12 month period applies as of July 1, 2007. Is it the period ending September 30, 2007, or September 30, 2006? Unlike the Connector regulations for Section 125 plan requirements, there is no special 12 month measurement period ending March 31, 2007 to determine initial coverage on July 1, 2007. I have suggested to the Division that they be consistent with the Connector.

What happens under the "emergency" regulations? Employers who provide health insurance, now have three more chores in addition to sponsoring 125 plans for part-time employees: (1) get signatures on an HIRD Form from Massachusetts employees who waive group health coverage or the use of a Section 125 Plan to buy health insurance; (2) maintain the HIRD Forms for a required period, and provide copies to the Commonwealth, if requested; and (3) file an annual Employer form with the Division of Unemployment Assistance to describe the type of employer health insurance (including cafeteria plan) which they offer to Massachusetts employees.

Chores (1) and (2) were covered under the June 20 regulations. Chore (3), which will require employer information as of July 1, 2007, and subsequent anniversaries of that date, will be addressed in later government guidance.

1. THE THREE CHORES

A. CHORE 1: GETTING SIGNATURES FROM EMPLOYEES

When you rent a car and decline insurance, you initial a form that says you know what you're waiving. Think of this first chore in the same way. The HIRD Form is meant for those employees who had a chance to get coverage through the workplace, and passed up the opportunity. It advises employees (in strangely small print on the model form) that if they do not have insurance they might have to pay their own medical bills and might have to pay penalties.

- ▶ Employees who have coverage through you DO NOT sign the HIRD Form.
- ▶ Employees who are not eligible either for your health insurance or for your special Massachusetts Section 125 Plan for Connector policies DO NOT sign the HIRD Form.

WHO SHOULD SIGN?

- ▶ A covered employee under your group insurance or your Massachusetts Section 125 Plan who elects to drop coverage after June 30, 2007 must sign.
- ▶ A New Hire who turns down your group insurance or your Massachusetts Section 125 Plan for purchase of Connector policies after June 30, 2007 must sign.
- ▶ Eligible employees for your group insurance who do not enroll during an open enrollment period, and eligible employees for your Massachusetts Section 125 Plan who do not enroll during an open enrollment period, must sign.

WHEN SHOULD THEY SIGN?

- ▶ A covered employee who drops coverage after June 30, 2007 must sign the HIRD Form within 30 days.
- ▶ A new employee who rejects coverage after June 30, 2007 must sign the HIRD Form no later than 30 days after the end of the "applicable open enrollment period."

RECOMMENDATION. Waiting this long to get the HIRD Form signed will confuse everyone. If a new employee rejects coverage, obtain the HIRD signature at the time that coverage is rejected.

- ▶ An eligible employee who rejects coverage in an open enrollment period must sign an HIRD Form within 30 days following the end of the open enrollment period. This applies even if the employee has coverage through another source, such as a spouse's employer. And it is an annual event for those who reject coverage annually.

OBSERVATION. Because most 2007 open enrollment periods have already closed, the special deadline for 2007 is generally September 30, 2007. However, if you have an open enrollment period that ended after June 30, 2007 and prior to August 31, 2007, signatures are due 30 days following the end of that enrollment period. And, if your open enrollment period ended before

June 30, 2007, and if you obtained valid waivers at the time, and if you maintain those waivers until July 1, 2009, your first deadline for this requirement is 30 days following the end of the enrollment period for the 2008 year.

OBSERVATION. A requirement to get HIRD Forms from people who waived in an open enrollment period that ended prior to June 30, 2007, whether they signed a waiver or not, does not make much sense. I have requested the Division to confirm that this is really what it requires, and will report when I have an answer.

B. CHORE 2: MAINTAIN THE HIRD FORMS FOR A REQUIRED PERIOD

THE BASIC REQUIREMENT

- ▶ You must maintain HIRD Forms for three years.
- ▶ You must produce them on demand of the DOR or the Division of Healthcare Finance and Policy.
- ▶ If an employee refuses to sign a form, you must keep documentation of your “diligent efforts” to get the form signed.
- ▶ You also must provide a copy of the signed form to the employee. The form advises the employee (in very small print) that he or she also has a duty to keep a copy, and that it contains information needed for the Employee’s Massachusetts tax return.

GETTING FANCY WITH THE FORMS

The regulations permit employers to recreate their own version of the HIRD Form, provided that all information is included, with exactly the same wording, order, sequence, and numbering of Questions on the model form.

RECOMMENDATION. At this stage, do not stray too far from the WORD version of the model form which was released with the Regulations. And don’t run up too big a printing bill, because the government could change the requirements for the form.

Is it necessary to keep the actual paper? What about PDF storage in lieu of keeping the hard copies? What about an online questionnaire in lieu of a signed form?

- ▶ Just keeping a PDF copy and discarding the signed form is not advisable at this stage.
- ▶ An online questionnaire will work, provided that it is printed out before signature. A printout is required so that the employee can have a copy.
- ▶ The Regulation seems to encourage electronic alternatives, but gives little guidance. At this stage, I strongly recommend that you plan to maintain signed forms, and just use electronic means as a supplementary recordkeeping tool.

C. CHORE 3: PROVIDING INFORMATION ABOUT YOUR HEALTH INSURANCE

Stay tuned for more governmental guidance. The Connector’s website estimates a required filing date of November 15, 2007. You will have to file information with the Division of Unemployment Assistance. DUA will share with the Department of

Revenue, and the Division of Healthcare Finance and Administration. (Are you starting to feel outnumbered?)

The Regulation lists 10 information items which the Commonwealth will want on this DUA filing. The effective date of the questions will be July 1, 2007. The Form will ask whether you had a Section 125 plan. It will ask about the open enrollment period for your group health plan, and the employee cost of your least expensive and most expensive health insurance options (for single and family coverage).

The Form will apparently not seek consolidated information about your experience in collecting HIRD Forms from employees (i.e. how many signed, etc.). Nor does it seek information about your employee census and coverage statistics. That may be due to a sensitivity about overlapping with ERISA, which is supposed to be the exclusive regulator of health plan reporting requirements. However, do not be surprised if more onerous questions surface than those in the current Regulation.

2. ANSWERING THE QUESTIONS ON THE EMPLOYEE HIRD FORM

The five questions must be answered by the employee, not the employer. Two of the three questions have two parts each. So there are really five questions. Read them carefully. They are deceptively tricky.

Do not be tempted to have the forms printed with the “right” answers. The waivers must be knowing and voluntary, which means you will have to devote time to explaining the questions. Considering the Commonwealth’s goal that employees maintain health insurance, that’s a good idea. The answers should be in the employee’s handwriting. Generally, this is how the questions should be answered.

The first questions, 1 and 1a, ask – Were you offered subsidized health insurance, and did you decline?

- ▶ Remember that the Form is only signed by those who waive.
- ▶ If they were eligible for your group and waived, Answer "YES" in 1 and "YES" in 1A.
- ▶ If they were eligible only for your Massachusetts Section 125 Plan and waived coverage, Answer "NO" on 1 and leave 1A blank. Employees not eligible for either plan do not sign the HIRD Form, because they are not waiving participation.

Question 2 will require more explanation to the employee – Were you offered a Section 125 plan to pay for health insurance?

- ▶ The answer should be “YES” for everyone who completes the Form. Why? The only people who could answer “NO” are those who do not qualify for your regular or Massachusetts Section 125 Plans. And that ineligible population does not fill out HIRD Forms because HIRD Forms are only for those who waive participation.

2a asks the employee – If you were offered a Section 125 plan, did you decline to use it to pay for health insurance?

- ▶ Employees who are waiving coverage under either your group insurance or your Massachusetts Section 125 plan will answer “YES.”

- It is illogical for an employee who has waived coverage (the only ones who should sign the HIRD Form) to answer "NO" to question 2a.

The fifth question (actually No. 3 on the HIRD Form) is easy - Do you have other health insurance?

- You might explain to the employees that the answer depends on whether the insurance they have would exempt them from Massachusetts penalties. Some types of insurance will not qualify to exempt the person from Massachusetts penalties.
- However, do not try to be the employee's expert. Encourage them to visit the Connector's website.

The HIRD Form also asks for the employee cost of the least expensive group health option available to the Employee. Use the single (not family) coverage cost as of July 1 of the reporting year (i.e. July 1, 2007 coverage cost for 2007 HIRD Forms).

OBSERVATION. It's a good idea to put a legend on the form that Employees who do not speak English should consult with a bilingual person at the worksite, who should be trained by you to help with this function. You might even consider having the HIRD Form translated into the languages most used by your non-English speaking groups, but none of this is a requirement under the current Regulation.

3. SPECIAL ISSUES

A. COBRA

- ISSUE:** What if the employee terminates employment and does not elect COBRA? If the decision to drop coverage is made after termination of employment, there should be no employer requirement to obtain an HIRD Form. However, if the decision is made while employed (i.e. due to a cutback in hours) there may be a HIRD requirement because coverage has been waived. The regulations are unclear. If active part-time employees are permitted to pay COBRA premiums through a Section 125 plan, a HIRD Form is advisable.
- ISSUE:** What if a former employee elects COBRA and discontinues it? Because this decision to drop coverage is made after termination of employment, there should be no employer requirement to obtain an HIRD Form.

B. LOSS OF COVERAGE

- ISSUE:** What if the employee loses coverage because of a cutback in hours or other reason (i.e. change in job class to an ineligible class)? If the employee has no available coverage through the workplace (including barebones Massachusetts Section 125 plan availability), there should be no employer requirement to obtain an HIRD. The HIRD is meant for situations when an employee declines available coverage.

C. CHANGE IN COVERAGE

- ISSUE:** What if an employee's coverage changes from your Massachusetts Section 125 Plan to your group plan (or vice versa)? This could happen with a change in hours. This

D. NON-RESIDENTS

- ▶ ISSUE: Should non-residents sign the HIRD Forms? YES, if they work at a Massachusetts location, they must sign.
- ▶ ISSUE: Should MA residents at non-Massachusetts locations sign? They are technically not covered by the Regulation. But this is a worrisome situation for companies with Massachusetts headquarters. How do you definitively establish that the employee does not interface with Massachusetts? Be on the safe side and have Massachusetts residents sign the forms if there is even a remote connection between their job and a Massachusetts location.

E. INDIVIDUAL CONTRACTORS

Be very careful not to exclude persons who are “common law” independent contractors but who do not meet the strict Massachusetts definition under M.G.L. c. 151A, § 2. A person is an employee (meaning you have HIRD Form and MA Section 125 responsibility) unless the individual (a) has been and will continue to be free from control and direction in connection with the performance of services for you, both under his contract and in fact; (b) such service is performed either outside the usual course of your business or is performed outside of all of your places of business; and (c) the contractor is customarily engaged in an independent business of the same nature with businesses unrelated to you.

4. CONCLUSION

The Massachusetts Healthcare law is a work in progress. I look forward to your comments and questions, and will keep you updated with relevant information I receive from the regulators and other colleagues.

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