



APPEALING DUA EMAC SUPPLEMENT DETERMINATIONS – WHAT YOUR CLIENTS NEED TO KNOW

So now the EMAC attack has been let out of the bag and has arrived at employers of six or more near you; likely some are your clients. I just received a call for EMAC Supplement assistance from a CFO just returning from a very nice vacation only to find the EMAC assessment on his desk waiting for him. Welcome back.

First quarter EMAC Supplement assessments are due Monday, April 30, 2018. Twelve percent interest begins to accrue thereafter until fully paid.

In case you need a reminder, the EMAC Supplement is a targeted assessment that is 5% of the first \$15,000 in wages paid to an employee receiving MassHealth or subsidized ConnectorCare coverage during the quarter (capped at \$750 per affected employee annually). This assessment is paid by the employer.

Plainly stated, the EMAC Supplement is a tax/revenue grab by the state based on wages paid and NOT hours worked.

SHOULD A HEARING / APPEAL BE REQUESTED?

- When in doubt, request a hearing within the 10-day timeframe to preserve the right to appeal – the request can be withdrawn later if necessary
- DUA has confirmed that just 1 appeal per FEIN will cover all employees
- Employers can send EMAC Supplement questions to EMACQuestions@MassMail.State.MA.US
- Employers can call DUA for additional information – at this number: 617-626-5975

WHAT CAN BE APPEALED?

DUA instructions state that any hearing “will be limited to the issues cognizable under the EMAC Supplement statute raised in the request.” Clear as mud, right?

The appeal request form indicates “Please circle the reasons for the appeal. If the reason is Other, please explain:” Here are the choices:

- Employer has less than 6 employees
- Employee(s) are independent contractors
- Reported employee wages are not for UI purposes
- Employees have not been on qualifying health care for a continuous period of 56 days
- Other: _____

This is quite limited. What about appeals based on employees not earning more than \$500 in the quarter? Or employees on the MassHealth Premium Assistance Program that somehow found their way onto the list? Or employees enrolled in both MassHealth and the employer plan at the same time (making MassHealth secondary)? Appeals based on these factors are much more likely. It seems employer will use the “Other” explanation line quite a bit.

Finally, employees offered ACA compliant coverage from their employer, or enrolled in any employer sponsored coverage whether ACA compliant or not, are not eligible for subsidized ConnectorCare coverage. In other words, if an employee is offered ACA compliant coverage from his employer, then that employee is not eligible for a tax credit subsidy and, therefore, the employer should not incur an EMAC Supplement liability for the employee in the quarter.

At this juncture it is uncertain if the Massachusetts DUA will entertain employer arguments that certain employees were not eligible for the ConnectorCare tax credit in the first place and, as a result, the employer should not be assessed. While this seems like a logical argument it is doubtful the DUA has contemplated reducing a penalty based on a coverage decision made by another state agency.

WHAT SHOULD EMPLOYERS LOOK FOR ON THEIR EMPLOYEE LIST?

Employers have no way presently to determine if a listed employee is enrolled in MassHealth or in subsidized ConnectorCare. That information is not available from the DUA; thus, making it nearly impossible to appeal penalty assessments on employees with ConnectorCare coverage plus available ACA compliant employer sponsored health coverage.

However, employers can check their employee list against information available to them such as payroll and their benefits system to:

- Confirm each employee listed was, in fact, employed in the first quarter of 2018
- Confirm each listed employee earned at least \$500 during the quarter
- Verify the listed wages for each employee
- Determine if any of the listed employees were actually enrolled in employer sponsored health care coverage during the quarter

HEARING THE APPEAL

Here are some basic/helpful facts about appeal hearings:

- Employers should begin preparing for the hearing right away once requested
 - Gather all supporting documentation that will prove the facts of the case
 - Don't forget to bring a copy of the documentation for the Review Examiner
- The DUA will provide a Notice of Hearing with the date, time and location of the hearing
 - The employer will be listed as the "appellant"
 - The DUA Review Examiner will conduct the hearing. S/he decides what documents and information may be admitted to the record and also controls the order of testimony – informing each party when it is their turn to speak
- Be on time. If the employer, any witnesses or the employer's representative are more than 10 minutes late the hearing may be cancelled, and the appeal dismissed
- Telephone hearings are available if the employer must travel more than 75 miles or more than 1.5 hours to the hearing
- No children are allowed in the hearing room, or in the waiting area if unattended
- Interpreters are available from DUA at no cost
- Requests to postpone the hearing:

- will be approved if requested by the deadline date listed on the Notice of Hearing
- after the deadline date listed on the Notice of Hearing will be approved for emergency situations only
- Withdrawals of the hearing request:
 - may be made in writing at any time before the hearing
 - requires approval of the Review Examiner if requested after the hearing has begun
- A written decision by the Review Examiner will be issued within 2 to 4 weeks after the hearing has taken place

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The EMAC Supplement became effective on January 1, 2018, but the actual assessments under this new program are just a week or so old. EMAC supplement administration is a large undertaking for the state / DUA and mistakes are inevitable. Available guidance sometimes leave practical questions unanswered. Accordingly, employers are frustrated and yet others are darn angry at the whole process; not to mention at the concept of raising \$400 million from employers over two years to plug the financial hole in the MassHealth program.

Stay tuned.

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