



DUA RELEASES PROPOSED HARDSHIP WAIVER REGULATION FOR EMAC SUPPLEMENT RELIEF

On September 13, 2018 the DUA published a proposed regulation (430 CMR 21.11) intended to establish procedures and to interpret the standards for granting hardship waivers to employers liable for the EMAC Supplement. The EMAC law was amended in July 2018, as part of the FY 2019 Budget, permitting the DUA to develop a waiver for employers experiencing a financial hardship because of the EMAC Supplement.

You may have clients that are interested in the hardship waiver process; most likely with seasonal businesses or in certain industries, such as the staffing industry for example. In order to apply for a hardship waiver, the employer must first be liable for the EMAC Supplement.

- The good news is there's now hardship waiver procedures to work with; even if in proposed form
- Perhaps more good news is that DUA may give special consideration to the following classes of employers:
 - employers with variable or limited revenue
 - employers with fewer than 50 employees
 - employers whose employees are mostly seasonal or temporary
 - employers that serve the public interest by providing human services or long-term care services and that receive a significant share of revenues from governmental programs
- The not so good news is that DUA exercises a great deal of discretion over the process and waiver decisions -- DUA's decision to deny a hardship waiver request is final and may not be appealed by the employer

HARDSHIP WAIVER

The hardship waiver is a discretionary waiver of liability of an employer's EMAC Supplement for the quarter for which a waiver application is granted. Any employer liable for the EMAC Supplement may submit an application for a hardship waiver. Given the definition of hardship below not all employers liable for the EMAC Supplement will apply as a practical matter.

But first, the DUA must determine whether hardship waivers will be considered for a particular quarter. It is not clear from the regulation how the DUA will make that determination or why it would decide not consider hardship waivers in a particular quarter. Assuming DUA determines that hardship waivers will be considered, DUA will:

- Make an announcement via the Department's website
- Post the application, and
- Specify the application period during which applications for the hardship waiver will be reviewed

DETERMINATION OF HARDSHIP WAIVERS

The application for a hardship waiver applies only to the quarter in which it is filed with the DUA. Thus, a separate application must be filed for each quarter. The employer has the burden of proof, naturally.

The DUA will consider employer applications for hardship waiver if they are complete, filed timely and the application relates to the quarter during which it is submitted.

- DUA may grant a full or partial waiver of the employer's EMAC Supplement liability if the applicant proves financial hardship by showing that:
 - because of financial hardship, the employer is unable to pay the EMAC Supplement
 - the employer has acted in good faith in all its relations with the Department AND
 - failure to obtain a hardship waiver is likely to result in termination of the employer's business or in loss of employment
- DUA may also grant a hardship waiver if the employer is assessed an EMAC Supplement and an ACA employer mandate penalty in same year
- Any waiver granted applies only to the EMAC Supplement for that quarter – a denial does not extend time for EMAC Supplement payment for the quarter
- Applicants will be notified of DUA's decision prior to the date payment of the EMAC Supplement is due
- Finally, DUA has the discretion to revoke a hardship waiver if it determines false information was submitted by the employer on the application for the hardship



waiver – if revoked the employer will be liable for the amount waived, plus applicable penalties and interest

DUA held public listening sessions on Monday, September 17th in Boston and Wednesday, September 19th in Springfield, which indicates the proposed regulation is on a fast track. It will be interesting to learn if these sessions and written commentary submitted to DUA will result in any clarifications to the regulation when finalized.

Given there is less than two weeks left in Q3, it is likely the first waiver applications will apply to Q4.

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Richard A. Szczebak, Esq.
781-731-9933 | rszczebak@raslawpc.com
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