

November 9, 2017

## DRAFT DUA REGULATIONS RE: EMAC SUPPLEMENT RELEASED

With just seven weeks to go before the new EMAC provisions become effective, the Division of Unemployment Assistance (DUA) released early this week its long awaited draft regulations regarding the EMAC Supplement, as it is now called. The DUA also quietly released last week an undated set of thirteen FAQs discussing the EMAC Supplement.

The next step is “listening sessions” to be held by the DUA across the state and, from there, final “implementing regulations” will be crafted. The listening sessions are scheduled for next week, November 13 through November 16, 2017, and take place in Boston, Springfield, Worcester and Lawrence. Details about each session can be found by clicking [here](#). Written comments may also be submitted via email to this state [email address](#).

### THE EMAC SUPPLEMENT

The EMAC Supplement is a new, temporary two-year employer assessment intended to support the provision of health insurance coverage through MassHealth and subsidized health insurance through the MA Health Connector. This new assessment targets only those employers with employees who are enrolled in MassHealth or in subsidized ConnectorCare coverage. Employers subject to the EMAC Supplement in any calendar quarter must pay to DUA 5% of wages paid to each affected employee during the quarter. The 5% assessment applies to a wage base of \$15,000 (capped at \$750 annually per affected employee).

### KEY POINTS REGARDING THE EMAC SUPPLEMENT AS OF NOVEMBER 6, 2017

While both the draft regulation and the FAQs describe the standards for determining when an employer is subject to, and liable for payment of, the EMAC Supplement, and the corresponding payment and administrative procedures, there are a few key elements that should be understood on the front end. They are:

- The EMAC Supplement is **based on wages paid and NOT hours worked**. Accordingly, employers subject to the EMAC Supplement will be liable for any employee enrolled in MassHealth or ConnectorCare REGARDLESS OF WHETHER:
  - THE EMPLOYEE IS FULL-TIME OR PART-TIME
  - the employee is benefit eligible for employer sponsored health coverage, or not
  - the employer sponsors group health plan coverage, or not

- The greatest challenge for employers remains determining which employees are enrolled in MassHealth or ConnectorCare and the start/end dates of that coverage in relation to EMAC Supplement reporting for the calendar quarter. Additional regulatory guidance in this area would be welcome.
  - The draft regulation does refer to some sharing of MA member enrollment information with employers for purposes of reviewing/appealing a DUA determination of EMAC Supplement liability. It is not clear when member enrollment information would be shared with employers and additional guidance is necessary.
  - Employers might discover MassHealth or ConnectorCare enrollment through responses entered on waiver of health coverage forms collected from their benefit eligible employees. However, this method is not available for part-time employees and others who are otherwise not benefits eligible.
- Unlike the current tier one, standard EMAC that has been in effect since January 1, 2014, there appears to be no six-year phase-in of the EMAC Supplement (tier two) for employers who become newly subject to the EMAC provisions due to their reaching six or more employees in a calendar quarter.

#### OTHER EMAC SUPPLEMENT GUIDANCE AS OF NOVEMBER 6, 2017

Following below are highlights of other EMAC Supplement guidance provided in the draft DUA regulation:

- In the Game -- Beginning January 1, 2018 any employer with 6 or more employees in the applicable calendar quarter will be in the EMAC Supplement game for that quarter.
  - Determining 6 or more -- For each of the 3 months in the calendar quarter, employers determine the number of employees who worked/received wages for any part of the pay period that includes the 12th of month. Then add the 3 monthly amounts and divide the sum by 3.
- Length of Time Employees Must be Enrolled -- For those employers “in the game” for the quarter, employers will be liable under the EMAC Supplement if one or more their employees is enrolled in MassHealth or ConnectorCare for a continuous period of 14 days during the quarter.
- Excluded Employees -- An employer will have no EMAC Supplement liability for employees participating in the Premium Assistance Program or enrolled in MassHealth who are:
  - Permanently and totally disabled for Social Security Disability Income purposes
  - Covered by MassHealth due to applicable state law

- Covered by employer-provided insurance where MassHealth is a secondary payer
- Non-profit and Governmental Employers – These employers are liable for the EMAC Supplement regardless of the method used to finance Unemployment Insurance benefits for their employees – these employers have a choice of either the contributory method or the reimbursement method.
- Payments -- Quarterly EMAC Supplement payments are due and payable by the last day of the month following the end of the applicable quarter
- Delinquent Accounts -- Interest will be assessed on late EMAC Supplement payments. The DUA can collect overdue amounts against delinquent accounts via dunning, property liens and bank levies.
- Penalties -- There are penalties for failure to comply with the EMAC provisions, including fines and imprisonment for:
  - willful attempts to evade or defeat any contribution, interest, or penalty payment
  - knowingly making any false statement or misrepresentation to avoid or reduce any financial liabilities under EMAC
  - knowingly failing or refusing to pay any such contribution, interest charge, or penalty under EMAC
  - attempting to coerce any worker to misrepresent his or her circumstances so that the employer may evade payment of contributions
- Appeals – Employers may request a hearing regarding the amount of their EMAC Supplement liability determined by DUA
  - The appeal request must be filed within 10 days of the employer’s receipt of a DUA determination notice
  - The DUA will issue a written decision on its initial determination after the appeal hearing
  - The DUA’s written decision on its initial determination may be further appealed by filing suit in MA Superior Court
- Confidentiality Rules – The draft regs clearly anticipate that disclosure of member information will be necessary to administer the EMAC Supplement provisions. This would include disclosure from the Division of Medical Assistance and the MA Health Connector to the DUA, and also disclosure from the DUA to employers determined liable for an EMAC Supplement payment. As between the DUA and employers:

- The DUA may provide member information to an employer for purposes of reviewing and/or appealing an EMAC Supplement liability determination by DUA.
  - The information disclosed to employers must be kept confidential by them and employers must limit use and disclosure of the information to the minimum necessary required to review and/or appeal.
  - Employers will be required to sign a written acknowledgement of their confidentiality obligation, in accordance with procedures to be established by DUA, prior to receiving any member information from DUA.
  - Employers are prohibited from using or disclosing member information provided by the DUA to disparage or retaliate against any employee or individual to whom the information relates.
- Change in Ownership Rules – The draft regs briefly address situations where employers are involved in a change of ownership, including, without limitation, changes occurring due to acquisition, consolidation, partial transfer, or whole successorship.
    - Seller (the acquired employer) is liable for any EMAC Supplement payments for quarterly wages reported prior to the transaction date.
    - Buyer (the acquiring employer) is not allowed any credit for EMAC Supplement amounts paid/reported by the acquired employer prior to the transaction date.

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Scheduling listening sessions for next week indicates DUA's commitment to quickly move the process forward given the short time frame involved. Final implementing regulations will hopefully be released in time to provide most employers with time to make any necessary adjustments to policies, procedures, practices and quarterly EMAC reporting. Employers should begin any EMAC Supplement planning now based on the draft regulations, which mostly contain basic administrative rules that likely will not see substantive modification in the final version.

Please contact me if you have any questions.

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