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The Massachusetts Division of Unemployment Assistance Issues Proposed Regulations Implementing EMAC Hardship Waivers

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Responding to widespread resistance—principally on the part of small businesses—to the increase in the Employer Medical Assistance Contribution ("EMAC") contributions and the addition of an EMAC supplemental contribution, Massachusetts lawmakers amended the EMAC rules in 2017 to add hardship waiver provisions. (Click here for a summary of the EMAC rules.) The Massachusetts Division of Unemployment Assistance (DUA) recently issued a proposed regulation implementing the hardship waiver rules. This post examines those proposed regulations.

Background

Chapter 63 of the Acts of 2017 amended M.G.L. c.149, § 189A to allow employers to

submit an application for an EMAC hardship waiver. In determining whether a hardship existed, the statute permitted the DUA to "give special consideration" to the following classes of employers:

(a) Employers with variable or limited revenue;

(b) Employers with fewer than 50 employees;

(c) Employers whose employees are mostly seasonal or temporary;

(d) 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 DUA issued its proposed regulation in response to this legislative mandate. Predictably, the waiver process requires an employer to complete an application that includes "sufficient supporting documentation" to justify the need for a waiver. Waivers relate to a specific calendar quarter, and there are no appeal rights, other than to the courts. Hardship waiver requests must be received during the first two weeks of each filing period (e.g., Q3 applications would be due by Friday, October 12th).

Hardship Standards

The standard for determining whether to grant a hardship waiver is set out in Proposed 430 CMR 21.11, which provides, in relevant part:

> The Director may grant a full or partial waiver of liability for the EMAC Supplement upon a determination that an applicant has proven a financial hardship. Where an employer is assessed an Employer Shared Responsibility Payment and an EMAC Supplement in the same calendar year, the Director may find that the employer is eligible for a hardship waiver. Applicants shall be notified of the Director's decision prior to the date upon which payment of the EMAC Supplement is due.

The term "financial hardship" is defined to mean:

> A showing by the employer that, (1) because of financial hardship, the employer is unable to pay the EMAC Supplement; (2) the employer has acted in good faith in all its relations with the Department; and (3) failure to obtain a hardship waiver is likely to result in termination of the employer's business or in loss of employment.

Confusingly, it is not clear how, or whether, these criteria modify the basic standard for financial hardship determinations. More confusingly still, a separate DUA announcement says that eligible recipients of the hardship waiver must meet the following requirements:

1. *The employer must have a determination by the commissioner that there exists an inability on the part of the employer to make full payment of contribution with interest or penalty.*

This standard, both in the proposed regulation and the announcement, is troublesome to us because it suggests that an employer must be on the verge of insolvency to qualify. Thus, for example, an employer whose EMAC supplemental contribution comprises more than half of its earnings before interest, taxes and amortization (EBITA) but can still operate is not eligible for relief. Such an employer could pay the supplement, but at the cost of gutting, or at least significantly impacting, the employer's business model.

2. *The employer has acted in good faith in all his relations with the department.*

While it is not clear (to us at least) what the DUA is getting at here, we worry that an isolated and minor infraction unrelated to the EMAC rules or at some time in the distant past might be used as a reason to deny an EMAC waiver.

3. *Failure to compromise may result in termination of the employer's business or in loss of employment.*

This requirement is a restatement of, and simply serves to reinforce, the first requirement above: only employers who are in extremis financially may qualify for a waiver, and even at that they will need to apply for the waiver every quarter.

The announcement further elaborates on the kinds of employers that are "potentially" eligible for hardship waivers. These include:

- *Small employers, i.e., employers with fewer than 50 employees*. The implication is that large employers are also eligible for the waiver, but it is not clear how the standards that apply to small employers differ from those that apply to large employers.
- *Employers billed by the IRS for "Employer Shared Responsibility" payments under the Affordable Care Act*. This rule is particularly pernicious in our view. An employer that endeavors to do the right thing, i.e., offer affordable, minimum major medical health insurance coverage, may not qualify for relief; but an employer that fails to offer coverage and incurs a penalty under the ACA employer mandate is eligible. It strikes us that this rewards employers for not offering coverage. If there is a sound regulatory policy underlying this rule, it eludes us.
- *Seasonal Employers*. A "seasonal employer" is defined as an employer reporting 90% of their annual total UI gross wages in two consecutive quarters.
- *Staffing companies*. Given that staffing companies, due to their high turnover, are disproportionately penalized under the EMAC supplement rules, we would like to see some accommodation for this sector in the final regulation.

The announcement provides additional details relating to the content of the petitions for waivers. In particular, waiver requests must be accompanied by supporting documentation that includes a profit and loss statement covering at least the most recent 12-month period; copies of the six most recent bank statements; if an asset is used as collateral on a loan, copies of the most recent statement from the lender(s) on loans, monthly payments, loan payoffs, and balances; copies of the most recent statement of outstanding notes receivable; copies of the most recent statements from lenders on loans, mortgages (including second mortgages), monthly payments, loan payoffs, and balances; information about reimbursements from the

state; and copy of IRS employer shared responsibility assessments (IRS Letter 226Js) and proof of payment, if applicable.

Concluding Observations and Next Steps

With the benefit of hindsight, the Legislature's choice of "hardship" as the operative legal standard might have had unintended consequences. At one end of the interpretive spectrum, a hardship could be little more than an inconvenience; at the other end of the spectrum is financial ruin. The DUA has chosen the latter. Given the political context, this is not what we think the Legislature intended.

Specifically, when it considered and enacted the hardship exception to the EMAC rules, the Legislature was responding to a common and recurring problem: businesses were overly burdened by the EMAC assessments. This is largely because EMAC exposure is "front-loaded." An employer with a stable workforce will likely pay the largest amount in the first quarter, with the exposure rapidly falling off in the remaining calendar quarters. But an employer with high turnover—say a staffing firm or a restaurant—will not see a drop from quarter-to-quarter. The hardship waiver amendment seemed intended to target this inequity, but the proposed regulation does not achieve that intent.

In conclusion, this proposed regulation needs work. At a minimum, the DUA should specify the relationship between the basic financial hardship waiver standard and the instances calling for "special consideration." More fundamentally, we would hope for a more forgiving test than near or actual insolvency to qualify. We doubt that this is what the Legislature intended, and if the DUA persists in this view in the final regulation, then the Legislature may need to intervene yet again to right the proverbial ship.