

956 CMR 4.00: EMPLOYER SPONSORED HEALTH INSURANCE ACCESS

Section

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4.01: Authority

956 CMR 4.00 is promulgated in accordance with the authority granted to the Connector by M.G.L. c. 176Q, § 16.

4.02: Purpose

The purpose of 956 CMR 4.00 is to implement the provisions of M.G.L. c. 151F, which requires Employers with 11 or more Employees to:

- (a) establish and maintain a Section 125 Cafeteria Plan in accordance with 956 CMR *et seq.*; and
- (b) file a copy of the Section 125 Cafeteria Plan with the Connector.

4.03: Scope

956 CMR 4.00 contains the Connector's regulations governing the requirements of M.G.L. c. 151F. 956 CMR 4.00 applies to all Employers with a total of 11 or more Employees at all locations within the Commonwealth of Massachusetts, regardless of whether any underlying medical care coverage accessed through a Section 125 Cafeteria Plan is maintained on an insured or self-insured basis, purchased on an individual or group basis, or provided through the Connector or through another distribution channel unrelated to the Connector.

4.04: Definitions

As used in 956 CMR 4.00, unless the context otherwise requires, terms have the following meanings:

Client Company. A person, association, partnership, corporation or other entity that is a co-Employer of workers provided by an Employee Leasing Company pursuant to a contract.

Connector. The Commonwealth Health Insurance Connector established under M.G.L. c. 176Q.

Employee. Any individual employed by any Employer at a Massachusetts location, whether or not the individual is a Massachusetts resident.

Employee Leasing Company. A sole proprietorship, partnership, corporation or other form of business entity whose business consists largely of leasing employees to one or more Client Companies under contractual arrangements that retain for such Employee Leasing Companies a substantial portion of personnel management functions, such as payroll, direction and control of workers, and the right to hire and fire workers provided by the Employee Leasing Company; provided, however, that the leasing arrangement is long term and not an arrangement to provide the Client Company temporary help services during seasonal or unusual conditions.

ERISA. Employee Retirement Income Security Act.

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Employer. An individual, partnership, association, corporation or other legal entity, or any two or more of the foregoing engaged in a joint enterprise, and including the legal representatives of a deceased employer, or the receiver or trustee of an individual, partnership, association, corporation or other legal entity, employing employees. Other legal entities shall include, without limitation, the commonwealth, its instrumentalities, political subdivisions, an instrumentality of a political subdivision, including municipal hospitals, municipal electric companies, municipal water companies, regional school districts and any other instrumentalities as are financially independent and are created by statute.

Notwithstanding 956 CMR 4.04: Employer, the owner of a dwelling house having not more than three apartments and who resides therein, or the occupant of a dwelling house of another who employs persons to do maintenance, construction or repair work on such dwelling house or on the grounds or buildings appurtenant thereto shall not because of such employment be deemed to be an employer. Further, the term "employer" shall neither include nonprofit entities, as defined by the Internal Revenue Code, which are exclusively staffed by volunteers, nor include sole proprietors.

Independent Contractor. An individual that provides services not deemed to be employment under M.G.L. c. 151A, § 2 because:

- (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
- (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
- (c) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Multiemployer Health Benefit Plan. A health benefit plan to which more than one Employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one Employer, and there is evidence that such Employer contributions to the Multiemployer Health Benefit Plan were the subject of good faith bargaining between such employee representatives and such Employers.

Seasonal Employee. An Employee who is a seasonal employee that works for an Employer that is a seasonal employer, as such terms are defined in M.G.L. c. 151A, § 1.

Section 125 Cafeteria Plan. A cafeteria plan that meets the requirements of Title 26, Subtitle A, Chapter 1, Subchapter B, Part III, Section 125 of the Internal Revenue Code.

Temporary Employee. An individual that works for an Employer on either a full or part time basis; whose employment is explicitly temporary in nature and does not exceed 12 consecutive weeks during the period from October 1st through September 30th.

4.05: Employers Subject to M.G.L. c. 151F

(1) General. An Employer is subject to the M.G.L. c. 151F requirement to adopt and maintain a Section 125 Cafeteria Plan in accordance with the rules of the Connector on and after the date, determined in accordance with 956 CMR 4.05(3), the Employer becomes a 151F Employer as determined in accordance with 956 CMR 4.05(2).

(2) 151F Employer. An Employer with 11 or more Employees during the applicable determination period, as determined in accordance with 956 CMR 4.05(3) shall become a 151F Employer as of the date set forth in 956 CMR 4.05(3).

(a) Number of Employees. An Employer has 11 or more Employees if the sum of total payroll hours for all Employees during the applicable determination period divided by 2,000 is greater than or equal to 11. In calculating total payroll hours:

1. For each Employee with more than 2000 payroll hours for the Employer, the Employer shall include 2000 payroll hours.

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2. Payroll hours includes all hours for which an Employer paid wages as defined in M.G.L. c. 151A, § 1(s) to an Employee including, by way of example and not by way of limitation, regular, vacation, sick, paid Federal Medical Leave of Absence, short term disability, long term disability, overtime and holiday payroll hours.

3. An Employer who is determined to be a successor under M.G.L. c. 151A shall include the payroll hours of the predecessor's Employees during the applicable determination period.

(b) Employees. For purposes of 956 CMR 4.05, Employees include, by way of example and not by way of limitation, full-time Employees, part-time Employees, Temporary Employees, and Seasonal Employees, regardless of whether his/her Employer is signatory to or obligated under a negotiated, *bona fide* collective bargaining agreement between such Employer and *bona fide* Employee representatives that governs the employment conditions of the Employee. Employees shall also include individuals who are considered self-employed for benefit plan purposes under Internal Revenue Code Section 401(c), but shall not include Independent Contractors.

(c) Multi-state Employer. A multi-state Employer with Massachusetts locations shall include all Employees employed at all Massachusetts locations in calculating total payroll hours.

(d) Certain Employee Leasing Arrangements. If and to the extent there is a co-employment arrangement between a Client Company and an Employee Leasing Company, the Client Company is the Employer for purposes of M.G.L. c. 151F with respect to those Employees covered under the co-employment arrangement. In the event the Client Company is determined to be a 151F Employer in accordance with 956 CMR 4.05(2), nothing in 956 CMR 4.00 prohibits the Client Company from contractually allocating to the Employee Leasing Company the responsibility to adopt and/or maintain a Section 125 Cafeteria Plan for the benefit of the co-employed Employees, in accordance with 956 CMR 4.06, and to comply with the filing requirements in 956 CMR 4.07. However, if and to the extent that the Employee Leasing Company fails to comply with any such responsibilities contractually allocated to it, then the Client Company continues to have responsibility for compliance with 956 CMR 4.00.

(e) Employers Providing Noncontributory Medical Coverage. Notwithstanding anything in 956 CMR 4.05 to the contrary, an Employer will not be considered a 151F Employer if the Employer provides medical care coverage to and pays the full monthly cost of such medical care coverage (both individual coverage AND any dependent coverage to the extent elected by the Employee) for all of its Employees who are not otherwise excludable from a Section 125 Cafeteria Plan in accordance with 956 CMR 4.06(3)(b)4. 956 CMR 4.05(2)(e) shall cease to apply on the date the Employer ceases to provide medical care coverage to or ceases to pay the full monthly cost of that medical care coverage for all of its Employees who are not otherwise excludable from a Section 125 Cafeteria Plan in accordance with 956 CMR 4.06(3)(b)4. (the "cessation date"). The Employer shall then determine its status as a 151F Employer in accordance with this 956 CMR 4.05 beginning with the April 1st determination date coincident with or next following the cessation date. In no event shall any reference to the full monthly cost of medical care coverage in 956 CMR 4.05(e) be construed to include any deductible, coinsurance, copayment or other cost-sharing amounts that are the responsibility of the Employee under the applicable medical care coverage.

(3) Applicable Determination Period.

(a) Initial Determination Period. The initial determination period shall be the 12 consecutive month period beginning April 1, 2006 and ending March 31, 2007. An Employer with 11 or more Employees during the initial determination period, as determined in accordance with 956 CMR 4.05(2), shall become a 151F Employer effective July 1, 2007.

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(b) Subsequent Determination Periods. For those Employers who do not have 11 or more Employees during the initial determination period (or a subsequent determination period, as applicable), as determined in accordance with 956 CMR 4.05(2), October 1, 2007 and each October 1st thereafter will be considered a new determination date for any Employer with less than 11 Employees during the preceding determination period. The applicable subsequent determination period for each October 1st determination date shall be the 12 consecutive month period ending on the September 30th immediately preceding the October 1st determination date. An Employer with 11 or more Employees during a subsequent determination period, as determined in accordance with 956 CMR 4.05(2), shall become a 151F Employer effective on January 1st following the corresponding October 1st determination date.

4.06: Adoption and Maintenance of Section 125 Cafeteria Plan

(1) General. Pursuant to M.G.L. c. 151F, a 151F Employer is required to adopt and maintain a Section 125 Cafeteria Plan in accordance with regulations and rules promulgated by the Connector. A Section 125 Cafeteria Plan must meet the requirements of 956 CMR 4.06(2) and (3) and must be adopted and maintained by the 151F Employer as described in 956 CMR 4.06(4) and (5) respectively. A 151F Employer shall not be in compliance with M.G.L. c. 151F if and to the extent its Section 125 Cafeteria Plan fails to satisfy 956 CMR 4.06.

(2) Section 125 Cafeteria Plan Requirements. A Section 125 Cafeteria Plan must satisfy applicable Internal Revenue Code Section 125 requirements, any applicable U.S. Treasury Department rulings, regulations and guidance, as determined by the Internal Revenue Service, and shall include:

(a) Written Plan Document. A Section 125 Cafeteria Plan must consist of a written plan document containing at least the following six elements.

1. A specific description of each of the benefits available under the plan, including the periods during which the benefits are provided. The benefit description need not be self-contained. Benefits described in other separate written plans may be incorporated by reference into the plan document.
2. The plan's eligibility rules regarding participation.
3. The procedures governing participant elections under the plan, including the period during which elections may be made, the extent to which elections are irrevocable, and the periods with respect to which the elections are effective.
4. The manner in which Employer contributions may be made to the plan, such as by salary reduction agreement between the participant and Employer or by non-elective Employer contributions to the plan.
5. The maximum amount of elective Employer contributions available to any participant under the plan either by stating the maximum dollar amount or maximum percentage of compensation that a participant may contribute, or by stating the method for determining the maximum amount or percentage.
6. The plan year on which the cafeteria plan operates.

(3) Connector Requirements. In addition, a Section 125 Cafeteria Plan must comply with the following minimum Connector requirements in order to comply with M.G.L. c. 151F:

(a) Premium Only Plan. A Section 125 Cafeteria Plan must, at a minimum, be a premium only plan offering access to one or more medical care coverage options to each eligible Employee in *lieu* of regular cash compensation.

1. Section 125 Cafeteria Plans that function as flexible spending account only plans, or as premium only plans offering access to benefit options that do not include access to any medical care coverage options will not satisfy 956 CMR 4.06(3).
2. Flexible spending accounts are not required to be offered as a coverage option.

(b) Eligibility for Participation. In connection with a Section 125 Cafeteria Plan offered by a 151F Employer:

1. Employee eligibility requirements for participation in a Section 125 Cafeteria Plan of a 151F Employer (and the extent of such participation) shall be established by the applicable 151F Employer and shall be clearly set forth in its written Section 125 Cafeteria Plan document.

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2. A 151F Employer may provide for an eligibility waiting period in its Section 125 Cafeteria Plan. Such a Section 125 Cafeteria Plan eligibility waiting period will be considered in compliance with M.G.L. c. 151F if the eligibility waiting period:

- a. corresponds with (and does not exceed) the eligibility waiting period for enrollment in the applicable medical care coverage option(s) available to the eligible Employee under the Section 125 Cafeteria Plan provided the 151F Employer makes contributions toward such coverage; or
- b. does not exceed two months (e.g., March 1st to May 1st; or March 20th to May 20th is considered two months) if the 151F Employer makes no contribution toward the applicable medical care coverage option(s) available to the eligible Employee under the Section 125 Cafeteria Plan.

Notwithstanding 956 CMR 4.06(3)(b)2.a. and b. to the contrary, those Employers that have 151F status as of July 1, 2007 may provide for a special initial eligibility waiting period in a Section 125 Cafeteria Plan for those eligible Employees who are employed on July 1, 2007 that may extend to no later than September 1, 2007.

3. An eligible Employee must be offered participation in the Section 125 Cafeteria Plan during any applicable election periods provided for in the written Section 125 Cafeteria Plan document, without regard to whether the eligible Employee was previously eligible or had previously waived participation in the Section 125 Cafeteria Plan during any prior election period.

4. Notwithstanding anything in 956 CMR 4.00 to the contrary, a 151F Employer may specifically exclude from eligibility to participate in its Section 125 Cafeteria Plan the following classes of Employees without being considered not in compliance with M.G.L. c. 151F with respect to such Employees:

- a. Employees who are less than 18 years of age;
- b. Temporary Employees;
- c. Part-time Employees working, on average, fewer than 64 hours per month for an Employer;
- d. Employees who are considered wait staff, service employees or service bartenders (as defined in M.G.L. c. 149, § 152A) and who earn, on average, less than \$400 in monthly payroll wages;
- e. Student Employees who are employed as interns or as cooperative education student workers;
- f. Employees whose Employer is required to contribute to a Multiemployer Health Benefit Plan based on their employment;
- g. Seasonal Employees who are international workers with either a U.S. J-1 student visa, or a U.S. H2B visa and who are also enrolled in travel health insurance.

(c) No Employer Contributions Required. All contributions made in connection with medical care coverage options offered under a Section 125 Cafeteria Plan may be made solely by Employee salary reduction. Non-elective Employer contributions to the Section 125 Cafeteria Plan are not required.

(d) Plan Document Configuration. The Section 125 Cafeteria Plan document may be a separate, stand-alone document or combined/consolidated with other employer-provided plans. A 151F Employer may utilize more than one Section 125 Cafeteria Plan document to provide its Employees with access to medical care coverage options, including a plan established solely for Employees not otherwise eligible for the 151F Employer's subsidized medical care coverage options.

(e) Affiliated/Participating Employers. Nothing in 956 CMR 4.00 is intended to restrict Section 125 Cafeteria Plan documents from covering Employees of two or more 151F Employers to the extent the Employers are affiliated/related to one another. The plan documentation should clearly identify all participating employers.

(4) Plan Adoption. Each 151F Employer shall take such actions as it deems necessary or appropriate to adopt its Section 125 Cafeteria Plan(s) in accordance with its own internal governance procedures and with applicable law, regardless of whether the Section 125 Cafeteria Plan is intended to be a newly established plan, a plan amendment to an existing plan or an amended and restated plan.

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(a) Plan Effective Date. The written plan documentation must clearly state the effective date of the Section 125 Cafeteria Plan (or, if applicable, the effective date of any subsequent plan amendment or restatement intended to conform the Section 125 Cafeteria Plan to M.G.L. c. 151F), which shall be no later than the date the Employer became a 151F Employer, as determined in accordance with 956 CMR 4.05.

(b) Affiliated/Participating Employers. Each 151F Employer who is a participating Employer in an affiliated/related Employer's Code Section 125 Cafeteria Plan shall take such actions as it deems necessary or appropriate to adopt such Section 125 Cafeteria Plan(s) in accordance with its own internal governance procedures and with applicable law.

(5) Plan Maintenance. A 151F Employer shall be deemed to maintain a Section 125 Cafeteria Plan as required by M.G.L. c. 151F if the plan meets the Cafeteria Plan requirements in 956 CMR 4.06(2), the Connector requirements in 956 CMR 4.06(3), has been adopted in accordance with 956 CMR 4.06(4), and has not been subsequently terminated by the 151F Employer.

4.07: Filing Section 125 Cafeteria Plan Documents

(1) General. Pursuant to M.G.L. c. 151F, a 151F Employer is required to file a copy of its Section 125 Cafeteria Plan(s) with the Connector.

(2) Filing Requirements.

(a) Each 151F Employer shall submit a copy of its Section 125 Cafeteria Plan(s) to the Connector, or its designee, on or before the effective date of its 151F Employer status. Any Section 125 Cafeteria Plan maintained by a 151F Employer that is not available to any Employees employed at a Massachusetts location is not subject to the filing requirement and need not be submitted to the Connector.

(b) Each submission shall be in the form and manner specified by the Connector and shall include such other documentation related to the 151F Employer's Section 125 Cafeteria Plan as the Connector may from time to time require.

(c) An Employer must designate a responsible individual authorized to verify and certify the accuracy of the documentation submitted.

(d) The Connector may change the filing requirements, including specified forms and filing deadlines, by administrative bulletin.

4.08: Other Provisions

(1) Compliance Enforcement. Compliance with M.G.L. c. 151F and 956 CMR 4.00 will be enforced by the attorney general. Noncompliance may subject a 151F Employer to the Employer Surcharge for State-funded Health Costs described in M.G.L. c. 118G and regulations promulgated by the Division of Health Care Finance and Policy (114 CMR).

(2) Consistency with Section 125. The Connector intends that 956 CMR 4.00 neither be inconsistent with Internal Revenue Code Section 125, nor require any Employer to take any action that would violate Internal Revenue Code Section 125.

(3) No ERISA Plan. In general, a Section 125 Cafeteria Plan is not an ERISA welfare benefit plan and nothing 956 CMR 4.00 is intended to require any Employer to establish an ERISA welfare benefit plan.

(4) Administrative Information Bulletins. The Connector may issue administrative information bulletins to clarify policies, update administrative requirements and specify information and documentation necessary to implement 956 CMR 4.00.

(5) Severability. The provisions of 956 CMR 4.00 are severable. If any provision or the application of any provision is held to be invalid or unconstitutional, such invalidity shall not be construed to affect the validity or constitutionality of any remaining provisions of 956 CMR 4.00 or the application of such provisions.

REGULATORY AUTHORITY

956 CMR 4.00: M.G.L. c. 176Q.