

## Important Affordable Care Act Deadline: Employee Notices of the Health Insurance Marketplace (Exchange) Due by October 1, 2013

May 21, 2013

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On May 8, 2013, the Employee Benefits Security Administration of the U.S. Department of Labor (“DOL”) issued [Technical Release No. 2013-02](#) (“Release”) providing important guidance under the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (“Affordable Care Act”), with regard to the requirement that employers provide notices to their employees of the existence of the Health Insurance Marketplace (“Marketplace”), previously referred to as the “Exchange.” These employee notices must be provided to existing employees no later than October 1, 2013. This deadline is intended to correspond to the open enrollment period for the Marketplace commencing October 1, 2013, for coverage through the Marketplace beginning January 1, 2014. The Release includes temporary guidance and two model employee notices of the Marketplace upon which employers may rely. Additionally, the Release provides an updated model election notice for group health plans for purposes of the continuation coverage provisions under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) to include information of the health coverage options offered to individuals through the Marketplace for comparative purposes.

*Employee Notice of the Marketplace.* The Affordable Care Act amended the Fair Labor Standards Act (“FLSA”) to require employers to issue to employees a notice of the health coverage options available under the Marketplace. The FLSA requirement was supposed to have been satisfied on or before March 1, 2013; however, given the regulatory delays in establishing and approving the Marketplace, the DOL extended the deadline. The guidance under the Release is temporary through the applicability date of October 1, 2013, but may be relied upon until future guidance and regulations are issued.

### Which Employers Are Required to Comply with the Notice Requirements?

Whether or not they are required to “pay or play” under the Affordable Care Act, all employers subject to the FLSA must provide their employees with notice. The FLSA generally applies to employers that employ one or more employees and are engaged in, or produce goods for, interstate commerce. The FLSA also covers, among other things, hospitals; schools; institutions of higher education; and federal, state, and local government agencies. To determine whether an employer is subject to the FLSA, the

DOL provides an Internet assistance tool at <http://www.dol.gov/elaws/esa/flsa/scope/screen24.asp>.

### **Which Employees Must Receive the Notice?**

Employers must provide the employee notice to each of their employees, whether or not an employee has part-time or full-time status. It does not matter whether the employee is enrolled or eligible to enroll in a group health plan. A separate notice is not required for dependents or other individuals who may become eligible for coverage under the plan but are *not* employees.

### **What Information Must the Notice Contain?**

The employee notice must contain the following information:

- the existence of the Marketplace;
- the contact information and description of services offered on the Marketplace;
- a statement that the individual may be eligible for a premium tax credit if the employee purchases a qualified plan on the Marketplace; and
- a statement that, if the employee purchases a qualified plan on the Marketplace, the employee may lose the employer contribution to any health benefit plan offered by the employer and all or a portion of employer contributions may be excluded from federal income.

### **What Are the DOL Model Notices?**

The DOL has provided two model employee notices, which are available on its website, [one for employers that do not offer a health plan](#) and [one for employers that offer a health plan to some or all employees](#). The Release provides that employers may use the model notice(s), provided that the notice(s) include(s) the information described above.

The model employee notice for employers that do not offer health coverage includes the information described above, as well as an explanation of the impact of the availability of employer health coverage on the employee's eligibility for subsidies on the Marketplace. The model employee notice does not require the employer to provide specific contact information for the Marketplace in the state where the employee resides, but rather refers the employee to the [healthcare.gov](http://healthcare.gov) website for contact information for the Marketplace in the employee's area. This model employee notice requires the employer to provide contact information for the employer, including the employer's EIN (Employer Identification Number). This is the information that an employee will need to include in an application for a premium subsidy on a Marketplace.

The model employee notice for employers that do offer health coverage, while generally including the same information as the model employee notice for employers that do not offer health coverage, also requires the employer to provide contact information to obtain more information about the employer's health care coverage. The disclosure

section requires the employer to state whether the health care coverage is offered to all employees and, if not to all employees, a description of those employees eligible for health care coverage. This model employee notice further requires the employer to state whether it offers dependent coverage and which dependents are eligible. Finally, the employer is required to disclose whether the health care coverage offered meets the minimum value standard and that the cost of coverage is intended to be affordable. The Department of Treasury and Internal Revenue Service recently issued proposed guidance to assist employees in assessing whether the coverage offered provides minimum value. (For more information, see the Epstein Becker Green *Health Employment And Labor* blog post by Michelle Capezza entitled "[New Proposed Guidance for Determining Whether Employer-Sponsored Health Plan Provides Minimum Value.](#)")

In addition, the model employee notice for employers that offer health coverage includes optional information that an employer may provide to employees based on the Marketplace Employer Coverage Tool to help them better understand their coverage choices, including whether an employee is eligible in the next three months for employer coverage, whether the employer offers a health plan that meets the minimum value standard, the premium for employee-only coverage under the lowest-cost plan that meets the minimum value standard if the employee received the maximum discount for any tobacco cessation program, and what changes the employer will make for the next plan year. Although this information is optional, it may be to an employer's benefit to demonstrate, where appropriate, that its plan is providing minimum value and is affordable.

### **When Must the Employee Notice Be Provided, and What Are the Acceptable Delivery Methods?**

Current employees who are employed before October 1, 2013, must be provided with the notice no later than October 1, 2013. Beginning October 1, 2013, the employer must provide each new employee with the notice at the time of hire, which will be considered timely in 2014 if it is provided within 14 days of the employee's start date.

The employee notice must be provided free of charge, in writing, and in a manner calculated to be understood by the average employee. The employee notice may be provided by first class mail or electronically if done in accordance with the [DOL's electronic disclosure safe harbor](#).

### **What Is the COBRA Model Notice?**

Under COBRA, an individual who was covered by a group health plan the day before a qualifying event occurred may be eligible to elect COBRA continuation coverage. These qualified beneficiaries must be provided with an election notice within 14 days after the plan administrator receives notice of a qualifying event. The COBRA election notice is required to include specific information.

The DOL updated its [model COBRA election notice](#) to provide information about the Marketplace for the purposes of informing qualified beneficiaries that they may also be eligible for a premium tax credit to pay for coverage offered through the Marketplace. The model COBRA election notice also includes a clarification on the limit on pre-

existing condition exclusions beginning in 2014. Such information is not specifically required under the Affordable Care Act and should have no impact on whether an employer is subject to the employer responsibility penalties if, in fact, a former employee obtains coverage on the Marketplace.

The Release provides that the use of the model COBRA election notice, if completed appropriately, will be considered good faith compliance with the COBRA election requirements. The model COBRA election notice does not provide a specific deadline or compliance date. Employers may wish to review their existing COBRA election notices for changes relating to the Affordable Care Act.

## Conclusion

Employers have long been waiting for specific guidance from the DOL on their employee notice requirements. Now that it is here, compliance should be addressed well before the October 1, 2013, deadline.

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