

August 14, 2013

Employers Still Required to Issue Exchange Notices by October 1st

One of the major elements of the Patient Protection and Affordable Care Act (“PPACA”) is the creation of various insurance Exchanges across the country, now called “Marketplaces”. These Marketplaces are intended to be electronic hubs enabling consumers to shop for health insurance online. Each state had the opportunity to build their own state-run Marketplace, partner with the federal government to build a Marketplace, or have the federal government build it for them. The Marketplaces are intended to be operational as of January 2014 with the enrollment process starting on October 1, 2013. The Marketplaces will be available for individual consumers and small businesses. In 2017, it is expected they will be available to larger employers. To help communicate the availability of these new Marketplaces, the PPACA stipulates that employers must issue notices to all workers making them aware of these new Marketplaces. This communication is referred to as an Exchange Notice and employers will be obligated to issue the notices by October 1, 2013.

While the “mandate” for employers to offer benefits to eligible full-time employees, or pay a penalty per employee, has been delayed, the requirement to issue the Marketplace Notice has not been delayed. The Department of Labor (DOL) has issued [DOL Technical Release No. 2013-02](#) and two model notices that employers may use to notify employees about health insurance Marketplaces. A new [model election notice under COBRA](#), revised to add language alerting employees about the option of purchasing coverage on the Marketplaces, was also issued.

Employer Sends Notice to Employees

Below are important points regarding the requirement to issue the Notices:

- The Notice requirement applies to employers covered by the Fair Labor Standards Act (FLSA). In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. This broad definition will likely encompass most employers. The DOL offers a [compliance assistance tool](#) employers can use to determine whether they are subject to the FLSA.
- The employer must provide the Notice to each employee, whether working full time or part time, and whether enrolled in a group health plan or not. The Notices do not have to be sent to retirees.
- Employers do not have to provide separate Notices to family members.
- Employers must provide the Notice free of charge to current employees no later than October 1, 2013. Employers must provide Notices to each new employee, upon hire, beginning October 1, 2013. For 2014, the DOL will consider a Notice to be provided upon

hire if it is provided within 14 days of an employee's start date.

- The Notice is designed to inform employees of the existence of the Marketplace and the effect of this new coverage option on their existing employment coverage (or lack thereof).
- The Notice must be provided in writing and must be able to be understood by the average employee. The guidance explicitly states that it may be provided via first class mail or electronically (provided it complies with the electronic delivery rules in existing DOL regulations meaning an employer must be regularly using electronic communication as their normal mode of distribution). These two methods appear to be safe harbors and a sufficient means by which the Notice can be distributed.
- Presumably the law also permits Notices to be provided in an open enrollment package, but the guidance is not clear on this point. Hopefully future guidance will confirm this.

Background

The PPACA requires employers subject to the Fair Labor Standards Act (FLSA) to provide a written Notice to employees containing the following information:

- Informing the employee of the existence of the Exchange, including a description of the services provided by the Exchange, and how employees may contact the Exchange for assistance;
- If the plan's share of the total allowed costs of benefits provided under the plan is less than 60%, that the employee may be eligible for a premium assistance tax credit and a cost-sharing reduction if the employee purchases a plan through the Exchange; and
- If the employee purchases a plan through the Exchange, the employee may lose the contribution (if any) to any health benefits and that all or a portion of such contribution may be excludable from income for federal income tax purposes.

Completing the Notice

The DOL has published two model Notices: one for employers that provide health coverage and one for those that do not. Employers may use the model Notices provided by the DOL or may modify the model, provided the Notice includes the required content. We suggest employers simply use the model Notices supplied by the DOL. The two model Notices are available here:

- [Model Notice to Employees of Coverage Options](#) (this is the version to use for employers who do not offer a health plan)
- [Model Notice to Employees of Coverage Options](#) (this is the version to use for employers who do offer a health plan to some or all employees)

Below are some general requirements for completing the Notices:

- Both model Notices have the same introductory information about the Exchanges/Marketplaces and whether individuals can receive federal assistance to help them purchase coverage there. Plus, both models require employers to provide general information about the employer, including name, Employer Identification Number (EIN), address and contact information. Employees will be asked to provide this information in applying for coverage under the Marketplace which is why it is required.
- Employers can use a modified version of the Notice as long as the content requirements are met. We recommend that employers simply use the DOL provided Notices at this time for ease of compliance.
- The guidance does not include a requirement to provide the Notice in alternate languages although the DOL has made [Spanish-language model notices](#) available.

The Notice for employers who do not offer a health plan

This Notice is easy and very straight-forward. It is a one-page document (front and back) and includes high-level introductory language about the Marketplaces and also includes a fill-in-the-blank section for the basic information about the employer. This information is mandatory and an employer can change the formatting as long as the basic required content, as noted above in the Background section, is there.

The Notice for employers who offer a health plan

This Notice is one-page (front and back) with an additional page to provide certain optional information. This Notice also includes the high-level introductory language about the Marketplaces and the fill-in-the-blank section for the basic employer information. Again, this information is mandatory and an employer can change the formatting as long as the basic required content, as noted above in the Background section, is there. However, this Notice includes optional questions on the second page about the employer's coverage, including whether all, or only some, of the employees receive health coverage, whether coverage is offered to dependents, and whether coverage meets the minimum value (60%) standard and is intended to be affordable. Employers can, but are not required to, include information in the Notice on whether the employer offers a plan that satisfies the minimum value and affordability requirements. As employers develop their own Notices, they could presumably choose to simply restate the statutory language regarding minimum value ("If this plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, you may be eligible for a premium tax credit and a cost-sharing reduction if you purchase a qualified health plan through the Exchange."). The last page of the Notice includes further optional questions that may be completed by the employer, including the employee's eligibility for coverage, whether the employer plan meets the minimum-value standard, employee contributions for the lowest cost employer plan that provides minimum value, and changes in the employer plan for the new plan year.

While it is completely optional for employers to include this additional information, it may help ensure that employees understand their coverage choices and help to avoid employers receiving penalty notices that do not apply. This information is the same as the questions on the [application for Marketplace coverage](#), which an employee would complete if he or she is attempting to obtain coverage on the Marketplace. Employers should review the application for coverage under the Marketplaces, which contains an "Employer Coverage Tool" page, which is a form that employees may bring to employers to complete, and then return to the Marketplace together with the employee's application for insurance coverage. The Employer Coverage Tool and parts of the employer Notice are identical, and both documents should be considered as employers prepare for the Notices.

In completing the Notices to send to employees, we recommend that employers consider not providing the optional information at this time. Once the employer mandate is implemented, then employers will presumably be required to provide what is now optional information. Employers can certainly choose to include the optional information but again, it appears that it is not required at this time. It is ultimately the employer's decision to provide or not provide the optional information.

Next Steps

Employers will need to review the requirements for the Notice and begin to address how to prepare it. Because the Notice is just a "model," employers are not required to provide all of the

information contained in the model Notice, but instead, must simply provide all of the information the statute requires them to provide. However, although completely voluntary, employers may have an interest in seeing that certain optional information is provided to employees and to the Marketplaces. To streamline this process, employers may want to consider completing certain of the optional sections of the Notice. Note too that the model Notice is not state-specific or employee-specific, so employers who complete the optional sections and who offer different health plans to different groups of employees, may need to prepare multiple versions of the Notices and coordinate the distribution. This is another reason why, for this period, we suggest that employers **not** provide the optional information at this time.

The Notices must be issued to employees no later than October 1, 2013.

Should you have questions regarding the Notice or any other area of healthcare reform, please contact your Conner Strong & Buckelew account representative. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, please visit our online [Resource Center](#).



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