

Health Care Reform

Simplifying Reform - Employee Exchange Notice

Department of Labor Releases Model Notice of Exchange

Background

Beginning Jan. 1, 2014, individuals and employees of small businesses will have access to insurance coverage through the Affordable Care Act's (ACA) health insurance exchanges (Exchanges). Open enrollment under the Exchanges will begin on Oct. 1, 2013. **ACA requires employers to provide all new hires and current employees with a written notice about ACA's Exchanges.** This requirement is found in Section 18B of the Fair Labor Standards Act (FLSA).

On May 8, 2013, the Department of Labor (DOL) released [Technical Release 2013-02](#) to provide temporary guidance on the Exchange notice requirement. This temporary guidance will remain in effect until the DOL issues regulations or other guidance. According to the DOL, future regulations or other guidance will provide employers with adequate time to comply with any additional or modified requirements.

In connection with the temporary guidance, the DOL announced the availability of **model Exchange notices** for employers to use to satisfy the Exchange notice requirement. The DOL also set a compliance deadline for the Exchange notices. Employers must provide employees with an Exchange notice by **Oct. 1, 2013**.

In addition, the DOL's temporary guidance includes a new COBRA model election notice, which has been updated to include information regarding health coverage alternatives offered through the Exchanges.

Exchange Notice

Affected Employers

ACA's Exchange notice requirement applies to employers that are subject to the FLSA. In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. In most instances, a business must have at least \$500,000 in annual dollar volume of sales or receipts to be covered by the FLSA.

The FLSA also specifically covers the following entities: hospitals; institutions primarily engaged in the care of the sick, the aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state and local government agencies.

The DOL's Wage and Hour Division provides guidance relating to the applicability of the FLSA in general, including a [compliance assistance tool](#) to determine applicability of the FLSA.

Issue Date: May 2013

Required Content

In general, the Exchange notice must:

- Inform employees about the existence of the Exchange and describe the services provided by the Exchange and the manner in which the employee may contact the Marketplace to request assistance;
- Explain how employees may be eligible for a premium tax credit or a cost-sharing reduction if the employer's plan does not meet certain requirements;
- Inform employees that if they purchase coverage through the Exchange, they may lose any employer contribution toward the cost of employer-provided coverage, and that all or a portion of this employer contribution may be excludable for federal income tax purposes; and
- Include contact information for the Exchange and an explanation of appeal rights.

Model Notices

The DOL provided the following model Exchange notices:

- A [model Exchange notice](#) for employers who do not offer a health plan; and
- A [model Exchange notice](#) for employers who offer a health plan to some or all employees.

Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above.

Providing the Notice

Who Must Receive a Notice?

Employers must provide the Exchange notice to each employee, regardless of plan enrollment status or of part-time or full-time status. Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

What Is the Deadline for Providing the Notice?

ACA required employers to provide the Exchange notice by March 1, 2013. However, on Jan. 24, 2013, the DOL announced that employers would not be held to the March 1, 2013, deadline and that employers would not have to comply with the Exchange notice requirement until more guidance was issued.

The DOL's temporary guidance sets a compliance deadline for providing the Exchange notices that matches up with the start of the first open enrollment period under the Exchanges.

Employers must provide the Exchange notice to both new hires and current employees as follows:

- **New Hires** – Employers must provide the notice to each new employee at the time of hiring beginning **Oct. 1, 2013**. For 2014, the DOL will consider a notice to be provided at the time of hiring if the notice is provided within **14 days** of an employee's start date.
- **Current Employees** – With respect to employees who are current employees before Oct. 1, 2013, employers are required to provide the notice no later than **Oct. 1, 2013**.

Employers that decide to inform their employees about the Exchanges earlier than the Oct. 1, 2013, deadline are permitted to use the model notices and rely on the DOL's temporary guidance.

Method of Providing Notice

The notice is required to be provided automatically, free of charge.

The notice must be provided in writing in a manner calculated to be understood by the average employee. It may be provided by first-class mail. Alternatively, it may be provided electronically if the requirements of the DOL's electronic disclosure safe harbor are met. This safe harbor allows plan administrators to send certain disclosures electronically to:

- Employees with work-related computer access; and
- Other plan participants and beneficiaries who consent to receive disclosures electronically.

The safe harbor does not require the use of any specific form of electronic media. However, plan administrators are required to use measures reasonably calculated to ensure **actual receipt** of the material by plan participants and beneficiaries. Merely placing a disclosure on a company website available to employees will not by itself satisfy this disclosure requirement.

Cobra Election Notice

Under COBRA, a group health plan must provide qualified beneficiaries with an election notice, which describes their rights to continuation coverage and how to make an election. The election notice must be provided to the qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event. The DOL has a model election notice that plans may use to satisfy the requirement to provide the election notice under COBRA.

According to the DOL, some qualified beneficiaries may want to consider and compare health coverage alternatives to COBRA continuation coverage that are available through the Exchanges. Qualified beneficiaries may also be eligible for a premium tax credit for an Exchange plan.

The DOL updated the [model COBRA election notice](#) to help make qualified beneficiaries aware of other coverage options available in the Exchanges. Use of the model election notice, appropriately completed, will be considered by the DOL to be good faith compliance with the election notice content requirements of COBRA.