

# REFORM *Update*

Issue Sixty-Seven

June 2013

June 14, 2013

The Department of Labor (DOL) recently issued temporary guidance on the Exchange notice that health care reform will require. At the same time, the DOL released a new model COBRA notice that includes required wording on coverage available through the Exchange.

## **Background**

Health care reform amended the Fair Labor Standards Act (FLSA). It now requires employers to inform employees about the Health Insurance Marketplace in writing. The notice must:

1. Inform employees that the Marketplace (or Exchange) exists, describe the services the Marketplace provides and state how to contact the Marketplace for help.
2. Explain that the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code (the Code) if the employee purchases a qualified health plan through the Marketplace. This tax credit may apply in cases where the employer's plan covers less than 60 percent of benefit costs.
3. State that employees purchasing a qualified health plan through the Marketplace may lose the employer contribution (if any) toward the health benefits plan the employer offers and that all or a portion of that contribution may be excludable from income for federal income tax purposes.

The notice was initially to be provided to all existing employees as of March 1, 2013. Any newly hired employee after March 1, 2013, would also need to receive the notice. However, the DOL indicated in February that it would modify the date because:

- Guidance was still pending on how to calculate the 60 percent minimum value.
- The March date did not coincide with the other marketing plans to educate individuals about the Marketplace.

The DOL received immediate feedback from employers. They appreciate the delayed effective date but wanted the DOL to provide reasonable time to comply with this new notice requirement. In addition, employers requested that the DOL provide model wording for the notice.

The DOL released temporary guidance on the notice requirement. Employers can rely on this temporary guidance until the DOL issues new regulations or additional guidance. Future guidance will provide adequate lead time to comply with any new or modified requirements.

### **Temporary Guidance on the Exchange Notices**

Employers must issue the notice if they are subject to the FLSA. In general, the FLSA applies to employers that employ one or more employees and are engaged in or produce goods for interstate commerce. For most firms, a revenue threshold of at least \$500,000 in annual volume of business applies. The FLSA also covers the following entities:

- Hospitals
- Institutions that care for 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
- Institutions of higher learning
- Federal, state and local governments and governmental agencies

It would be unusual for an employer to be excluded from the FLSA. The DOL's Wage and Hour Division provides assistance to determine whether the FLSA applies to your organization. This tool can be found at <http://www.dol.gov/elaws/esa/flsa/scope/screen24.asp>.

Employers must distribute the notice to all full-time and part-time employees, including employees who are not eligible for employer-sponsored health coverage. It does not include dependents or others that may be eligible for coverage but are not employees.

The statute requires the notice to include specific information. Model notices are provided at <http://www.dol.gov/ebsa/healthreform/>. Two model notices are found under the section titled "Notice to Employees of Coverage Options." One notice is posted for employers that do not cover any employees under an employer-sponsored health plan. The other is posted for employers that cover all or some of their employees under an employer-sponsored health plan.

The notices contain information specific to the employer's benefit plan. The notice requires general information about the employer's plan, including the contact person available to answer any questions. In addition, the notice should state eligibility criteria. Criteria for employee and dependent eligibility must be disclosed. The notice also requires the employer to indicate how eligible dependent children are defined. The employer needs to check a box if the plan provides minimum value and if the employer believes the plan is affordable based on the employee's income.

An optional section is included for employers. It includes employee-specific data, such as the new hire waiting period and when the employee should be eligible for coverage. The employer also can provide information regarding the contributions required for the lowest-cost plan that meets the minimum value. Additional optional questions may be answered if the employer's plan year is almost over. These questions concern potential changes to plan benefits and contributions.

Employers are not required to answer the optional questions. However, if employees do go to the Marketplace to apply for coverage, the Marketplace will likely contact the employer representative for the details of the optional content in order to assess whether the employee is eligible for tax credits. Employers may want to forgo filling in the optional information if they anticipate few employees will investigate the Marketplace. Otherwise, it may make sense to complete that section.

Employers must provide the notice to each new employee at the time of hire beginning on October 1, 2013. The DOL will consider the notice delivered at the time of hire if it is provided within 14 days of the employee's start date.

Current employees must be given the notice no later than October 1, 2013.

The notice must be easily understood by the average employee. It should be sent by first-class mail. Employers also can send it electronically so long as they meet the DOL's electronic disclosure safe harbor. The safe harbor for electronic distribution is found at 29 CFR 2520.104b-1(c). It permits electronic delivery to employees that meet either of the following classifications:

1. **Integral Part of Duties.** Those who can effectively access electronic documents anywhere they are reasonably expected to perform their duties and who access the employer's or plan sponsor's electronic information system as an integral part of those duties.
2. **Affirmative Consent.** Those who do not use a computer as an integral part of their duties. These employees must consent to receiving the notice electronically.

The safe harbor requires employers to take specific steps when they distribute the information:

- Develop a process to determine whether the employee received the information. This process might include using return receipt for e-mail or a notice of undelivered electronic mail. Employers could also periodically check to confirm their employees received the transmitted information.
- Protect confidential personal benefit information.
- Prepare and furnish the document so that it is consistent with the required style, format and content.
- Inform the employee that the document is important when it is transmitted.
- Inform employees that they can request a paper copy of the document.

Employers will likely try to deliver the notice electronically if it is possible to meet the delivery requirements.

### **New Model COBRA Notices**

The temporary guidance also covers the COBRA election notice sent to qualified beneficiaries when they experience a COBRA-qualifying event. This notice must:

- Include the name of the plan and the name, address, and telephone number of the plan's COBRA administrator.
- Identify the qualifying event.
- Identify the qualified beneficiaries (by name or by status).
- Explain that the qualified beneficiaries have a right to elect continuation coverage.
- Provide the date coverage will end (or has ended) if the employee does not elect continuation coverage.
- Explain how to elect continuation coverage.

- Explain what will happen if the employee waives or does not elect continuation coverage.
- Describe the continuation coverage, state how long it will be available, and (if it is for less than 36 months) explain how to extend it for disability or secondary qualifying events.
- State how continuation coverage might end early.
- State premium payment requirements, including due dates and grace periods.
- Explain the importance of keeping the plan administrator informed of the addresses of qualified beneficiaries.
- State that the election notice does not fully describe COBRA or the plan and that more information is available from the plan administrator and in the plan's summary plan description (SPD).

Qualified beneficiaries may want to consider coverage through the Marketplace in addition to COBRA coverage. They may qualify for premium tax credits that will help to pay for coverage in the Marketplace.

The revised notice includes a short paragraph discussing the Marketplace. It informs qualified beneficiaries that they can obtain health coverage other than COBRA, and that the Marketplace coverage may be less expensive.

The temporary guidance does not offer a deadline for issuing the new model notice. However, employers should adopt it by January 1, 2014, when Marketplace coverage becomes effective.

### **Concluding Thoughts**

The DOL released this temporary guidance early, so employers can implement a process for delivering the Exchange notice. The notice requires certain employer-specific data. However, employee-specific data is optional.

Employers will also welcome the fact that the notice directs the employee to one website. Because that site will direct employees to the applicable Marketplace, multistate employers do not need to worry about directing employees to different state Marketplaces.

Employers should start thinking through the best process for distributing these notices to new hires as of October 1, 2013. They should also consider how they will distribute notices to current employees. The short time frame to deliver the notice (14 days from the date of hire) means some employers will not be able to deliver the notice with other benefit information.

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