



Employer Notice of Health Insurance Exchange Coverage Options: Deadline Fast Approaching, but No DOL Penalty for Late Notice

Sometimes lost in the temporary reprieve from employer mandate penalties for 2014 is the fact that employers still have much to do this year to comply with the Patient Protection and Affordable Care Act ("ACA"). One such responsibility is the requirement to distribute notices to all employees regarding the pending availability of health insurance exchanges (now referred to as "marketplaces" by federal agencies), by October 1, 2013. This requirement is found under Section 18B of the Fair Labor Standards Act ("FLSA"), which was added by Section 1512 of the ACA.

Who Sends the Notice?

All employers subject to the FLSA must send the notice. In general, all employers engaged in interstate commerce that have over \$500,000 of gross receipts are subject to the FLSA and must send the notice, as well as governmental entities.

The DOL confirmed in [FAQs](#) that third parties may distribute the notice on behalf of employers. However, the DOL cautioned that if another entity such as a third party administrator or health insurer provides the notice to plan participants, the employer must ensure that employees who are not plan participants also receive the notice (*e.g.*, those not eligible for or not enrolled in the plan).

Who Receives the Notice?

The notice must be provided to all employees, regardless of whether or not the employer offers health insurance coverage, regardless of whether such coverage meets minimum value or affordability requirements, and regardless of whether the employee is eligible for employer coverage.

The notice does not have to be provided to non-employees such as former employees who have elected COBRA coverage, but providing the notice to COBRA participants may benefit the employer in the long run. If COBRA participants receive information about the availability of exchange coverage and decide to enroll in such coverage in lieu of COBRA, that may benefit the employer's claims experience rating. Also, COBRA participants may find that coverage under an exchange is more affordable than COBRA coverage, especially if the individual qualifies for subsidized exchange coverage.

When Must the Notice be Distributed?

The notice must be distributed to current employees by October 1, 2013. New hires must receive the notice within 14 days after being hired.

What Must be in the Notice?

By law, there are only a few items that must be included in the notice, and the Department of Labor has issued two model notices that exceed these minimum requirements ([one for employers that offer health insurance](#) and [another notice for those that do not](#)).

All information that is legally required to be included in the notice is on page 1 of the model notice, and in one item on page 2 regarding whether the employer's plan is intended to satisfy the "minimum value" and "affordability" requirements under the ACA. While not mandatory, the rest of page 2 and all of page 3 of the model notice include information to be used by employees in determining whether they qualify for a subsidy under the exchange. While employers are not required to include this information in the notice, doing so may reduce the questions that employers receive from employees down the road (note that the information on page 3 is employee-specific). On the other hand, employers should take care to provide only accurate information in the notices and should tailor the model notices to their plan, as necessary.

How Can the Notice be Sent?

The notice must be provided in the same manner that the employer provides other plan materials such as summary plan descriptions. This means that merely posting the notice in the workplace or online is not sufficient. Electronic distribution is acceptable, provided the distribution meets DOL requirements (*e.g.*, those who do not routinely use computers at work must either consent to receipt of electronic notices, or must be given a paper copy). Distribution by hand and first-class mail are also acceptable methods.

What Happens if an Employer Does Not Provide the Notice?

The notice is one of few employer mandates under the ACA that does not carry with it an explicit penalty for noncompliance. This was confirmed by the DOL in an [FAQ](#) posted on September 12, 2013. However, employers who ignore the notice requirement are taking a risk even though there is no specific penalty for noncompliance. It is unknown what a court might do if presented with an employee who claims to have been harmed by the employer's failure to distribute a notice that is required by law. There is also a general expectation that plan administrators will be prudent and forthcoming in communicating with participants and employees. Finally, Employee Benefits Security Administration ("EBSA") personnel noted informally after issuance of the FAQ that a failure to provide the notice could increase the chances of a DOL review of the health plan. EBSA representatives have also declined comment regarding whether employers may face enforcement action by other agencies if they fail to provide the notice (such as the IRS, the Department of Health and Human Services, or the DOL's Wage and Hour division).

— [Timothy P. Brechtel](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, please contact your Jones Walker relationship attorney or:

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