

## DOL'S EMPLOYER EXCHANGE/MARKETPLACE NOTICES AND INSTRUCTIONS

Beginning January 1, 2014, individuals and employees of small businesses will have access to affordable coverage through a new competitive private health insurance market – the Health Insurance Marketplace. The Marketplace offers “one-stop shopping” to find and compare private health insurance options. Open enrollment for health insurance coverage through the Marketplace begins October 1, 2013. **ACA requires employers to provide all new hires and current employees with a written notice about ACA's Exchanges by October 1, 2013.**

Employers may use the applicable DOL's model Exchange notices to satisfy this requirement using the interactive form available online:

- Model Exchange notice for employers who do not offer a health plan; and <http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf>
- Model Exchange notice for employers who offer a health plan to some or all employees. <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf>

### *Employers Subject to the Notice Requirement*

The FLSA section 18B requirement to provide a notice to employees of coverage options applies to employers to which the FLSA applies. In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. For most firms, a test of not less than \$500,000 in annual dollar volume of business applies.(4) 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 Department's Wage and Hour Division provides guidance relating to the applicability of the FLSA in general including an internet compliance assistance tool to determine applicability of the FLSA. See [www.dol.gov/elaws/esa/flsa/scope/screen24.asp](http://www.dol.gov/elaws/esa/flsa/scope/screen24.asp).

### ***Providing Notice to Employees***

Employers must provide a notice of coverage options to each employee, regardless of plan enrollment status (if applicable) 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.

### ***Form and Content of the Notice***

Pursuant to the statute, the notice to inform employees of coverage options must include information regarding the existence of a new Marketplace as well as contact information and description of the services provided by a Marketplace. The notice must also inform the employee that the employee may be eligible for a premium tax credit under section 36B of the Code if the employee purchases a qualified health plan through the Marketplace; and a statement informing the employee that if the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

### ***Timing and Delivery of Notice***

Employers are required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. For 2014, the Department 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.

With respect to employees who are current employees before October 1, 2013, employers are required to provide the notice not later than October 1, 2013. 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 Department of Labor's electronic disclosure safe harbor at 29 CFR 2520.104b-1(c) are met.

### ***Model Notice***

To satisfy the content requirements for FLSA section 18B, model language is available on the Department's website [www.dol.gov/ebsa/healthreform](http://www.dol.gov/ebsa/healthreform). There is

one model for employers who do not offer a health plan and another model for employers who offer a health plan or 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.

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.

#### *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:

1. **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.
2. **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.