DOL issues eagerly anticipated guidance on Marketplace Notice requirement

The DOL has issued temporary guidance and model notices addressing the Exchange notice requirement under the ACA. Employers are required under the law to provide employees with a notice of their options under the insurance Exchanges (referred to in the guidance as Marketplaces). Originally due by March 1, 2013, the agencies postponed distribution of this “Marketplace Notice” earlier this year. The newly released guidance also updates COBRA election notices, revised to inform qualified beneficiaries about other coverage options available in the Marketplaces. Generally, employer group health plans will need to provide the Marketplace Notice to new employees starting on — and to existing employees by — October 1, 2013.

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Background

Section 18B of the Fair Labor Standards Act (FLSA), as added by the Affordable Care Act (ACA), requires employers to provide employees with a written notice describing the public Marketplaces (referred to as Exchanges in the law). This notice will be used to inform employees:

- About the existence of Marketplaces, including a description of the services provided by the Marketplaces and how they can contact Marketplaces to request assistance
- That they might be eligible for a premium tax credit if they purchase a qualified health plan through a Marketplace and the employer plan’s share of the total costs of benefits under the plan is less than 60%
- That they may lose any employer contribution and tax savings towards the cost of employer-sponsored coverage if they purchase a qualified health plan through a Marketplace

This notice requirement was originally to take effect on March 1, 2013. However, guidance issued earlier this year by the Department of Labor (DOL) delayed the notice requirement until late summer or fall of 2013, so that the notice requirement can be synchronized with the open enrollment period for the Marketplaces. (See our January 25, 2013 For Your Information.)
On May 8, 2013, the DOL issued temporary guidance through Technical Release No. 2013-2 that implements this Marketplace Notice requirement effective October 1, 2013. This guidance will remain in effect until the DOL issues regulations or other guidance. Adequate time will be provided to comply with any additional or modified requirements. The guidance provides model Marketplace notices as well as a modified COBRA election notice.

**Employers subject to the notice requirement**

The notice requirement applies to all employers subject to FLSA. This includes:

- Employers with one or more employees who are engaged in, or produce goods for, interstate commerce. Generally includes employers with annual dollar volume of sales or receipts in the amount of $500,000 or more
- Federal, state and local government agencies
- Hospitals and other institutions primarily engaged in the care of sick, aged, mentally ill, or disabled. Includes private, public, for-profit, and not-for-profit institutions
- Pre-schools, elementary and secondary schools, and institutions of higher education

The DOL has an internet compliance assistance tool employers can use to determine whether they are subject to the FLSA.

**Form and content of notice**

To inform employees of their coverage options, the notice must include the following information:

- The existence of the Marketplace, contact information, and a description of the services provided by a Marketplace
- That the employee may be eligible for a premium tax credit for qualified health plans purchased through a Marketplace
- A statement that if the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution to benefits offered by the employer, and that all or a portion of that employer contribution may be excluded from Federal income tax

To satisfy the content requirements, the DOL has provided model language. There is a model notice for employers who offer a health plan to some or all employees, and a model notice for employers who do not offer a health plan. Employers can use a modified version of the notice as long as the content requirements are met.

**Buck Comment.** Unlike the Summary of Benefits and Coverage (SBC), the guidance does not include a requirement to provide the notice in alternate languages. The DOL does not indicate its intention to provide the model notice template in other languages. Both model notices require information on the employer such as name, address, and contact information. The model notice for employers who offer a health plan also requires the following information:

- Whether the plan is offered to some or all employees, and the definition of eligible employees
- Whether the plan is offered to dependents, and the definition of eligible dependents
Whether the coverage satisfies the 60% minimum value standard and whether the coverage is intended to be affordable

Employers also have the option to include employee-specific information in the notice, 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
- Changes in the employer plan for the new plan year

**Buck Comment.** While it is optional for employers to include this additional information, it will help ensure that employees understand their coverage choices and help avoid employers receiving penalty notices that do not apply.

The notices also provide a link to HealthCare.gov, a site that will provide additional information on health care reform as well as an online application for health insurance coverage and contact information for a local Marketplace.

**Buck Comment.** It is welcome news that the model notices are not state-specific or employee-specific. Employers who offer different health plans to different groups of employees, however, may need to prepare multiple notices and coordinate the distribution.

**Timing and delivery of notice**

For 2013, the notice must be provided to each new employee on their date of hire starting October 1, 2013. For employees who are current employees before October 1, 2013, the notice must be provided no later than October 1, 2013. For 2014, the notice must be provided within 14 days of the employee’s start date.

The notice can be provided by first-class mail. Alternatively, it can be provided electronically if the DOL electronic safe harbor requirements are satisfied (see sidebar).

**Model COBRA election notice**

The DOL has previously provided a COBRA model election notice that plan sponsors can use to satisfy the COBRA election requirement. A revised COBRA model notice has also been provided to help make COBRA beneficiaries more aware of the available Marketplace options.

**Buck Comment.** Plan sponsors should consider amending their existing COBRA notices. With the availability of Marketplace coverage and subsidies, the need for COBRA coverage could drop significantly.
Enrollment in Marketplace coverage instead of COBRA can often benefit both the COBRA beneficiary and the employer.

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