

EMPLOYEE BENEFITS

NEW NOTICE REQUIREMENTS TO EMPLOYEES REGARDING HEALTH INSURANCE EXCHANGES AND COBRA

by Roberta P. Granadier

All employers who employ one or more employees and are subject to the Fair Labor Standards Act ("FLSA") must provide a new notice to employees **no later than October 1, 2013** regarding the availability of health coverage under the Health Insurance Exchange, also referred to as the Health Insurance Marketplace. Employees hired after October 1, 2013 must be given the notice within 14 days after their start date.

Contents of Notice

The purpose of the notice is to inform employees of coverage options available through the Health Insurance Marketplace ("Marketplace") commencing January 1, 2014. The Department of Labor (the "DOL") has issued two model notices, one for employers who offer employer-provided health insurance, <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf>, and one for employers who do not, <http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf>. Even small employers who are not subject to the "play or pay" penalty provisions under the Affordable Care Act ("ACA") or large employers who choose to "pay" rather than "play" under ACA are required to distribute this notice to employees.

In the notice for employers who offer coverage, the employer must make certain representations and complete specific information about its group health plans, including information on eligibility and dependent coverage and whether the plan provides minimum value and affordable coverage. This means that most employers will have to determine whether their plans satisfy the minimum value and affordable coverage rules of the ACA before the October 1, 2013 notice date.

For purposes of this notice, an employer plan is affordable if the employee's required contributions for plan coverage is less than or equal to 9.5% of the employee's W-2 wages. A plan provides minimum value if the plan's share of the total allowed cost of benefits is at least 60% of such costs. The information in the notice may have to be customized for different employee groups since the minimum value and affordability tests may be met for some employees but not for others. These sections will take some time to complete accurately, and Dickinson Wright employee benefits attorneys are ready to assist in analyzing your plan's status regarding minimum value and affordability and to assist in completing your notice obligations.

The notice must inform employees that they may be eligible for a premium tax credit if they purchase coverage through the Marketplace and that if they do purchase coverage through the Marketplace, they may forfeit the employer contribution (if any) to the employer-sponsored group health plan. The notice must also provide that an

employer contribution to a group health plan is not includable in the employee's income.

Notice Requirements

The notice must be distributed to all employees, even if they are not eligible for or enrolled in the employer's health plan, including both full-time and part-time employees. Employers are not required to send the notice to spouses, dependents or other individuals who may become eligible for coverage but are not employees. The notice must be written in a manner intended to be understood by the average employee. Employers may send the notice by first class mail or electronically, provided the employer satisfies DOL electronic disclosure requirements.

COBRA Election Notice

The DOL also issued a new model COBRA Election Notice, <http://www.dol.gov/ebsa/modelelectionnotice.doc>. The model COBRA Election Notice includes new language to help to make qualified beneficiaries under COBRA aware of their coverage options under the Marketplace and that they may be eligible for a premium tax credit to help pay for coverage in plans purchased through the Marketplace. It also makes changes to prior COBRA notice language related to pre existing conditions. As with the prior DOL model Election Notice, there are certain blanks that must be completed to make the form complete. The DOL has not indicated when the new COBRA Election Notice must be used, but because of the references to the Marketplace, it appears that the earliest use would be October 1, 2013.

Action Steps

1. Determine if you are subject to the notice requirement. Most employers, other than very small businesses, will have to comply.
2. If you offer a group health plan, determine whether your plan provides minimum value and affordable coverage under the ACA. This information could vary for different employees. If you do not have a health plan, or your plan does not provide minimum value **and** affordable coverage, you are still subject to the notice requirements, and a large employer will want to assess its liability for potential penalty taxes under ACA.
3. Complete information required by the notice and modify model language, if necessary.
4. Determine how the notice will be distributed or whether it will be incorporated with open enrollment materials. If you wish to send the notice electronically, confirm that you satisfy DOL electronic delivery requirements for **all employees** who must receive the notice.
5. Update your COBRA election materials and coordinate with your third party COBRA vendor, if any.

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