

COMPLIANCE ALERT



Regulatory Guidance for Health and Welfare Plans

» 5/13/13 | 2013-10

DOL Issues Exchange Notices and Revised COBRA Election Notice

On May 8, the Department of Labor ("DOL") issued a model notice employers may use to meet the Affordable Care Act ("ACA") requirement that they provide notice to employees about their coverage options on the Health Insurance "Marketplaces". We refer to this notice as the "Marketplace Notice." Note that the ACA originally used the term "Exchanges," but the federal government is now using the term "Marketplaces" to describe the Exchanges. In addition, the DOL released additional guidance about the Marketplace Notice and released an updated COBRA model election notice.

Which employers must provide the Marketplace Notice?

Employers subject to the Fair Labor Standards Act ("FLSA") are required to provide the Marketplace Notice. The FLSA generally applies to employers with an annual dollar volume of sales or business of at least \$500,000, and to hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies, regardless of volume of sales or business.

Which employees must receive the Marketplace Notice?

All employees must receive the Marketplace Notice, even employees who are part-time or who are not enrolled in the employer's health plan. Employers are not required to provide the Marketplace Notice to dependents, spouses, or domestic partners who are not employees (regardless of whether they are covered by the employer's health plan).

What information must the Marketplace Notice contain?

The Marketplace Notice must contain the following:

- Information about the existence of the new Marketplace, including contact information and a description of the Marketplace's services;
- A statement that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Marketplace; and
- A statement that if the employee buys a qualified health plan through the Marketplace, the employee may lose the employer's contributions (if any) to any health plan offered by the employer and that all or a portion of the employer's contribution may not be subject to federal income taxes.

Is there a model Marketplace Notice?

Yes. The DOL published model Marketplace Notices, discussed further below. One Notice is for employers who offer health plan coverage, while the other is for employers who do not offer

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health plan coverage.

Can we change the model Marketplace Notices?

Yes. In fact, the model Notices appear to contain more information than is legally required and may create additional administrative burdens for employers. The DOL indicates that employers may use one of these models, as applicable, or a "modified version", as long as the Notice meets the content requirements.

When must the Marketplace Notice be provided?

For new employees hired on or after October 1, 2013, the Marketplace Notice must be provided within 14 days of the employee's start date.

For employees who are employed before October 1, 2013, the Marketplace Notice must be provided no later than October 1, 2013. It appears an employer could provide the Marketplace Notice at any time between now and October 1, 2013. However, an employer probably should wait until closer to October 1, 2013 to distribute the Marketplace Notice. This will be more informative for employees. Also, the web site mentioned in the Marketplace Notice (www.healthcare.gov) is still being updated for additional Marketplace information.

How must the Marketplace Notice be provided?

The Marketplace Notice can be provided by first-class mail or can be provided electronically if the DOL's electronic disclosure safe harbor requirements are met. The Marketplace Notice must be provided automatically for free, and must be written so that it can be understood by the "average" employee.

What information is included in the model Marketplace Notices?

As noted above, there are two model Marketplace Notices: one for employers that offer a health plan to some or all employees, and one for employers that do not offer a health plan. Both Marketplace Notices appear to contain more information than what is legally required. Also, the model Marketplace Notices may need to be customized on an employee-by-employee basis. For example, the model Marketplace Notice for employers offering a health plan includes the following information:

- Employer's contact information
- The plan's eligibility rules for employees and their dependents
- A check box that, when checked, means the employer's coverage meets the minimum value standard and the cost of the coverage is intended to be affordable to the employee "based on employee wages"
- Information about the cost to an employee under the employer's lowest-cost minimum value plan
- Information about any upcoming changes to the plan

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It appears that the check box noted above would need to be completed on an employee-by-employee basis because coverage that is "affordable" for one employee based on his or her "wages" may not be "affordable" for other employees based on their "wages." This could make completing the model Marketplace Notice substantially more difficult. Thus, we believe many employers who offer health plans will consider using a modified version of the Marketplace Notice to avoid this step.

Updated Model COBRA Election Notice

The DOL's model COBRA election notice has been updated to make COBRA qualified beneficiaries aware of coverage options in the Marketplace and to reflect certain other ACA changes. An employer is not required to use the model COBRA election notice, but the DOL will consider the employer to be in good faith compliance with COBRA's election notice content requirements if the employer uses the model COBRA election notice with any appropriate modifications or supplements.

When should we start using the new model COBRA election notice?

The guidance does not state when, exactly, an employer should begin using the new COBRA election notice. There is some risk in using it immediately due to two "quirks." First, the new notice eliminates some references to pre-existing condition restrictions and how employees should consider those when deciding whether to elect COBRA. Pre-existing condition exclusions will be eliminated for plan years starting on or after January 1, 2014. However, that means an employee could potentially still face a pre-existing condition exclusion at any time through December 31, 2014. So, an employer may want to re-insert the language the DOL removed and clarify the effective date of the elimination of pre-existing condition exclusions.

The second concern is that the new COBRA notice does not specifically state that the Marketplace becomes effective January 1, 2014. An employer may want to include this in the notice so that employees will understand that Marketplace coverage is not available currently.

Links to Guidance:

- [DOL guidance describing the notice requirement](#)
- [Model Marketplace Notice for employers offering a health plan](#)
- [Model Marketplace Notice for employers not offering a health plan](#)
- [Updated model COBRA election notice](#)
- [Redline notice showing the May 2013 changes to the model COBRA election notice](#)

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