

employee benefits lawflash

July 12, 2013

DOL Guidance on Notice of Exchange Options

New notice describing availability of Exchange coverage must be provided by October 1, 2013.

On May 8, the U.S. Department of Labor (DOL) issued Technical Release 2013-02, which provided long-awaited information about the required Notice of Coverage Options for the Exchanges (now referred to as “the Marketplace”) created as part of 2010’s Affordable Care Act.¹ The technical release also updated the model Consolidated Omnibus Budget Reconciliation Act (COBRA) notice to incorporate language relating to the availability of coverage in the Marketplace. This notice requirement was scheduled to take effect on March 1, 2013, but it was delayed until guidance was issued. Now that the DOL has issued such guidance, all employers subject to the Fair Labor Standards Act must provide the notice, even if health coverage is not offered to employees. Importantly, the recent one-year delay for the employer shared responsibility penalty requirement does not affect the due date for this notice.²

Who must receive the notice?

The notice must be delivered to every employee, whether or not they have health plan coverage (or are even eligible for such coverage) and regardless of their full-time or part-time employment status. Employers are not required to provide notices to dependents (whether or not they are covered or eligible) or to former employees, such as retirees or COBRA-qualified beneficiaries.

When must the notice be provided to new employees?

Effective October 1, 2013, the notice must be provided to each new employee at the time of hire. The DOL has indicated that providing the notice within 14 days of the date of hire will satisfy this requirement.

When must the notice be provided to existing employees hired on or before October 1, 2013?

The notice must be provided to existing employees on or before October 1, 2013. Presumably, this includes employees hired after September 15, 2013, meaning, in some cases, the notice must be provided less than 14 days after date of hire.

How must the notice be delivered?

The notice must comply with the same standard as other Employee Retirement Income Security Act (ERISA) notices. Thus, 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. The notice can be provided electronically; however, it must comply with the DOL’s electronic disclosure requirements. In general, this means that it is only feasible to provide notice electronically to employees who use a computer as part of their regular job duties. Employees who do not use a computer to perform their duties would not be eligible to receive the documents electronically unless they specifically consent to electronic delivery of the notice.

1. View Technical Release 2013-02 at <http://www.dol.gov/ebsa/newsroom/tr13-02.html>.

2. For more information on the one-year delay, view our July 3, 2013 LawFlash, “Affordable Care Act Shared Responsibility Penalty Delayed Until 2015,” available at http://www.morganlewis.com/pubs/EB_LF_ACASharedResponsibilityPenaltyDelayedUntil2015_03july13.

What must the notice say?

Under the statute, the notice must address the following items:

- The existence of the Marketplace, a description of services provided by the Marketplace, and contact information for the Marketplace
- That the employee may be eligible for a premium tax credit or other cost-sharing reduction if the employer-sponsored plan covers less than 60% of allowable claims (i.e., does not provide minimum value) and the employee purchases qualifying health coverage through the Marketplace
- That the employee may lose the tax-free contributions from the employer (if any) toward coverage offered through the employer's plan if the employee purchases health coverage through the Marketplace

Are there model notices an employer can use?

The DOL has prepared two model notices³ that can be used—one for employers that offer health coverage and one for employers that do not offer health coverage. The first pages of the model notices are almost identical and contain the required information set forth in the statute. Part B of the model notice for employers offering health coverage requires very specific information about the employer's health coverage, including a checkbox to indicate whether the coverage is affordable or provides minimum value. Part B also includes additional, customized information that would be useful in connection with an application for coverage through the Marketplace. These provisions suggest that some employers may have to prepare and deliver multiple versions of Part B, depending on the types of coverage offered to their employees. Page three of the model notice states that employers have the option of completing Part B sections 13–16, which include additional information related to applying for Marketplace coverage. There is no similar statement indicating that the rest of Part B (on page two) is optional.

The technical release provides that employers may use one of the model notices or a modified version, provided the notice meets the applicable content requirements. Notably, the information in Part B is not listed in the content requirements. However, the DOL has informally advised that the sentence in Part B that begins “** Even if your employer intends your coverage to be affordable . . .” should also be included in the notices from employers that provide coverage. Given the difficulty of customizing Part B of the model notice, employers offering coverage may want to provide only the first page of the notice and the Part B section quoted above, at least until future regulations force the provision of the additional information.

When should the revised model COBRA notice be used?

The changes to the model COBRA notice are not yet required by the statute or regulations, and the technical release indicates that employers “may” use the updated model election notice⁴ to help make qualified beneficiaries aware of coverage options through the Marketplace. Even so, there is no reason not to use the updated model notice as the new language is generic and benign and may someday find its way into the notice requirements. Because coverage will not be available through the Marketplace until 2014, employers will want to be careful not to start using the updated model too early. Since a COBRA election must typically be made within 60 days of receipt of the notice, the new model notice should not be used before November 2013.

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3. View the model notices at <http://www.dol.gov/ebsa/healthreform/index.html>.

4. View the updated model election notice at <http://www.dol.gov/ebsa/healthreform/index.html>.

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