

## Employers Must Provide Health Exchange Notice by October 1, 2013

Employers have until October 1, 2013 to provide employees with the Health Exchange Notice. The simplest way to satisfy this obligation is to choose the appropriate model notice (there is one for employers who sponsor a plan and one for employers who do not sponsor a plan) and distribute a paper copy of it by hand or by mail.

### Which Employers Are Subject?

The Exchange Notice requirement applies to employers subject to the Fair Labor Standards Act (“FLSA”). FLSA generally applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. FLSA also specifically covers hospitals and resident care institutions for the sick, disabled, and aged; schools; and federal, state, and local government agencies. Special additional rules and exceptions apply and are summarized at: <http://www.dol.gov/compliance/guide/minwage.htm>. An internet compliance assistance tool is available at: <http://www.dol.gov/elaws/esa/flsa/scope/screen24.asp>. Using the tool, an employer can answer a series of questions to determine if they are required to provide the notice to their employees.

### Which Employees Must Receive the Exchange Notice?

The Exchange Notice must be provided to **all employees**, regardless of whether they are enrolled in an employer-sponsored health plan, and regardless of whether they are full- or part-time. The Exchange Notice does not need to be sent to dependents of employees.

### Model Exchange Notices

The DOL has issued two model Exchange notices – one for employers who do not offer a health plan and one for employers who do (either to some or to all of their employees). Part B of the model notices require the employer to enter certain information before use, including: name, Employer Identification Number (EIN), address, contact information about health coverage, whether all or only some employees receive health coverage, whether coverage is offered to dependents and if so, which ones, and whether coverage meets the minimum value (60 percent) standard and whether the cost of coverage is intended to be affordable (all as necessary to avoid excise taxes under the Employer Shared Responsibility Mandate). All three model notices are available on-line at: <http://www.dol.gov/ebsa/healthreform/>

Additional questions on the model notice are optional are intended to provide employees with the information the employees must provide if they attempt to obtain coverage on the market place.

### Elements of Exchange Notice

Employers are not required to use the Model Exchange Notices. If an employer chooses to prepare its own notice, its notice must be in writing and must:

- Inform the employee of the existence of the Marketplace, describe the services of the Marketplace and provide contact information about the Marketplace;
- If the employer plan does not provide minimum value (i.e., generally, if the plan reimburses less than 60 percent of the costs of a typical employer plan, as determined under other guidance), inform the employee that he or she may be eligible for a premium tax credit by purchasing a qualified health plan through the Marketplace; and

- Inform the employee that, if he or she purchases a plan through the Marketplace, the employee may lose the employer contribution (if any) to any employer-provided health plan and that such contribution may be excludable from taxable income.
- **Timing and Delivery of Exchange Notice**
- If an employee is employed before October 1, 2013, he or she must be provided the Exchange Notice **by October 1, 2013**. Any employee hired on or after October 1, 2013 must be provided with the Exchange Notice at the **time of hiring**. Beginning in 2014, the DOL will consider the “time of hiring” to be anytime within 14 days of an employee’s start date. Note that the DOL has not explicitly provided this 14-day window for employees hired between October 1 and December 31, 2013, so cautious employers may wish to provide the Exchange Notice to employees hired during that time on the employees’ actual start dates.
- Theoretically, the Exchange Notice may be provided by hand to employees; however, an employer may run into proof issues about whether the notice was properly delivered.
- The Exchange Notice may be provided by first-class mail. If it is provided electronically, it must comply with the DOL’s electronic disclosure safe harbor, found at 29 CFR 2520.104b-1(c). In general, the DOL safe harbor allows email or other electronic disclosure to employees who have computer access as a regular part of their job functions or who affirmatively consent to electronic disclosure in a way that reasonably demonstrates the employee’s ability to access the information. **Posting the notice to a company intranet or website will not suffice.**

Remember, employers subject to the FLSA must provide a health care exchange notice to their employees by October 1, 2013 and beginning January 1, 2014 to new hires within 14 days of the date of hire. The US Department of Labor has provided model notices and details of compliance on their web site.

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