



# Health Care Reform

## LEGISLATIVE BRIEF

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## Exchange Notice Requirements for Employers

Beginning Jan. 1, 2014, individuals and employees of small businesses will have access to insurance coverage through the Affordable Care Act's (ACA) health insurance exchanges (Exchanges), which are also known as Health Insurance Marketplaces. Open enrollment under the Exchanges will begin on Oct. 1, 2013.

**The ACA requires employers to provide all new hires and current employees with a written notice about ACA's Exchanges.** This requirement is found in Section 18B of the Fair Labor Standards Act (FLSA).

On May 8, 2013, the Department of Labor (DOL) released [Technical Release 2013-02](#) to provide temporary guidance on the requirement to provide employees with a notice about the Exchanges. The name the DOL uses for the Exchange Notice is the "Notice to Employees of Coverage Options."

In connection with the temporary guidance, the DOL announced the availability of **Model Notices to Employees of Coverage Options** for employers to use to satisfy the ACA's Exchange Notice requirement. The DOL also set a compliance deadline for the Exchange Notices. Employers must provide employees with an Exchange Notice by **Oct. 1, 2013**.

In addition, the DOL's temporary guidance includes a new COBRA model election notice, which has been updated to include information regarding health coverage alternatives offered through the Exchanges.

On Sept. 11, 2013, the DOL issued a [frequently asked question](#) (FAQ) on the penalties for failing to provide an Exchange Notice. In this FAQ, the DOL stated that **there is no fine or penalty under the ACA for failing to provide the notice**. This means that employers cannot be fined for failing to provide employees with notice about the ACA's new Exchanges.

### AFFECTED EMPLOYERS

ACA's Exchange Notice requirement applies to employers that are subject to the FLSA. In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. In most instances, a business must have at least \$500,000 in annual dollar volume of sales or receipts to be covered by the FLSA.

The FLSA also specifically covers the following entities: hospitals; institutions primarily engaged in the care of the sick, the aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state and local government agencies.

The DOL's Wage and Hour Division provides guidance relating to the applicability of the FLSA in general, including a [compliance assistance tool](#) to determine applicability of the FLSA.

### Other Entities Providing Notice on Behalf of Employers

On Sept. 4, 2013, the DOL, HHS and the Treasury issued an [FAQ](#) stating that it is permissible for another entity (such as an issuer, multiemployer plan or third-party administrator) to send the Exchange Notice on behalf of an employer to satisfy the employer's obligations. According to this FAQ, an employer will have satisfied its obligation to provide the notice with respect to an individual if another party provides a timely and complete notice.

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The DOL notes that employers are required to provide notice to all employees, regardless of whether an employee is enrolled in, or eligible for, coverage under a group health plan. Accordingly, an employer is not relieved of its statutory obligation to provide the Exchange Notice if another entity sends the notice to only participants enrolled in the plan, if some employees are not enrolled in the plan.

When providing notices on behalf of employers, multiemployer plans, issuers and third party administrators should:

- Take proper steps to ensure that a notice is provided to all employees regardless of plan enrollment; or
- Communicate clearly to employers that the plan, issuer or third party administrator will provide notice only to a subset of employees (for example, employees enrolled in the plan) and advise of the residual obligations of employers with respect to other employees (for example, employees who are not enrolled in the plan).

## REQUIRED CONTENT

Under the temporary guidance, the Exchange Notice must:

- Include information regarding the existence of an Exchange, as well as contact information and a description of the services provided by an Exchange;
- Inform the employee that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Exchange; and
- Contain a statement informing the employee that, if the employee purchases a qualified health plan through the Exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.

## Model Notices

The DOL provided the following model Exchange Notices:

- A [Model Notice to Employees of Coverage Options](#) for employers who do not offer a health plan; and
- A [Model Notice to Employees of Coverage Options](#) for employers who offer a health plan to some or all employees.

In addition to the required content, the DOL's model notice for employers who offer a health plan includes information regarding the employer's current health plan coverage. This information is included to help individuals enroll in coverage through the Exchanges and determine their eligibility for federal subsidies. Employers are not required to provide this information, although including it in the notice may help reduce the number of employee questions on whether the employer's health plan is affordable and provides minimum value.

Also, although the model notice for employers with health plans includes a section about design changes that the employer knows will occur for an upcoming plan year, the model notice does not ask employers to speculate about changes in coverage that may be made in the future but have not been finalized yet.

Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above. Thus, employers may use the DOL's models "as is," customize the DOL's models or create their own Exchange Notices, as long as the notices contain the required content elements.

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## PROVIDING THE NOTICE

### *Who Must Receive a Notice?*

Employers must provide the Exchange Notice to each employee, regardless of plan enrollment status or of part-time or full-time status. Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

### *What Is the Deadline for Providing the Notice?*

ACA required employers to provide the Exchange Notice by March 1, 2013. However, on Jan. 24, 2013, the DOL announced that employers would not be held to the March 1, 2013, deadline and that employers would not have to comply with the Exchange Notice requirement until more guidance was issued.

The DOL's temporary guidance sets a compliance deadline for providing the Exchange Notices that matches up with the start of the first open enrollment period under the Exchanges. Employers must provide the Exchange Notice to both new hires and current employees as follows:

- New Hires—Employers must provide the notice to each new employee at the time of hiring beginning **Oct. 1, 2013**. For 2014, the DOL will consider a notice to be provided at the time of hiring if the notice is provided within **14 days** of an employee's start date.
- Current Employees—With respect to employees who are current employees before Oct. 1, 2013, employers are required to provide the notice no later than **Oct. 1, 2013**.

Employers that decide to inform their employees about the Exchanges earlier than the Oct. 1, 2013, deadline are permitted to use the model notices and rely on the DOL's temporary guidance.

### *Method of Providing Notice*

The notice is required to be provided automatically, free of charge. The notice must be provided in writing in a manner calculated to be understood by the average employee; however, no particular method of providing the notice is specifically required (for example, by mail, hand delivery or electronically).

The DOL has stated that the notice may be provided by first-class mail. Alternatively, it may be provided electronically if the requirements of the DOL's electronic disclosure safe harbor are met. This safe harbor allows plan administrators to send certain disclosures electronically to:

- Employees with work-related computer access; and
- Other plan participants and beneficiaries who consent to receive disclosures electronically.

The safe harbor does not require the use of any specific form of electronic media. However, plan administrators are required to use measures reasonably calculated to ensure **actual receipt** of the material by plan participants and beneficiaries. Merely placing a disclosure on a company website available to employees will not by itself satisfy this disclosure requirement.

## PENALTIES FOR FAILING TO PROVIDE THE NOTICE

In an [FAQ](#), the DOL stated that employers that are subject to the FLSA should provide a written notice to its employees about the Exchange by Oct. 1, 2013, but there is no fine or penalty under the ACA for failing to provide the notice. This means that employers cannot be fined for failing to provide employees with notice about the ACA's new Exchanges.

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Although this FAQ asserts that there will be no penalties for failing to provide an Exchange Notice, there are several reasons why employers may still want to provide the notice. The Exchange Notice can help employers answer employee questions about:

- What the Exchange is;
- Whether the employer will still provide a plan once the Exchanges are operational;
- How Exchange plans are different from the employer's plan; and
- Whether the employer's plan is intended to be affordable and provide minimum value.

If the employer's plan is affordable and provides minimum value, employees will not be eligible for federal subsidies through the Exchange. However, most employees will have the option of waiving employer-sponsored coverage and, instead, enrolling in coverage through the Exchange.

In many cases, employer-sponsored coverage may be a better option for employees than Exchange coverage. For example, premiums for employer-sponsored coverage will often be cheaper for the employee than premiums for coverage through the Exchange. Additionally, the employee portion of the premium for employer-sponsored coverage is typically excluded from taxable income and is therefore tax-free. This is not the case in the Exchange.

## **COBRA ELECTION NOTICE**

Under COBRA, a group health plan must provide qualified beneficiaries with an election notice, which describes their rights to continuation coverage and how to make an election. The election notice must be provided to the qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event. The DOL has a model election notice that plans may use to satisfy the requirement to provide the election notice under COBRA.

According to the DOL, some qualified beneficiaries may want to consider and compare health coverage alternatives to COBRA continuation coverage that are available through the Exchanges. Qualified beneficiaries may also be eligible for a premium tax credit for an Exchange plan.

The DOL updated the [model COBRA election notice](#) to help make qualified beneficiaries aware of other coverage options available in the Exchanges. Use of the model election notice, appropriately completed, will be considered by the DOL to be good faith compliance with the election notice content requirements of COBRA.

*Source: Department of Labor*

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