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What Do Employers Need to Know About the ACA Marketplace Notices?

By Steven Friedman and Ilyse Schuman

Although the Affordable Care Act's (ACA) "employer mandate" has been delayed until 2015, health insurance exchanges are still scheduled to start offering health coverage to individuals and employees of small businesses starting January 1, 2014. Open enrollment in these Health Insurance Marketplaces will begin on October 1, 2013. The ACA requires employers to send a Notice to their current employees advising them about the Health Insurance Marketplaces by October 1, 2013. With this Marketplace Notice deadline fast approaching, employers may have a number of questions about the scope of their obligations. This ASAP addresses some of the most frequently asked questions surrounding this Notice requirement.

Which Employers are Subject to the Notice Requirement?

The ACA added section 18B to the Fair Labor Standards Act (FLSA) requiring all employers subject to the FLSA to send the Marketplace Notice. In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. For most companies, a threshold of at least \$500,000 in annual volume applies.

To Whom Must Employers Send the Marketplace Notice?

Employers must send or provide the Notice to all employees, regardless of whether or not they are eligible for or enrolled in coverage under an employer-sponsored health plan. Therefore, employers must send or provide the Marketplace Notice to part-time, seasonal or temporary employees in addition to sending or providing the Notice to full-time employees.

When Must Employers Send the Marketplace Notice?

As stated above, employers are required to send or provide the Marketplace Notice to each current employee by October 1, 2013. Employers must also send or provide the notice to new employees hired after October 1, 2013 within 14 days of such employee's date of hire.

How Must the Notice be Delivered to Employees?

Employers must provide the Marketplace Notice to employees in writing in a manner calculated to be understood by the average employee. The Marketplace Notice may be sent to employees

by first-class mail. Alternatively, employers may provide the Notice electronically if the requirements of the Department of Labor's electronic disclosure safe harbor at 29 CFR 2520.104b-1(c) are met.

What Must the Marketplace Notice Say?

Under the FLSA, the Marketplace Notice must inform employees of the following:

- Of the existence of the Marketplace (referred to in the statute as the Exchange) including a description of the services provided by the Marketplace, and the manner in which the employee may contact the Marketplace to request assistance;
- That if the employee purchases a qualified health plan through the Marketplace, the employee may be eligible for a premium tax credit under the ACA if either (i) the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs or (ii) the coverage offered to the employee is "unaffordable" (because the cost of single coverage exceeds 9.5% of household income); and
- That the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer if the employee purchases a qualified health plan through the Marketplace.

The Department of Labor (DOL) has provided a Model Marketplace Notice for employers who do not offer a health plan (available here) and another Model Marketplace Notice for employers who do offer a health plan to some or all of their employees (available here). The COBRA model election notice has been updated to inform qualified beneficiaries of the alternative coverage options available through the Exchanges.

Are Employers Required to Use the DOL Model Notices?

No. Employers are not required to use the Model Notices. In fact, the Model Notice for employers who do offer a health plan provides information that is far more extensive than that which is specified by statute. This Model Notice may create more questions and confusion for some employers and employees. Specifically, Part B of the Model Notice calls for information about employee eligibility for coverage, coverage for dependents, and whether the coverage is affordable and provides minimum value. Part B also asks employers to provide information about any changes in coverage for the next plan year. Employers may not know the answers to these questions at this time. Employers may not want to provide information on the Notice that is inaccurate or speculative, particularly because the questions solicited in this Model Notice go far beyond the statutory requirements.

What About Multiemployer Plans?

Employers that contribute to multiemployer plans may face difficulty sending the Marketplace Notice. Although the obligation to send the Notice falls on the employer, not the union fund, the employer may not have access to the information called for in the DOL Model Notice. The employer may be reliant on the union fund to provide information about the health coverage under the union plan Marketplace Notice requirements, and whether it is affordable and provides minimum value. The DOL has issued guidance, in the form of FAQs, providing that an employer will have satisfied its obligation to provide the Marketplace Notice with respect to an individual if another party, such as the multiemployer plan, provides a timely and complete Notice. Although some union funds may provide this information to participating employers or send the Notice on the employer's behalf, other union funds may not be so helpful.

Can an Employer be Fined for Failing to Provide Employees with the Marketplace Notice?

No. The DOL has issued guidance stating that employers covered by the FLSA should provide a written Notice to its employees about the Marketplace by October 1, 2013. However, there is no specific fine or penalty under the law for failing to provide the Notice. Employers are technically required under the FLSA to send the Marketplace Notice, so employers may still want to send the Notice with, at least, the minimum information specified by the statute. Furthermore, employers who disregard the Marketplace Notice requirement may be subject to claims by employees who suffer damages as a result, for example, by not obtaining Marketplace coverage.

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