

INSIGHTS

Affordable Care Act Mandates Employer Notice of Coverage Options to Employees by October 1, 2013

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Pursuant to the Affordable Care Act (ACA), individuals and employees of small businesses will be able to access health insurance coverage through a private health insurance market – the Health Insurance Marketplace – beginning on January 1, 2014. The ACA mandates that employers provide a notice to employees with information regarding their coverage options, including those available in the Marketplace, by October 1, 2013.

Under this mandate, found in newly-created Section 18B of the Fair Labor Standards Act (FLSA), employers will be required to provide current employees with a one-time written notice about the Health Insurance Marketplace. New employees hired after the October 1, 2013 effective date must receive such notice of coverage options within 14 days of their start date.

To Whom does the Notice Requirement Apply?

All employers subject to the FLSA are required to send this notice. Covered employers must provide a notice of coverage options to all employees, regardless of whether or not they are eligible for or enrolled in coverage under an employer-sponsored health plan. This notice requirement extends to part-time, seasonal and temporary employees.

What Information Must be Included in the Notice?

The notice must be in writing and be written in a manner calculated to be understood by the average employee. The written notice to employees must contain, at a minimum, information about the following:

1. 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;
2. The possibility that employees may lose the employer contribution to any employer-provided health plan if they purchase a qualified health plan through the Marketplace;
3. The possibility that employees may lose the ability to exclude employer and employee contributions from their income for federal income tax purposes if they purchase a qualified health plan through a Marketplace; and
4. The possibility that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Marketplace.

To assist employers with their notice obligations, the Department of Labor (DOL) has promulgated two model notices, one for employers who do not offer a health plan and another model for employers who do offer a health plan to some or all employees. Employers are free to use one of these models, as applicable, or a modified version, provided the employer's version meets the content requirements contained in Section 18B of the FLSA.

How Should the Notice be Delivered?

Employers may deliver the notice via first-class mail. Alternatively, the notice may be distributed to employees electronically if the requirements of the DOL's electronic disclosure safe harbor at 29 CFR 2520.104b-1(c) are met. In general, this requires that the recipient be either (a) an employee who uses a computer as part of his or her normal job function, or (b) an employee who has consented to electronic delivery in a manner that demonstrates they can effectively receive the electronic delivery.

What are the Penalties for Non-Compliance?

While there are currently no specific fines or penalties provided for in the case of employer default, employers are encouraged to comply with this notice requirement, as they are technically obligated to do so under the FLSA. Further, employers who fail to send the required notice could potentially open themselves up to claims by employees who suffer damages as a result of such failure.