

“OBAMACARE” NOTICES ARE MANDATORY FOR ALL EMPLOYERS.

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The following advice is applicable to every employer who is subject to the Fair Labor Standards Act, (and that includes practically every employer).

The Health Insurance Marketplace created by the Affordable Care Act (ACA, a/k/ a “Obamacare”)) currently is scheduled to become effective for purposes of enrolling individuals in health insurance plans on October 1, 2013. While the President has delayed implantation of those provisions of the law requiring some employers to provide health care insurance coverage to employees, other provisions of the law will become mandatory for employers of all sizes by the October 1, 2013 deadline. This includes the obligation covering every employer that is subject to the FLSA: They must distribute a notice of coverage options to their employees no later than October 1, 2013. After October 1, 2013, they must distribute the notice to every new hire not later than 14 days after they start working for the employer.

The United States Department of Labor (DOL) has issued two model notices that may be used to meet this obligation: The first is a notice to be used by employers offering employer-sponsored health insurance to some or all of their employees. The second is for employers who offer health insurance coverage. The model notices can be found on the DOL website (www.usdol.gov) under the header “Notice to Employees of Coverage Options.”

Section 1512 of the Affordable Care Act, Section 512 amended the Fair Labor Standards Act (FLSA) section 18(B) that requires employers to provide notice to employees of coverage options available through the Health Insurance Marketplace. On May 8, 2013, the Department of Labor (DOL) issued temporary guidance regarding the notice requirement. This guidance will remain in effect until the DOL issues new regulations or other guidance.

Contents of the Notice

Employers may use the appropriate DOL model notice to satisfy the content requirements of the statute, or a modified version, provided the notice includes the following:

- information regarding the existence of a new Health Insurance Marketplace as well as contact information and a description of the services provided by the Health Insurance Marketplace; and
- notice that the employee may be eligible for a premium tax credit under Section 36B of the Internal Revenue Code if the employee purchases a qualified health plan through the Health Insurance Marketplace; and

- a statement informing the employee that if the employee purchases a qualified health plan through the Health Insurance Marketplace, the employee may lose the employer contribution (if any) to any health benefit plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.

Which Employers Are Subject to the Requirement ?

The obligation to distribute the notice applies to all employers subject to the FLSA. In general, this includes employers with one or more employees who are engaged in, or produce goods for, interstate commerce. For most employers, a test of not less than \$500,000 in annual dollar volume of business applies.

Which Employees Must Receive the Notice ?

The notice must be sent to all employees, regardless of the employee's plan enrollment status (if the employer maintains an applicable plan) and regardless of whether the employee is on part-time or full-time status.

Employers are *not* required to provide a separate notice to employees' dependents or to other individuals who are or may become eligible for coverage under the plan but who are not employees.

What is the Timing for Distribution of the Notice ?

The employer must provide the notice to all current employees not later than October 1, 2013. The employer must provide the notice automatically, free of charge.

Beginning on October 1, 2013, every employer also must provide the notice to every new employee at the time of hiring. Starting in 2014, the DOL will consider a notice to be timely if the employer provides it not later than 14 days after the employee's start date.

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. Alternatively, it may be provided electronically if the requirements of the Department of Labor's electronic disclosure safe harbor are met.

What are the Penalties for Non-Compliance?

The penalty for noncompliance with the notice requirement is unclear. However, an employer that fails to distribute the notice would violate the FLSA and the PPACA, and may be subject to investigation and penalties.

Don't Be Fooled

Employers should pay close attention to these notice requirements. Avoid the common pitfalls, including:

- Assuming “My insurance provider is taking care of the notice requirement for me.” *Be careful! Employers are required to send the notice to all employees. Work with your insurance provider to make sure all employees, not just plan participants, receive the notice.*
- “I just looked at the DOL model notice, and we don’t have time to fill out individualized information for every employee.” *Don’t worry! The individualized information requested on page 3 of the DOL model notice for employers who offer health coverage is optional. See the instructions included in the model notice for more details.*
- “I’m sure this requirement doesn’t apply to my small company.” *Don’t be so sure! As detailed above, the requirement applies to nearly all employers, large or small. If you are covered by the FLSA (and most employers are) you are covered by these notice provisions.*

What You Should Do Now

Send the notices as soon as administratively possible to meet the October 1, 2013 distribution deadline. After that date, include the notice in all new hire materials, and distribute the notice to all new employees within fourteen (14) days of their start dates. Work with your provider and legal counsel to complete and distribute the notice