



## Reminder: Exchange Notice Due October 1, 2013

By October 1, 2013 all employers are required to send a Notice of Exchange to each of their employees regardless of whether the employee is eligible or participates on the employer's health plan. The DOL recently issued FAQ guidance that (1) third parties such as MEWAs are allowed to provide the notice on employers' behalf (see the discussion below for more information) and (2) there will be no penalties for failure to provide the notice.

### **What is the notice?**

The Exchange Notice is designed to inform employees about the existence of the Health Insurance Marketplaces (the "Exchange"). It is meant to describe the services provided by the Marketplaces and give employees contact information to enable them to request assistance. The notice also informs employees about potential benefits and downsides to purchasing insurance through the Marketplaces.

### **Who is required to send the notice?**

Employers subject to the Fair Labor Standards Act ("FLSA") are required to give an exchange notice to each employee.

Generally, an employer is subject to FLSA if the employer has one or more employees and engages in, or produces goods for, interstate commerce. Given the FLSA's broad definition of "employer", most employers are subject to the notice requirement including private employers, educational employers, and local, state, and federal governmental agencies

### **Impact on TPAs, MEWAs, and Association Plans**

The obligation to send the Exchange Notice to the employee belongs to the employer. However, a third party such as an insurer, multiemployer plan, MEWA, or third party administrator may satisfy the employer's obligation by sending out notice on the employer's behalf.

Third parties will take different approaches to dealing with the Exchange Notice requirement:

- **Third Party will not prepare or distribute the Exchange Notice.** The third party should communicate with the employer to ensure that the employer understands its compliance obligations.
- **Third Party will prepare Exchange Notice, but will not distribute.** Some third parties, such as MEWAs, are in a position to provide notice preparation assistance, but may not have access to information to allow distribution to all employees (not just those participating on the plan). The third party should communicate with employers to ensure each employer understands its responsibility to distribute the notice.
- **Third Party will prepare and distribute Exchange Notice to *some* employees.** If the third party only intends to send out the notice to a subsection of the employer's employees, then the third party should notify the employer of which employees will receive the notice. The third party should notify the employer of its obligation to provide notice to the remainder of its employees.
- **Third Party will prepare and distribute Exchange Notice to *all* employees.** If the third party intends to satisfy the notice obligation on the employer's behalf, then the third party will need to obtain a full and complete list of all employees (full and part time) including those who are not currently eligible or participating on the employer's plan.

### **Who should receive the notice?**

The notice must be sent to both part time and full time employees, regardless of whether they are eligible for or enrolled in the employer's health care plan. Notice is required to be given to employees, even if the employer offers no health care coverage to its employees.

However, separate notices are not required to be sent to spouses or other dependents who might be eligible but are not employees.

### **When does the notice need to be sent?**

This notice is required to be sent to all current employees by **October 1, 2013**.

Employees hired after October 1, 2013 must receive this notice within 14 days of their start date.

### **How should the notice be provided to employees?**

The notice must be given to the employee automatically and free of charge.

An employer may send the notice to all employees through first class mail.

The notice may also be sent electronically so long as the DOL's safe harbor is followed.

**Are there model notices?**

Yes, the DOL has provided two model notices:

- For employers who offer a health plan to some or all employees; and
- For employers not offering a health plan to any employees.

However, employers or third parties sending the notice will have to add in several pieces of information prior to sending out the notice.

**Are there penalties for not sending the notice?**

No. The DOL recently issued guidance that no penalties or fines will be assessed for employers failing to provide the notice.

**Should we still send the notice?**

Employers should still provide the Notice of Exchange to employees because it allows employers to direct their employees' questions regarding the Marketplaces to the proper person and reflects on an employer's overall compliance in the event of an audit.

Please contact our office if you have any questions about completing or distributing the Exchange Notice.

Dated: September 27, 2013

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