Exchange Notice Requirement

FAQs for Advising Employer Group Clients

The Patient Protection and Affordable Care Act (PPACA) requires all employers subject to the Fair Labor Standards Act (FLSA) to provide notices to current employees and new hires about the forthcoming health insurance exchanges and subsidies that may be available through the exchanges for qualified individuals. In January of 2013, the federal Department of Labor (DOL) issued guidance delaying the notice requirement under Section 1512 of the law to better coordinate it with the open enrollment period for the new health insurance exchange marketplaces. In May of 2013, further guidance was issued indicating that employers are to provide these notices to employees by October 1, 2013. This frequently asked question (FAQ) document is intended to assist NAHU members who are working with their employer clients to implement the notice requirement.

What is the FLSA and what kinds of employers are subject to this law and the notice requirements?

Section 1512 of PPACA adds a new section (18B) to an existing law, the FLSA, and requires all employers subject to section 18B of this law to provide exchange marketplace notices to their employees, whether or not the employer provides them with access to a group health insurance plan.

The FLSA is a far-reaching federal law enacted in 1938 to establish minimum wage, overtime pay, and recordkeeping and child-labor standards. It affects employees in the private sector and in federal, state and local governments. It applies to certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling or otherwise working on goods or materials that have been moved in or produced for such commerce by any person.

According to the law, a covered enterprise is the related activities performed through unified operation or common control by any person or persons for a common business purpose and:

1. Whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated); or
2. Is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or
3. Is an activity of a public agency.

Employees of organizations that do not meet the above standards may still be subject to the FLSA's overtime pay, child-labor and recordkeeping provisions for other legal reasons, so that is not a good indicator of whether or not an employer is subject to section 18B of the FLSA, which creates the PPACA exchange notice provisions. Instead, to determine applicability, the employer should determine if annual gross volume of sales made or business done is less than $500,000 (exclusive of excise taxes at the retail level that are separately stated). If the answer is no and business volume or sales exceeds

$500,000 annually, then the employer must provide all employees with the exchange marketplace notice, even if they do not offer coverage today.

Furthermore, some employers must provide the exchange marketplace notice regardless of their annual volume of gross sales or business. The employers that have to provide employees with a notice no matter what include: hospitals; institutions primarily engaged in the care of the sick, 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.

If an employer does not fall into these categories, then the employer is not required to provide employees with an exchange marketplace notice. If an employer is unsure, there is no penalty for providing employees with notice about the exchange marketplaces on a voluntary basis.

The DOL's Wage and Hour Division provides guidance relating to the applicability of the FLSA in general including an Internet compliance assistance tool to determine applicability of the FLSA, which can be accessed at www.dol.gov/elaws/esa/flsa/scope/screen24.asp. If an employer is uncertain whether they meet the requirements to be governed by the FLSA, we encourage you to walk through this compliance tool.

Who needs to get the FLSA notice?

Employers must provide a notice of coverage options to each employee, regardless of whether or not the employee participates in a group health plan. Notices must also be provided to every employee, which includes part-time and full-time employees, union employees and those in benefit waiting periods. Employers are not required to provide a separate notice to dependents or other individuals who may be participants or potential participants in the group health plan but are not current employees. COBRA continuants and former employees do not need to receive a notice.

When do notices need to be sent?

Current employees must receive the notice by October 1, 2013. Employers are required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. For 2014, the DOL has issued guidance indicating it 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.

Does the delay of the employer shared-responsibility requirement penalties (employer mandate) affect the notice requirement?

No, an employer's obligation to provide an exchange notice is not affected by the employer mandate penalty delay. The delay in the mandatory employer reporting requirements, which will aid in the enforcement of the law's individual and employer mandate provisions, until 2015 also does not relieve

an affected employer of the obligation to provide employees with a FLSA exchange notice by October 1, 2013.

How should an exchange notice be distributed?

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. The DOL has also informed us employers may distribute the notices, as follows:

- Include in renewal packets. However, the employer must make sure all employees are provided with a notice, not just those eligible for health plan.
- Include in new hire kits for employers hired on or after October 1, 2013.
- Personally hand out to all employees. If this is the method chosen, the employer must ensure that each employee receives a copy. So for example, it would not be appropriate to leave a stack in "break" room.
- Attach to paychecks.

Alternatively, the guidance states it may be provided electronically if the requirements of the DOL's electronic disclosure safe harbor at 29 CFR 2520.104b-1(c) are met. The electronic-disclosure requirements an employer must follow are outlined in a DOL technical release issued in 2011 and available online at http://www.dol.gov/ebsa/pdf/tr11-03r.pdf .

Is there a model notice available?

To help affected employers comply with the notice requirement, the DOL has made notice model language available on www.dol.gov/ebsa/healthreform. There is one model for employers that do not offer a health plan and another model for employers that offer a health plan to some or all employees. Employers will use only one notice depending on whether the employer offers coverage or not; whether an employee is eligible for coverage or not does not determine which notice is provided.

Do employers need to use the model notice verbatim?

Employers may use one of the DOL's model notices, as applicable, or use a modified version, provided the notice meets the content requirements described below. According to the health reform law, the notice to inform employees of coverage options must include information regarding the existence of the new health insurance exchange marketplaces. A modified notice must also include contact information for the state marketplace and a description of the services provided by the marketplaces. The notice must inform the employee that he/she may be eligible for a premium tax credit if the employee purchases a qualified health plan through the marketplace and meets other eligibility requirements. Finally, any notice must include a statement informing the employee that if the employee purchases a qualified health plan through the marketplace, 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.

The current notice guidance online from the DOL says that it is temporary. How long is it reliable and is it likely to change?

The notice requirement compliance guidance issued by the DOL does indeed indicate it is temporary guidance on what the Department will consider to be compliance with FLSA section 18B. However, the information provided also clearly states that this guidance will remain in effect until the Department promulgates regulations or other guidance. Further, the Department provides assurances that future regulations or other guidance on these issues will provide adequate time to comply with any additional or modified requirements. If an employer creates their own notice or significantly modifies the model notice, it may be prudent to obtain a legal review of the document.

The model notice contains an optional section about employer-sponsored coverage details. Should employers complete this section?

The model notice is three pages long and contains an optional section on page three (questions 13 though 16). An employer is in no way obligated to provide the optional information requested on the model notice. Also, an employer may modify the notice as long as the end result corresponds to the overall basic content guidelines. However, the employer should carefully weigh the value of providing additional information about the cost and value of the employee's group health plan options.

Employees who are considering forgoing group coverage for coverage through the individual exchange marketplace may use the information provided on their notice to assist them in completing the exchange eligibility and subsidy information. Providing the employee with accurate coverage details now may help preserve the integrity of the group plan in the long run and help ensure that employees receive accurate subsidy determinations from the exchanges, particularly considering that mandatory employer coverage reporting requirements will not be effective until at least 2015.

How does an employer determine if its plan offering meets the law's minimum-value standard?

A question on page two of the model notice asks if the employer plan is affordable and meets the minimum value standard created by the health reform law. The Centers for Medicare and Medicaid Services (CMS) has posted an online calculator for employers to use to calculate the value of their plan: http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mv-calculator-final-4-11-2013.xlsm.

For small groups, plans that meet any of the metal tiers (platinum, gold, silver and bronze) specified for qualified small-group coverage are deemed to provide minimum value.

The Department of Treasury also plans to release in the near future checklists that employers can use to analyze their coverage offerings. If the employer plan's terms are consistent with or more generous than any one of the safe-harbor checklists, the plan will be deemed as meeting the minimum value standard. This method will not involve calculations and can be completed without an actuary. Finally, plans with nonstandard features (such as plans that are incompatible with the online calculator) may obtain a certification of their value from a qualified actuary.

Obviously, many plans that are in force today were developed prior to the availability of minimum-value guidance and the minimum-value calculator. These plans may or may not meet the minimum-value standard. If a higher-deductible plan is offered, it may not be compatible with the minimum-value calculator online. An employer may ask its health insurance issuer for information about the minimum-value status of their current plan, but many issuers are not readily providing this information. Remember, if the employer does not feel able to determine the value of its current health plan offering, it is perfectly acceptable for the employer to indicate to employees via the model notice or a modified version of the model notice that information about the status of current coverage is unknown.

The model notice also provides an optional section for employers to complete if they will be changing their plan options in the near-term future. While an employer may be unsure if it has a minimum-value plan in place now, if the employer plans to offer employees a minimum value plan when they are readily available for sale in 2014, then employer may note that fact and its anticipated coverage renewal date on the form. Again, it's important to note that any bronze-level or higher qualified small-group health plan sold in 2014 and beyond has been deemed to be in a safe harbor and is automatically assumed to meet the minimum value standard. So, if a small employer plans to offer coverage following its 2014 plan renewal or plans to offer SHOP exchange coverage as an option, the employer should know that whatever bronze- or higher level plan the employer or employee picks will meet the standard.

Will employees need their FLSA notice if they go to the exchange and apply for coverage?

No, an individual will not be required to produce their exchange notice if and when they attempt to apply for exchange-based individual coverage and/or a premium tax credit. However, given that employers will not be required to report information to the exchanges about their coverage offering until 2015, the information an employer may provide on this form could help employees that use it more accurately determine their potential subsidy eligibility. Furthermore, accurately providing employees with coverage information could help prevent them from possibility being awarded a subsidy inappropriately and the related financial consequences for an improper or too generous award.

Who will enforce the notice requirement and what are the penalties?

The DOL administers and enforces the FLSA with respect to private employment, state and local government employment, and federal employees of the Library of Congress, Postal Service, Postal Rate Commission and the Tennessee Valley Authority. The FLSA is enforced by the U.S. Office of Personnel

Management for employees of other executive branch agencies, and by Congress for covered employees of the legislative branch.

The law does not specifically address a penalty for employers that fail to comply with the notice requirement. It is not clear if FLSA provisions that allow for the DOL to impose administrative actions, civil suits and criminal prosecutions for violations of pre-existing FLSA sections would apply to this provision of the law, but it appears they may not apply. However, that does not mean that noncompliance is a good option or that the employer may not be subject to other penalties. Employees in plans subject to ERISA likely have the right to recover damages sustained as a result of the employer failing to provide information as directed under law's notice requirement. ERISA also provides for recovery of legal fees and other related damages. Furthermore, compliance with notice requirements could be a focus of routine Department of Labor audits of group health plans subject to ERISA.

How does an employer document compliance with the notice requirement?

The Department of Labor guidance does not specify how an employer should document compliance with the notice requirement, but NAHU recommends that employer retain a copy of the notice and maintain a list of how the notice was distributed, to which individuals the notice was provided and the date(s) when it was provided to applicable individual employees.

How does the notice requirement impact COBRA beneficiaries?

The notice distribution requirements apply to all current employees and do not apply to former employees or other individuals who are not employees but may be eligible for group coverage, including COBRA beneficiaries.

However, a t the same time the DOL issued its model exchange notice template, it also released a new model COBRA-election notice that group benefit plans must provide to departing employees about their COBRA coverage options. The COBRA Model Election Notice was revised to inform qualified beneficiaries of coverage options available through the exchange marketplaces. The template can be found online at http://www.dol.gov/ebsa/modelelectionnotice.doc.

To use this model election notice properly, the plan administrator must complete it by filling in the blanks with the appropriate plan information. The DOL has stated it will consider plan administrators who properly complete the model election notice to be in good-faith compliance with COBRA's election notice content requirements.

What other steps should I consider?

When employees receive this notice it will likely generate questions. Employers should identify who within the firm will respond to questions. This will help ensure consistency in replies. The questions will

not merely focus on the notice but will also lead to whether employees should consider exchange coverage and how the employer's plan (if one is offered) will or won't be in compliance.

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