Healthcare Reform – Guidance on the Notice to Employees of Coverage Options



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Guidance on the Notice to Employees of Coverage Options under Fair Labor Standards Act §18B and Updated Model Election Notice under the Consolidated Omnibus Budget Reconciliation Act of 1985

Printer Friendly Version

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Introduction

Many provisions of the Patient Protection and Affordable Care Act (Affordable Care Act) that become effective beginning in 2014 are designed to expand access to affordable health coverage. These include provisions for coverage to be offered through a Health Insurance Marketplace (Marketplace), premium tax credits to assist individuals in purchasing such coverage, employer notice to employees of coverage options available through the Marketplace, and other related provisions. The Departments of Labor, Health and Human Services (HHS), and the Treasury are working together to develop coordinated regulations and other administrative guidance to assist stakeholders with implementation of the Affordable Care Act.

Beginning January 1, 2014, individuals and employees of small businesses will have access to affordable coverage through a new competitive private health insurance market – the Health Insurance Marketplace. The Marketplace offers "one-stop shopping" to find and compare private health insurance options. Open enrollment for health insurance coverage through the Marketplace begins October 1, 2013. Section 1512 of the Affordable Care Act creates a new Fair Labor Standards Act (FLSA) section 18B requiring a notice to employees of coverage options available through the Marketplace.(1)

This Technical Release provides temporary guidance regarding the notice requirement under FLSA section 18B and announces the availability of the Model Notice to Employees of Coverage Options. This Technical Release also provides an updated model election notice for group health plans for purposes of the continuation coverage provisions under Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to include additional information regarding health coverage alternatives offered through the Marketplace.

Background On The Notice to Inform Employees of Coverage Options Under the FLSA

Section 18B of the FLSA, as added by section 1512 of the Affordable Care Act, generally provides that, in accordance with regulations promulgated by the Secretary of Labor, an applicable employer must provide each employee at the time of hiring (or with respect to current employees, not later than March 1, 2013), a written notice:

1. Informing the employee 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;
2. If the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code (the Code) if the employee purchases a qualified health plan through the Marketplace; and
3. 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.

On January 24, 2013, the Department of Labor (the Department) issued guidance stating the Department's conclusion that the notice requirement under FLSA section 18B will not take effect on March 1, 2013 for several reasons.(2) The Department explained that this notice should be coordinated with HHS's educational efforts and Internal Revenue Service (IRS) guidance on minimum value. The guidance also stated the Department's commitment to a smooth implementation process including providing employers with sufficient time to comply and select an applicability date that ensures that employees receive the information at a meaningful time. The guidance further stated that the Department expects the timing for distribution of notices will be the late summer or fall of 2013, which will coordinate with the open enrollment period for the Marketplace.

The Department is issuing this temporary guidance and model notice in advance of the expected timeframe announced in the guidance because, since the issuance of the guidance, the Department has received several requests from employers for a model notice on an earlier timeframe so that they may be able to inform their employees now about the upcoming coverage options through the Marketplace. Therefore, employers are permitted to use the model notice and/or rely on this temporary guidance prior to the applicability date stated below(3) to inform their employees earlier.

Guidance For The Notice to Inform Employees of Coverage Options Under the FLSA

This section provides temporary guidance on what the Department will consider as compliance with FLSA section 18B, and this guidance will remain in effect until the Department promulgates regulations or other guidance. Future regulations or other guidance on these issues will provide adequate time to comply with any additional or modified requirements.

- **Employers Subject to the Notice Requirement**

The FLSA section 18B requirement to provide a notice to employees of coverage options applies to employers to which the FLSA applies. 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 firms, a test of not less than $500,000 in annual dollar volume of business applies.(4) The FLSA also specifically covers the following entities: hospitals; institutions primarily engaged in the care of the sick, the 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.(5)

The Department'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.*See* webapps.dol.gov/elaws/esa/flsa/scope/screen24.asp.

- **Providing Notice to Employees**

Employers must provide a notice of coverage options to each employee, regardless of plan enrollment status (if applicable) or of part-time or full-time status. Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

- **Form and Content of the Notice**

Pursuant to the statute, the notice to inform employees of coverage options must include information regarding the existence of a new Marketplace as well as contact information and description of the services provided by a Marketplace. The notice must also inform the employee that the employee may be eligible for a premium tax credit under section 36B of the Code if the employee purchases a qualified health plan through the Marketplace; and 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.

- **Timing and Delivery of Notice**

Employers are required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. For 2014, the Department 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.

With respect to employees who are current employees before October 1, 2013, employers are required to provide the notice not later than October 1, 2013. The notice is required to be provided automatically, free of charge.

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 at 29 CFR 2520.104b-1(c) are met.

- **Model Notice**

To satisfy the content requirements for FLSA section 18B, model language is available on the Department's website www.dol.gov/ebsa/healthreform. There is one model for employers who do not offer a health plan and another model for employers who offer a health plan or some or all employees. Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above.

- **Paperwork Reduction Act Statement**

The notice specified by this guidance is a collection of information approved under OMB Control Number 1210-0149, which currently is scheduled to expire on November 30, 2013. The Department notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number.*See* 44 U.S.C. § 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number.*See* 44 U.S.C. § 3512. A covered employer's response to this collection is mandatory.*See* 29 U.S.C. § 218b. Each individual response is estimated to take less than 15 seconds, as an employer may send a copy of the same notice to each affected employee. Send comments about this information collection, including suggestions for reducing its burden, to G. Christopher Cosby, Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Ave, NW, N-5718, Washington, DC 20210 (cosby.chris@dol.gov). Do not send a copy of the notice to this address.

Background and Guidance for the Model COBRA Election Notice

In general, under COBRA, an individual who was covered by a group health plan on the day before a qualifying event occurred may be able to elect COBRA continuation coverage upon a qualifying event (such as termination of employment or reduction in hours that causes loss of coverage under the plan).(6) Individuals with such a right are called qualified beneficiaries. A group health plan must provide qualified beneficiaries with an election notice, which describes their rights to continuation coverage and how to make an election. The election notice must be provided to the qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event.

The election notice is required to include:

- The name of the plan and the name, address, and telephone number of the plan's COBRA administrator;
- Identification of the qualifying event;
- Identification of the qualified beneficiaries (by name or by status);
- An explanation of the qualified beneficiaries' right to elect continuation coverage;
- The date coverage will terminate (or has terminated) if continuation coverage is not elected;
- How to elect continuation coverage;

- What will happen if continuation coverage isn’t elected or is waived;
- What continuation coverage is available, for how long, and (if it is for less than 36 months), how it can be extended for disability or second qualifying events;
- How continuation coverage might terminate early;
- Premium payment requirements, including due dates and grace periods;
- A statement of the importance of keeping the plan administrator informed of the addresses of qualified beneficiaries; and
- A statement that the election notice does not fully describe COBRA or the plan and that more information is available from the plan administrator and in the plan’s summary plan description (SPD).

Some qualified beneficiaries may want to consider and compare health coverage alternatives to COBRA continuation coverage that are available through the Marketplace. Qualified beneficiaries may also be eligible for a premium tax credit (a tax credit to help pay for some or all of the cost of coverage in plans offered through the Marketplace).

The Department of Labor has a model election notice that plans may use to satisfy the requirement to provide the election notice under COBRA. This notice is being revised to help make qualified beneficiaries aware of other coverage options available in the Marketplace. As with the earlier model, in order to use this model election notice properly, the plan administrator must complete it by filling in the blanks with the appropriate plan information. Use of the model election notice, appropriately completed, will be considered by the Department of Labor to be good faith compliance with the election notice content requirements of COBRA.