

ACA OVERVIEW

Provided by Clarke & Company Benefits, LLC

Exchange Notice Requirement for Employers

Beginning Jan. 1, 2014, individuals and small businesses have access to insurance coverage through the Affordable Care Act's (ACA's) Health Insurance Exchanges, which are also known as Marketplaces. The 2016 open enrollment period through the Exchange runs from Nov. 1, 2015, through Jan. 31, 2016.

Found in Section 18B of the Fair Labor Standards Act (FLSA), the ACA requires employers to provide all new hires and current employees with a **written notice about the ACA's Exchanges**, which the Department of Labor (DOL) calls the "Notice to Employees of Coverage Options." Employers were generally required to begin providing employees with an Exchange Notice by **Oct. 1, 2013**.

This ACA Overview provides a summary of the ACA's Exchange Notice requirement, including the employers who are affected, deadlines for providing the notice and specific content requirements.

LINKS AND RESOURCES

- DOL [Technical Release 2013-02](#) provides temporary guidance on the Exchange Notice requirement
- Model Notices to Employees of Coverage Options and an updated COBRA Model Election Notice are available on the [DOL's website](#)
- DOL [FAQ](#) announced that there is no fine or penalty under the ACA for failing to provide the Exchange Notice

This ACA Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

HIGHLIGHTS

COMPLIANCE DEADLINES

- Employers were required to provide the Exchange Notice by Oct. 1, 2013, to individuals who were current employees before then.
- There is no requirement to provide the Exchange Notice to **current employees** on an annual basis.
- However, this is a continuing requirement, because the notice must be provided to each **new employee at the time of hiring**.

PENALTIES

- A DOL FAQ provided that there is no fine or penalty under the ACA for failing to provide the Exchange Notice.
- This means that employers cannot be fined for failing to provide employees with notice about the ACA's Exchanges.



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COMPLIANCE DEADLINES

As it was written, the ACA required employers to provide the Exchange Notice by March 1, 2013. However, the DOL did not hold employers to the March 1, 2013, deadline, and instead, set a compliance deadline that matches up with the start of the first open enrollment period under the Exchanges. Thus:

- Employers were required to provide the Exchange Notice by **Oct. 1, 2013**, to individuals who were **current employees** before that date. **There is no requirement to provide the Exchange Notice to current employees on an annual basis.**
- However, **this is a continuing requirement**, because the notice must be provided to each **new employee at the time of hiring**. For 2014, the DOL considered a notice to be provided “at the time of hiring” if the notice was provided within **14 days** of an employee’s start date.

Employers that decided to inform their employees about the Exchanges earlier than the Oct. 1, 2013, deadline could use the model notices and rely on the DOL’s temporary guidance.

AFFECTED EMPLOYERS

The ACA’s Exchange Notice requirement applies to employers that are subject to the FLSA. In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. In most instances, a business must have at least \$500,000 in annual dollar volume of sales or receipts to be covered by the FLSA.

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.

The DOL’s Wage and Hour Division provides guidance on the FLSA’s applicability in general, including a [compliance assistance tool](#) for employers.

Other Entities Providing Notice on Behalf of Employers

On Sept. 4, 2013, the DOL, Department of Health and Human Services (HHS) and the Treasury issued an [FAQ](#) stating that it is permissible for another entity (such as an issuer, multiemployer plan or third-party administrator) to send the Exchange Notice on behalf of an employer to satisfy the employer’s obligations under the ACA. According to this FAQ, an employer will have satisfied its obligation to provide the notice with respect to an individual if another party provides a timely and complete notice.

Employers are required to provide notice to **all employees, regardless of whether an employee is enrolled in, or eligible for, coverage under a group health plan**. Accordingly, an employer is not relieved of its statutory obligation to provide the Exchange Notice if another entity sends the notice to only participants enrolled in the plan, if some employees are not enrolled in the plan.

When providing notices on behalf of employers, multiemployer plans, issuers and third party administrators should:

- Take proper steps to ensure that a notice is provided to all employees regardless of plan enrollment; or
- Communicate clearly to employers that the plan, issuer or third party administrator will provide notice only to a subset of employees (for example, employees enrolled in the plan) and advise of the residual obligations of employers with respect to other employees (for example, employees who are not enrolled in the plan).

REQUIRED CONTENT

The Exchange Notice must:

- Include information regarding the existence of an Exchange, as well as contact information and a description of the services provided by an Exchange;
- Inform the employee that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Exchange; and
- Contain a statement informing the employee that, if the employee purchases a qualified health plan through the Exchange, 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 that contribution may be excludable from income for federal income tax purposes.

Model Notices

The DOL has provided the following model Exchange Notices for employers to use:

- [Model Notice to Employees of Coverage Options](#) for employers who do not offer a health plan
- [Model Notice to Employees of Coverage Options](#) for employers who offer a health plan to some or all employees

In addition to the required content, the DOL's model notice for employers who offer a health plan includes information regarding the employer's current health plan coverage. This information is included to help individuals enroll in coverage through the Exchanges and determine their eligibility for federal subsidies. **Employers are not required to provide this information**, although including it in the notice may help reduce the number of employee questions on whether the employer's health plan is affordable and provides minimum value.

Also, although the model notice for employers with health plans includes a section about design changes that the employer knows will occur for an upcoming plan year, the model notice does not ask employers to speculate about changes in coverage that may be made in the future, but have not been finalized yet.

Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above. Thus, employers may use the DOL's models "as is," customize the DOL's models or create their own Exchange Notices, as long as the notices contain the required content elements.

PROVIDING THE NOTICE

Employers must provide the Exchange Notice to each employee, **regardless of plan enrollment status or of part-time or full-time status**. However, 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.

Method of Providing Notice

The notice must be provided automatically, free of charge and in writing in a manner calculated to be understood by the average employee. However, no particular method of providing the notice is specifically required (for example, by mail, hand delivery or electronically). The notice may be provided by first-class mail. Alternatively, it may be provided electronically if the DOL's electronic disclosure safe harbor requirements are met. This safe harbor allows plan administrators to send certain disclosures electronically to:

- Employees with work-related computer access; and
- Other plan participants and beneficiaries who consent to receive disclosures electronically.

The safe harbor does not require the use of any specific form of electronic media. However, plan administrators are required to use measures reasonably calculated to ensure **actual receipt** of the material by plan participants and beneficiaries. Merely placing a disclosure on a company website available to employees will not, by itself, satisfy this disclosure requirement.

PENALTIES FOR FAILING TO PROVIDE THE NOTICE

In an [FAQ](#), the DOL stated that employers that are subject to the FLSA should provide a written notice to its employees about the Exchange by Oct. 1, 2013, **but there is no fine or penalty under the ACA for failing to provide the notice**. This means that employers cannot be fined for failing to provide employees with notice about the ACA's Exchanges.

Although this FAQ asserts that there will be no penalties for failing to provide an Exchange Notice, there are several reasons why employers may still want to provide the notice. The Exchange Notice can help employers answer employee questions about:

- What the Exchange is;
- Whether the employer will still provide a plan once the Exchanges are operational;
- How Exchange plans are different from the employer's plan; and

- Whether the employer's plan is intended to be affordable and provide minimum value.

If the employer's plan is affordable and provides minimum value, employees **will not be eligible for federal subsidies** through the Exchange. However, most employees will have the option of waiving employer-sponsored coverage and, instead, enrolling in coverage through the Exchange.

In many cases, employer-sponsored coverage may be a better option for employees than Exchange coverage. For example, premiums for employer-sponsored coverage will often be cheaper for the employee than premiums for coverage through the Exchange. Additionally, the employee portion of the premium for employer-sponsored coverage is typically excluded from taxable income and is therefore tax-free. This is not the case in the Exchange.

COBRA ELECTION NOTICE

Under COBRA, 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 qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event. The DOL has a model election notice that plans may use to satisfy the requirement to provide the election notice under COBRA.

According to the DOL, some qualified beneficiaries may want to consider and compare health coverage alternatives to COBRA continuation coverage that are available through the Exchanges. Qualified beneficiaries may also be eligible for a premium tax credit for an Exchange plan.

The DOL updated the [model COBRA election notice](#) to help make qualified beneficiaries aware of other coverage options available in the Exchanges. The DOL will consider use of the model election notice, appropriately completed, to be good faith compliance with COBRA's election notice content requirements of COBRA.

MORE INFORMATION

Please visit the [DOL's webpage](#) for more information on the ACA's Exchange Notice requirement.

Source: Department of Labor