Health Insurance Exchange Notice*

Under the health care reform law, employers that are subject to the Fair Labor Standards Act must provide a notice to each employee regarding the health insurance exchanges that became available starting in 2014 (the exchanges are also referred to as the “Health Insurance Marketplace”). While the notice requirement was originally scheduled to take effect on March 1, 2013, this was later delayed to October 1, 2013. Employers are required to provide the notice even if they do not make health benefits available to employees.

Exchange notice content

The notice must be written in a manner calculated to be understood by the average employee. The statute specifies that an employer must provide written notice –

- Informing the employee of the existence of an exchange, including a description of the services provided, and the manner in which the employee may contact the exchange to request assistance

- If the employer plan's share of the total allowed costs is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the exchange

- 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 such contribution may be excludable for federal income tax purposes

TEMPORARY GUIDANCE ON EXCHANGE NOTICES

In May, the DOL issued temporary guidance that set the exchange notice compliance date at October 1, 2013 and provided a model notice. The DOL also issued a second model notice for employers who do not offer a health plan. Because this employer guide is intended for Willis clients that have health plans, it addresses only the model notice provided for employers that offer health plans.

Employers are not required to use the DOL’s model exchange notice, and may create their own version of an exchange notice so long as it includes the required information (listed above).

* The information in this document is not intended as legal or tax advice and has been prepared solely for informational purposes. You may wish to consult your attorney or tax adviser regarding issues raised in this publication.
The DOL’s model notice

Although using government-issued model notices in exactly the form issued generally is considered a best practice, in the case of the DOL’s model exchange notice, that is more difficult than it sounds.

WHY USE THE DOL’S MODEL EXCHANGE NOTICE?

Using the model notice ensures that, for DOL enforcement purposes, an employer’s exchange notice meets the content requirements. It also is advantageous to employers to use the model notice’s description of the exchanges, the coverage they offer and the trade-offs between exchange coverage and employer-sponsored coverage. This is because the exchange notice provides information that employees will use to make coverage choices. By using the model notice in exactly the form it was issued, an employer generally will minimize exposure to claims that it misled employees about the merits of exchange coverage relative to employer-sponsored coverage, causing employees to make choices they would not otherwise have made.

The model exchange notice consists of two parts (Part A and Part B).

• **Part A** (page 1) of the model notice is boilerplate text and employers using the model notice clearly are required to provide this portion. The only customization required when using Part A is adding a contact for information about health coverage offered by the employer.

  **Note:** The DOL has not updated the exchange notice since it was first released in 2013. While use of the model notice is recommended, some employers may prefer to use a notice that does not appear to be outdated. For that purpose, a revised Part A of the insurance exchange notice (for those employers offering health plans) is available.

    • Revised Part A of the Health Insurance Exchange Notice (employer offering health plans)

• **Part B** of the model notice (pages 2 and 3) is a different story. It calls for the employer to provide extensive information about itself and its health plans. Some of the Part B items (those on page 3) are clearly optional, and an employer may omit them yet still be considered to have a complete model notice. The model notice and temporary guidance do not address whether the remaining Part B items (those on page 2) must be completed for an employer to have the assurance of compliance that results from using a government-issued model notice. Those page 2 Part B items consist of:

    • Information identifying the employer and contact information for obtaining information about employer-sponsored health coverage

    • A statement of whether the coverage that the employer provides meets the minimum value standard (generally, 60% actuarial value) and is intended to be affordable, based on employee wages

    • A description of the eligibility requirements that apply to health coverage offered by the employer

Most employers will be able to provide the first two bulleted items easily. The final item – eligibility information – may not be easily available or easily restated. In addition, providing this information in the exchange notice creates the risk of conflict with eligibility information provided in other plan materials (e.g., SPDs).

A [Word version of the model notice](#) is available, as well as a [Spanish language version](#).
Options for completing part B of the model exchange notice

All employers using the model notice will include Part A in whatever they distribute. Determining whether and how to complete the various Part B items raises difficult questions, and it does not seem that there is a clear “best practice.” Here are some options that employers may wish to consider in consultation with legal counsel.

- **Option 1: Complete All Of Part B.** This would entail sending individualized notices since at least one of the items on page 3 relates to a specific individual’s eligibility. Employers that provide all of the Part B information (i.e., both page 2 and page 3) in the exchange notice may receive fewer requests for information and assistance from employees and the exchanges when employees begin applying for exchange coverage and subsidies. (See discussion below regarding employees’ requests for assistance with exchange applications.)

- **Option 2: Complete the Page 2 Portion of Part B.** As noted above, the difficult item on page 2 is describing which employees and dependents are eligible under the employer’s health plans. Even so, providing a notice that includes Part A and the page 2 portion of Part B, fully completed, clearly constitutes proper use of the DOL’s model notice.

- **Option 3: Partially Complete Page 2, Omitting Eligibility Item.** This approach may not provide the assurance of compliance that usually results from using a government-issued model notice because it is not clear whether an employer will be treated as having properly used the model notice if it omits the eligibility information. In reviewing the list of items that must be included in an exchange notice (see above), it does not appear that information about eligibility for coverage under the employer’s plan is one of the requirements. In informal remarks representing only her own views, a DOL representative would only say that providing that page 2 information would be considered a “best practice.” When pressed to state which of the page 2 items would be required for an employer to provide a model notice that the DOL would consider complete, the representative noted that providing a statement of whether the plan provides minimum value may be required. The implication is that all of the other information requested on page 2 need not be included.

- **Option 4: Omit Part B.** Like the previous option, this approach does not clearly satisfy the DOL’s interpretation of the required exchange notice content. At the same time, it may meet the statutory requirements for the exchange notice (see above).

Distribution requirements

For then-current employees, the temporary guidance specified that the exchange notice must be provided not later than October 1, 2013. For each new employee starting on or after October 1, 2013, the temporary guidance calls for the exchange notice to be provided “at time of hiring.” The guidance notes that, “for 2014,” the notice is considered provided at time of hiring if provided within 14 days of an employee’s start date. This 14-day timing also is generally assumed to be sufficient for notices provided to new employees during 2013. The notice must be provided to each employee, regardless of plan enrollment status (if applicable) and regardless of part-time or full-time status. Distribution to an employee’s dependents is not required.

The temporary guidance notes that the notice “may be provided by first-class mail [or] may be provided electronically, if the requirements of the [DOL’s] electronic disclosure safe harbor … are met.” See the ERISA Disclosure Employer Guide for the requirements of the DOL’s electronic disclosure safe harbor. Although the guidance does not state that in-hand delivery of the notice (e.g., included with an employee’s paper paycheck) will suffice, it is generally assumed that it will suffice if done (and documented) in a manner that would be adequate to demonstrate distribution of an SPD. See the ERISA Disclosure Employer Guide for details on acceptable methods of distributing SPDs.
Responding to questions as to whether there is a penalty for failing to provide the exchange notice (i.e., $100 per day fine for failure to provide the exchange notice by October 1), the DOL released the following FAQ:

Q: Can an employer be fined for failing to provide employees with notice about the Affordable Care Act's new Health Insurance Marketplace?
A: No. If your company is covered by the Fair Labor Standards Act, it should provide a written notice to its employees about the Health Insurance Marketplace by October 1, 2013, but there is no fine or penalty under the law for failing to provide the notice. [emphasis added]

It is good to have the DOL's concurrence that no such fine applies to exchange notice failures. At the same time, we are reluctant to suggest that there would not be any potential consequences for an employer that failed to provide the notice. For example, a notice failure might be deemed a breach of fiduciary duty under ERISA. It is unclear, however, what liability would result from establishing that a notice failure amounts to a fiduciary breach. Nonetheless, we concur with the DOL's admonition that employers "should" provide the exchange notice as prescribed in the temporary guidance.

Preventing employee misunderstandings

The exchange notice is unusual because it is to be distributed to all employees – not just to health plan participants or those eligible for health plan participation. There is some concern, therefore, that receiving the notice may cause confusion about whether a recipient is eligible for (or participating in) employer-sponsored coverage. In addition, receiving a notice regarding the exchanges from an employer may encourage employees to contact the employer for assistance in deciding whether to apply for exchange coverage and subsidies.

To counteract these issues, an employer may wish to send a cover letter with its exchange notice explaining that receipt of the notice is not an indication of eligibility or participation under the employer’s plan and that employees should not ask the employer for information about the exchanges and the coverage available. A sample cover letter is attached that employers, in consultation with their legal counsel, may wish to adapt to their situation.

Employees’ requests for assistance with exchange application

As noted above, receiving the exchange notice from an employer may encourage individuals to look to the employer for assistance with decisions about coverage. In addition, exchange application materials include a Marketplace Application Checklist which urges applicants to request employers to complete an Employer Coverage Tool, so most employers will receive inquiries from employees and dependents as they complete exchange applications. Employers may also receive requests for information from exchanges seeking to verify employee statements about employer coverage. An employer’s decision about the information it provides in its exchange notice (see Options 1-4 above) will affect how the employer responds to employees’ requests for assistance as they consider obtaining coverage through an exchange.

The items requested by HHS’ Employer Coverage Tool are largely identical to those requested in the Part B portion of the DOL’s model exchange notice (except that the Employer Coverage Tool does not request information about which employees and dependents are eligible for employer coverage). As noted earlier, completing all of Part B may reduce the number of requests an employer receives in connection with exchange applications. It is important to note, however, that employers are not required to respond to requests for assistance at all, and can respond with materials other than a completed Employer Coverage Tool. For example, an employer may choose to avoid creating new materials to respond to such requests, providing instead the SBC for its plan and a schedule of required employee contributions. For information on SBCs, see the ERISA Disclosure Employer Guide.
As with individuals’ requests, there is apparently no obligation for employers to respond to requests from exchanges, and failure to respond apparently will not deprive an applicant of premium assistance. Employers should consider how they prefer to handle these inquiries – whether from individuals or exchanges – and what form their response will take (e.g., not responding at all, completing a form in advance, providing information as part of the exchange notice, or providing existing materials instead of completing a form).

**Mid-year election changes by employees choosing exchange coverage**

Generally benefit elections made through a cafeteria plan are made in advance of the cafeteria plan’s plan year and are 12-month elections which are irrevocable during the year unless there is a change in status event. The opportunity to elect coverage through the exchanges does not constitute a change in status event which would allow an employee to change his/her cafeteria plan election. For details of permissible mid-year election changes, see the [Cafeteria Plans Employer Guide](#).

The Treasury Department and the Internal Revenue Service created a transition rule that applied to individuals participating in a non-calendar year cafeteria plan that started in 2013 and allowed such individuals to make a one-time change in their elections to either add coverage under the employer plan or drop the employer coverage in order to take the coverage in the exchange. In order to allow the exchange enrollment, employers had to amend their cafeteria plans in order to allow employees to make prospective pre-tax elections.

To implement this provision, a qualifying employer had to adopt the necessary plan amendments. It can be done on a retroactive basis so long as the amendments are (i) adopted by no later than December 31, 2014, and (ii) are effective back to the first day of the cafeteria plan’s 2013 plan year (i.e., the non-calendar cafeteria plan year that began during 2013). For details regarding the transition rule, see the [Cafeteria Plans Employer Guide](#). Note that this transition rule was only for non-calendar year cafeteria plans starting in 2013 and it is not applicable for plan years starting in 2014 or later.
Sample Cover Letter for DOL Model Exchange Notice†

[Date]

Name of Employer
Street Address
City, State, Zip Code


To All New __________________ Employees:

It has been several years since the Patient Protection Affordable Care Act, more commonly known as Health Care Reform was enacted. In order to comply with Health Care Reform we have had to make changes in certain benefits our plan provides as well as provide several new notices to employees.

Health Care Reform imposes a notice requirement on employers in regard to its new employees. This notice (attached) goes to ALL new employees, even those who are not eligible to participate in our group health plans.

Receipt of this notice does not indicate that you are eligible for or covered by any health plan. Eligibility to participate in our group health plans and applicable enrollment continues to be based on an employee meeting the eligibility and participation requirements as set out in the terms of the plans.

Therefore, if you currently are not able to participate in the plan because of not meeting the eligibility and participation requirements, receipt of this Notice does not change or affect those participation requirements.

Although the attached notice relates to coverage options available through a Health Insurance Marketplace (more commonly referred to as the “Exchange”), [Employer] has no information or expertise on those options. [Employer’s] human resources representatives are not allowed to answer questions regarding those options. Therefore, you will need to consult with other resources regarding any questions you may have about Exchange coverage options, programs like Medicare, Medicaid and CHIP, or any coverage other than our group health plans.

You should maintain the attached notice with your health coverage information. It should be kept regardless of whether you have coverage through [Employer], coverage under another group health plan (e.g., one offered by a spouse’s employer), or individual coverage.

Sincerely,

[Employer]

† This sample document is provided for informational purposes only and is not intended as legal or tax advice. It must be revised, in consultation with legal counsel, to adapt it for use by a particular employer with respect to its plan(s).