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What if Employers Fail to Provide the Exchange Notice? No Statutory Penalties but Significant Exposure Remains

Background. Open enrollment for health coverage through the government run Exchanges begins October 1, 2013. To make employees aware of this alternative coverage option, Health Care Reform amended the Fair Labor Standards Act (“FLSA”) to require employers covered by the FLSA to provide a notice (an “Exchange Notice”) to all their employees. The law requires that employers provide this notice to employees by **October 1, 2013**.

In an FAQ issued recently, the DOL clarified that there is no fine or penalty under Health Care Reform for failing to provide the Exchange Notice. However, such a failure will be a violation of federal law and is by no means risk-free.

Who Must Receive the Exchange Notice. Under the FLSA, the Exchange Notice must be provided to all current employees (regardless of benefits eligible status or part-time/full-time status) by **October 1, 2013**. Additionally, any employees hired on or after October 1, 2013, must receive the Exchange Notice at the time of hiring (for 2014, the notice may be provided within 14 days of an employee’s start date). Employers are not required to provide a separate notice to non-employee dependents.

Method of Delivery. Employers may distribute the Exchange Notice by any method that ensures receipt (e.g., first-class mail, hand delivery, or electronic delivery, as long as the Department of Labor’s electronic delivery requirements are satisfied).

Model Exchange Notice. The DOL released two model notices—one for employers who do not offer a health plan, and one for employers who offer a health plan for some or all employees. Employers may use the applicable model notice or a modified version so long as the following information is provided:

- The Exchanges’ existence (including services provided and contact information);
- Availability of premium tax credits; and
- The effect that participation in the Exchanges will have on employer-sponsored coverage (e.g., loss of employer contributions).

Revised COBRA Notice. The DOL’s temporary guidance also explains that the COBRA model election notice has been updated to inform qualified beneficiaries of the alternative coverage options available through the Exchanges. Thus, it appears that employers must also update their COBRA notices to inform employees of the existence of the Exchanges.

Copies of the model Exchange Notice and the revised COBRA model election notice may be found on the DOL website at the following address <http://www.dol.gov/ebsa/healthreform/index.html>.

Next Steps. To comply with the FLSA, employers must provide the Exchange Notice to employees by the October 1, 2013 deadline.

Exposure for Failure to Comply. Although, it appears that the DOL will not penalize employers that do not provide the Exchange Notice to their employees, a blatant disregard of the requirement to provide the Exchange Notice could expose an employer to lawsuits if one or more employees are unhappy with their coverage situations. These lawsuits would likely not be preempted by ERISA and could, for example, be brought in state court based on tort or general common law theories. A purposeful and total failure to provide Exchange Notices would likely be viewed by a court as different from the situation in which an employer makes a good faith effort and just misses a few employees.

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