

Compliance Alert

Department of Labor Delays the Employer Notice of Exchange Requirement

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As anticipated, based on prior informal comments, the Department of Labor (DOL) has delayed the employer requirement to send a "Notice of Exchange" to employees.

The Affordable Care Act (ACA) amended the Fair Labor Standards Act (FLSA) requiring employers to send a notice describing certain elements of exchanges and subsidy eligibility to employees by March 1st, 2013. However, citing a number of factors, the DOL has delayed the requirement until after guidance is issued later in 2013.

In an FAQ on the department's website, the DOL states that it expects notice distribution will be required late summer or fall of 2013, which will coordinate with the open enrollment period for Exchanges. The announcement also states that the DOL plans to release model language, or additional guidance regarding the format and content of the notice.

So for now, employers need not worry about meeting the March 1, 2013 notice deadline, but should stay tuned for future guidance and details regarding an updated distribution date later this year.

Text of DOL Announcement

Notice of Coverage Options Available Through the Exchanges

Section 18B of the Fair Labor Standards Act (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:

- *Informing the employee of the existence of Exchanges including a description of the services provided by the Exchanges, and the manner in which the employee may contact Exchanges to request assistance;*
- *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 an Exchange; and*
- *If the employee purchases a qualified health plan through an 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 from income for Federal income tax purposes.*

Q1: When do employers have to comply with the new notice requirements in section 18B of the FLSA?

Section 18B of the FLSA provides that employer compliance with the notice requirements of that section must be carried out "[i]n accordance with regulations promulgated by the Secretary [of Labor]." Accordingly, it is the view of the Department of Labor that, until such regulations are issued and become applicable, employers are not required to comply with FLSA section 18B.

The Department of Labor has concluded that the notice requirement under FLSA section 18B will not take effect on March 1, 2013 for several reasons. First, this notice should be coordinated with HHS's educational efforts and Internal Revenue Service (IRS) guidance on minimum value. Second, we are committed to a smooth implementation process including providing employers with sufficient time to comply and selecting an applicability date that ensures that employees receive the information at a

meaningful time. The Department of Labor expects that the timing for distribution of notices will be the late summer or fall of 2013, which will coordinate with the open enrollment period for Exchanges.

The Department of Labor is considering providing model, generic language that could be used to satisfy the notice requirement. As a compliance alternative, the Department of Labor is also considering allowing employers to satisfy the notice requirement by providing employees with information using the employer coverage template as discussed in the preamble to the Proposed Rule on Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing (78 FR 4594, at 4641), which will be available for download at the Exchange web site as part of the streamlined application that will be used by the Exchange, Medicaid, and CHIP. Future guidance on complying with the notice requirement under FLSA section 18B is expected to provide flexibility and adequate time to comply.

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