

Issue Brief

DOL Posts New Notice of Coverage Options FAQ

Issue Date: September 2013

Background

On Sept. 11, 2013, the DOL posted a new FAQ regarding the Notice of Coverage Options (also called the Exchange Notice), which states “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 Oct. 1, 2013, but there is no fine or penalty under the law for failing to provide the notice.”

The problem is that the Fair Labor Standards Act (FLSA) requires employers to send this information to all employees. Specifically §218b of the FLSA states in part “an employer...shall provide to each employee at the time of hiring (or with respect to current employees, not later than March 1, 2013), written notice [including information about the Exchange specified in the law]”. Then in May the DOL issued Technical Release No. 2013-02 which states “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 understandably confused. Must the notice be provided by October 1, as stated in earlier DOL guidance or not?

It is important to note that the recent DOL release is in the form of an informal FAQ, posted in the DOL website. While it is often helpful to receive informal guidance from regulatory agencies, this announcement does not carry the same weight as statutory language, or even formal regulations. Every employer will need to make their own decision regarding their approach, but the bottom line is that the notice is still required by the law even if, for now, an employer will not be fined by the DOL for failure to send it.

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