

EXCHANGE NOTICE

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SUMMARY

The Patient Protection and Affordable Care Act (PPACA) requires employers to provide all employees with a written notice providing information about the state health insurance exchanges (also referred to as “marketplaces”) and how to request assistance, describing the availability of a premium tax credit and outlining the implications for the employee if they choose to purchase a qualified health plan through an exchange. The law requires employers to distribute the notice by Oct. 1, 2013. Employers must distribute exchange notices to all new employees hired after Oct. 1, 2013, within 14 days of the date of hire.

Importantly, the exchange notice is not an annual requirement. Thus, assuming employers complied with the Oct. 1, 2013, deadline, the employer is only required to provide the notice to new hires.

In general, the exchange notice must:

- Inform employees about the existence of the exchange and describe the services provided by the exchange and the manner in which the employee may contact the exchange to request assistance
- Explain how employees may be eligible for a premium tax credit or a cost-sharing reduction if the employer’s plan does not meet certain requirements
- Inform employees that if they purchase coverage through the exchange, they may lose any employer contribution toward the cost of employer-provided coverage, and that all or a portion of this employer contribution may be excludable for federal income tax purposes

The U.S. Department of Labor (DOL) provided two model notices: one for employers that do not offer a health plan and another for employers that offer a health plan to some or all of their employees. Each notice is available in English and Spanish, with PDF and Word versions available. Links to the model notices are available under “Model Notices” below.

Employers are only required to complete questions 1–12 of the notice. Questions 13–16 are optional until future guidance states otherwise.

COVERED EMPLOYERS

All employers subject to the Fair Labor Standards Act (FLSA) are subject to the exchange notice requirement. FLSA’s reach is broad — nearly all employers will be subject to FLSA and therefore will be subject to the exchange notice requirement. There is an exception if an employer has annual dollar volume of sales or business that is less than \$500,000. For more information on that exception, see FAQ 1 below. If an employer needs assistance in determining if it is subject to FLSA, the DOL Wage and Hour Division provides an online compliance assistance tool to determine if an employer is subject to FLSA.

See www.dol.gov/elaws/esa/flsa/scope/screen24.asp.



METHODS OF DISTRIBUTION

Employers must provide the notice automatically and free of charge. Employers may distribute the notices by any of the following methods:

- First-class mail (preferred).
- Included in open enrollment packets. Employers must make sure all employees are provided with a notice, not just those eligible for the health plan.
- Included in new hire materials for employers hired on or after Oct. 1, 2013 (confirmed informally by the DOL).
- Personally handed out to all employees. If this method is chosen, the employer must ensure that each employee receives a copy. For example, it would not be appropriate to leave a stack in the break room (confirmed informally by the DOL).
- Attached to paychecks (confirmed informally by the DOL).
- Posted to a company intranet. If this method is chosen, separate notification must still be sent to each employee notifying them of the document's availability and its significance. The notification may be a paper document or it may be electronic. If it is sent via email, the electronic disclosure procedures below must be followed.

The notice may be provided electronically if the requirements of the DOL's electronic disclosure safe harbor (at 29 CFR 2520.104b-1(c)) are met. These rules provide that the exchange notice may be sent via email to employees who have electronic access as an integral part of their job. The employer must take necessary steps to ensure that the email system "results in actual receipt of transmitted information" (which would be satisfied by return receipts or failure to deliver notices), protects the employee's confidential information, maintains the required style/format/content requirements, and includes a statement as to the significance of the document and a statement as to the right to request a paper version.

If employees do not have electronic access as an integral part of their job, they may provide the employer with an email address to provide the notice, and they must affirmatively give consent to the electronic notice before each electronic document is provided. The email must explain what documents will be provided electronically, that their consent can be withdrawn at any time, procedures for withdrawing consent and changing the email address, the right to request a paper copy of the document and if there is an applicable fee, and what hardware or software will be needed.

EFFECTIVE DATE

Employers were required to distribute the exchange notice to all employees who were actively employed prior to Oct. 1, 2013, by Oct. 1, 2013. Employers are required to provide the notice to each new employee hired on or after Oct. 1, 2013, no later than 14 days after the date of hire. The notice must be distributed to all new employees, regardless of their eligibility for coverage under the employer's group health plan and regardless of whether the employee is part-time or full-time status. Employers not offering any group health plan coverage must also provide the notice to all employees.

FREQUENTLY ASKED QUESTIONS

Q1. What employers are subject to the notice requirements?

A. PPACA adds a new section (18B) to an existing law, FLSA, and requires all employers subject to FLSA to provide exchange notices to their employees, whether or not the employer provides them with access to a group health insurance plan. Generally speaking, an employer is subject to FLSA if they have an annual dollar volume of sales or business done of at least \$500,000.

Put simply, employers should determine if annual gross volume of sales made or business done is less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated). If the answer is no and business volume or sales exceed \$500,000 annually, then the employer must provide all employees with the exchange notice, even if they do not offer coverage today.

Some employers must provide the exchange notice regardless of their annual volume of gross sales or business. The employers that have to provide employees with a notice no matter what include hospitals; institutions primarily engaged in the care of the sick, 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.

Q2. If an employer does not know if it is subject to FLSA, should it provide the notice anyway?

A. If an employer qualifies for the exception, the employer is not required to provide employees with an exchange notice. If an employer is unsure, there is no penalty for providing employees with notice about the exchanges on a voluntary basis, although the employer should consult with outside counsel in determining FLSA's application (since there are other labor law-related reasons for knowing whether FLSA applies).

Q3. Who needs to receive the exchange notice?

A. Employers must provide an exchange notice to each employee, regardless of whether or not the employee participates in a group health plan. Notices must be provided to every employee, including part-time and full-time employees, union employees and those in benefit waiting periods. Employers are not required to provide a separate notice to dependents or other individuals who may be participants or potential participants in the group health plan who are not current employees (COBRA continuants, retirees and former employees).

Q4. The model notice contains an optional section about employer-sponsored coverage details. Should employers complete this section?

A. The model notice is three pages long and contains an optional section on Page 3 (questions 13 through 16). An employer is not obligated to provide the optional information requested on the model notice. Employers should carefully weigh the value of providing additional information about the cost and value of the employee's group health plan options.

In weighing the value, employees who are considering forgoing group coverage for individual coverage through the exchanges may use the information provided on their notice to assist them in completing the exchange eligibility and subsidy information. Providing the employee with accurate coverage details may help preserve the integrity of the group plan in the long run and help ensure that employees receive accurate subsidy determinations from the exchanges.

Q5. How does an employer determine if its plan offering meets the law's minimum value standard?

A. Many plans in force today were developed prior to the availability of minimum value guidance and the minimum value calculator. These plans may or may not meet the minimum value standard. An employer may ask its health insurance issuer for information about the minimum value status of their current plan, but many issuers are not readily providing this information. If the employer does not feel able to determine the value of its current health plan offering, it is acceptable for the employer to indicate to employees via the model notice or a modified version of the model notice that information about the status of current coverage is unknown, or provide as much information on the current plan as possible.

The model notice also provides an optional section for employers to complete if they will be changing their plan options in the near future. While an employer may be unsure if it has a minimum value plan in place now, if the employer plans to offer employees a minimum value plan when they are readily available for sale in 2014, then the employer may note that fact and its anticipated coverage renewal date on the form.

Q6. How does an employer document compliance with the notice requirement?

A. There is no specific documentation requirement associated with the exchange notice requirement. Generally, employers should retain a copy of the notice and maintain records of how the notice was distributed, and to which individuals the notice was provided (and the relevant date), so that this information may be provided in the event of an audit.

MODEL NOTICES

DOL Technical Release 2013-02 contains a model exchange notice for employers that offer coverage to some or all employees, and a separate model notice for employers that do not offer coverage to employees.

- [Model Exchange Notice for Employers That Do Not Offer a Health Plan](#)
- [Model Exchange Notice for Employers That Offer a Health Plan](#)
- [Model Exchange Notice for Employers That Do Not Offer a Health Plan](#) (in Spanish)
- [Model Exchange Notice for Employers That Offer a Health Plan](#) (in Spanish)
- [Model Exchange Notice for Employers That Do Not Offer a Health Plan](#) (Modifiable Word Format)
- [Model Exchange Notice for Employers That Offer a Health Plan](#) (Modifiable Word Format)

ADDITIONAL RESOURCES

- [Technical Release 2013-02 \(Including FAQs\)](#)

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