
Model Notices of Health Insurance Options – Employers Must Distribute by October 1, 2013

By Howard L. Clemons

The U.S. Department of Labor has issued model notices for informing existing employees and new hires of health coverage options which will be available through the new marketplace of state and federally supported health insurance exchanges. To comply and distribute the appropriate notice to current employees by the October 1, 2013, deadline an employer needs to have determined whether its plans provide minimum value and are affordable to the recipient employee under the employer shared responsibilities provisions of the Affordable Care Act (“ACA”). The Department of Labor also released an updated model notice for informing plan participants of COBRA health care continuation coverage rights.

Notices of Health Insurance Options

A new provision of the Fair Labor Standards Act added by the ACA requires employers to provide a notice to employees of the health care coverage options which will be available through the new health insurance marketplace of exchanges supported by the states and the federal government.¹ Because this requirement is under the Labor Management Relations Act it applies to almost all employers, without regard to whether the employer is a large employer with at least 50 full-time equivalent employees subject to the employer shared responsibility provisions of the ACA.

Employer compliance with the new notice requirement was delayed to give the government agencies additional time to publish additional guidance under the ACA. On May 8, 2013, the Department of Labor issued guidance on the notice requirement as well as two model notice forms and an updated model notice

¹ The exchanges are generally being referred to as the Health Insurance Marketplace. See, <http://www.healthcare.gov/marketplace/index.html>

of COBRA health care contribution coverage rights. One model is for employers who offer employer-provided health insurance coverage to some or all of their employees² and the other model is for employers who do not offer employer-provided health insurance coverage.³ The appropriate notice must be distributed to all current employees not later than October 1, 2013, and an employer must begin distributing the appropriate notice to new employees not later than October 1, 2013. Existing and new employees entitled to the notice include all employees, including all full, part-time and seasonal employees. Although new employees must receive the notice at the time of hiring, at least through 2014 this requirement will be met if the appropriate notice is provided within 14 days of the employee's start date. The notice must be provided by first class mail or, if the Department of Labor's safe harbor rules for electronic disclosure⁴ are met, electronically.

The model notices, however, are not just boilerplate language than can be copied and distributed to current employees and new hires. The form of notice for employers who do not offer employer-provided health insurance requires identifying and contact information for the employer. However, the form for employers who offer health insurance coverage, in addition to employer identifying and contact information, requires information on to whom health coverage is offered and the eligibility requirements, whether dependents may obtain coverage and the rules for dependent eligibility, and a statement as to whether the coverage meets the minimum value standard and whether the cost of the coverage to the employee is intended to be affordable based on the employee's wages. An employer may also, but is not required to, provide specific information about the recipient employee's eligibility, the cost of coverage intended to meet the minimum value standard and whether the employer intends to make certain changes to the plan starting with the new plan year. Note that the answer as to whether the cost is affordable and the additional optional information could vary depending on the employee to whom the notice is being given.

Furthermore, at least some of the required information and most of the optional information can only be determined by an employer if it has already determined what the status of its plan will be under the employer shared responsibility rules and how it will comply or not comply with the shared responsibility rules for its different categories of employees. In this regard, to meet the minimum value requirements, the plan's share of the cost of coverage must be at least 60%, and under the affordable coverage requirement, the employee's share of the premium may not exceed 9.5% of annual household income. Many employers will likely want to modify the models to properly explain their particular situations. Employers may even find it useful to have multiple "standard" forms of notices depending on the employee's status and terms of employment.

In summary, an employer can only comply with these notice requirements if it understands its health plan's status of compliance with the employer shared responsibility provisions of the ACA. A key aspect of that compliance for an employer intending to avoid the penalties for noncompliance with the employer shared responsibility provisions is setting the eligibility terms of the plan. Because many employers may wish to adopt permitted safe harbor methods for determining who is or is not a full-time employee (that is, employed on average at least 30 hours per week), the eligibility provisions of these plans are going to require changes and, in some cases, have rather complicated eligibility rules. Other aspects, such as

² <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf>

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⁴ The Department of Labor's electronic disclosure safe harbor is found at 29 CFR 2520.104b-1(c). Under the safe harbor, information may be delivered through electronic media to a plan participant— with proper notice of its electronic availability— if the electronic system meets requirements to ensure delivery and confidentiality; the communication apprises the recipient of the significance of the communication; and is to a plan participant who has the ability to effectively access the electronic document at a location where he or she is reasonably expected to perform his or her job duties and such access to the employer's electronic information system is an integral part of those job duties, may receive the disclosure electronically. Alternative requirements apply if the last requirement regarding access to the employer's electronic systems as an integral part of the recipient's duties is not met.

whether and how to meet or not meet the affordability requirements for all full-time employees must also be addressed.

Updated COBRA Notice

The Department of Labor also issued an updated model notice that can be used to inform plan participants of their COBRA health care continuation coverage rights. Although the changes include removal of certain language regarding pre-existing conditions which is becoming obsolete, the changes to the model notice seem intended to alert an individual receiving the notice that in addition to health care continuation coverage under COBRA, the individual may also have health care coverage opportunities through the Health Insurance Marketplace. We believe the new language added to the model COBRA notice may be confusing to a recipient. Specifically, many participants will not understand what is meant by the "Health Insurance Marketplace" and, at least for participants losing coverage before January 1, 2014, when coverage under the Health Insurance Marketplace exchanges first becomes available, the references to the Health Insurance Marketplace may not be helpful as written. As a result, we would recommend that employers consider modifying the model language for clarity before using the revised model. The new model COBRA notice and a copy marked to show changes to the prior model notice are available at: <http://www.dol.gov/ebsa/modelelectionnotice.doc> and <http://www.dol.gov/ebsa/modelelectionnoticeredline.doc>.

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