



JONES DAY COMMENTARY

NEW AFFORDABLE CARE ACT NOTICE TO EMPLOYEES MUST BE PROVIDED BY OCTOBER 1, 2013

The Affordable Care Act provides employees who are not offered health coverage by their employers with the option of purchasing health coverage through new health insurance marketplaces (also known as health insurance exchanges) that will operate in every state. Even employees who are offered coverage by their employers have the choice of taking that coverage or purchasing coverage from a health insurance marketplace instead. The Affordable Care Act requires employers to provide employees with written notice of the new marketplace coverage option. While the marketplaces will not open until fall, and the coverage they offer will not start until January 1, 2014, the Department of Labor (“DOL”) has announced that notices for current employees must be provided by October 1, 2013, a fairly short timeframe given the potential complexity of preparing the notice and the limited methods of delivery permitted.

THE DOL’S NEW GUIDANCE ON THE NOTICE OF COVERAGE OPTIONS

The Affordable Care Act added new section 18B to the Fair Labor Standards Act (“FLSA”), requiring all employers who are otherwise subject to the FLSA to provide a one-time written notice about health insurance marketplaces to all of their current employees before the marketplaces open, as well as written notice to all new employees upon hire. On May 8, 2013, the DOL issued [Technical Release 2013-02](#) (“Release”), which provides employers with temporary guidance on the required timing and content of the notices. The Release also gives employers guidance on updating election notices for employees who experience a COBRA-qualifying event.

WHICH EMPLOYERS MUST PROVIDE NOTICE OF COVERAGE OPTIONS TO EMPLOYEES?

All employers covered by the FLSA must provide a notice of coverage options to their employees. In general, the FLSA covers employers that have at least \$500,000 in annual dollar volume of business—based on its gross receipts from sales over a 12-month period—and that engage in, or produce goods for, interstate commerce. An employer engages in interstate commerce if it has any regular contact with interstate commerce, no matter how small. Only employers that engage in purely isolated local activity may be said to be uninvolved in interstate commerce. In addition, hospitals, certain non-acute care and residential facilities, schools, and federal and state governments, among others, are covered by the notice requirement.

WHICH EMPLOYEES MUST RECEIVE A NOTICE OF COVERAGE OPTIONS?

The employer must provide a notice of coverage options to all employees, regardless of whether they are full- or part-time employees or whether the employees currently participate in any employer-provided health plan. Employers do not have to provide notice to employees' dependents nor to retirees. But an employer's obligation to provide notice may extend to its independent contractors, and contract and leased workers, depending on the nature of their relationship with the employer as determined under the FLSA's "economic reality" test.

WHAT INFORMATION MUST EMPLOYERS INCLUDE IN THE NOTICE OF COVERAGE OPTIONS?

The notice of coverage options must be in writing and be written in a manner calculated to be understood by the average employee. FLSA Section 18B requires the notice of coverage options to provide employees with information about:

- The existence of health insurance marketplaces;
- Services provided by health insurance marketplaces;
- How to contact a health insurance marketplace for assistance;

- The possibility that employees may lose the employer contribution to any employer-provided health plan if they purchase a plan through a health insurance marketplace;
- The possibility that employees may lose the ability to exclude employer and employee contributions from their income for federal income tax purposes if they purchase a plan through a health insurance marketplace; and
- Whether employees may be eligible for a premium tax credit if they purchase a qualified health plan through a health insurance marketplace.

The DOL has provided employers with two model notices: one version for employers that offer health coverage to some or all employees, which is *available* at <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf>, and another version for employers that do not offer health care coverage, which is *available* at <http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf>.

Each model notice includes a Part A with general information about the marketplaces and the tax and economic consequences of declining employer-provided coverage, and a Part B that the employer completes with specific identifying information and answers to questions about any health coverage it may offer. Rather than including extensive eligibility information in the notice, employers may wish to cross-reference existing eligibility descriptions, either in the employer's summary plan description or in the enrollment materials.

Part A of the notice provides the first five items of information required under section 18B. Part B provides the sixth item—information about whether any health plan the employer may offer will affect the employee's eligibility for a premium tax credit. If an employer offers an employee a health plan that provides what is called "minimum value" and has an affordable premium for self-only coverage, then the employee is not eligible for a premium tax credit. (For more information on the connection between employer health plans and the premium tax credit, including the minimum value standard and affordability of coverage, and on the penalty that may apply to employers whose employees

receive premium tax credits, see our *Commentary* “[Deciding Whether to Pay or Play Under the Affordable Care Act.](#)”)

The model notice for employers that offer health coverage also includes an optional section where the employer can provide information that employees will need if they seek financial assistance when purchasing coverage through a marketplace.

Employers may provide current employees with one of the model notices or create their own version that includes the mandatory items listed above. The language in the model notices may be helpful to employers because they provide general information about marketplaces and refer employees to a web site with contact information for the marketplace in their particular states. Providing this general information may minimize employee questions and is far simpler than creating different notices with information specific to the marketplaces in each state. An employer may want to consider adjustments or additions to the model notices that take into account the employer's particular workforce, what information is appropriate to provide to help employees understand their coverage options, and potential questions employees face in making health coverage decisions that effectively did not exist before the advent of the marketplaces.

WHEN MUST EMPLOYERS PROVIDE NOTICES OF COVERAGE OPTIONS?

Current Employees: Employers must provide each current employee with a notice of coverage options by October 1, 2013.

New Hires: Employers must provide a notice of coverage options to employees hired after October 1, 2013 through December 31, 2014 within 14 days of the start of their employment. The DOL may change the timing requirements for new hires who come on board in 2015 or later.

HOW CAN EMPLOYERS SEND NOTICES OF COVERAGE OPTIONS TO EMPLOYEES?

An employer can provide notice of coverage options by first-class mail or electronically. To provide the notice electronically, an employer must meet the same requirements for electronic distribution of ERISA plan disclosures. In general, this means that notices can be distributed electronically only to (a) those employees who use a computer as part of their normal job function or (b) those employees who have consented to electronic delivery in a manner that demonstrates they can effectively receive the electronic delivery.

There is no prohibition on sending the notice with other items. Thus, employers may wish to consider including it with their new hire packets, annual enrollment materials, or other existing communications. However, these items will have to be delivered in the manner and timeframe required for the notices.

WILL THE NOTICE OF COVERAGE OPTIONS REQUIREMENTS CHANGE AFTER 2013?

The DOL promised employers that they may rely on the guidance in the Release for notices they are required to provide to current employees by October 1, 2013. They may also rely on the Release for new employees they hire during 2013 and through 2014. According to the Release, any changes to the requirements will come in future regulations or guidance that will provide adequate time to comply with any such changes. Future regulations should also clarify the consequences for noncompliance with the notice of coverage options requirement.

UPDATED COBRA ELECTION NOTICE

In general, COBRA allows employees covered by an employer's health plan to elect continuation coverage after a qualifying event, such as termination of employment or reduction in hours that results in a loss of coverage under the employer's plan. These employees must be given an election notice explaining their right to continuation coverage under COBRA. Although the Affordable Care Act did

not require any changes to the COBRA election notice, the DOL revised its model COBRA election notice to provide employees who are eligible for COBRA continuation coverage with information regarding health coverage alternatives offered through the marketplaces, as well as to eliminate stale references to preexisting condition limitation rules that have been substantially revised by the Affordable Care Act. Employers should work with their COBRA administrators to appropriately update notices. There is no fixed deadline for doing so, but it makes sense for the COBRA notices to be updated for qualifying events occurring in late 2013, so that COBRA-qualifying beneficiaries are aware of health coverage options other than COBRA that are available to them effective January 1, 2014.

FOLLOW-UP AND LAWYER CONTACTS

Jones Day has developed an in-depth understanding of the Affordable Care Act and its implications for employers. We will continue to watch for, and provide updates on, new guidance and regulations of interest to employers.

For further information or assistance in meeting the requirements of the Affordable Care Act, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

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