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New “Notice of Exchange” Requirement for Employers

As amended by the Affordable Care Act (“ACA”), the Fair Labor Standards Act (“FLSA”) includes a new notice requirement for employers. The purpose of the new Notice of Exchange is to inform employees about the private health insurance markets (referred to as the “Health Insurance Marketplaces” or “Marketplaces”), which some states and the Federal government are in the process of establishing in accordance with the ACA. While Section 1512 of the ACA requires employers to distribute this new notice beginning March 1, 2013, as of January, 2013, the U.S. Department of Labor (“DOL”) delayed distribution until further guidance could be issued. On May 8, 2013, the DOL issued additional guidance in the form of DOL Technical Release 2013-02, which will remain in effect until regulations or other guidance is promulgated and which outlines the distribution deadlines and content requirements for the new Notice of Exchange.

In addition to Technical Release 2013-02, the DOL also issued two model notices that employers are permitted to use, in lieu of creating their own notice. Which model the employer uses depends on whether or not it sponsors a group health plan for some or all employees. The following Alert highlights the Notice of Exchange distribution and content requirements and provides the link where employers can find copies of Technical Release 2013-02 and the two model notices.

Employers that are Subject to the new Notice of Exchange Requirement

Unlike ACA’s employer mandate, which applies only to those companies that employ 50 or more full-time employees and full-time employee equivalents, the Notice of Exchange applies to any employer that is subject to the FLSA. Generally, the FLSA applies to employers with annual revenues of at least \$500,000, who employ at least one worker. This includes hospitals, institutions, schools, and government entities. See www.dol.gov/elaws/esa/flsa/scope/screen24.asp for more information on the kinds of employers that are subject to the FLSA.

All Employees Must Receive the Notice of Exchange

The Notice of Exchange must be provided to all part-time or full-time employees of the employer, regardless of the employee’s enrollment in an employer-sponsored group health plan, if one is offered. Employers are not required to distribute the notice to the employee’s dependents.

Notice of Exchange Distribution Requirements

Existing employees must receive the Notice of Exchange before October 1, 2013. Employees hired between October 1, 2013 and December 31, 2013 must receive the notice at the time of hire. Employees hired after January 1, 2014 must receive the notice at the time of hire, with delivery within 14 days of the employee's start date being considered timely.

Notice of Exchange Content Requirements

The Notice of Exchange must be written in a manner to be comprehended by the average employee. The Fair Labor Standards Act Section 18B expressly requires that the notice:

- inform the employee about the Health Insurance Marketplace, including contact information and the services offered by the Marketplace;
- explain that the employee may be eligible for a premium tax credit under Internal Revenue Code Section 36B, if the employer offers a group health plan that pays less than 60 percent of covered benefit costs and the employee actually purchases health insurance through the Marketplace; and
- alert employees that purchasing health coverage through the Marketplace may result in the loss of employer contributions (if any) and tax advantages associated with employer-offered health coverage (e.g., tax-free to employees).

In addition to the content required under FLSA Section 18B and Technical Release 2013-02, the DOL model notices include information that explain that employees:

- may be eligible to save money or lower monthly health plan premiums by purchasing coverage through the Marketplace;
- will not receive a premium tax credit the employee may otherwise be eligible for if the employer offers the employee coverage under an employer-sponsored group health plan that satisfies the employer mandate standards discussed in the next bullet; and
- may be eligible for cost sharing subsidies, provided the employer does not offer the employee coverage under an employer-sponsored group health plan that satisfies the standards required under the employer mandate, which include:
 - (i) the individual's share of employee-only premiums under the employer's health plan be 9.5% or less of the employee's household income; and
 - (ii) the employer-sponsored health plan provides minimum value (e.g., covers at least 60% of the plan's covered benefit costs).

Each model notice also includes a section which requires that the employer complete information regarding the employer's contact information, the employer's tax identification number and other information about any employer-provided health coverage, if applicable. Copies of the model notices may be obtained at: <http://www.dol.gov/ebsa/healthreform>.

What Should Employers do Now?

Once an employer delivers the Notice of Exchange, employees are likely to have additional questions and concerns about the Health Insurance Marketplaces and the employer's group health plan, if any. However, because the vast majority of jurisdictions, including Georgia, are still in the process of establishing their state or federally-facilitated Marketplaces, there is virtually no information available on the operating procedures, services and insurance products that each Marketplace will offer. Therefore, we recommend that employers prepare the notice, but otherwise delay distribution, until sometime in September when more information about the State Marketplace is available.

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