

May 17, 2013

Practice Group(s):

*Benefits, ESOPs
and Executive
Compensation*

The Affordable Care Act's Marketplace Notice: What Employers Need to Know

By Mary Turk-Meena, Lynne Shore Wakefield, Katie M. Morton

On May 8, 2013, the Department of Labor ("DOL") issued long-awaited guidance on the notice that must be provided to employees by October 1, 2013, the first day of the Health Insurance Marketplace open enrollment period (the "Marketplace Notice"). The Marketplace Notice requirement applies broadly to any employer that is subject to the Fair Labor Standards Act ("FLSA"), regardless of how many employees the employer has or whether it sponsors a group health plan. This Alert describes the Marketplace Notice requirement under the Patient Protection and Affordable Care Act (the "Affordable Care Act"), the key provisions of the DOL guidance, and practical considerations not directly addressed by the guidance.

The Statutory Requirement

Beginning January 1, 2014, individuals and employees of small businesses will be able to purchase health insurance coverage through a Health Insurance Marketplace, previously referred to under the Affordable Care Act's statutory language as an Exchange (the "Marketplace"). The Affordable Care Act added provisions to the FLSA requiring most employers to provide written notice to employees regarding the coverage options available through the Marketplace. The Affordable Care Act requires the Marketplace Notice to describe:

- the existence of the Marketplace, the services provided by the Marketplace, and contact information;
- the employee's potential eligibility for a premium tax credit under Section 38B of the Internal Revenue Code if the employer plan's share of total allowed costs of benefits provided under the plan is less than 60% of those costs and the employee purchases a qualified health plan through the Marketplace; and
- the employee's potential loss of an employer contribution to any health benefits plan offered by the employer (which contribution may be excludable from income for Federal income tax purposes) if the employee purchases a qualified health plan through the Marketplace.

Key Provisions of Guidance

The DOL guidance is comprised of Technical Release 2013-02, a model notice for employers that offer group health coverage, a model notice for employers that do not offer group health coverage, and a modified model COBRA election notice. The guidance provides helpful clarification on many details not addressed in the Affordable Care Act's statutory language, as described below.

- **Impacted Employers:** Businesses with one or more employees who are engaged in, or produce goods for, interstate commerce are required to provide the Marketplace Notice. This requirement does not apply to employers with less than \$500,000 in annual revenue.
- **Employees Entitled to Marketplace Notice:** Employers must provide the notice to all employees, regardless of plan enrollment status or of part-time or full-time status. The

The Affordable Care Act's Marketplace Notice: What Employers Need to Know

Marketplace Notice does not need to be provided to spouses, eligible dependents, or anyone else who may be entitled to health plan coverage through the employer who is not an employee.

- **Timing Requirements:** The Marketplace Notice must be provided to all current employees no later than October 1, 2013 and to all employees hired on or after October 1, 2013 within 14 days of the new employee's start date.
- **Method of Distribution:** The Marketplace Notice must be provided automatically and free of charge in a manner calculated to be understood by the average employee. The Marketplace Notice may be delivered electronically if the DOL's electronic distribution safe harbor is satisfied, or via first-class mail.
- **Model Notices:** Employers may use one of the model notices included with the DOL guidance, or a modified version provided that the notice satisfies the content requirements. Both models are available at <http://www.dol.gov/ebsa/healthreform/>.
- **Revised COBRA Election Notice:** The modified model COBRA election notice includes language intended to help make individuals who lose coverage under a group health plan as a result of a COBRA qualifying event (such as a termination of employment) aware of coverage options available in the Marketplace. The modified COBRA election notice and a redline version showing the latest changes are both available at <http://www.dol.gov/ebsa/cobra.html>.

Practical Considerations for Employers

While the DOL guidance provides helpful clarification on many details not addressed in the Affordable Care Act's statutory language, it also raises a number of questions for employers. Key issues to consider in advance of the October 1, 2013 compliance deadline include the following:

- **Timing Requirements:** The timing requirements for distribution of the Marketplace Notice described above apply regardless of the plan year for a group health plan. There is no special rule for non-calendar year plans. As a result, employers that sponsor non-calendar year group health plans are subject to the October 1, 2013 deadline described above.
- **Method of Distribution:** Administrative systems should be examined to ensure that they are capable of fulfilling the distribution requirement to current employees and new hires who are not eligible for benefits. In addition, employers seeking to fulfill the distribution requirement via electronic delivery should consider whether employees who are not eligible for benefits, and who are entitled to receive the Marketplace Notice, have regular access to a computer as an integral part of their job duties, and whether the other requirements of the DOL's electronic disclosure safe harbor are satisfied, so that electronic distribution is permissible.
- **Marketplace Notice Content:** Employers who sponsor group health coverage should consider what level of detail to include in the Marketplace Notice with respect to their group health plan eligibility requirements, and whether to complete the optional provisions in the model notice that are intended to help employees understand their coverage options. The optional provisions include items such as whether the employee is currently eligible for coverage offered by the employer, or will be eligible in the next three months, whether the employer's group health plan meets the minimum value standard, and the cost of coverage under the group health plan. Completing these optional provisions on the Marketplace Notice will likely require employers to personalize the Marketplace Notice based on eligibility status. However, employers who do not complete the optional provisions may see an increased volume of questions from employees who are attempting to fill out the Marketplace applications this fall without the benefit of this information.

The Affordable Care Act's Marketplace Notice: What Employers Need to Know

- **Combining Marketplace Notice with Annual Enrollment Materials:** Employers with calendar year plans may want to consider including the Marketplace Notice with annual enrollment materials, keeping in mind the more restrictive delivery methods required for the Marketplace Notice and the timing of the employer's group health plan enrollment. Regardless of whether the Marketplace Notice is combined with annual enrollment materials, employers will want to consider how to coordinate the two communications.

Although the guidance issued by the DOL is temporary, it may be relied upon until further guidance is issued.

Authors:

Mary Turk-Meena

mary.turk-meena@klgates.com

+1.704.331.7590

Lynne Shore Wakefield

lynne.wakefield@klgates.com

+1.704.331.7578

Katie M. Morton

katie.morton@klgates.com

+1.704.331.7527

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt
Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris
Perth Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane
Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates practices out of 48 fully integrated offices located in the United States, Asia, Australia, Europe, the Middle East and South America and represents leading global corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2013 K&L Gates LLP. All Rights Reserved.