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ACA Advisor

What you need to know about the Affordable Care Act



Frequently Asked Questions about the Exchange (Marketplace) Notice

On September 11, 2013, the Department of Labor (DOL) issued an FAQ that stated that no penalties will apply to employers that fail to provide the exchange/marketplace notice. Despite this FAQ, employers may still want to provide the notice, to provide information to employees and to reduce the risk of unanticipated liability.

This FAQ is based on Department of Labor (DOL) Technical Release 2013-02, which does not provide specific guidance on many issues. Consequently, some of the answers in this FAQ are based on agency guidance provided in similar situations. The answers in this FAQ assume the employer is completing the model notice that applies to employers that offer coverage.

Q1. Who needs to give the notice?

A1. All employers who are subject to the Fair Labor Standards Act (FLSA) must give the notice. This includes:

- All hospitals, nursing homes, and other health care facilities, regardless of size
- All public and private preschools, elementary and secondary schools, and institutions of higher education, regardless of size
- All governments and governmental agencies, regardless of size
- All other entities with \$500,000 or more in annual dollar volume

Employers that are uncertain if they are subject to the FLSA may use the [elaws - Fair Labor Standards Act Advisor](#). (The FLSA is the law that has the minimum wage and overtime requirements. If the employer pays minimum wage and overtime based on the FLSA rules, the organization has probably determined it is subject to the FLSA.)



Q2. Who must receive the notice?

- A2. The notice must be given to all employees, including temporary, seasonal, part-time, and full-time workers. It does not matter if the worker is not eligible for coverage under the health plan sponsored by the employer, and never will be eligible. The notice must be given to employees covered by a union or multiemployer plan. The notice does not need to be given to COBRA participants, retirees, or dependents.

One method of determining who should receive the notice would be to give the notice to everyone on the employer's payroll as of the notice date.

New employees who start work after the date the notice is generally distributed also must receive the notice within 14 days after they start work.

Q3. When is the notice due?

- A3. The notice is due by October 1, 2013, but may be given before that date. If given earlier, employees hired after that date need to be given the notice within 14 days after their start date.

Q4. Can an employer provide the notice electronically?

- A4. The notice may be provided electronically to employees who routinely use a computer as part of their job. The employer may not simply post the notice on its website.

Q5. What other ways can an employer provide the notice?

- A5. The notice can be sent to the employee's home or work address by first class mail. The instructions for providing the notice do not mention hand delivery, but that normally is an acceptable way to provide a notice, and should be acceptable for this notice. Simply posting the notice in a break room will not be adequate, however.

Q6. Does an employer have to use the same delivery method for all employees?

- A6. No. An employer could, for example, provide the notice electronically to home office employees who use computers as part of their jobs and mail the notice to employees working on an assembly line.

Q7. Are individualized notices required?

- A7. According to the DOL Technical Release, individualized notices are not required. As a practical matter, however, if the employer chooses to complete part 3, the notice will need to be individually prepared.

Q8. Which employees must receive the Spanish version of the notice?

- A8. The DOL instructions for the exchange notice do not address this question. Generally speaking, if a significant portion of the workforce is only literate in a language other than English, those

employees should be provided a notice in the language they do speak and read. "Significant" often means 10 percent or more.

Q9. Please provide a summary of page 1 of the notice.

A9. The model notice is intended to cover information the law says the notice must include.

The "What is the Health Insurance Marketplace?" section provides information on the main task of the marketplace (which is also called the exchange), which is to provide a web-based place to compare available health insurance and to enroll in a plan offered through the marketplace. Employees that meet financial requirements are eligible for an advanced tax credit – often called the subsidy – to help them pay their premium each month.

The "Can I Save Money on my Health Insurance Premiums in the Marketplace?" section provides basic information on how to qualify for the premium subsidy. Two main requirements apply – that the person not be eligible for employer-provided coverage that meets certain standards (which are described in the next section) and that the person's income is low enough. The lower the person's income, the bigger a subsidy the person may receive.

The "Does Employer Health Coverage Affect Eligibility for Premium Savings through the Marketplace?" section provides more information on eligibility for the premium subsidy. If the person's employer offers affordable, minimum value coverage, the employee is not eligible for a premium subsidy – even if the employee declines the employer-provided coverage. If, however, the person is not eligible for coverage, or the employer-provided coverage is not "minimum value" (it does not cover at least 60 percent of claims costs) and/or is not "affordable" (employee-only coverage costs 9.5 percent (indexed each year) of the employee's household income or more) the employee likely will qualify for a subsidy, as long as the employee's income is low enough. (An employee who purchases coverage through his or her employer is not eligible for a premium subsidy, even if the coverage is not affordable and minimum value.)

The "Note" explains that individuals who purchase coverage through the marketplace typically will not receive an employer contribution toward that coverage. It also notes that only employer-provided coverage can be purchased on a pre-tax basis through a Section 125 cafeteria plan – marketplace coverage will be paid for with after-tax dollars.

Q10. Does an employer have to complete page 2?

A10. The delay in the employer shared responsibility/play or pay requirements did not remove or change the requirement to provide this notice. The requested information about whether the plan offers affordable, minimum value coverage will be used by the marketplace as part of its determination of whether an individual is eligible for a premium subsidy. (Regardless of how this page is completed, the person will be required to provide information about eligibility for employer-provided affordable, minimum value coverage when applying for the premium subsidy.)

Q11. How does an employer complete page 2 (Part B) of the notice?

A11. The employer information in the shaded area is information the employee will be asked to provide when applying for a premium subsidy through the marketplace.

The DOL instructions do not address how to complete the section if multiple employers are in a single plan, or if the plan and the employer have different employer identification numbers (EINs). In view of the reporting that this information will eventually be used for, using the employer name and EIN on the employee's W-2 appears to be the best option.

The "Here is some basic information about health coverage offered by this employer" section is looking for basic eligibility information, to help the marketplace decide if the person is ineligible for a premium subsidy because the person is eligible for affordable, minimum value coverage through his or her employer.

An employer that offers health coverage to all employees (regardless how few hours they work) should check the first box.

An employer that offers coverage to some, but not all, employees should check the second box and provide basic eligibility rules in the blank space. Examples would include "All employees who work 35 or more hours per week and who have completed 60 days of employment," "All employees not covered by a collective bargaining agreement," or "Employees who are regularly scheduled to work at least 30 hours a week and who are classified as home office employees."

An employer that offers coverage to dependents (spouses and/or children) should check the third box and provide basic details in the white space – even if the employer makes no contribution for family coverage. Examples would include "All natural, adopted, step and foster children to age 26 and all legally married spouses" or "Natural, adopted, step, foster and grandchildren. Spouses who are eligible for medical coverage through the spouse's employer are not eligible."

An employer that does not offer coverage to spouses or children should check the fourth box.

An employer that offers coverage that is **both** minimum value and affordable should check the fifth box.

Q12. How does an employer know if the coverage it offers is minimum value?

A12. The Department of Health and Human Services (HHS) has provided a calculator for employers to use to determine whether their plan meets the "minimum value" standard. If the employer is a small (fewer than 50 employees) fully insured group, the employer should use the "actuarial value" calculator. If the employer is a large (more than 50 employees) fully insured group or self-funded, it should use the "minimum value" calculator. To access the calculators, visit the [IRS web page on minimum value and affordability](#).

There are also minimum value safe harbors. If the plan meets any of these designs, it is minimum value and the employer does not need to use the calculator:

- a) A plan with a \$3,500 integrated medical and drug deductible, 80 percent plan cost-sharing, and a \$6,000 maximum out-of-pocket limit for employee cost-sharing.
- b) A plan with a \$4,500 integrated medical and drug deductible, 70 percent plan cost-sharing, a \$6,400 maximum out-of-pocket limit, and a \$500 employer contribution to a health savings account (HSA).

- c) A plan with a \$3,500 medical deductible, \$0 drug deductible, 60 percent plan medical expense cost-sharing, 75 percent plan drug cost-sharing, a \$6,400 maximum out-of-pocket limit, and drug co-pays of \$10/\$20/\$50 for the first, second and third prescription drug tiers, with 75 percent coinsurance for specialty drugs.

Q13. How does an employer know if the coverage it offers is affordable?

A13. Employers should use one of the affordability safe harbors under the employer shared responsibility/play or pay regulations. The safe harbors are:

- a) W-2 (Box 1) income
- b) Rate of pay
- c) Federal Poverty Level

Q14. How does an employer determine affordability if the plan charges different amounts for smokers and non-smokers?

A14. The employer can assume everyone is a non-smoker.

Q15. How does an employer determine affordability if its plan has wellness incentives?

A15. The employer should assume no one qualifies for a wellness incentive.

Q16. If the plan has a bundled medical/dental premium should the employer use the bundled premium?

A16. Yes.

Q17. What should the employer do if the coverage it offers is affordable for some employees but not others?

A17. The employer has a choice:

- a) Assuming the plan provides minimum value (and most employer plans do) the employer can provide a version of the notice that has the fifth box checked to employees for whom coverage is affordable, and a version that has the fifth box blank to employees for whom coverage is not affordable; or
- b) The employer can provide the same notice for all employees, check the fifth box, and add an asterisk with the following language: "This plan may not be affordable for employees earning less than \$_____ " (for example, \$18,000 annually).

Q18. What if the employer doesn't know its 2020 benefit package yet?

A18. The employer should complete the notice based on the current benefit package.

Q19. What if the benefits change after the employer gives the notice?

A19. The employer will not be required to provide an updated notice. It could probably provide an updated notice if it chose to.

Q20. Must this notice be given annually?

A20. This is a one-time notice (as part of the effort to educate people that the opportunity to enroll in the marketplace is coming and how employer and marketplace coverage interact). Employers are required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. The Department will consider a notice to be provided at the time of hiring if the notice is provided within 14 days of an employee's start date.

Q21. Does an employer have to complete page 3?

A21. Employers are not required to complete page 3. This page does require employee-specific information that may make it impractical to complete for all employees by October 1. An employer could omit page 3 for current employees but complete it for new hires going forward if it wished to.

Q22. If an employer doesn't complete page 3, does it need to provide it at all?

A22. The DOL instructions are not specific on this, but it would seem reasonable to omit page 3 if it has not been completed.

Q23. Can an employer change the notice?

A23. An employer may tailor the notice to reflect its particular situation as long as all of the key points are included. Employers may want to retain the general format in an effort to reduce the number of questions it may receive from the marketplace.

Q24. If an employer has employees in several states can it give them all the same notice?

A24. Yes. At one time it looked like each state might need its own notice, but the DOL chose to reduce the burden on employers by directing all employees to the www.healthcare.gov website. This website will direct employees to a state-specific page for information about the marketplace in that state.

Q25. Can an employer provide the "no offer" notice to employees who are not eligible for coverage and the "offers" notice to those who are eligible?

A25. Yes.

Q26. May someone other than the employer provide the notice?

A26. Yes. Another entity, such as a union or insurer, may provide the notice on behalf of the employer. Because the notice requirement applies to all employees, the employer may be able to rely on a third party to provide the notice to some employees (such as those covered by a union plan), while providing the notice itself to others.

Q27. Is there a penalty for not providing the notice?

A27. The DOL has stated that there is no fine or penalty for failing to provide the marketplace notice. However, this requirement technically is still the law. The DOL FAQ may be accessed at [Notice of Coverage Options FAQs](#).

Q28. If an employer decides to provide the notice, should it provide the notice to individuals hired after October 1, 2013?

A28. There is no reason to treat new hires differently than those employed when the notice is first given, so the notice should be provided to new hires.

Q29. Where can an employer find the model notices?

A29. The model notices are available from the Employee Benefits Security Administration (EBSA) website at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice>.

Q30. Where can an employer find the DOL instructions for providing the notice?

A30. The DOL instructions are at [Technical Release No. 2013-02](#).

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