

LEGAL UPDATE

September 2013

REMINDER TO EMPLOYERS: AFFORDABLE CARE ACT REQUIRES EMPLOYERS TO SEND NOTICE OF HEALTH CARE MARKETPLACE EXCHANGES TO EMPLOYEES

EMPLOYER NOTICE REQUIREMENT

The Patient Protection and Affordable Care Act (“PPACA”) requires most employers¹ in the United States to provide all of their employees with notice concerning the existence of federal and state health benefits exchanges and other information to help employees evaluate and purchase health insurance coverage (the “Notice”). The PPACA has mandated various exchanges or “marketplaces” to be established by October 1, 2013. Therefore, the PPACA requires that current employees receive notice of these marketplaces by October 1, 2013.

MODEL NOTICES

The U.S. Department of Labor has issued two model Notices (the “Model Notices”) for use by employers to satisfy the Notice requirement. The first Model Notice (see Appendix I) is for employers that sponsor a group health plan. The second Model Notice (see Appendix II) is for employers who do not sponsor a group health plan. We have included copies of both Model Notices for your convenience. The

¹ The PPACA notice requirement applies to any employer covered by the Fair Labor Standards Act (“FLSA”). Since the FLSA applies to most employers with 2 or more employees, and many employees even if they are not employed by an employer with 2 or more employees, most employers should consider themselves covered by these Notice requirements. However, if the employer has reason to believe that for some reason it is not covered by these Notice requirements, the employer should seek the advice of Pryor Cashman’s Labor and Employment Department.

Model Notices can also be found in English and Spanish on the Department of Labor’s website in the health reform section: <http://www.dol.gov/ebsa/healthreform/>.

Each Model Notice has two parts. Part A contains various information about the exchanges, and Part B requires employers to provide some basic information about themselves. Furthermore, Part B of the Model Notice applicable to employers with a group health plan (Appendix I) also requires some basic information about such plan. Employers’ completion of the third page of the Model Notice applicable to employers with group health plans (Appendix I) is optional.

WHO MUST RECEIVE NOTICE

Employers must send the Notice to each employee, regardless of whether an employee is a participant in the employer’s group health plan or whether the employee is full time or part time. Employers are not required to send separate Notices to their employees’ dependents or other individuals who are or may become eligible for coverage under the employer’s group health plan but who are not employees of the employer.

TIMING AND DELIVERY OF NOTICE

Employers must send the Notice to all current employees by October 1, 2013. For new employees starting on or after October 1, 2013, employers must send the Notice within 14 days following an employee’s start date.

Employers may mail the Notice by first-class mail. Alternatively, employers may provide the Notice electronically to employees, provided that the Department of Labor's electronic disclosure safe harbor requirements are met.² Posting the Notice on the employer's web site and/or intranet, however, will not satisfy these requirements.

PENALTIES FOR FAILING TO PROVIDE NOTICE

If an employer who is subject to this Notice requirement fails to provide such Notice to its employees, penalties may apply. While the Department of Labor's guidance on the Notice does not specifically mention penalties for failing to provide a Notice to employees, there is a general penalty for failing to comply with PPACA rules to which such employer may be subject. That penalty is \$100 a day per participant affected. We strongly urge all employers required to provide a Notice to employees to do so.

IF THE MODEL NOTICE IS NOT USED

If an employer decides to develop its own Notice and not to use the Model Notices, it should make sure that such Notice is written in a manner calculated to be understood by the average employee. Furthermore, the Notice must inform the employees of:

- The existence of the Marketplace;
- A description of the services provide by the Marketplace;
- Contact information for the Marketplace;
- Information about the possible premium tax credit the employee may receive if

he or she purchases insurance coverage through the Marketplace; and

- A statement explaining that employees who purchase insurance coverage through the Marketplace may lose their employer's contribution (if any) towards any group health plan offered by the employer and that such employer contribution may be excludable from income for Federal income tax in some cases.

*The foregoing is merely a discussion of the required employer notice to employees and is not intended to provide legal advice. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact **Alice B. Stock** at astock@pryorcashman.com or (212) 326-0480, or **Joshua Zuckerberg** at jzuckerberg@pryorcashman.com or (212) 326-0885.*

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² The Department of Labor generally permits electronic delivery to employees who have access to computers as part of their regular job duties or who consent to such electronic delivery. However, employers should consult with legal advisors if they plan on providing employees with the Notice electronically.

APPENDIX I



New Health Insurance Marketplace Coverage Options and Your Health Coverage

Form Approved
OMB No. 1210-0149
(expires 11-30-2013)

PART A: General Information

When key parts of the health care law take effect in 2014, there will be a new way to buy health insurance: the Health Insurance Marketplace. To assist you as you evaluate options for you and your family, this notice provides some basic information about the new Marketplace and employment-based health coverage offered by your employer.

What is the Health Insurance Marketplace?

The Marketplace is designed to help you find health insurance that meets your needs and fits your budget. The Marketplace offers "one-stop shopping" to find and compare private health insurance options. You may also be eligible for a new kind of tax credit that lowers your monthly premium right away. Open enrollment for health insurance coverage through the Marketplace begins in October 2013 for coverage starting as early as January 1, 2014.

Can I Save Money on my Health Insurance Premiums in the Marketplace?

You may qualify to save money and lower your monthly premium, but only if your employer does not offer coverage, or offers coverage that doesn't meet certain standards. The savings on your premium that you're eligible for depends on your household income.

Does Employer Health Coverage Affect Eligibility for Premium Savings through the Marketplace?

Yes. If you have an offer of health coverage from your employer that meets certain standards, you will not be eligible for a tax credit through the Marketplace and may wish to enroll in your employer's health plan. However, you may be eligible for a tax credit that lowers your monthly premium, or a reduction in certain cost-sharing if your employer does not offer coverage to you at all or does not offer coverage that meets certain standards. If the cost of a plan from your employer that would cover you (and not any other members of your family) is more than 9.5% of your household income for the year, or if the coverage your employer provides does not meet the "minimum value" standard set by the Affordable Care Act, you may be eligible for a tax credit.¹

Note: If you purchase a health plan through the Marketplace instead of accepting health coverage offered by your employer, then you may lose the employer contribution (if any) to the employer-offered coverage. Also, this employer contribution—as well as your employee contribution to employer-offered coverage—is often excluded from income for Federal and State income tax purposes. Your payments for coverage through the Marketplace are made on an after-tax basis.

How Can I Get More Information?

For more information about your coverage offered by your employer, please check your summary plan description or contact _____.

The Marketplace can help you evaluate your coverage options, including your eligibility for coverage through the Marketplace and its cost. Please visit HealthCare.gov for more information, including an online application for health insurance coverage and contact information for a Health Insurance Marketplace in your area.

¹ An employer-sponsored health plan meets the "minimum value standard" if the plan's share of the total allowed benefit costs covered by the plan is no less than 60 percent of such costs.

PART B: Information About Health Coverage Offered by Your Employer

This section contains information about any health coverage offered by your employer. If you decide to complete an application for coverage in the Marketplace, you will be asked to provide this information. This information is numbered to correspond to the Marketplace application.

3. Employer name		4. Employer Identification Number (EIN)	
5. Employer address		6. Employer phone number	
7. City	8. State	9. ZIP code	
10. Who can we contact about employee health coverage at this job?			
11. Phone number (if different from above)		12. Email address	

Here is some basic information about health coverage offered by this employer:

- As your employer, we offer a health plan to:
 - ☐ All employees.
 - ☐ Some employees. Eligible employees are:

 - With respect to dependents:
 - ☐ We do offer coverage. Eligible dependents are:
 - ☐ We do not offer coverage.
 - ☐ If checked, this coverage meets the minimum value standard, and the cost of this coverage to you is intended to be affordable, based on employee wages.
- ** Even if your employer intends your coverage to be affordable, you may still be eligible for a premium discount through the Marketplace. The Marketplace will use your household income, along with other factors, to determine whether you may be eligible for a premium discount. If, for example, your wages vary from week to week (perhaps you are an hourly employee or you work on a commission basis), if you are newly employed mid-year, or if you have other income losses, you may still qualify for a premium discount.

If you decide to shop for coverage in the Marketplace, **HealthCare.gov** will guide you through the process. Here's the employer information you'll enter when you visit **HealthCare.gov** to find out if you can get a tax credit to lower your monthly premiums.

The information below corresponds to the Marketplace Employer Coverage Tool. Completing this section is optional for employers, but will help ensure employees understand their coverage choices.

13. Is the employee currently eligible for coverage offered by this employer, or will the employee be eligible in the next 3 months?

☐ **Yes** (Continue)

13a. If the employee is not eligible today, including as a result of a waiting or probationary period, when is the employee eligible for coverage? _____ (mm/dd/yyyy) (Continue)

☐ **No** (STOP and return this form to employee)

14. Does the employer offer a health plan that meets the minimum value standard*?

☐ **Yes** (Go to question 15) ☐ **No** (STOP and return form to employee)

15. For the lowest-cost plan that meets the minimum value standard* offered **only to the employee (don't include family plans): If the employer has wellness programs, provide the premium that the employee would pay if he/ she received the maximum discount for any tobacco cessation programs, and didn't receive any other discounts based on wellness programs.**

a. How much would the employee have to pay in premiums for this plan? \$

b. How often? ☐ Weekly ☐ Every 2 weeks ☐ Twice a month ☐ Monthly ☐ Quarterly ☐ Yearly

If the plan year will end soon and you know that the health plans offered will change, go to question 16. If you don't know, STOP and return form to employee.

16. What change will the employer make for the new plan year?

☐ Employer won't offer health coverage

☐ Employer will start offering health coverage to employees or change the premium for the lowest-cost plan available only to the employee that meets the minimum value standard.* (Premium should reflect the discount for wellness programs. See question 15.)

a. How much will the employee have to pay in premiums for that plan? \$

b. How often? ☐ Weekly ☐ Every 2 weeks ☐ Twice a month ☐ Monthly ☐ Quarterly ☐ Yearly

Date of change (mm/dd/yyyy):

* An employer-sponsored health plan meets the "minimum value standard" if the plan's share of the total allowed benefit costs covered by the plan is no less than 60 percent of such costs (Section 36B(c)(2)(C)(ii) of the Internal Revenue Code of 1986)

APPENDIX II



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7. City	8. State	9. ZIP code	
10. Who can we contact at this job?			
11. Phone number (if different from above)		12. Email address	

You are not eligible for health insurance coverage through this employer. You and your family may be able to obtain health coverage through the Marketplace, with a new kind of tax credit that lowers your monthly premiums and with assistance for out-of-pocket costs.