

September , 11, 2013

Notice of Exchange Penalties: There Aren't Any, But Timely Compliance is Key

The Department of Labor (DOL) has clarified in a [Frequently Asked Question](#) that no fine or penalty will apply to an employer who fails timely to provide a Notice of Exchange to employees. The Affordable Care Act amended the Fair Labor Standards Act (FLSA) to require provision of the Notice of Exchange. The FLSA imposes corrective measures on employers that violate its other mandates, including federal minimum wage rules, but does not contain an express penalty provision for failing timely to provide the Notice of Exchange. I earlier outlined Notice of Exchange distribution duties, which require action on or before October 1, 2013, [here](#), and [here](#).

This information, at this late date, is more confusing than it is helpful to employers who have already invested significant resources in preparing to deliver the Notice of Exchange. The wording of the FAQ says that employers "should" rather than "must" provide the Notice, which is misleading, because Section 18B of the FLSA ([29 U.S.C. Sec. 218B](#)) clearly states that employers "shall" provide the Notice within the time period specified, and all prior DOL communications have used consistent wording. The FAQ did not change this nor did it modify any prior guidance on exchange notice duties in DOL [Technical Release 2013-02](#), including instructions on how the Notice should be delivered. Noting the lack of express Notice-related penalties in an [online article](#) that predated the FAQ, Boston ERISA attorney Alden Bianchi identified the still-remaining risk to employers:

"This does not mean, of course, that noncompliance is a good idea or even a viable option. The lack of penalties does not translate into a lack of consequences. Plan sponsors still have a fiduciary obligation to be forthcoming with plan participants and beneficiaries."

Particularly for employers with pre-existing group health plans, the Notice of Exchange potentially could be viewed by the DOL as within the scope of the employer's required disclosures to participants and thus within the scope of an ERISA audit, or separate penalties could be imposed through amendment to the FLSA or the ACA. (I discussed some of the existing ACA penalties in this [earlier post](#).)

Accordingly, even in the absence of any current, known monetary penalty or fine, employers must take all measure necessary timely to provide the Notices of Exchange on or before the October 1, 2013 deadline, and to each new employee upon hire thereafter (the DOL has clarified that in 2014, providing the Notice within 14 days of hire will constitute timely delivery).

Finally the FAQ directs readers to Spanish-language versions of the DOL model Notices of Exchange. As with the English versions there is one model notice for use by employers that [do not offer group health coverage](#) and one version for employers that [do offer coverage](#).

<http://www.dol.gov/ebsa/faqs/faq-noticeofcoverageoptions.html>

<http://eforerisa.wordpress.com/2013/05/13/model-notice-of-marketplace-coverage-options-released/>

<http://eforerisa.wordpress.com/2013/01/27/notice-of-exchange-deadline-postponed-until-further-guidance-issues/>

<http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf>

<http://www.dol.gov/ebsa/newsroom/tr13-02.html>

<http://www.mintz.com/newsletter/2013/Advisories/3304-0813-NAT-ELB/index.html>

<http://eforerisa.files.wordpress.com/2011/08/health-plan-excise-tax-chart-updated1.pdf>

<http://www.dol.gov/ebsa/pdf/FLSAwithoutplanssp.pdf>

<http://www.dol.gov/ebsa/pdf/FLSAwithplanssp.pdf>