



## Think PPACA Doesn't Apply to You? Think Again!

**Notice required by October 1, but what happens if you don't comply?**

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### I Thought I Was Exempt!

As a small employer with only a handful of employees, I have read about the Patient Protection and Affordable Care Act (PPACA or ACA) issues as an interested benefits professional but NOT as an interested business owner who had to worry about it. I "knew" that since I didn't have 50 or more employees, I didn't have to worry about ACA as a business owner.

It turns out I was wrong and you might be too!

We are not going to go into the details of ACA in this *asap*, since that is outside the normal purview of ASPPA and the private retirement plan system. However, we have many ASPPA members who might have thought they did not have to deal with this law. In the interest of helping those ASPPA members, we have produced this *asap*.

### Notice is Required by October 1, 2013

ACA requires that all employers subject to the Fair Labor Standards Act (FLSA) distribute a Health Insurance Marketplace Notice (the Notice) to all

employees by October 1, 2013. Most businesses with \$500,000 or more in annual dollar volume of sales or receipts will be required to provide this Notice. ACA mandates that beginning January 1, 2014, individuals and employees of small businesses will have a new way to access coverage through the new Health Insurance Marketplace (the Marketplace). Open enrollment for health insurance coverage through the Marketplace begins October 1, 2013. ACA §1512 creates a new FLSA §18B requiring a Notice to employees of coverage options available through the Marketplace.

Employers are required to provide the Notice to each new employee at the time of hiring, beginning October 1, 2013. For 2014, the Department of Labor (DOL) 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.

With respect to employees who are current employees before October 1, 2013, employers are required to provide the Notice not later than October 1, 2013.

The Notice is required to be provided automatically, free of charge and in writing in a manner calculated to be understood by the average employee. It may be provided by first-class mail or by electronic delivery if the requirements of the DOL's electronic disclosure safe harbor at 29 CFR 2520.104b-1(c) are met.

An employer may want to track delivery and receipt of the Notice, although there is no requirement to obtain an employee's signature.

### What Must Be Included in the Notice?

The following items are required to be in the Notice:

- Services provided by the Marketplace.
- Contact information for the Marketplace.
- Employee's eligibility for premium tax credits or cost-sharing reductions in situations where the employer's share of the employer-sponsored health plan is less than 60% of the total costs and the employee purchases a qualified health plan through the Marketplace.
- Possibility of losing employer contributions to any employer-sponsored health plans if insurance is purchased through the Marketplace.
- Possibility that a portion or all of an employer's contributions to employer-sponsored health plans may be excluded from income for tax purposes.

### Model Notices

Model language is available on the DOL's website to satisfy the above content requirements for FLSA §18B. There is [one model for employers who do not offer a health plan](#) and [another model for employers who offer a health plan](#) to some or all employees. Employers may use one of these models, as applicable, or a modified version.

### What is the Penalty for Noncompliance?

There isn't any...or maybe there is!

There have been a number of articles discussing the penalty for non-compliance with the Notice requirement, including incorrect statements of \$100/day per person penalties from both the New York Times and Fox News (as well as others)

reporting what some high profile law firms were saying. That is just plain wrong.

How do we know? The DOL has said so.

### DOL Guidance: No Fine for Failure to Provide Notice of Coverage Options

The American Benefits Council reported the following last week:

In a very brief [Frequently Asked Question \(FAQ\) document](#) issued on September 11, the U.S. Department of Labor formally clarified that an employer covered by the Fair Labor Standards Act "will not be subject to a fine or penalty under the [Patient Protection and Affordable Care Act (PPACA)] if they fail to provide a written Notice to its employees about the Health Insurance Marketplace by October 1, 2013."

So, no penalties, right? Then I really don't have to worry about this silly Notice, right?

*Not so fast, my friend!*

### FAQ Does Not Necessarily Mean No Consequence for Not Giving Notice

*The following information comes to us from Solutions Law Press with their permission:*

While many employers and their advisors are reading the FAQ on Notice of Coverage Options to mean that there is no consequence for an employer's failure to provide Exchange Notices to its employees, discussions with Employee Benefits Security Administration (EBSA) representatives cast doubt on this interpretation of the FAQ.

EBSA representatives asked on the morning of September 12, 2013 about the FAQ on Notice of Coverage Options stated that while employers "should" and EBSA "encourages" employers to in fact provide the Exchange Notices, EBSA does not view

employers as subject to any penalty *under "ERISA"* (emphasis added) for not providing an Exchange Notice in accordance with Section 18B of the FLSA.

On the other hand, statements made by other EBSA officials responding to questions about the implications of the FAQ on Notice of Coverage Options on the afternoon of September 12, 2013 raise concerns about reading the FAQ to mean that there is no consequence for an employer's failure to provide the Exchange Notice. These EBSA officials cautioned that employers should not interpret the statement in the FAQ on Notice of Coverage Options [that] there is no penalty under ERISA for not providing the Exchange Notice as meaning that there will be no adverse consequence if an employer does not provide an 18B Exchange Notice to its employees.

On the contrary, these EBSA officials caution that EBSA may view the Exchange Notice as a required disclosure about the plan, which could trigger audit or other enforcement activity. EBSA representatives also are declining to comment on whether not providing the Exchange Notice might trigger penalties or other liabilities from other agencies.

When asked whether employers failing to provide an Exchange Notice could face

penalties imposed by the Department of Labor Wage & Hour division under the FLSA, the Internal Revenue Service under Section 8928 or other provisions of the Internal Revenue Code, the Department of Health & Human Services under the Public Health Services Act, plaintiffs' in a private cause of action brought under ERISA or the FLSA, or otherwise, EBSA representatives declined to comment about the potential implications of an employer's failure to provide an Exchange Notice in accordance with FLSA Section 18B under laws administered or construed by other agencies. EBSA representatives instead referred these inquiries for response to the applicable enforcement agency.

For a more complete analysis, see: [Impending 10/1 Exchange Notice & Other New Notice Deadlines Cut Time Short For Employers To Finalize 2014 Health Plan Terms & Contracts](#)

#### **Bottom Line?**

The Notice is generally required by October 1, 2013, if your business does over \$500,000 in annual dollar volume. The DOL has provided Model Notices, but like any complex issue involving governmental agencies, you might be best advised to review this issue with your own counsel as to 1) whether you should provide the Notice; 2) what the content should be; and 3) what the risk would be if you didn't provide the Notice.