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Employee Benefits & Executive Compensation ADVISORY ■

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October 1 Is Almost Here: Are You Ready to Send Out Your Marketplace Notice?

This is a *reminder* that the Marketplace Notice required by new Section 18B of the Fair Labor Standards Act (as added by the Section 1512 of the ACA) must be distributed to existing employees—without regard to health plan eligibility—on or before October 1, 2013, and thereafter to new employees within 14 days of their hire date. No doubt that you have had sufficient notice of this impending obligation from us and others—and most of you have already taken the steps necessary to furnish the notice by October 1—but we felt that the constant flow of guidance from the agencies regarding the Affordable Care Act (ACA) warranted a reminder.

The annual enrollment period for the Marketplace is due to begin October 1. The Marketplace Notice provides information to employees regarding the Marketplace (aka the "Exchange"), the ability to obtain a premium tax credit or subsidy in the Marketplace and the impact any employer coverage may have on the employee's eligibility for the premium tax credit.

> **Practice Pointer:** The DOL recently confirmed that there are no specific civil money penalties for failing to send the notice. This should not be perceived as permission to forgo sending the notice. As we have noted previously, while there may not be civil money penalties for failing to send the notice, there could be adverse consequences arising from a failure to properly inform employees of their options.

To assist with furnishing a notice, the DOL issued Technical Release 2013-02 (which you can find at http://www.dol.gov/ebsa/newsroom/tr13-02.html) that outlines the general requirements for preparing and distributing the Marketplace Notice. The DOL also issued two model notices—one for employers who offer no coverage at all to their employees and one for employers who offer coverage to some or all employees. Employers are NOT required to use the model notices.

> **Practice Pointer:** The DOL also revised the model COBRA election notice to reflect new information relevant to coverage in the Marketplace and the elimination of pre-existing condition exclusions. You can find a copy of the new model notices at http://www.dol.gov/ebsa/healthreform/.

The following is a brief recap of the Marketplace Notice requirements for your convenience.

1. What is this notice requirement?

The ACA added new FLSA Section 18B, which requires employers to provide notices to employees regarding the Marketplace and how they might qualify for a premium tax credit/subsidy in the Exchanges. **NOTE:** The Obama administration recently began referring to the Exchange as the "Marketplace."

> **Practice Pointer:** The statute requires employers to furnish the notice by March 1, 2013; however, the DOL initially delayed that March 1 effective date while they worked on the details of the notice not otherwise provided by the statute. As noted in the Technical Release, the start date for sending the notice is now October 1, 2013 (see "By when must we furnish notices?" below for more information).

2. Who is obligated to provide the notice?

The notice obligation is imposed on employers regardless of size; however, recent guidance from the DOL indicates that a third party may send the notice on the employer's behalf but that the employer remains ultimately obligated to ensure the notice is sent.

> **Practice Pointer:** The second page of the model notice requires information relating to the employer who employs the employee (including contact information), suggesting that information relating to the specific employing unit should be provided. Nevertheless, we believe information related to the parent (or the plan sponsor where coverage is made available) can be listed there absent guidance to the contrary. Remember, the goal here is to provide notice to employees so that they can make an informed decision regarding enrollment in the Marketplace.

3. To whom must the notice be provided?

You must provide the notice to employees without regard to benefit plan eligibility. Thus, the notice goes not only to those that are eligible for coverage under an employer's plan—but to all employees. Fortunately, employers are not required to send the notice to dependents of employees or former employees, even if such employees are covered under the employer's plan.

4. How must notices be furnished?

The Technical Release indicates that you must provide the notice by first-class mail or electronically, but only if you satisfy ERISA's electronic safe harbor. And if you do plan to send the notice electronically, it appears as though compliance with ERISA's electronic safe harbor disclosure rules is required for this purpose—i.e., ERISA's electronic safe harbor rules do not appear to be a *safe harbor* in this instance.

> **Practice Pointer:** In-hand delivery—e.g., during new-hire orientation—would presumably be appropriate so long as it is timely provided.

5. By when must you furnish the notices?

You must send a notice to existing employees by October 1. You must provide a notice to everyone hired on or after October 1, 2013, within 14 days of the hire date. Set these dates on your calendar and note that they may not match up with your normal timelines for distributing benefit-related materials to employees.

> **Practice Pointer:** The current guidance does not indicate whether the notice can be sent with other materials. Presumably, you can; however, we recommend that you indicate on the first page of the materials in appropriate font that the materials include the Marketplace Notice and why that notice is important.

6. What is in the notice?

The first page defines the Marketplace, indicates how you qualify for a premium tax credit/subsidy (generally), and the impact employer coverage could potentially have on the employee's eligibility for a subsidy.

The second page includes general information about the coverage provided by the employer—more specifically, the second page indicates:

- **who is eligible for coverage under the plan;**

> **Practice Pointer:** Can you just reference the SPD instead of describing eligibility? Employers with plans that have complex terms of eligibility or who have numerous plans may want to provide a general description of eligibility (e.g., "the plan generally covers full-time employees with some exceptions") and then reference the SPD and contact information to request a copy of the SPD.

- **whether coverage is offered to dependents; and**
- **whether the employer intends for that coverage to be affordable and whether it provides minimum value.**

> **Practice Pointer:** Whether coverage is affordable or not is relevant to any employee of any employer if that employee is enrolling in the Marketplace and applying for a premium tax credit/subsidy—not just full-time employees of "applicable large employers" as defined in Code Section 4980H. Unfortunately, many employers may not have determined affordability of coverage provided to part-time employees or for any employees if the employer is otherwise subject to Code Section 4980H. Also, the affordability standard for purposes of 4980H, which generally looks to W-2 wages, is different than the affordability standard under Code Section 36B (the rule that governs premium tax credits/subsidies), which looks to household income. It is possible that W-2 wages will be higher than household income; therefore, it isn't prudent to affirmatively state that coverage will be affordable.

The third page provides much more detail regarding the plan. Fortunately, the third page is optional. Keep in mind that you will be providing similar information to each employee when they apply for a subsidy in the exchange.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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