

# Client Alert **Employment & Labor**

## *ACA Exchanges “Go Live” on October 1, 2013: Immediate Action Required by Employers*

Pursuant to the federal Affordable Care Act (“ACA”), employers are required to send a notice to current employees about the new Health Insurance Marketplace (“the Marketplace”) (previously called “exchanges”) by October 1, 2013, and to new employees hired on or after October 1, 2013, within 14 days of hire.<sup>1</sup> The Marketplace’s open enrollment period commences on October 1, 2013, although coverage provided through the Marketplace will not be effective until January 1, 2014.

The ACA’s notice requirement mandates that employers provide notice to current employees regarding what the Marketplace will offer, and the direct and ancillary impact it may have on employee health benefits.

The notice requirement applies to any business regulated under the Fair Labor Standards Act – a category which includes virtually all employers. Specifically, the FLSA applies to employers with one or more employees who are engaged in, or produce goods for, interstate commerce. It also covers the following entities: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on premises; schools for children who are mentally or physically disabled

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<sup>1</sup> This mandate notwithstanding, according to an FAQ posted by the U.S. Department of Labor’s Employee Benefits Security Administration on September 11, 2013, employers will not be fined for failing to provide such notice.

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or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state and local government agencies.

With regard to content, the United States Department of Labor (“DOL”) has provided two model forms of notice – one for employers that presently offer health plans, and another for employers that do not. Those forms of notice are accessible, respectively, at <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf> and <http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf>.

Any employer that opts not to use the DOL’s form notice must ensure that whatever alternative notice it distributes meets the following requirements:

1. The notice must inform employees of the existence of the Marketplace, provide a brief description of what it offers, and indicate that additional information, including online applications for health insurance coverage and contact information for the Marketplace, can be found at [HealthCare.gov](http://HealthCare.gov).
2. The notice must make employees aware that, in the event that their employer either does not provide coverage or provides coverage that does not meet certain criteria,<sup>2</sup> they may be eligible for premium tax credits.
3. The notice must alert employees to the fact that if they opt to purchase a qualified health plan through the Marketplace, they may lose eligibility for certain tax credits, as well as contributions, if any, their employer would have made under the employer-sponsored alternative.
4. The notice should inform employees where to direct questions regarding the employer-sponsored coverage available to them.
5. The notice must convey the foregoing information in an accessible manner, thus ensuring that it will be understood by the average employee.

Employers may furnish notice to employees via first class mail, or may do so electronically. Employers opting for the latter method, however, must be sure to comply with the DOL’s electronic disclosure safe harbor. All expenses incurred in distributing the notices must be borne by the employer.

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<sup>2</sup> If an employer-sponsored health plan’s share of the total allowed benefit costs covered by that plan is less than 60 percent of such costs, the plan does not meet the “minimum value standard.” Employees covered under plans which fail to meet this standard may, if they purchase a qualified health plan through the Marketplace, be eligible for a premium tax credit under section 36B of the Internal Revenue Code.

Although of less immediate concern, employers should be aware that, by no later than January 1, 2014, they are required to update their COBRA Notice to include information about the Marketplace. The DOL issued an updated COBRA model election notice in May of this year, which is accessible at <http://www.dol.gov/ebsa/cobra.html>.

Employers should further note that the U.S. Department of the Treasury has announced that it is delaying the ACA's "pay-or-play" mandate and accompanying employer reporting requirements until January 1, 2015. As a result, employers will not be penalized for failing to offer full-time employees healthcare coverage that complies with certain standards established under the ACA until the commencement of calendar year 2015.

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If you have any questions concerning ACA's notice requirement, please feel free to contact one of the attorneys in our group.

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