

### **Action Items for Employers: Notice to Employees of Health Insurance Marketplace & Related Updates to COBRA Election Notices**

As we have alerted you in the past, health care reform enacted in 2010 under the Patient Protection and Affordable Care Act (referred to herein as "PPACA") has imposed new obligations on employers and group health plans. One such obligation on employers is to provide a notice to all employees regarding the upcoming availability of health insurance marketplaces beginning in 2014 (the "Notice"). The U.S. Department of Labor ("DOL") has recently published guidance regarding employers' compliance with this notice requirement and has also indicated that related changes to COBRA continuation coverage election notices may be needed to reflect the availability of health insurance marketplaces.

**Employers must act by October 1, 2013.**

Overview of the Notice. The new Notice is intended to inform employees of health insurance coverage options and give information regarding the existence of new health insurance marketplaces—i.e., "exchanges". It also serves to ensure that employees understand the trade-off when they give up employer-provided coverage and instead choose coverage under the health insurance marketplaces (e.g., loss of the employer contribution toward the cost of health plan benefits, which is usually provided on a tax-free basis).

Employers Subject to the Notice Requirement. PPACA imposed this notice requirement by creating a new section under the federal Fair Labor Standards Act ("FLSA"). There are very few exceptions to being subject to the FLSA, and therefore most employers will be subject to this new notice requirement.<sup>1</sup>

Individuals Who Must Receive the Notice. All current employees and new hires must receive the new Notice, regardless of whether the employee is eligible for or enrolled in the employer's group health plan. The DOL has confirmed that employers are not required to give a separate notice to dependents or other individuals who are not employees even if they are eligible (or may become eligible) for coverage under the employer's group health plan.

Timing and Delivery of the Notice. Employers are required to provide the new Notice to each current employee no later than October 1, 2013. Employers are required to provide the Notice to each new employee at the time of hire

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<sup>1</sup> The FLSA applies to enterprises with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce. For most employers, a test of not less than \$500,000 in annual dollar volume of business applies (i.e., the FLSA does not cover enterprises with less than this amount of business). The FLSA also covers the following regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state, and local government agencies. For employers that do not meet the \$500,000 annual dollar volume test, individual employees may be covered by the FLSA in any workweek when they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods. In addition, the FLSA covers domestic service workers, such as day workers, housekeepers, chauffeurs, cooks, or full time babysitters, if they receive at least \$1,700 (threshold adjusted annually) in cash wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers.

beginning on October 1, 2013. For 2014, the DOL has indicated that the Notice will be deemed timely if provided within 14 days of an employee's first day of employment. The DOL has specifically stated that the new Notice may be provided in hard copy form by first-class mail. It is also possible to provide the new Notice electronically, but there are specific rules that must be followed in order to properly do so.

The October 1, 2013 compliance date for the Notice coincides with open enrollment periods opening on October 1, 2013 for coverage under the health insurance marketplaces that first becomes available as of January 1, 2014.

Model Notice. To satisfy the requirement to provide this new Notice, the DOL has published model Notices. There is one model for employers who do not offer a health plan to any employees (Click here: <http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf>) and another model for employers who do offer a health plan to some or all of its employees (Click here: <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf>).

Employers will need to complete sections of the Notice prior to distributing it to employees, including employer contact information, and, for employers that do offer a health plan to employees, information about eligibility for coverage under the health plan as well as whether the health plan meets the "minimum value standard". Other information requested as part of the DOL's model for employers that offer a health plan to employees seems to be optional (but likely would need to be provided to any employees who ask for it in connection with their own completion of an application to enroll in a health insurance marketplace plan).

With respect to indicating on the Notice whether an employer-sponsored plan meets the "minimum value standard", the determination can be quite tedious. The IRS has provided that the determination can be made by use of one of the following methods: (i) using the Minimum Value Calculator available at <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mv-calculator-final-4-11-2013.xlsm>, (ii) by using a plan design designated by the IRS as a safe harbor plan,<sup>2</sup> or (iii) obtaining a certification from an actuary. We would anticipate that for fully-insured health plans, the insurers will indicate to employers whether the applicable plan design meets the minimum value standard. For self-insured health plans, third party administrators and other providers may be able to assist in making this determination; otherwise, the employer should consider how it will use the methods indicated above to make a determination about its plan(s). Notably, in certain instances, employer contributions to health savings accounts (HSAs) and amounts made available under certain health reimbursement arrangements (HRAs) may be counted toward minimum value.

Impact on COBRA Election Notices. When an individual who was covered by a group health plan experiences a qualifying event (such as termination of employment) and loses group health plan coverage, s/he may be eligible to

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2 While the IRS has yet to issue final rules designating safe harbor plan designs for this purpose, it has proposed that the following designs may be designated as safe harbors for determining minimum value where a plan covers all of the benefits included in the Minimum Value Calculator: (1) a plan with a \$3,500 integrated medical and drug deductible, 80% plan cost-sharing, and a \$6,000 maximum out-of-pocket limit for employee cost-sharing; (2) a plan with a \$4,500 integrated medical and drug deductible, 70% plan cost-sharing, a \$6,400 maximum out-of-pocket limit, and a \$500 employer contribution to an HSA; and (3) a plan with a \$3,500 medical deductible, \$0 drug deductible, 60% plan medical expense cost-sharing, 75% plan drug cost-sharing, a \$6,400 maximum out-of-pocket limit, and drug co-pays of \$10/\$20/\$50 for the first, second and third prescription drug tiers, with 75% coinsurance for specialty drugs.

continue group health plan coverage by electing to enroll in COBRA continuation coverage.<sup>3</sup> It is a long-standing rule that a group health plan must provide such individuals with an election notice that describes their rights to COBRA continuation coverage and how to make an election ("COBRA Election Notice"). Most plans use some form of the DOL model COBRA Election Notice to fulfill this notice requirement.

Enrolling in COBRA continuation coverage typically significantly increases the cost of health insurance for the enrollees. As such, some individuals that are otherwise eligible for COBRA continuation coverage may want to consider and compare health insurance alternatives to COBRA continuation coverage that are available through the new health insurance marketplaces. Some individuals may also be eligible for a premium tax credit to help pay for some or all of the cost of coverage in plans offered through health insurance marketplaces. Given the introduction of the health insurance marketplaces effective for 2014, the DOL has revised its model COBRA Election Notice to incorporate information regarding options under the health insurance marketplaces. As such, employers that sponsor group health plans and who are required to provide COBRA Election Notices will want to revisit their COBRA Election Notices and make appropriate updates as necessary. (Click here for the DOL's new model COBRA Election Notice: <http://www.dol.gov/ebsa/modelectionnotice.doc>) For employers that use an insurance company's or third party administrator's COBRA notices, it would be prudent to check with those providers to confirm that the COBRA Election Notices are being properly updated. While the DOL has not provided a specific effective date for using the updated COBRA Election Notice, we think it is reasonable for employers to implement the updated COBRA Election Notice at the same time it first issues the health insurance marketplace Notice (i.e., on or before October 1, 2013).

Employers should begin to take the following steps to ensure timely compliance with the new notice requirements:

- Review the applicable model health insurance marketplace Notice, and fill-in the required employer and plan information. Consider whether to also complete the optional sections of the Notice.
- Contact health plan insurers, third party administrators and/or actuaries to confirm whether they can assist in determining whether the employer sponsored health plans meet the "minimum value standard" so that item on the Notice can be completed.
- Determine when and in what format the Notices will be distributed to employees.
- Update new hire packets as of October 1, 2013 to include the Notice.
- For employers that rely on COBRA Election Notices created (and/or distributed) by insurers or COBRA vendors, contact such parties to ensure that COBRA Election Notices will be properly updated to reflect the DOL's new model so that they can be provided for COBRA qualifying events that occur on and after October 1, 2013.
- For employers that draft and provide COBRA Election Notices in-house, review and revise those election notices so that they can be provided for COBRA qualifying events that occur on and after October 1, 2013.

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<sup>3</sup> COBRA continuation coverage is a concept under federal law that generally applies to individuals covered under a group health plan sponsored by an employer with 20 or more employees. Individuals covered under a group health plan sponsored by a smaller employer are generally not eligible for COBRA continuation coverage, but may have a continuation coverage right under state law, which is often very similar to COBRA continuation coverage. However, each state's laws are different in this regard and must be consulted in these situations. For purposes of this Alert, we refer only to federal COBRA continuation coverage and the applicable election notices under federal law, but similar changes to state continuation coverage election notices may be required as well.

Please contact any of the attorneys listed below if you would like assistance with preparing the health insurance marketplace Notices and the updated COBRA Election Notices.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

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