

CLIENT ALERT: Employers Must Provide Written Notice of Coverage to Employees by October 1, 2013 Under the Patient Protection and Affordable Care Act

On July 2, 2013, the United States Department of Treasury announced a one-year delay of the employer mandate and its potential employer penalties under the Patient Protection and Affordable Care Act (“ACA”) until January 1, 2015. Despite this reprieve, employers are still required to provide written notice to their employees about the existence of the health insurance marketplaces created by the ACA by October 1, 2013.

The ACA offers individuals, employees of small businesses, and employees who are not offered health insurance coverage by their employers the option of purchasing health insurance coverage through private health insurance marketplaces available in each state, also known as health insurance “Exchanges”. The option of purchasing health insurance through a health insurance marketplace is also available to employees who have access to coverage through their employers.

All Employers Must Provide Notice by October 1, 2013

Under the ACA, all employers subject to the Fair Labor Standards Act (“FLSA”) must provide informational notices to their current employees about the health insurance marketplaces on or before October 1, 2013. Employers must provide this notice to employees hired after October 1, 2013 within fourteen (14) days of the start of their employment. Generally, the FLSA applies to employers who are engaged in interstate commerce or who have at least \$500,000 of business per year, government agencies, hospitals, certain residential institutions, and schools.

Content of the Notice

The notice must be written in a manner designed to be understood by the

average employee. The notice must include information about:

- The existence of the Exchange;
- Contact information and a description of the services provided by the Exchange;
- That an employee may be eligible for a premium tax credit if the employee purchases a plan through the Exchange;
- That if the employee purchases a plan through the Exchange, the employee may lose any employer contribution to an employer-sponsored health insurance plan;
- That all or part of the employer's contribution to an employer-sponsored health insurance plan may be excludable from the employee's income for federal income tax purposes.

Model Notice

The U.S. Department of Labor has put out model notices for employers to use. One model notice is for use by employers who offer a health insurance plan, available here: <http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf> and one is for employers who do not offer a health insurance plan, available here: <http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf>.

Employers Must Provide the Notice to Employees Regardless of Plan Enrollment

Employers must provide these notices to all employees, whether full or part-time and whether or not the employees currently participate in their employers' health insurance plans. The notice must be in writing and may be delivered by first-class mail or e-mail, if the requirements of the U.S. Department of Labor's electronic disclosure safe harbor are met. See 29 CFR 2520.104b-1(c). In short, this means that an employer may distribute the notices electronically only to: (a) those employees who use a computer to perform their job duties; or, (b) those employees who have consented to electronic delivery in a manner that demonstrates that they are able to access the electronic delivery, have provided an electronic address for the receipt of the electronic communication, and who have not withdrawn this consent.

Use of a Third-Party Administrator to Provide Employees with Notice

Employers may rely on another entity, such as a third-party administrator to send the notices to employees. However, an employer must still ensure that

all employees, including those who are not enrolled in, or eligible for, group coverage under the employer's plan receive the notice. If an employer relies on a third-party administrator to provide the notices, the employer will want to determine whether the third-party administrator will send the notices to all employees regardless of plan enrollment. If not, then the employer will need to distribute the notices to the remaining employees.

COBRA Election Notice

The U.S. Department of Labor has also revised its model COBRA election notice to include information about the Exchanges and to remove information about preexisting condition limitations, which have been eliminated by the Affordable Care Act, as well as other outdated information. The model notice may be found at: <http://www.dol.gov/ebsa/cobra.html>.

Other notice requirements may be forthcoming over the next year as the U.S. Department of Treasury and the Internal Revenue Service continue to finalize regulations related to employers' reporting and other obligations under the ACA. Employers should contact their M&J attorney with questions concerning these notices or other requirements of the ACA.

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