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CAPITAL CHECKUP

June 27, 2013

What Sponsors of Multiemployer Plans Need to Know about the Model Employer Notice under the Affordable Care Act and Revised Model COBRA Election Notice

The Department of Labor (DOL) has issued Technical Release 2013-02[1] and two model notices that employers may use to notify employees about health insurance Exchanges,[2] as well as a revised election notice for continued health coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) alerting employees about the option of purchasing coverage on the Exchanges (now called “Marketplaces” by the federal government).[3] The new employer notice is required under section 18B of the Fair Labor Standards Act (FLSA), which the Affordable Care Act[4] added to the FLSA.

Employers must send the Notice to current employees no later than the date on which enrollment in the new health insurance Exchanges will begin: October 1, 2013. In addition, employers must provide it to new employees hired after that date. The Notice is designed to inform employees of the existence of the Exchanges and the effect of this new coverage option on their existing employment coverage (or lack thereof).

Employers will need to review the requirements for the Notice and begin to address how to prepare it. Employers should also review the application for coverage under the Exchanges, also released recently, which contains a page called Employer Coverage Tool, a form that employees may bring to employers to complete, and then return to the Marketplace together with the employee’s application for insurance coverage. The Employer Coverage Tool and parts of the employer Notice are identical, and both documents should be considered as employers prepare for the Notices.

Plan sponsors will need to consider a communications campaign informing participants about the meaning of the new Exchange system, and the fact that it will not replace their group health coverage and will not require them to sign up on the Exchanges.

This *Capital Checkup* discusses what sponsors of multiemployer plan need to know about this new guidance, the model Employer notices, and the revised COBRA election notices.

Impact on Multiemployer Plans

The requirement to send the Notice applies to an employer, not to a group health plan, and not to a multiemployer plan. Neither the statute nor the guidance addresses the application of the notice requirement to employers that contribute to multiemployer plans with respect to some or all of their employees. The obligation to provide the Notice is legally that of the employer, not the plan, but employer will need the assistance of multiemployer plans to complete the information on the form. Employers concerned about not being subjected to the employer shared responsibility penalty are also likely to seek assurance from trustees that the multiemployer plan to which they contribute meets the coverage standards for the transition rule, including 60 percent actuarial value.[5] Trustees of multiemployer plans may wish to consider providing contributing employers with information about the form and about the plan's ability to satisfy the employer shared responsibility penalty requirements in advance of their request, in order to save time.

It is likely that plan participants may become confused about their coverage and how they are affected by the Exchanges if the notice comes from an employer, not a multiemployer plan. Consequently, plan sponsors may want to proactively provide plan participants with information about the Exchanges with the right message, namely, that the participant will not lose coverage in the plan and does not need to enroll in the Exchange.

Background on the Exchange Notices

The Affordable Care Act requires employers subject to the FLSA to provide a written notice to employees containing the following information:

- Informing the employee of the existence of the Exchange, including a description of the services provided by the Exchange, and how employees may contact the Exchange for assistance;
- If the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent, that the employee may be eligible for a premium assistance tax credit and a cost-sharing reduction if the employee purchases a plan through the Exchange; and
- If the employee purchases a plan through the Exchange, the employee may lose the contribution (if any) to any health benefits and that all or a portion of such contribution may be excludable from income for federal income tax purposes.

Employers may use the model notices provided by the DOL or may modify the model, provided the notice includes the required content.

Employers Subject to the FLSA

As explained in the guidance, the FLSA applies to employers with one or more employees who are engaged in, or produce goods for, interstate commerce. In general, it covers a company or organization with annual dollar volume of sales or receipts in the amount of $500,000 or more. The FLSA specifically covers hospitals, preschools, elementary and secondary schools, institutions of higher education, and federal, state and local governmental agencies.[6]

All Employees Must Receive the Notice

The employer must provide the notice to each employee, whether working full time or part time, and whether enrolled in the group health plan or not. However, employers do not have to provide separate notices to family members.

Employers must provide the notice free of charge to current employees no later than October 1, 2013. Beginning October 1, 2013, new hires must be provided the notice within 14 days of their start date.

Manner of Delivery

The notice must be provided in writing and must be able to be understood by the average employee. If mailed, it must be provided by first-class mail. It may also be provided electronically if the employer complies with the electronic delivery rules in existing DOL regulations. Those regulations generally require that employees have the ability to access electronic documents at any location where they are reasonably expected to perform their duties and that access to the electronic information system be an integral part of the employee's work duties. Alternatively, employers may provide electronic notice if employees have given prior consent to electronic receipt after being provided with certain information about their rights (such as the right to request and receive a paper copy).[7]

Completing the Notice

DOL published two model Notices: one for employers that provide health coverage and one for those who do not. The model Notice has introductory information about the Marketplaces and whether individuals can receive federal assistance to help them purchase coverage there. The model requires employers to provide general information about the employer, including name, Employer Identification Number (EIN), address, and contact information about health coverage. Several items of information about the employer's benefit plans must be completed in the form, which is a fillable PDF. These items include:

- Whether all or only some of the employees receive health coverage;
- Whether coverage is offered to dependents and if so, which ones; and
- Whether coverage meets the minimum value (60 percent) standard and is intended to be affordable.

Additional space on the model Notice includes further optional questions that may be completed by the employer. This information is the same as the questions on the application for Marketplace coverage, which an employee would complete if he or she is attempting to obtain coverage on the Marketplace.

Revised COBRA Notices

Although the Affordable Care Act does not require that COBRA election notices be amended, government officials auditing group health plans will likely look to see if notices have been modified to inform employees about their option to purchase coverage on an Exchange. The guidance does not include a deadline by which to make these changes to COBRA election notices.

Implications for Plan Sponsors

As discussed above, trustees of multiemployer plans may wish to consider providing contributing employers with information about the form and about the plan's ability to satisfy the employer shared responsibility penalty requirements at the same time. In addition, trustees may want to communicate directly with their participants to avoid confusion when they receive these notices from their employers. This communication could explain that employers are required to send these notices, plan participants do not need to enroll in the Marketplaces, and their coverage through the multiemployer plan will continue. It could also alert participants that they may want to consider enrolling in Marketplace coverage during periods when they do not work sufficient hours to earn coverage under the multiemployer plan.

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As with all issues involving the interpretation or application of laws and regulations, sponsors of multiemployer plans should rely on their fund counsel for authoritative advice on the interpretation and application of the Affordable Care Act and related guidance, including the new guidance summarized in this Capital Checkup. *Segal Consulting can be retained to work with plan sponsors and their fund counsel on compliance issues.*

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1. Technical Release 2013-02, which was issued on May 8, 2013, is available on the DOL website. (Return to the *Capital Checkup*.)
2. The two model notices — one for employers that offer group health coverage to some or all employees and another for employers that do not offer a group health plan — are available on the DOL website. (Return to the *Capital Checkup*.)
3. The revised COBRA election notice is available on the DOL website. The DOL also posted a redlined version of the notice to illustrate the changes. (Return to the *Capital Checkup*.)
4. The Affordable Care Act is the shorthand name for the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-48, as modified by the subsequently enacted Health Care and Education Reconciliation Act (HCERA), Public Law No. 111-152. (Return to the *Capital Checkup*.)
5. For more information about the employer shared responsibility penalty, see Segal's January 25, 2013 *Capital Checkup*, "Proposed Rule on the Affordable Care Act's Employer Penalty Addresses Application to Multiemployer Plans." (Return to the *Capital Checkup*.)

6 The DOL's Wage and Hour Division provides guidance on the applicability of the FLSA. (Return to the *Capital Checkup*.)

7 To read more about the DOL's electronic delivery rules, see Segal's June 2002 *Bulletin*, "Disclosure Requirements for ERISA Plans." (Return to the *Capital Checkup*.)

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