



Should Employers Issue MarketPlace Notices by October 1?

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On September 12, 2013, the Department of Labor (DOL) issued a FAQ stating that employers “should provide a written notice” by October 1, as required by Section 1512 of the Affordable Care Act (ACA), but “there is no fine or penalty under the law for failing to provide the notice.”

Section 1512 of the ACA requires employers to deliver a written Notice of Exchange to each employee, regardless of plan enrollment status or the employee’s status as a part-time or full-time employee informing the employee of the existence of the public health insurance exchanges as well as other specified information. Most experts believed that the ACA’s general \$100 per day penalty for non-compliance would apply, making compliance with Section 1512 very important. Now, the DOL has announced that penalties for non-compliance will not be imposed, at least for now.

Understandably, many employers are considering not providing the notice in light of the fact that no penalties are associated with non-compliance. **We recommend that employers provide some form of the notice, using the Model Notices on the DOL website, for the following reasons:**

1. The DOL has indicated that employers still should provide the notice as required by the ACA.
2. Employers still have some fiduciary duties to employees and plan participants to fully inform them about options.
3. In the future, the DOL could potentially determine that the notice is within an employer’s required disclosures to participants and, therefore, within the scope of ERISA.

Although we recommend providing the notice to employees as directed by Section 1512 of the ACA, the good news is that penalties will not be imposed if certain technical issues arise regarding the content of the notice or the manner in which it was provided.

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