

ACA: NOTICE OF EXCHANGE

The notice of exchange applies to all employers subject to FLSA and must be distributed to all new employees, regardless of benefits eligibility status, within 14 days of date of hire.

OVERVIEW

The Affordable Care Act (ACA) requires employers of all sizes to distribute a written notice to new employees that provides information about the state health insurance exchanges (also referred to as “marketplaces”) and how to request financial assistance for coverage on the exchange. The notice of exchange (or exchange notice) describes the availability of a premium tax credit and outlines the implications for employees if they choose to purchase a qualified health plan through an exchange in lieu of enrolling in the employer’s group health plan.

Employers must distribute the exchange notice to all new employees, regardless of benefits eligibility status or seasonal or temporary status, within 14 days of their date of hire. Although the exchange notice is not an annual requirement, many employers choose to include the notice with annual open enrollment materials. This practice is permissible, but it does not satisfy the distribution requirement, as explained in greater detail in the Methods of Distribution section below.

In general, the exchange notice must:

- Inform employees about the existence of the exchange and describe the services provided by the exchange and the manner in which employees may contact the exchange to request assistance.
- Provide employees with basic eligibility information regarding the employer’s health coverage (if offered), including 1) whether coverage is available to all employees or only some employees; and 2) the types of dependents (e.g., spouses, domestic partners, children) who are eligible for coverage under the employer’s plan. For further information about the eligibility of domestic partners and the children of domestic partners under an employer’s health plan, see the PPI publication **Domestic Partner Benefits: A Guide for Employers**.
- Confirm whether coverage offered by the employer meets the ACA’s minimum value standard and is intended to be affordable based on employee wages, and explain that employees may be eligible for a premium tax credit or a cost-sharing reduction for coverage on the exchange if the employer’s plan does not meet the ACA’s minimum value and affordability requirements. For further information about the ACA requirements an employer’s plan must satisfy to avoid triggering an employee’s eligibility for a premium tax credit on the exchange, see the PPI publication **ACA: Employer Mandate Penalties and Affordability**.
- Inform employees that if they purchase coverage through the exchange, they may lose any employer contribution toward the cost of employer-provided coverage and that some or all of this employer contribution, as well as the employee cost-share contribution toward employer-sponsored coverage, may be excludable for federal income tax purposes. By contrast, payments for coverage through the exchange are made on an after tax basis.



The DOL provides two model notices: one for employers that do not offer a health plan and another for employers that offer a health plan to some or all of their employees. Each notice is available in PDF and Word versions in both English and Spanish. Links to the model notices are available under the Resources section below.

Employers are only required to complete questions 1–12 of the exchange notice. Questions 13–16 correspond to the Marketplace Employer Coverage Tool and are optional until future guidance states otherwise. Employers should carefully weigh the value of providing the optional information about the cost and value of their group health plan options, as employees may use the information provided on the notice to assist them in completing the exchange eligibility and subsidy application.

COVERED EMPLOYERS

All employers subject to the Fair Labor Standards Act (FLSA) are subject to the exchange notice requirement. The FLSA's reach is broad — nearly all employers will be subject to the FLSA and therefore will be subject to the exchange notice requirement. There is an exception if an employer has an annual dollar volume of sales or business that is less than \$500,000. However, some employers must provide the exchange notice regardless of their annual volume of gross sales or business. This requirement applies to 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.

If an employer is unsure if it is subject to the FLSA, there is no penalty for providing the exchange notice to employees on a voluntary basis, although the employer should consult with outside counsel to determine the FLSA's application to their business (since there are other labor law-related reasons for knowing whether the FLSA applies). For assistance with determining whether an employer is subject to the FLSA, see the link to the **Fair Labor Standards Act: Who is Covered** tool in the Resources section below.

COVERED EMPLOYEES

Employers must distribute the exchange notice to all active employees, regardless of whether the employees are eligible for benefits under the employer's health plan. This includes part-time, variable hour, seasonal and temporary employees.

Note that employers are not required to provide the exchange notice to employees' dependents. Further, employers are not required to provide the notice to COBRA participants or retirees.

METHODS OF DISTRIBUTION

Employers may distribute the exchange notice by hand, by mail, or by electronic delivery (email) in a manner that complies with the DOL's electronic disclosure safe harbor. In general, employers must "use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals." The DOL's safe harbor rules allow for electronic distribution to employees who have computer access as an integral part of their job (work email address, regular access to laptop/ phone or other devices). Employees without computer access as an integral part of their job must consent to electronic distribution of notices (usually using a personal email address). While electronic delivery can include posting to an employer's intranet or benefits portal or sending via email (among other electronic means), these measures alone do not satisfy the DOL's distribution requirements. The employer must also notify employees that the notice has been posted and must describe the significance of the notice and the employee's right to request a paper copy. Note that the exchange notice (as distinct from certain other required notices) must be provided automatically and free of charge.

The exchange notice can be included in new hire or enrollment packets; however, the notice distribution requirement is only satisfied only if such new hire materials are provided to all new hires, regardless of eligibility for the employer's health plan, within 14 days of hire. The exchange notice can also be attached to a paycheck, provided the new employee receives the paycheck within 14 days of hire.

Importantly, employers should routinely document all methods of delivery used for the exchange notice (and all other required notices) and should retain these records in accordance with the employer's record retention policy. In general, records related to ERISA plans should be retained for eight years. For more detailed information about electronic distribution rules, including a Sample Employee Communication and a Sample Employee Consent to Receive Plan Disclosures, see the PPI publication **Electronic Distribution Rules: A Guide for Employers**.

EFFECTIVE DATE

Effective October 1, 2013, employers are required to provide the exchange notice to all then-current employees by October 1, 2013, and to all newly hired employees within 14 days of the hire date, regardless of an employee's eligibility for coverage under the employer's group health plan and regardless of an employee's part-time or full-time status or union status. Employers that do not offer any group health plan coverage must also provide the notice to all then-current and newly-hired employees within the same time frame and according to the same conditions.

SUMMARY

All employers subject to the FLSA have ongoing compliance obligations to distribute the notice of exchange to all newly hired employees, including employees who are not eligible for the employer's group health plan, within 14 days of their date of hire.

RESOURCES

[Fair Labor Standards Act: Who is Covered](#)

[Model Exchange Notice for Employers That Do Not Offer a Health Plan](#)

[Model Exchange Notice for Employers That Offer a Health Plan](#)

[Model Exchange Notice for Employers That Do Not Offer a Health Plan \(in Spanish\)](#)

[Model Exchange Notice for Employers That Offer a Health Plan \(in Spanish\)](#)

[Model Exchange Notices in Modifiable Word Format](#)

[Technical Release 2013-02 \(Including FAQs\)](#)