

May 21, 2013

## Health Care Reform—Required Exchange Notice to Employees

On May 8, 2013, the Department of Labor (DOL) released published **Technical Release No. 2013-02**, guidance about the notice (Notice) that most employers nationwide must provide to their employees no later than **October 1, 2013**, under the Patient Protection and Affordable Care Act (PPACA or ACA). The Notice describes the health insurance that will be available through health care marketplaces established by the ACA, known as “Exchanges.” The DOL guidance includes model (template) Notices for employers to use. A printer-friendly version of the DOL’s Exchange Notice guidance is provided [here](#).

*Annual conferences, general agencies, many local churches and most other United Methodist employers (salary-paying units) must comply with this Notice requirement no later than **October 1, 2013**.*

October 1, 2013 also is the beginning date for open enrollment for the ACA’s Exchanges, i.e., the date individuals may choose to enroll in federal or state health care exchanges.

Some small local churches may be exempt from the requirement to provide the Exchange notice to their employees, based on certain factors (see “*Applicability to Churches and other UMC Employers*” on page 3). However, most employers nationwide are required to provide the Notice.

### Model Notices (Templates) for Employers to Use

DOL has created model notices that employers can use to meet the Exchange Notice requirement:

- **Model Notice for employers that offer a health plan to some or all employees**
- **Model Notice for employers that do not offer a health plan to any employees**

### Notice Timing and Delivery

Under the ACA, employers must notify *all employees* about the new health care exchanges (now being called “Marketplaces.”) This notification requirement applies whether or not employees are covered in the employer’s health plan (if any), and whether they are full-time or part-time employees.

Employers must provide the Notice to all *current* employees no later than October 1, 2013. For employees hired after October 1, 2013, employers must provide the Notice to new employees *within 14 days* of an employee’s start date. Employers are *not required* to provide a separate Notice to dependents or other individuals who are or may become eligible for coverage under the health plan but who are not employees.

### How Employees May Be Notified

DOL offers flexibility in how employers may notify their employees about the Exchanges (“Marketplaces”). Employers can choose any of three notification methods:

1. Employers may hand-deliver the Notice to each employee.
2. Employers may mail the notice via first-class U.S. Mail to each employee.

- Employers may deliver the notice electronically to each employee, but must satisfy DOL's safe harbor requirements below.

**Please note:** *Merely posting a disclosure Notice on the employer's website so it is available to employees will not by itself satisfy this disclosure requirement.* E-mailing the Notice directly to each employee is the safest way to assure compliance with the safe harbor guidelines for electronic distribution.

The DOL's electronic delivery safe harbor is undergoing review and may become more flexible in the future.

**Electronic safe harbor:** The Exchange Notice may be provided electronically if the requirements of the DOL's electronic disclosure safe harbor described in labor regulations (29 CFR 2520.104b-1(c)) are satisfied. Generally, this safe harbor allows disclosure through electronic media to employees:

- Who have the ability to effectively access documents furnished in electronic form at any location where the employee is reasonably expected to perform duties; or
- For whom access to the employer's electronic information system is an integral part of those duties.

**Please note:** Employers relying on the electronic safe harbor must ensure that the system for furnishing documents *results in actual receipt by the employee* and must inform the employee of his or her right to request a hardcopy paper version of the Notice.

### **For Employers: Content and Template Notices**

The Notice must be provided in writing in a manner calculated to be understood by the average employee. Using the DOL-provide Model Notice (template) will help assure that the employer's Notice complies with the understandability rule for most employees.

Church employers that offer health coverage (through an annual conference plan or otherwise) may use the **template form** Notice for employers with a health plan. The Notice should be customized with demographic information about the employer (employer name, address, EIN, and contact person) and certain information about the employer's health plan, such as whether it provides **minimum value** (i.e., covers 60% of total benefits) and is considered **affordable** (i.e., costs the employee less than 9.5% of his or her household income). These last two facts can determine whether an employee is eligible for premium tax credits (PTCs) for Exchange coverage. The Notice also identifies any waiting periods, the cost of coverage, and any changes in coverage that the employer intends to make for the coming plan year. Employers have some discretion to modify the Notice to meet their needs.

Similarly, employers who do not offer health coverage can use a different **template form** Notice to inform employees about the Exchanges and their potential eligibility for PTCs.

Should an employer decide to create its own Notice rather than using the DOL-provided templates, the employer's Notice must inform employees of the following:

- The existence of the Exchange (Marketplace), the services it offers, and how employees can contact the Exchange for assistance;
- If the employer's health plan (if any) fails to meet the minimum value requirement (i.e., the share of total allowed costs of benefits provided by the plan is less than 60% of total costs), the employee may be eligible for a premium tax credit (federal assistance toward purchasing coverage through an Exchange for lower and moderate income families);

- If the employee obtains coverage through the Exchange, the employee will lose the employer's contribution toward health benefits (if any) and the corresponding tax-favored treatment of that employer contribution.

### **For Individuals: The Exchanges Under ACA**

ACA's underlying objective is to assure universal health care coverage for all citizens (i.e., the "**individual mandate**"). ACA supports this objective by:

- Expanding health care coverage access to previously uninsured Americans, and
- Making health care coverage options affordable to most Americans.

The Exchanges (health insurance Marketplaces) and premium tax credit are fundamental to this objective.

#### *Exchanges:*

- *What:* Exchanges are new competitive, regulated health insurance Marketplaces that offer access to affordable health insurance coverage. The Exchanges offer "one-stop shopping" to help individuals find and compare private individual health insurance options, called qualified health plans (QHPs).
- *Who:* Individuals without employer-provided health coverage or other government coverage (for example, Medicare) are eligible to enroll in QHPs through the Exchanges. Additionally, individuals who have been offered employer-provided coverage from a large business or a small employer (including, for example, local churches, church-affiliated employers, general agencies and annual conferences) but for whom the offered coverage is not "affordable" ("affordable" means the coverage costs the employee less than 9.5% of his or her household income) may be eligible to purchase insurance through an Exchange.
- *When:*
  - Coverage through the Exchanges begins **January 1, 2014**.
  - Open enrollment for the exchanges begins **October 1, 2013**. For the first year of the Exchanges, the open enrollment period will be October 1, 2013 through February 28, 2014. Thereafter, the Exchanges must provide an annual open enrollment period from October 15 through December 7. Individuals would be able to enroll outside of this annual opportunity only if they qualify for special enrollment under certain circumstances, such as loss of other coverage, marriage, birth, becoming eligible for a PTC, or becoming a citizen or legal resident.

Every state will have an Exchange. In states that do not maintain their own Exchanges, eligible individuals can access the federally-facilitated Exchange.

#### *Premium Tax Credit:*

- Certain individuals purchasing QHP coverage through an Exchange, i.e., those whose household income is between 100% and 400% of federal poverty level (FPL) (approximately \$48,000 for an individual or \$98,000 for a family of four in 2014), will receive premium tax credits from the government to make the QHP coverage more affordable. For more details about individual mandate, premium tax credits and health coverage for dependents, click [here](#).

## Applicability to Churches and other UMC Employers

All employers subject to the Fair Labor Standards Act (FLSA) must provide the Exchange Notice to employees—including churches and church-related employers. The Supreme Court has said “[T]he [FLSA] contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations, and the agency charged with its enforcement has consistently interpreted the statute to reach such businesses.”

In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. The DOL’s Wage and Hour Division provides guidance relating to the applicability of the FLSA in general and has an internet compliance assistance tool to help employers determine the applicability of the FLSA. See [www.dol.gov/elaws/esa/flsa/scope/screen24.asp](http://www.dol.gov/elaws/esa/flsa/scope/screen24.asp).

An organization can be subject to the FLSA in either of two ways:

1. **Individual Coverage:** any one of its employees is engaged in interstate commerce; or
2. **Enterprise Coverage:** the organization itself is engaged in interstate commerce.

DOL’s **Technical Release 2013-2** can be viewed as suggesting that either type of FLSA coverage will trigger the ACA Notice requirement. This suggests that **almost every organization will be required to provide Exchange Notices to employees, including most churches**. Generally, a threshold of \$500,000 in dollar volume of business applies to Enterprise Coverage. Individual Coverage can be triggered if a substantial portion of an employee’s work involves using the U.S. mail, telephones or possibly the internet. Determining whether Individual coverage applies is very fact-specific.

To illustrate, Enterprise Coverage can apply to a local church that brings in more than \$500,000 a year in activities that compete with for-profit business, such as rental income from leasing, or operation of a school, day-care center or after school program. Individual Coverage can apply to church employees who are regularly doing activities that can be construed as interstate commerce, such as telephoning, mailing, or traveling out of state. The “ministerial exception” to federal employment laws may mean that clergy are not subject to Individual Coverage under the FLSA. This may mean that for very small churches where the pastor is the only employee, the church could be exempt from the FLSA. But in many cases even small local churches will have one or more employees who are covered under Individual Coverage.

## Consequences of Failure to Deliver the Exchange Notice

It is unclear what the consequences are for failure to deliver the Notice. However, an employer failing to deliver the Notice would be violating the FLSA and the ACA, and may be subject to investigation and penalties. Employees complaining about not receiving the Notice (or reporting the violation) would have employment protections under the ACA.

## United Methodist Considerations

The Exchange Notice requirement will be applicable to most employers in the denomination. Many local churches (unless completely exempt from the FLSA), general agencies, other United Methodist employers, and the annual conferences as employers with respect to their own employees will be required to send this Notice to employees by October 1. Annual conferences may need to help smaller local churches interpret and comply with this requirement. In many cases, the Notice will have to be customized by each employer required to distribute it with information about the employer and its health plan, if any.

*The Notice will provide part-time employees and many non-covered lay employees across the Connection with valuable information about new coverage options under the ACA beginning in 2014.*

### **COBRA Election Notice**

Group health plans have long been required to give participants and beneficiaries who lose coverage because of certain qualifying events notice of their eligibility for continuation coverage under COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985). Technical Release No. 2013-02 also amends the required COBRA Notice to inform beneficiaries that coverage through the Exchange is an alternative to COBRA that may often be more affordable, and that COBRA beneficiaries may also be eligible for PTCs. The model election notice is available in modifiable, electronic form on the Department's website at [www.dol.gov/ebsa/cobra.html](http://www.dol.gov/ebsa/cobra.html).

*Church health plans are generally exempt from COBRA* [unless the plan has elected to become subject to the Employee Retirement Income Security Act of 1974 (ERISA)]. However, most church plans offer some type of continuation coverage, either under state law if fully-insured or as a matter of plan design if self-insured. DOL's added language about the Exchanges in the model COBRA Notices might be something that plan sponsors of church health plans consider adding to the notices they send to employees and dependents who lose coverage describing the plan's continuation coverage (offered in accordance with state law or otherwise) options, as the Exchanges may be a more affordable option for former participants.

### **More About Exchanges and Other ACA Requirements**

Wespath continues to monitor federal health care reform and provide applicable information for annual conferences, local churches and other UMC employers, as well as information for individuals. We encourage you to check Wespath's [health care reform web page](#) frequently for updates.

### **Questions and Information**

If you have questions or would like additional information, please send your inquiries to [healthcarereform@gbophb.org](mailto:healthcarereform@gbophb.org). General information about health care reform is available from the federal government at [www.healthcare.gov](http://www.healthcare.gov).

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