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Employers Must Provide Notice of Exchange to Employees By October 1, 2013

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We expect multiple pieces of guidance on implementation of health care reform for the rest of this year – in advance of the 2014 effective date of so many of the law's key provisions. Recently, employers were given the green light on a notice requirement that the agencies had previously delayed.

The central feature of much of health care reform is the exchange system. One piece of the law requires employers to provide each employee a written notice:

- Informing the employee of the existence of the exchange including a description of services provided by the exchange, and the manner in which the employee may contact the exchange to request assistance;
- Explaining that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the exchange; and
- Including a statement informing the employee that if the employee purchases a qualified health plan through the exchange rather than choosing employer-offered health coverage (if any), the employee may be foregoing the employer's contribution (if any) to the employer-offered health coverage, as well as a statement that such employer contributions are often excludable from income for federal income tax purposes.

Under the law, employers were required to start distributing this notice to current employees by March 1, 2013, and then after that to all new employees at the time of hiring. In January, the Department of Labor suspended the notice requirement until further notice (View our alert). Earlier this month, that suspension was lifted when the Department of Labor issued Technical Release 2013-02 that now says employers must provide the notice to current employees **not later than October 1, 2013**. For employees hired on or after October 1, the notice must be provided to the new-hire within 14 days of the employee's start date. Unfortunately, the October 1st deadline is probably too early to be able to include the new notice in open enrollment materials.

Technical Release 2013-12 provides two model notices for employers to use. There is one model for employers who do not offer a health plan and another model for employers who offer a health plan for some or all

employees. Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above.

Electronic distribution of the notice is permitted if the delivery is in accordance with the Department of Labor's electronic disclosure safe harbor. The safe harbor generally requires an individual's consent to the electronic disclosure *unless* an employee's access to the employer's electronic information system is "an integral part" of the employee's duties. The notice must be provided to all employees (both full time and part time and whether or not enrolled in current health coverage). Also, the notice must be provided free of charge to employees.

Because the notice must provide information about the specific exchange available to employees based on the state in which they reside, the challenge for some employers will be to customize the notice forms for each of the states where they have employees (although it will be helpful that the same notice can be used for each state that will be relying on the federal exchange instead of creating its own).

Finally, the Technical Release also includes a link to an updated model COBRA election notice for group health plans. This notice has been updated, among other things, to include information about health coverage available through the exchanges and to reflect changes in preexisting condition exclusion rules under new health care reform rules.

If you have questions about the employer notice requirement or any other aspect of PPACA as it applies to employers and the plans they sponsor, contact a member of Holland & Hart's Benefits Law Group. And for any other questions about PPACA including its impact on health care providers or insurers, contact Holland & Hart's Health Care Law Group.

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