Solutions Law Press

HR & BENEFITS UPDATE

September 12, 2013

Should You Reconsider Giving FLSA Exchange Notices Given New DOL Guidance?

Employer and union group health plan sponsors and insurers of group and individual health plans who have struggled to complete and send the new employer notice (Exchange Notice) to employees required by Fair Labor Standards Act (FLSA) Section 18B by the October 1, 2013 deadline set by the U.S. Department of Labor Employee Benefit Security Administration (EBSA) should contact their legal counsel to discuss the advisability of sending the Exchange Notice in light of a new informal guidance posted and distributed by EBSA yesterday (September 11, 2013) **here** titled "FAQ On Notice of Coverage Options." While many employers are reading the guidance in the new FAQ On Notice of Coverage Options as justification for not sending the notice, some EBSA representatives asked about the FAQ are cautioning that its provisions does not mean that there is no consequence for not sending an Exchange Notice. In the face of these conflicting messages, employers under pressure to decide what Exchange Notice, if any to send by October 1, 2013 are more confused than ever.

Exchange Notice Requirement Under 18B Due October 1

To promote awareness among employees of the option scheduled to take effect on January 1, 2014 under ACA to obtain health coverage through their state's Marketplace, ACA amended the FLSA to require each FLSA-covered employer to give each employee a notice about the option to enroll in health coverage through a Marketplace and certain other information required by new Section 18B of the FLSA.

Although the FLSA usually is administered by the Labor Department's Wage & Hour Division, EBSA as the agency with primary responsibility over employee benefit plan regulation and enforcement generally has taken the lead in interpreting and implementing FLSA Section 18B.

In the EBSA interim guidance implementing Section 18B published in **Technical Release 2013-02** and later communications and guidance prior to September 11, 2013, EBSA said FLSA Section 18B requires that each employer covered by the FLSA "**must**" provide each employee at the time of hiring a written notice that meets the requirements of Section 18B to inform the employee:

- Of the existence of the Marketplace (referred to in the statute as the Exchange) including a description of the services provided by the Marketplace, and the way the employee may contact the Marketplace to request assistance;
- If the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code (the Code) if the employee purchases a qualified health plan through the Marketplace; and
- If the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

According to Technical Release 2013-02, an employer covered by the FLSA must give each employee notice under FLSA Section 18B whether the employer offers coverage, whether a particular employee qualifies for health coverage, if any, offered by the employer, or both.

Since its publication of Technical Release 2013-02, EBSA also has continued and reaffirmed its message to employers that their timely delivery of Exchange Notices was mandated by Section 18B in connection with its publication of Model Notices that the Labor Department said it published to help employers prepare the notices necessary to comply with Section 18B's requirement to provide the Exchange Notice. See **Model Notice For Employers Who Offer A Health Plan To Some or All Employees**; **Model Notice for Employers Who Do Not Offer A Health Plan**; and **COBRA Model Election Notice**. Indeed, the **Model Notice For Employers Who Offer A Health Plan To Some or All Employees** reinforced this message by specifically delineating the employer's completion of the last portion of the form by the employer as "optional." Likewise, the responses shared by EBSA representatives in response to questions from employers and others

about Section 18B and the Model Notices caused employers to believe that employers faced liability if they didn't timely give an Exchange Notice to their employees by the October 1, 2013 deadline established by the Labor Department.

9/11/13 FAQ On Notice of Coverage Options Not Necessarily Mean No Consequence For Not Giving Notice

In the face of the previous zealous efforts by the EBSA to notify employers of the Section 18B requirement, EBSA's announcement in its September 11, 2013 **FAQ on Notice of Coverage Options** is creating a stir among employers and their advisors. The FAQ on Notice of Coverage Option and the responses of EBSA representatives to questions about its interpretation and effect are confusing to say the least.

In the FAQ on Notice of Coverage Options, the EBSA responds "No." to the sole question addressed by the FAQ: "Can an employer be fined for failing to provide employees with notice about the Affordable Care Act's new Health Insurance Marketplace?"

While many employers and their advisors are reading the FAQ on Notice of Coverage Options to mean that there is no consequence for an employer's failure to provide Exchange Notices to its employees, discussions with EBSA representatives cast doubt on this interpretation of the FAQ.

EBSA representatives asked on the morning of September 12, 2013 about the FAQ on Notice of Coverage Options stated that while employers "should" and EBSA "encourages" employers to in fact provide the Exchange Notices, EBSA does not view employers as subject to any penalty *under "ERISA"* (emphasis added) for not providing an Exchange Notice in accordance with Section 18B of the FLSA.

On the other hand, statements made by other EBSA officials responding to questions about the implications of the FAQ on Notice of Coverage Options on the afternoon of September 12, 2013 raise concerns about reading the FAQ to mean that there is no consequence for an employer's failure to provide the Exchange Notice. These EBSA officials cautioned that employers should not interpret the statement in the FAQ on Notice of Coverage Options there is no penalty under ERISA for not providing the Exchange Notice as meaning that there will be no adverse consequence if an employer does not provide an 18B Exchange Notice to its employees. On the contrary, these EBSA officials caution that EBSA may view the Exchange Notice as a required disclosure about the plan, which could trigger audit or other enforcement activity.

EBSA representatives also are declining to comment on whether not providing the Exchange Notice might trigger penalties or other liabilities from other agencies. When asked whether employers failing to provide an Exchange Notice could face penalties imposed by the Department of Labor Wage & Hour division under the FLSA, the Internal Revenue Service under Section 8928 or other provisions of the Internal Revenue Code, the Department of Health & Human Services under the Public Health Services Act, plaintiffs' in a private cause of action brought under ERISA or the FLSA, or otherwise, EBSA representatives declined to comment about the potential implications of an employer's failure to provide an Exchange Notice in accordance with FLSA Section 18B under laws administered or construed by other agencies. EBSA representatives instead referred these inquiries for response to the applicable enforcement agency.

The author has contacted and is awaiting reply from the Department of Labor Wage & Hour Division and the Departments of Treasury and Health & Human Services on their position, if any, on the potential liability of an employer for failing to timely deliver and Exchange Notice under the laws and rules subject to that agency's jurisdiction. Stay tuned for any future updates.

Consult With Qualified Counsel About What To Do & Document Analysis

The ambiguities created by the EBSA's release of the FAQ on Notice of Coverage Options make it more necessary than ever that employers obtain documented advice from qualified legal counsel about responding to the requirements of Section 18B of the FLSA.

Because the preparation and distribution of an Exchange Notice by necessity involves an employer in making statements about its employee benefit plans, employers generally should use care to prudently craft each statement in any Exchange Notice to fit the actual terms of the applicable health plan to which it relates to manage fiduciary liability and other potential liabilities potentially arising from the dissemination of an inaccurate or misleading the Exchange Notice. See **Employers Beware! DOL-Model FLSA Section 18B Exchange Notice Requires Tailoring!** Furthermore, depending on the size of the employer's workforce, an employer often will be forced to expend significant time and money to prepare and distribute the Exchange Notice to its employees.

In light of the EBSA's position in **FAQ on Notice of Coverage Options**, employers may want to consult with experienced legal counsel about whether to provide the Exchange Notice after all pending further guidance from the Employee Benefit Security Administration or other relevant agencies. If and to the extent that an employer has or in the future does provide the Exchange Notice, employers also should consult with counsel on the appropriate tailoring of the content of the Exchange Notice. Whether or not the employer elects to provide the Exchange Notice, however, employers and the plan fiduciaries, administrators and insurers that administer the employer's health plan will want to ensure that the plan administrator or other

appropriate named fiduciary of its health plan is timely preparing and distributing the Summary of Benefits and Communications (SBC), 60-day prior notice of material plan amendments reducing coverage or service, summary plan description and host of other notices required with respect to the health plan by ERISA and other applicable laws, See e.g. **Impending 10/1 Exchange Notice & Other New Notice Deadlines Cut Time Short For Employers To Finalize 2014 Health Plan Terms & Contracts**.

In connection with these and other upcoming 2013 health plan preparations, employers and applicable health plan fiduciaries, insurers, and service providers should work together to ensure that plan terms and practices are carefully updated to meet new rules, as well as to tighten long-standing terms to promote enforceability and minimize fiduciary and other exposures. All communications about the plan generally should both match as closely as possible the language contained in the official plan documents, as well as accurately identify the relevant named fiduciary and its role concerning the matters addressed, notify reads of the retained rights of the plan sponsor to modify or amend the plan, and contain other appropriate disclaimers and disclosures.

For Help or More Information

If you need help understanding or dealing with these impending notification requirements, with other 2014 health plan decision-making or preparation, or with reviewing and updating, administering or defending your group health or other employee benefit, human resources, insurance, health care matters or related documents or practices, please contact the author of this update, Cynthia Marcotte Stamer.

A Fellow in the American College of Employee Benefit Council, immediate past Chair of the American Bar Association (ABA) RPTE Employee Benefits & Other Compensation Group and current Co-Chair of its Welfare Benefit Committee, Vice-Chair of the ABA TIPS Employee Benefits Committee, a council member of the ABA Joint Committee on Employee Benefits, and past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms. Stamer is recognized, internationally, nationally and locally for her more than 25 years of work, advocacy, education and publications on cutting edge health and managed care, employee benefit, human resources and related workforce, insurance and financial services, and health care matters.

A board certified labor and employment attorney widely known for her extensive and creative knowledge and experienced with these and other employment, employee benefit and compensation matters, Ms. Stamer continuously advises and assists employers, employee benefit plans, their sponsoring employers, fiduciaries, insurers, administrators, service providers, insurers and others to monitor and respond to evolving legal and operational requirements and to design, administer, document and defend medical and other welfare benefit, qualified and non-qualified deferred compensation and retirement, severance and other employee benefit, compensation, and human resources, management and other programs and practices tailored to the client's human resources, employee benefits or other management goals. A primary drafter of the Bolivian Social Security pension privatization law, Ms. Stamer also works extensively with management, service provider and other clients to monitor legislative and regulatory developments and to deal with Congressional and state legislators, regulators, and enforcement officials about regulatory, investigatory or enforcement concerns.

Recognized in Who's Who In American Professionals and both an American Bar Association (ABA) and a State Bar of Texas Fellow, Ms. Stamer serves on the Editorial Advisory Board of Employee Benefits News, HR.com, Insurance Thought Leadership, Solutions Law Press, Inc. and other publications, and active in a multitude of other employee benefits, human resources and other professional and civic organizations. She also is a widely published author and highly regarded speaker on these matters. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, Modern and many other national and local publications. You can learn more about Ms. Stamer and her experience, review some of her other training, speaking, publications and other resources, and register to receive future updates about developments on these and other concerns from Ms. Stamer **here**.

Other Resources

If you found this of interest, you may also be interested in the following recent publications by Ms. Stamer published by Solutions Law Press, Inc. including:

- **IRS Publishes Final Health Reform Individual Shared Responsibility Rules**
- **Cascom Inc. Owner Must Pay Nearly $1.5 M After Company Misclassified Employees As Independent Contractors**
- **Government Contractors To Face Hiring "Targets" for Vets & Disabled Under Impending Rules**
- **Impending 10/1 Exchange Notice & Other New Notice Deadlines Cut Time Short For Employers To Finalize 2014 Health PlanTerms & Contracts**

- **Health Plan Pays $1.2M+ HIPAA Settlement For Not Protecting PHI On Copiers**
- **Report Questions Security As HHS Invites Consumers To Set Up Personal Accounts To Prepare For Exchange Enrollment Period**
- **Justice Department Sues Texas Bus Company For Illegal Discrimination Against Citizens When Hiring H-2B Program Workers**
- **Legislation Proposes To Change Obama Care Full-Time Employee Definition**
- **IRS Releases Updated Healthcare Law Online Resources Publication**
- **IRS Extends Remedial Amendment On Cycle Opinion Deadline For Some Defined Benefit Plans**
- **Self-Dealing Or Other Mishandling of Employee Benefit Plan Funds Risky For Fiduciaries & Those Appointing Them**
- **Employers & Insurers Reminded Of July 31 Deadline To Pay New ACA-Required PCORI Fees**
- **Use New Government Health Care Reform Resources With Care**
- **OCR Warns Others Learn From WellPoint's $1.7 M HIPAA Settlement**