



Federal Notice Requirements • IRS Guidance on Same-Sex Spouses

This *Alert* provides information about:

- Upcoming mandated notice requirements under three separate federal rules
- Recent IRS guidance on the treatment of benefits for same-sex spouses

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Mandated Notice Requirements

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Mandated Notice Overview

The chart below summarizes the distribution and timing requirements for the mandated notices over the next several weeks. Details about each notice begin on page 2.

Notice	Purpose	Source of Notice	Who Receives It	Distribution Method	Deadline
HIPAA Notice of Privacy Practices	Notify plan participants about their updated privacy rights under HIPAA	A link to the updated notice is included in this <i>Alert</i>	Employees enrolled in the medical plan	Post on health plan web site, and include with next annual benefits information distribution	9/23/2013 for posting; include with next annual mailing distribution
Marketplace Notice of Coverage Options	Inform employees about the Health Insurance Marketplaces	Employer has a choice of notices to use: Links to the DOL, Health Plans-modified and MA Health Connector notices are included in this <i>Alert</i> .	All employees, regardless of eligibility or enrollment in the medical plan	First-class mail or electronic distribution*	10/1/2013 for current employees; within 14 days of hire for new employees on/after 10/1/2013
Medicare Part D Notice of Creditable Coverage	Notify covered employees of the status of their prescription drug coverage	Health Plans will email the applicable notices to clients by 9/18/2013.	Employees enrolled in the medical plan ¹	In-hand, mail or electronic distribution*	10/1/2013

* Under the DOL disclosure rules, electronic distribution is permitted only if the employee either accesses the employer's electronic information system as an integral part of the employee's job duties, or the employee has affirmatively consented to receiving disclosures through electronic media.

¹ Only Medicare-eligible employees and dependents are required to receive the notice, but because an employer may not be aware of who is Medicare-eligible, Health Plans continues to recommend sending the notice to all enrolled employees.

Mandated Notice Requirements

The three mandated notice requirements described below are all required by federal law. We have summarized each.

Health Insurance Marketplace Notice of Coverage Options

Summary

- The Affordable Care Act (ACA) amended the Fair Labor Standards Act (FLSA) to require that notices about Health Insurance Marketplaces (formerly known as Exchanges) be distributed to all current employees by October 1, 2013 and to new employees within 14 days of hire.
- The Department of Labor (DOL) has prepared model notices that employers may, but are not required to use; the Massachusetts Health Connector has also prepared model notices that employers may use for Massachusetts residents.
- COBRA election notices must also be modified to include information about the Marketplaces.
- **Health Plans** has prepared two alternatives to the DOL model notice which employers may elect to use to satisfy this notice requirement for current and new employees.
- **Health Plans** will modify the COBRA election notices to include information about the Marketplaces for those who become eligible for COBRA on and after October 1, 2013.

Background – Content

Under the ACA, the FLSA was modified to require that all employers subject to the FLSA,² regardless of size, provide a notice to employees about the availability of Health Insurance Marketplaces.³ According to the DOL Technical Release 2013-02 issued on May 8, 2013, the notices must inform the employee

- about the existence of a Marketplace, and provide contact information and a description of the services provided by a Marketplace;
- that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Marketplace; and
- that if the employee purchases coverage through a Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer, and that the employer contribution may be excludable from the employee's income for federal income tax purposes.

Timing

The notices must be provided to all current employees by October 1, 2013, and to new employees within 14 days of hire. In addition, the DOL guidance indicates that information about the Marketplaces should be included in COBRA election notices on and after October 1, 2013. Under the current rules, there is no requirement to distribute the notices at any other time, nor to include any information in addition to the specific information listed above.

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² If an employer wants to confirm whether it is subject to the FLSA, the Department of Labor has an Internet compliance assistance tool to help. See www.dol.gov/elaws/esa/flsa/scope/screen24.asp.

³ Since the ACA was originally passed, the federal government has changed the name of the entities through which individuals can purchase insurance from "Exchanges" to "Marketplaces". Because the published model notices now use the term Marketplace, going forward in our Compliance communications we will also use that term.

Mandated Notice Requirements, *cont'd.* Health Insurance Marketplace Notice of Coverage Options, *cont'd.*

Employers Choose Which Notice to Use

Our clients may choose from the following options for the notices they distribute:

1. **The Department of Labor (DOL) three-page model notices** are available on the DOL website. Employers may modify the language provided that it “meets the content requirements described above”.⁴ Note, however, that the DOL model notice directs employers to provide a considerable amount of plan and employee information beyond the statutory requirements outlined above. In addition, the DOL model notice fails to identify the applicable effective date of the eligibility criteria and employee information, and to provide any notice about the Plan Sponsor’s right to amend or terminate the plan. Another issue with the DOL model notice is the direction for the employer to indicate whether the plan is “affordable”. With the postponement of the employer mandate to 2015, affordability is not calculated by and has no impact on employers. Instead, it is the Health Insurance Marketplaces which will determine affordability for individuals and identify those who are eligible for tax premium credits in 2014.
2. **One of the Health Plans modified notices** (appropriate for all employees)
 - A **one-page notice** that we understand will satisfy the specific requirements of the notice rule; it is a duplicate of the first page of the DOL model notice and requires only that the employer provide contact information for questions about the health plan.
 - A **three-page notice** if clients want to provide additional information about their organization and health plan to help employees apply for coverage through a Health Insurance Marketplace. The three-page version is similar to the DOL model notice, but is edited on page 2 as follows:
 - » Adds a statement that the eligibility criteria is as of October 1, 2013
 - » Adds a statement that the Plan Sponsor has the right to amend or terminate the plan
 - » Removes references to whether the employer intends the coverage to be affordable because with the postponement of the employer mandate, affordability is not calculated by and has no impact on employers
3. **The Massachusetts Health Connector model notice** (appropriate only for employees who reside in Massachusetts). This notice may not be practical because employers with employees who live outside Massachusetts would have to provide a separate notice for the non-Massachusetts residents.
4. **A modified notice drafted by the employer** provided it meets the content requirements described above under *Background-Content*. Thus, employers are free to draft their own notices.

Health Plans understands that distributing the one-page version of the notice satisfies the specific requirements of the rule. However, some employers with large populations of employees who may apply for health coverage through the Marketplaces may find it more cost-effective to also include the additional information requested on the DOL model notice instead of responding to individual requests for the information.

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⁴ DOL Employee Benefits Security Administration Technical Release No. 2013-02

Mandated Notice Requirements, *cont'd.*

Health Insurance Marketplace Notice of Coverage Options, *cont'd.*

Implementation

Health Plans' Actions

Health Plans is providing links to:

- [DOL model notice](#)
- [Health Plans' 1-page modified model notice](#)
- [Health Plans' 3-page modified model notice](#)
- [The Massachusetts Health Connector model notice](#)

Health Plans has tested every medical plan design we administer against the IRS/HHS minimum value calculator. Without exception, all the medical plans in effect for October 1, 2013 offered by our employer groups provide minimum value.

Why this matters: Under the ACA “minimum value” means a plan that covers 60% of the costs of benefits provided under the plan, which is the equivalent of a Bronze level of coverage when compared to plans offered through the Health Insurance Marketplaces. While employers are not mandated to provide this level of benefits until plan years beginning in 2015, employees who apply for coverage through Health Insurance Marketplaces are eligible for premium tax credits only if their employer’s plan does not provide minimum value and/or is not affordable. In addition, a statement regarding minimum value must be included on Summaries of Benefits and Coverage (SBCs) for plan years that begin in 2014.

Here’s the problem: With the postponement of the employer mandate until at least 2015, with its complicated safe harbor provisions for calculating affordability, there is no requirement (or method) for employers to calculate the affordability of plans either now or in 2014.

To help employers provide information about minimum value and avoid addressing affordability, as noted on page 3 of this *Alert*, we modified the DOL model notice to indicate that the Health Insurance Marketplace will determine affordability. Employers for whom we currently administer medical plans and who use the Health Plans 3-page modified model notice can check the box at the bottom of page 2 that simply states: *If checked, this coverage meets the minimum value standard.*

However, the DOL and Massachusetts Health Connector model notices still contain the compound statements regarding minimum value and the employer’s assessment of affordability:

- **DOL:** *If checked, this coverage meets the minimum value standard, and the cost of this coverage to you is intended to be affordable, based on employee wages.*
- **Massachusetts:** *Does this employer offer employer-sponsored health insurance coverage that is affordable and meets a minimum value standard (according to federal standards) to at least some of its employees?*

Employers who choose to use either the DOL or Massachusetts Health Connector notices will want to consider whether they want to complete that part of the form.

Health Plans is modifying the COBRA election notices for those groups for whom we provide COBRA administration services to include the suggested new text about the Marketplaces.

Employer Actions

1. Choose which of the notices above to complete (or draft a different version which includes the elements listed under *Background-Content* on page 2 of this *Alert*).

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Mandated Notice Requirements, *cont'd.* Health Insurance Marketplace Notice of Coverage Options, *cont'd.*

Employer Actions, cont'd.

2. Fill in the requested information:
 - contact information for your organization's benefits or HR department
 - if using the DOL model notice or Health Plans-modified three-page notice:
 - » complete page 2, but if the eligibility information on page 2 for either employees or dependents will not fit in the available space, put "see attached" and add additional pages as required to fully state the eligibility requirements
 - » decide whether to complete page 3 or leave blank as optional
3. Distribute to all employees by October 1, 2013, regardless of eligibility or enrollment status, via either first class mail or electronically.**

Note: Clients who would like help with distributing this notice should contact their Health Plans Account Manager.

HIPAA Notice of Privacy Practices (NPP)

Summary

The revised HIPAA NPP advises covered members of new rights regarding the use of protected health information (PHI) for sales and marketing purposes, notification regarding breaches of PHI, a member's ability to request electronic PHI, protection from the disclosure of genetic information in the underwriting process and more.

The NPP must be posted on health plan web sites by September 23, 2013 and distributed to covered employees with the next annual benefits mailing. In addition,

- NPPs must be provided to newly enrolled employees;
- NPPs must be provided to covered employees upon request; and
- Covered employees must be reminded at least every three years that they may request a copy of the NPP.

Background

In January 2013, the Department of Health & Human Services (HHS) issued final omnibus regulations ("Final Rule") making modifications to the HIPAA Privacy, Security, Enforcement and Breach Notification Rules. Due to the changes the Final Rule made to the Privacy Rule, the HIPAA Notice of Privacy Practices (NPP) must be updated. The details about the Final Rule are included in the **Health Plans** September 10, 2013 Compliance *Bulletin*, which is available at: www.HealthPlansInc.com/Employers/Regulatory-Compliance/Federal-Compliance.

In this *Alert*, we are addressing only the distribution requirements for the Notice of Privacy Practices. The specific content changes are described on page 11 of the September 10th *Bulletin*.

Timing

The updated NPP must be:

- Posted on the website that provides information about the plan or benefits on or before September 23, 2013; and
- Distributed to covered employees with the next annual distribution of materials related to the plan (e.g., open enrollment materials).

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** Under the DOL disclosure rules, electronic distribution is permitted only if the employee either accesses the employer's electronic information system as an integral part of the employee's job duties, or the employee has affirmatively consented to receiving disclosures through electronic media.

Mandated Notice Requirements, *cont'd.* **HIPAA Notice of Privacy Practices (NPP), *cont'd.***

Implementation

Health Plans' Actions

- **Health Plans** posted the updated notice to the member and employer pages on our website on September 17, 2013.
- **Health Plans** will also include the updated NPP with the materials sent to newly enrolled employees.

Employer Actions

Employers should distribute the updated NPP to all enrolled employees with the next annual mailing. For example, the NPP could be included with the next distribution of annual open enrollment materials, or with the Medicare Part D Notice of Creditable Coverage (see below). Employers also need to provide a copy of the NPP upon an employee's request. It is available for download at: [Group Health Plan Notice of Privacy Practices](#).

Medicare Part D Notice of Creditable Coverage

Summary

Every year, Health Plans sends our clients the applicable templates for the annual Disclosure of Medicare Part D Creditable Coverage. Because the notices vary based on whether each plan is creditable or non-creditable, the applicable templates are sent to clients under a separate email, along with instructions regarding their completion and distribution. The notices then need to be distributed to covered employees prior to October 15, 2013.

Background

Annually, prior to October 15 (the first day of the annual Medicare Part D election period) employers must notify Medicare-eligible employees and spouses covered under the medical plan about whether their prescription drug coverage is creditable under standards for Medicare Part D. Under the regulations, "prior to" means in the 12 months before October 15. Most employers make the distribution either in early October or with their annual open enrollment materials. To avoid the need to track which employees and spouses may be Medicare-eligible, it is strongly recommended that employers distribute these notices to all covered employees.

Timing

Clients for whom Health Plans administers the medical plan can expect to receive their Medicare Part D templates by September 18, 2013. The cover email will include the information about this annual distribution, as well as the other notice obligations related to prescription drug coverage.

Notices must be distributed to enrolled employees before October 15, 2013.

Implementation

Health Plans' Actions

- **Health Plans** will review all prescription drug coverage and make a determination about whether the coverage is creditable under Medicare Part D standards.
- **Health Plans** will then send the applicable notice templates to clients by email by September 18, 2013.

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Mandated Notice Requirements, *cont'd*. Medicare Part D Notice of Creditable Coverage, *cont'd*.

Implementation

Employer Actions

Employers should insert the applicable contact information where highlighted on the templates and distribute the notices to enrolled employees before October 15, 2013.

Note: Clients who would like help with distributing this notice should contact their Health Plans Account Manager.

IRS Guidance on Same-Sex Spouses

Summary

On August 29, 2013, the IRS issued Revenue Ruling 2013-17 (Revenue Ruling), clarifying that same-sex spouses who enter into a legally valid marriage in any jurisdiction will be treated as married for federal tax purposes under the Internal Revenue Code, whether or not they reside in a state that recognizes same-sex marriage.

Here is our understanding of how the guidance will affect coverage under employer group health plans:

- Employee contributions for same-sex spouse health coverage, as well as distributions from FSAs, HRAs and HSAs for same-sex spouse medical expenses may be made on a pre-tax basis, regardless of where the employee lives.
 - » Effective immediately, employers can process contributions for same-sex spouses on a pre-tax basis as they do for opposite-sex spouses.
 - » Employers may be able to recover FICA/FUTA and federal income taxes – additional guidance from the IRS is expected to provide a stream-lined filing approach for these refunds.
 - » Employees may file amended tax returns if they want to recover taxes paid on the coverage for same-sex spouses in prior years.
- Plans that currently cover same-sex spouses must offer COBRA coverage to these spouses under the same conditions that opposite-sex spouses are offered COBRA.
- Plans are not required to cover same-sex spouses if they don't currently cover them (and under the ACA, plans are not required to cover any spouse). However, many commentators note that there is a potential for sex discrimination litigation under Title VII if a plan covers opposite-sex spouses, but excludes coverage for same-sex spouses.
- Plans may extend a special open enrollment period under Section 125 to permit same-sex spouses who previously declined coverage to enroll under the theory that the IRS's recent recognition of their status as married under the Internal Revenue Code is a qualifying change in status.

Background

On June 26, 2013, the United States Supreme Court, in *United States v. Windsor (Windsor)*, held that Section 3 of the Defense of Marriage Act (DOMA), which had prohibited the federal government from recognizing marriages between same-sex couples, was unconstitutional. The holding determined that the federal government should not define what a marriage is or should be, and may not discriminate against a marriage validly entered into under local law. The decision did not, however, force recognition of same-sex marriages in states that do not provide such recognition now.

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IRS Guidance on Same-Sex Spouses, *cont'd.*

Background, cont'd.

The *Windsor* decision raised a host of questions over the treatment of employee benefits for same-sex married couples who now live in or later move to states that don't recognize same-sex marriage. Would employers have to base the tax treatment of employee contributions on where an employee lived? Could employers decline to provide COBRA coverage to a same-sex spouse living in a state that doesn't recognize same-sex marriage? Would otherwise qualifying medical expenses be reimbursable under HRAs and FSAs?

The IRS guidance issued on August 29, 2013 answered these questions and confirmed that, regardless of residence now or in the future, same-sex married couples will be treated the same as opposite-sex spouses for purposes of the federal tax code.

Timing

Provision	Implementation
Tax treatment of contributions for health coverage	Immediately – more guidance is expected on recovering amounts withheld by employers in 2013; employees should consult with their tax advisors about recovering amounts paid in prior years
Extension of COBRA coverage to same-sex spouses	Effective for qualifying events occurring on and after September 16, 2013*
Reimbursements for qualifying expenses from HSAs, HRAs and FSAs	Effective for expenses incurred on and after September 16, 2013*

Implementation

Health Plans' Actions

- Amend plans to edit references to the definition of spouse, potential taxability of coverage for same-sex spouses and exclusion of COBRA coverage for same-sex spouses, as applicable
- Administer COBRA for same-sex spouses who have qualifying events on and after September 16, 2013, for plans which cover same-sex spouses
- Permit the reimbursement of medical expenses for same-sex spouses incurred on and after September 16, 2013 for those plans for which we administer FSAs and HRAs

Employer Actions

- If same-sex spouses are not currently covered under the plan, determine whether to amend the plan to extend coverage to same-sex spouses
- Determine whether to offer a special enrollment period from September 16 through October 15, 2013 for same-sex spouses who are newly-eligible for coverage or who may have previously declined enrollment because of the tax implications of coverage

Please contact your **Health Plans** Account Manager with questions about the material in this *Alert*.

This Alert is intended to provide a summary of Health Plans' understanding of recent regulatory developments which may affect our clients' plans. It should not be construed as specific legal advice or legal opinion. The contents are for general informational purposes only and are not a substitute for the advice of legal counsel.

* The Revenue Ruling generally takes effect on September 16, 2013, for all provisions except the tax treatment of employee contributions and withholdings on amounts used to cover same-sex spouses under employer-sponsored group health plans. However, the Revenue Ruling also states that the IRS "intends to issue further guidance on the retroactive application of *Windsor* to other employee benefits and benefit plans and arrangements." As such additional guidance is issued, **Health Plans** will update this information as applicable.