

ALERTS

Labor & Employment Law Alert - Employers: Are You Prepared To Comply With The Notice Requirements Under Section 1512 Of The Affordable Care Act?

September 18, 2013 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [South Bend](#)

As originally drafted, Section 1512 of the Patient Protection and Affordable Care Act (ACA) amended the Fair Labor Standards Act (FLSA), requiring employers of all sizes to provide their employees with a written notice of the availability of coverage through a public health insurance exchange (the "Notice of Exchange") by March 1, 2013. In January 2013, however, the U.S. Department of Labor (DOL) announced a delay in the effective date of this Notice of Exchange to the "late summer or fall of 2013." On May 8, 2013, the DOL issued Technical Release No. 2013-02, in which it set a new effective date of **Oct. 1, 2013**.

Just recently, the DOL issued an FAQ stating that employers "should provide a written notice" to their employees by Oct. 1, 2013, but "there is no fine or penalty under the law for failing to provide the notice." It appears many employers are interpreting this DOL statement to mean that the notice is optional. Employers should carefully consider whether they should take this stance for the following reasons:

- The likelihood that a subsequent DOL audit would not look favorably on an employer opting not to provide the Notice of Exchange;
- The Notice of Exchange potentially could be viewed by the DOL as within the scope of the employer's required disclosures to participants and thus within the scope of an ERISA audit; and
- Employers still have a fiduciary obligation to be forthcoming with plan participants and beneficiaries, and failing to provide the Notice of Exchange could be deemed a breach of those duties.

That said, providing the Notice of Exchange is recommended, although it is within an employer's discretion to decide not to send the notice and, technically, there would be no financial penalty for not doing so.

As a refresher, Section 1512 provides that employers are to deliver a written Notice of Exchange to each employee, regardless of plan enrollment status or the employee's status as a part-time or full-time employee:

1. Informing the employee of the existence of the public health insurance exchange, including a description of the services provided by the public health insurance exchange, and the manner

RELATED PEOPLE



Kenneth J. Yerkes

Partner
Indianapolis

P 317-231-7513
F 317-231-7433
ken.yerkes@btlaw.com



John T.L. Koenig

Partner
Atlanta

P 404-264-4018
F 404-264-4033
john.koenig@btlaw.com



Norma W. Zeitler

Partner
Chicago

P 312-214-8312
F 312-759-5646
norma.zeitler@btlaw.com



William A. Nolan

Partner
Columbus

P 614-628-1401
F 614-628-1433
bill.nolan@btlaw.com

in which the employee may contact the public health insurance exchange to request assistance;

2. 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 if the employee purchases a qualified health plan through a public health insurance exchange; and
3. If the employee purchases a qualified health plan through a public health insurance exchange, the employee may lose the employer contribution (if any) to any health benefit plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

Employers are to provide the Notice of Exchange to current employees no later than Oct. 1, 2013 when "open enrollment" begins for coverage through the public health insurance exchanges. For new employees, employers are to provide the Notice of Exchange at the time of hiring beginning Oct. 1, 2013. For 2014, if the Notice of Exchange is provided within 14 days of an employee's start date, the DOL will consider the Notice of Exchange to be provided at the time of hiring.

The Notice of Exchange may be sent via first class mail or it may be provided electronically as long as the requirements of the DOL's electronic disclosure safe harbor are met. Employers may not charge current employees or new hires a fee for providing the Notice of Exchange.

Employers can find two model notices that meet the notice content requirements discussed above on the DOL's website: [One model notice](#) for employers who do not offer a health plan and [another](#) for employers who do offer a health plan to some or all of their employees. Importantly, these model notices are not simply boilerplate language that can be photocopied and dispersed to current employees and new hires or posted to a bulletin board. There are a few details employers must fill in. Employers may use one of these models, as applicable, or a customized version, provided the Notice of Exchange meets the content requirements.

For more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Department in the following offices:

Kenneth J. Yerkes, Chair (317) 231-7513; John T.L. Koenig, Atlanta (404) 264-4018; Norma W. Zeitler, Chicago (312) 214-8312; William A. Nolan, Columbus (614) 628-1401; Eric H.J. Stahlhut, Elkhart (574) 296-2524; Mark S. Kittaka, Fort Wayne (260) 425-4616; Michael A. Snapper, Grand Rapids (616) 742-3947; Peter A. Morse, Indianapolis (317) 231-7794; Scott J. Witlin, Los Angeles (310) 284-3777; Tina Syring Petrocchi, Minneapolis (612) 367-8705; Janilyn Brouwer Daub, South Bend (574) 237-1139; Teresa L. Jakubowski, Washington, D.C. (202) 371-6366.

Visit us online at www.btlaw.com, and don't forget to bookmark our blogs at www.btlaborrelations.com and www.btcurrenents.com. You can also find us on Twitter at www.twitter.com/btlawle.

© 2013 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg



Mark S. Kittaka

Partner

Fort Wayne, Columbus

P 260-425-4616

F 260-424-8316

mark.kittaka@btlaw.com



Michael A. Snapper

Of Counsel (Retired)

P 616-742-3947

mike.snapper@btlaw.com



Peter A. Morse, Jr.

Partner

Indianapolis, Washington, D.C.

P 317-231-7794

F 317-231-7433

pete.morse@btlaw.com



Scott J. Witlin

Partner

Los Angeles

P 310-284-3777

F 310-284-3894

scott.witlin@btlaw.com

LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.

This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.



Janilyn Brouwer Daub

Partner

South Bend, Elkhart

P 574-237-1139

F 574-237-1125

janilyn.daub@btlaw.com



Teresa L. Jakubowski

Partner

Washington, D.C.

P 202-371-6366

F 202-289-1330

teresa.jakubowski@btlaw.com

RELATED PRACTICE AREAS

Labor and Employment