

ATTORNEYS AT LAW

TO: Ann Cottongim  
FROM: Jim Hamilton  
Christine Zoccola  
DATE: August 26, 2013  
RE: Electronic Distribution of the Marketplace Notice

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The New Health Insurance Marketplace Coverage Notice (“Notice”) may be sent by first-class mail or be provided electronically if the Department of Labor’s electronic disclosure safe harbor requirements are met.<sup>1</sup> In general, the Department of Labor (“DOL”) safe harbor allows electronic disclosure only to those employees who use a computer as part of their normal job function or who have affirmatively consented in a manner that reasonably demonstrates the individual’s ability to access the information provided. Below are the specific DOL safe harbor requirements for the electronic distribution of the Notice.

Classification of Employees

The Notice may be electronically delivered to the following two classes of employees:

1. *Integral Part of Duties.* Employees who can effectively access electronic documents anywhere they are reasonably expected to perform their duties and who access the employer’s electronic information system as an integral part of those duties may receive the Notice electronically. The DOL safe harbor includes the employee’s worksite and extends to employees who work at home or travel, provided that they have ready access to the employer’s information system. The safe harbor does not include a computer kiosk in common areas and, thus, merely posting the Notice on a website or intranet will not be sufficient.
2. *Affirmative Consent.* Employees who do not use a computer as an integral part of their duties and give affirmative consent also may receive the Notice electronically. The employee’s affirmative consent to receive the Notice through electronic media must be in a manner that reasonably demonstrates the employee’s ability to access information in the electronic form that will be used to provide the Notice, and has provided an address for the receipt of the electronically furnished Notice. Prior to consenting, the employee must be provided, in electronic or non-electronic form, a clear and conspicuous statement that:

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<sup>1</sup> The Department of Labor Electronic Disclosure Safe Harbor is found at 29 CFR 2520.104(b)-1(c)

- Describes the type of document (in this case, the Notice) to which the consent would apply;
- Explains that the consent can be withdrawn at any time without charge;
- Describes the procedures for withdrawing consent and for updating the employee's address for receipt of electronically furnished documents or other information;
- Explains the right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and
- Identifies any hardware and software requirements for accessing and retaining the documents.

Following consent, if a change in hardware or software creates a material risk that the employee will be unable to access or retain electronically furnished documents, then the employee must be provided with a statement of the revised hardware or software requirements for access and retention of electronically furnished documents. Also, the employee must be given the right to withdraw consent without charge and without the imposition of any new condition or consequence that was not disclosed at the time of the initial consent. Following notice of the hardware or software changes and notice of the right to withdraw consent, the employee must again affirmatively consent to the receipt of the Notice through electronic media.

#### Electronic Distribution Steps

The DOL safe harbor requires employers to follow certain steps when they distribute information electronically. Employers must abide by these specific steps for electronic distribution:

1. Ensure that the system for furnishing the documents results in actual receipt of transmitted information. This system may include, for example, return receipt for e-mail or a notice of undelivered electronic mail. The employer may also conduct periodic reviews or surveys to confirm receipt of the Notice.

2. Protect confidential personal benefit information. Incorporated into the system should be measures that are designed to preclude unauthorized receipt or access to such information by individuals other than the individual for whom the information is intended.
3. Prepare and furnish the Notice in a manner that is consistent with the style, format, and content requirements applicable to the particular document.
4. Provide notice to each employee of the significance of the Marketplace Notice when it is transmitted (e.g., the attached document contains information about the new health insurance marketplace and health care coverage offered by the municipality.)
5. Inform employees that they can request and obtain a paper copy of the Notice.