



September 12, 2013

## Health Care Reform—Exchange Notice Requirement Frequently Asked Questions Part 2

On May 8, 2013, the Department of Labor (DOL) released **Technical Release No. 2013-02**, which provides guidance about the Exchange Notice that nearly all employers nationwide must provide to their employees no later than October 1, 2013, under the Patient Protection and Affordable Care Act (PPACA or ACA). The Notice describes the health insurance that will be available through Health Insurance Marketplaces established by the ACA, known also as “exchanges.”

*Annual conferences, general agencies, most local churches and other United Methodist Church (UMC) employers (salary-paying units) must comply with this Exchange Notice requirement no later than **October 1, 2013**.* This also is the beginning date for open enrollment for the ACA’s Marketplaces, i.e., the date individuals may begin choosing to enroll in federal or state health care exchanges.

On September 4, 2013, the DOL, Department of Health and Human Services (HHS), and Department of the Treasury (collectively, the Departments) jointly published a set of **Frequently Asked Questions** regarding implementation of the ACA. The Departments indicate that the Exchange Notice can be delivered by an entity other than an employee’s employer, such as a health insurance company, a third-party administrator or a multi-employer plan.

The following frequently asked questions (FAQs) clarify this Notice requirement as it applies to local churches and other UMC employers. Previously published FAQs are available [here](#). Further information and resources regarding the Exchange Notice requirement are posted on the General Board of Pension and Health Benefits (General Board) [health care reform Web page](#).

**Q: Is it permissible for another entity (such the annual conference board of pensions or its third-party administrator, or a health insurance company) to send the Exchange Notice on behalf of a local church to satisfy the church’s obligations related to the Exchange Notice?**

**A: Yes, but with an exception.** An employer will have satisfied its obligation to provide the Exchange Notice with respect to an individual employee if another party provides a timely and complete Exchange Notice. *However*, the DOL noted that employers are required to provide the Exchange Notice to **all** employees, regardless of whether an employee is enrolled in, or eligible for, coverage under the employer’s group health plan. However, a local church is not relieved of its statutory obligation to provide the Exchange Notice if another entity, such as the annual conference board of pensions, sends the Notice only to participants enrolled in the conference plan, and there are some clergy or other employees who are not enrolled in the plan.

The Departments stress that if an annual conference or health insurer is providing Exchange Notices on behalf of a local church, the annual conference or health insurer must take proper steps to ensure that a copy of the Exchange Notice is provided to **all** employees regardless of plan enrollment, or else communicate clearly to the local church that the annual conference or insurer will provide the Notice only to a subset of employees (i.e.,

employees enrolled in the plan) and advise the local church of its obligation to provide the Exchange Notice to all other employees (i.e., employees who are not enrolled in the plan).

**Q: Our local church's only employee is a retired pastor. The retired pastor's health benefits are provided through the annual conference group retiree health plan, with premiums paid by the annual conference, not the local church. Does the local church need to send the Exchange Notice to this pastor? If so, do we send the Notice version for employers that offer health plans to some, or the Notice version for employers that do not offer health plans?**

**A:** Very small churches may be exempt from the Fair Labor Standards Act (FLSA), which is the law through which the Exchange Notice requirement applies (the ACA amended the FLSA). You can read more about whether the FLSA applies to your church organization in the **previously published FAQs**. **Please note if your organization is sending Exchange Notices:** If a pastor (or any other employee) is actively at work despite being “retired,” he or she may be considered a current employee under the FLSA and should receive an Exchange Notice. If the local church does not provide a health plan for the pastor or any other employee, it should use the version of the Notice for employers that do not offer a plan. This would be the case if the retired pastor were covered in the annual conference Medicare supplement plan and the conference (and pastor) pays the premium—i.e., the local church does not provide the coverage.

**Q: Our local church's only employee is a retired pastor. The retired pastor's health benefits are provided through a retiree medical plan exchange (such as Extend Health for Medigap and Medicare supplement plans), with funding to a health reimbursement arrangement (HRA) from the annual conference rather than the local church. Does the local church need to send the Exchange Notice to this pastor? If so, which version of the Notice should the local church send?**

**A:** As described above, a pastor or any other employee who is actively at work is considered a current employee under the FLSA—even if he or she is “retired”—and therefore should receive an Exchange Notice. If the local church does not provide a health plan for the pastor or any other employee, it should use the Notice version for employers that do not offer a plan. This would be the case where the annual conference provides an HRA or stipend for the retired pastor to purchase Medicare supplement coverage through an exchange or a private market.

**Q: If a pastor serves a multipoint charge and each local church in the charge pays toward the pastor's salary, does each church need to send the Exchange Notice, or is a Notice from only one local church adequate? Is that answer different if the pastor receives a *Form W-2* from each local church versus a single *W-2* for the salary of the entire charge?**

**A:** If each local church pays some salary directly to the pastor and issues the pastor a *W-2*, then *each church* should provide the required Exchange Notice. If one local church or a charge office pays all salary and issues the *W-2* on behalf of the churches in the multipoint charge, then it would suffice if just that one church or charge office provides the Notice.

**Q: What happens to a local church or other employer that fails to send the required Exchange Notice by October 1?**

**A:** It is unclear exactly what the consequences are for failure to deliver the Notice. However, in an **FAQ** published September 11, 2013, the DOL stated that there is no penalty or fine under the FLSA for employers for failure to deliver the Notice by October 1, 2013. However, failure to provide the Notice could subject the employer to investigation or a court order to provide the Notices. In addition, employees not receiving the Exchange Notice may have a private cause of action under the employment protections of the ACA against the employer failing to provide the Notice, for interfering with his or her receipt of tax credits and other benefits under the ACA.

**Q: Does Individual Coverage apply if the local church's pastor and other employees (if any) use phone, fax, mail, or e-mail/Internet largely for *in-state* church communications? Does any (even one) communication to another state invoke Individual Coverage, or is there some threshold or parameter that must be exceeded?**

**A:** Individual Coverage under the FLSA is very broad. The most prudent approach is to distribute the Exchange Notice to all employees, even if there is any doubt about the applicability of the FLSA, and thus the Notice requirement, to a church's particular facts and circumstances.

Technically, one could argue that a local church with a pastor or employees who only use the phone, fax and U.S. mail for intrastate (in-state) communications is not subject to Individual Coverage under the FLSA. However, any use of e-mail and the Internet is likely to trigger application of Individual Coverage to an employee, as those media use servers and data from interstate and international commerce sources.

**Q: Are seasonal workers subject to the Notice requirement for new hires (for example, if they are hired after October 1, 2013, for the Christmas season)? Are those being "re-hired" as seasonal staff also subject to the Notice requirement for new hires?**

**A: Yes and yes.** Seasonal employees are employees subject to the FLSA and should receive a copy of the Exchange Notice at the time they are hired, if they are hired between October 1, 2013 and December 31, 2013 (or within 14 days of hire if they are hired on or after January 1, 2014). "Re-hired" employees are also new hires under the FLSA, even if they are hired for a short duration, like a "seasonal employee." "Re-hired" employees should also be given the Exchange Notice at the time of hire.

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