



September 3, 2013

Health Care Reform—Exchange Notice Requirement Frequently Asked Questions

On May 8, 2013, the Department of Labor (DOL) released **Technical Release No. 2013-02**, which provides guidance about the 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.” The DOL guidance includes template Notices for employers to use. A printer-friendly version of the DOL’s Exchange Notice guidance is provided **here**.

*Annual conferences, general agencies, most local churches and other United Methodist Church (UMC) employers (salary-paying units) must comply with this 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.*

You can read general descriptions of how the Notice requirements affect UMC employers **here** and **here**. The following frequently asked questions (FAQs) clarify this Notice requirement, as it applies to local churches and other UMC employers. Additional helpful hints about the Notice requirement are provided **here** and **here**.

Q: What if our state has not yet established an “exchange” or Marketplace as recommended under the ACA? Does the Notice requirement apply to us and our employees?

A: Yes, this provision of the ACA applies to nearly all employers in *all states and the District of Columbia*. This is true even in states that will not have a state-established Marketplace. Those states will have a federally-facilitated exchange (a Marketplace run by the U.S. Department of Health and Human Services) in place of a state exchange.

Q: Can the Exchange Notice be mailed in the same envelope as other required notices to save on our mailing costs? (For example, can the Exchange Notice be mailed with the Medicare Part D Notice of Creditable Coverage since they are both required to mail around the same date?)

A: There does not appear to be anything that prohibits mailing the Exchange Notice with other required notices, such as the Medicare Part D notice or HIPAA privacy notices. It seems that the Exchange Notice could be printed together with another notice, e.g., on the back side of a page. In fact, the regulations indicate that employers can customize the Exchange Notice to some extent.

However, the ACA Exchange Notice is a requirement under the Fair Labor Standards Act (FLSA) and applies to *employers* directly and *all* their full-time and part-time employees, regardless of whether the employer offers health coverage or whether the employee is in the health plan. In contrast, the Medicare and HIPAA notices apply to employers’ *health plans* and generally only the *employees covered in a health plan*. While an employer could include the Exchange Notice with the Medicare or HIPAA notice to employees covered in its plan (most likely, only full-time employees and only employees who have enrolled in the plan), the employer would still have to

send the Exchange Notice separately to non-covered employees, such as new employees on a waiting period, part-time employees, full-time employees who are not enrolled in the employer-sponsored plan and seasonal employees.

Q: What if some of the clergy and lay employees in our ministry have coverage through the Indian Health Service, Medicaid, TRICARE or a spouse's plan? Do we need to provide them an Exchange Notice?

A: Yes, you should provide the Exchange Notice to these employees. The Notice is a requirement under the FLSA related to their employment status, not related to where they have health coverage. However, these employees (like others covered in various health plans) may have coverage that suits them well, and the Exchange Notice may seem unnecessary. Nonetheless, they should receive the Exchange Notice just like any other employee.

Q: Is the annual conference supposed to provide the Exchange Notice to bishops?

A: No. The General Council on Finance and Administration (GCFA) is the responsible party for sending the Notice to bishops.

Q: Are we required to provide the Exchange Notice to volunteers?

A: No. You do not have to provide the Exchange Notice to volunteers. Volunteers, as long as they are not paid, are not employees, and their work is not subject to the FLSA.

Q: Our local church employs tutors (high school and college-aged) for an after-school program; do we need to provide the Exchange Notice to these individuals?

A: Yes, you need to provide these employees with the Notice. Any common-law “W-2” employee—no matter how few hours, or whether seasonal or temporary—should receive the Notice if he or she is employed when the employer distributes the Notice (on or before October 1). These are the types of employees (i.e., those unlikely to be offered employer health coverage) for whom the Marketplaces may provide the greatest benefit. Keep in mind that the Exchange Notice requirement is an ongoing duty of the employer for all new hires after October 1, 2013.

Q: Are we required to provide the Exchange Notice to independent contractors whom we provide a Form 1099 rather than a Form W-2?

A: No. You do not have to provide the Exchange Notice to independent contractors. If there is any doubt, the most prudent course is to provide the Notice.

Q: Do we need to send the Exchange Notice to our summer seasonal camp staff that may have just finished (terminated) or will soon be done working for this year (and possibly forever)?

A: In most cases, no. You are only required to distribute the Exchange Notice to *current employees as of the date you send it*. If the seasonal employees have finished working by the date you distribute the Notice, then you do not need to provide a Notice to them.

However, if the seasonal employees are working on the date you distribute the Notice to other employees, then you should provide a Notice to them also.

Q: Do we need to send the Exchange Notice to employees who terminated employment earlier this year?

A: No. You are not required to provide a Notice to any employee terminated earlier this year.

Q: What about early retirees (pre-Medicare, pre-age 65)?

A: In most cases, no. Retired employees are not generally subject to the FLSA. As such, you do not need to provide them an Exchange Notice—unless they are actively working (e.g., retired but rehired). This is true even if early retirees are covered in your employer health plan or conference plan as a retiree. If they are neither actively employed nor receiving wages, then the Notice requirement does not apply.

However, it may be the case that you think the Health Insurance Marketplace offers a more affordable option for these retired employees, (for example, if the retiree coverage through your employer plan is costly). You can provide these formerly retired employees with information about the Marketplace if you wish (e.g., some of the information from the Exchange Notice). The information on the first page of the template Notices from the DOL may be useful in this case.

Further, Medicare-eligible retirees of any age should *not* be provided the Notice—because they are covered in Medicare, they are not eligible for coverage through the Marketplaces. The same would be true for pre-65 individuals who are Medicare-eligible because of a disability.

Q: What about active employees who are eligible for Medicare?

A: Active employees who are Medicare-eligible should be provided an Exchange Notice just like all other current employees. Although their Medicare eligibility would preclude them from benefiting from the Marketplace, they are active employees to whom the Notice requirement applies.

Q: Does the conference have to provide the Exchange Notice to clergy on medical leave (formerly “incapacity leave”) or long-term disability through the Comprehensive Protection Plan (CPP)?

A: No. Generally you should not have to provide the Exchange Notice to clergy on CPP disability or medical leave. These individuals are not actively working and not subject to the Notice requirement. However, as in the case of pre-Medicare retirees described above, clergy on CPP disability or medical leave (or other leaves of absence) may benefit from information about the Marketplaces. For example, if the church or conference requires a clergy on CPP disability to pay the full cost for coverage under the conference or employer plan, then the Marketplace may provide more affordable options for these individuals and their families. Some of the information on the first page of the Exchange Notice may be useful to these individuals.

Q: Is the conference required to provide the Exchange Notice to local pastors without a current appointment?

A: No. The conference should not need to provide the Exchange Notice to local pastors without an appointment. These individuals are not in an employment relationship under the FLSA with the conference or a local church.

Q: Some churches are required to cover appointed clergy in the annual conference plan, but they cover their lay employees in a different plan (e.g., a small group market plan).

- **Does our church need to prepare different versions of the Exchange Notice for the two groups of covered employees?**
- **What if the plans differ; for example, what if the conference plan for clergy offers coverage to dependents and the plan for lay employees does not offer dependent coverage?**

A: It may be possible for the church to fit a narrative description of these coverage differences and who is eligible for each plan in the space designated on the DOL’s template Notices. This would allow a church to use one version of the Notice for all employees (i.e., both plan audiences and anyone not covered in the plans). However, this could be confusing to employees. The purpose of the Notice is to clearly make employees aware of their coverage options and the potential consequences of their choices.

The church may instead create two different versions of the Exchange Notice: one for employees covered in or who could be eligible for the outside insured plan (i.e., the lay employees covered and not covered), and one for those in the annual conference plan (i.e., the clergy, covered and not covered). The information about who is covered in each plan as described in each Notice would differ, as would the premiums charged and other “affordability” questions that are contained in the Notice (and are to be completed by the church or employer). There could also be different answers about whether the plan covers “minimum value.”

The clearer the information on the Notices can be, the better. As such, employers with different plans or eligibility rules for clergy and lay workers would be advised to consider the employee audience when deciding whether to use one version of the Notice or multiple versions.

Q: Is the annual conference required to send out the Exchange Notice to all appointed clergy serving at local churches?

A: In most cases, no. The responsibility for distributing the Exchange Notice under the FLSA falls upon the *salary-paying employer*, which is usually the *W-2 issuer*. In most cases, the salary-paying unit is the local church. Given how the FLSA applies, it will be up to each local church (or other salary-paying unit) to distribute the Notice to the clergy serving that church and to its lay employees.

Unlike the ACA’s summaries of benefits and coverage or HIPAA notice, it is not the responsibility of the health plan, its insurer or its administrator (e.g., the agency or conference board) to provide this Exchange Notice. However, annual conferences will need to distribute the Exchange Notice to their own *W-2 employees* (including any *W-2 clergy* serving the conference directly).

Local churches and other UMC employers may benefit from Exchange Notice toolkits created by the General Board of Pension and Health Benefits (General Board). Toolkit materials are posted on the General Board’s **health care reform page**.

Q: Are all churches required to distribute this Notice? I have read that there is a \$500,000 in annual revenue requirement for the Fair Labor Standards Act (FLSA) to apply to an organization, so some churches might be exempt from the FLSA.

A: Yes, essentially all churches are required to distribute the Exchange Notice. There may be some very small local churches to which the FLSA does not apply, even through its application to individual employees, as explained below—but those will be very rare. All employers subject to the FLSA must provide the Exchange Notice to all employees. This requirement applies to churches and church-related employers. The Supreme Court has said “[T]he [FLSA] contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations, and the agency charged with its enforcement [the DOL] has consistently interpreted the statute to reach such businesses.” So, there is no express exemption or exception for churches and church employers.

In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. The DOL’s Wage and Hour Division has an Internet compliance assistance tool to help employers determine whether they are subject to the FLSA.

See www.dol.gov/elaws/esa/flsa/scope/screen24.asp.

An organization can be subject to the FLSA in either of two ways:

1. **Enterprise Coverage:** the organization itself is engaged in interstate commerce, or
2. **Individual Coverage:** any one of its employees is engaged in interstate commerce.

Generally, a threshold of \$500,000 in dollar volume of business applies to Enterprise Coverage. Some churches will be subject to the FLSA through Enterprise Coverage. To illustrate, Enterprise Coverage can apply to a local church that brings in more than \$500,000 a year in activities that compete with for-profit business, such as rental income from leasing property or operation of a school, day-care center or after-school program.

Individual Coverage depends on the nature of an employee’s work. An employee is covered on an individual basis if he or she performs any work constituting engagement in interstate or foreign commerce. Individual Coverage can be triggered if a substantial portion of an employee’s work involves using the U.S. mail, telephones or Internet. Determining whether Individual Coverage applies is very fact-specific, but application is broad. Some examples of employees subject to Individual Coverage include:

- An employee who uses a telephone, fax machine, the U.S. mail or a computer e-mail system to communicate with persons in another state.
- An employee who drives or flies to another state.
- An employee who unloads goods which came from an out-of-state supplier.
- An employee who uses an electronic device which authorizes a credit card purchase.

As a result of this broad application of the FLSA through Individual Coverage, most local churches are subject in some manner to the Exchange Notice requirement.

Disclaimer: *These updates are provided by the General Board of Pension and Health Benefits as a general informational and educational service to its plan sponsors, the annual conferences, plan participants and friends across The United Methodist Church. The updates should not be construed as, and do not constitute, legal advice nor accounting, tax, or other professional advice or services on any specific matter; nor do these messages create an attorney-client relationship. Readers should consult with their counsel or other professional advisor before acting on any information contained in these documents. The General Board expressly disclaims all liability in respect to actions taken or not taken based on the contents of this update.*