

**TESTIMONY OF PHYLLIS C. BORZI
ASSISTANT SECRETARY OF LABOR
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
BEFORE THE
SENATE COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP
UNITED STATES SENATE**

November 20, 2013

Introductory Remarks

Good morning Chair Landrieu, Ranking Member Risch, and Members of the Committee. Thank you for inviting me to discuss the Department of Labor's (Department) activities related to communicating with small businesses about the opportunities and requirements that exist under the Affordable Care Act. The Department's Employee Benefits Security Administration (EBSA) is charged with the administration of the Employee Retirement Income Security Act of 1974 (ERISA), and is committed to protecting the security of health, retirement, and other employee benefits for America's workers, retirees and their families.

The Affordable Care Act will extend health care coverage to millions of Americans. Many provisions of the Affordable Care Act are designed to expand access to affordable healthcare coverage. These include provisions for coverage to be offered through the Health Insurance Marketplace (Marketplace), premium tax credits to assist individuals and small businesses in purchasing coverage, and employer notices to employees of coverage options available through the Marketplace. For small businesses, the Small Business Health Options Program (SHOP) offers "one-stop shopping" to enable small businesses to find and compare private health insurance options.

The Department, Treasury, and HHS work together to administer and provide compliance assistance with respect to many aspects of the Affordable Care Act, particularly the consumer protection provisions. The Departments share responsibility for issuing regulations and other guidance. Other provisions such as the Marketplace and SHOP rules are administered by HHS and the States, while the employer-shared responsibility and tax credit provisions are administered by IRS and Treasury. We also work closely on outreach with HHS, Treasury, the Small Business Administration (SBA), and others to ensure that small business owners know the facts about the Affordable Care Act.

EBSA works to provide understandable and easily accessible communications about the law's requirements. Our approach to date has been to work together with plans, issuers, consumers, providers, States, and other stakeholders to help members of the regulated community come into compliance with the law and to help individuals and small businesses understand and benefit from the law, as intended.

Expanding Access to Affordable and Comprehensive Health Care Coverage

New Notice Requirement

The new Marketplaces will help individuals and small businesses evaluate private health insurance options for coverage effective January 1, 2014. The Affordable Care Act creates a new Fair Labor Standards Act (FLSA) section 18B requiring employers to provide a notice to employees of coverage options available through the Marketplace and, if applicable, information about their employer-offered coverage. Employers covered by the FLSA¹ are required to provide this key notice of coverage options to each employee, regardless of plan enrollment status or part-time or full-time status.

To assist employers with their notice obligations, on May 8, 2013, the Department issued Technical Release 2013-02 providing temporary guidance on FLSA section 18B, as well as model notices. These model notices serve as a compliance assistance tool for employers, but they are not compelled to use these notices. One model notice is for employers who offer a health plan to some or all employees, and a second model notice is for employers who do not offer a health plan. The model notices are also available in Spanish. The Department developed the model notices after engaging in outreach and receiving feedback from employers. The Technical Release also outlines the statutory content requirements so that employers may tailor the models to their own situations. Many employers find this information through our website – the Technical Release was the second most visited page on our website last fiscal year. The model notices and related FAQs are popular as well.

The model notices respond to requests from employers to assist them as they communicate with their employees about coverage in the Marketplace and to help answer the many questions employees may have. In particular, the model notice for employers who offer a health plan contains more information than the minimum statutory content requirements and assists employees by providing them with information about their coverage options inside and outside the Marketplace. This model notice will create efficiencies for employers because it matches the Marketplace Employer Coverage Tool designed by HHS (which is part of the single-streamlined application for Marketplace coverage). Accordingly, employers who use the model notice will not face additional requests for information about coverage with respect to an employee. The model notice is posted on EBSA's website in multiple formats for easier use by employers.

Employers that prefer to organize their notices differently, or to provide more or less information are free to do so, as long as the notices still meet the minimum statutory content requirements. To comply with the statute, the notice must inform employees how to contact the Marketplace, and describe the services it provides. It must inform employees that, depending on their income and the coverage offered by their employer,

¹ The Department's Wage and Hour Division provides guidance relating to the applicability of the FLSA in general, including an Internet compliance assistance tool to determine applicability of the FLSA.

they may be eligible for a premium tax credit if they purchase coverage through the Marketplace. The notice must include a statement informing employees that, if an employee purchases a qualified health plan through the Marketplace, he or she may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

Covered employers were required to provide the notice to all current employees no later than October 1, 2013.² For all new employees hired on or after that date, employers must provide the notice within 14 days of the employee's start date. Employers have several options for delivering the notice, including hand delivery, first-class mail, or electronic delivery. As explained in guidance released September 11, 2013, there is no fine or penalty under the statute for failing to provide the notice.

Tax Credits and Market Reforms

Many small businesses that offer coverage to lower-wage workers may receive a tax credit. In addition, as explained in the FLSA notice requirements, individuals may qualify for a premium tax credit depending on household income if they purchase health insurance through the new Marketplace, but only if their employer does not offer coverage, or offers coverage that does not meet certain standards. Treasury administers these provisions.

The insurance market reforms under the Affordable Care Act improve health coverage for small businesses and individuals by providing important protections. These reforms include extending dependent coverage up to age 26; prohibiting preexisting condition exclusions for children under age 19 and for all individuals beginning in 2014; and prohibiting lifetime dollar limits on essential health benefits. Most individuals are now able to receive coverage without cost sharing for recommended preventive services, such as blood pressure, diabetes and cholesterol tests, regular well-baby and well-child visits, routine vaccinations and many cancer screenings. The Departments have worked together to release guidance and inform the public about these important reforms.

Outreach and Compliance Assistance

Outreach and compliance assistance are high priorities for the Departments and, as previously mentioned, our approach emphasizes helping employers, especially small employers, to understand and comply with requirements of the law. We partner with the Departments and SBA, using a multi-channel approach that includes coordinated online

² The statute provided that the FLSA notice requirements take effect on March 1, 2013, in accordance with Department of Labor guidance. The Department issued guidance on January 24, 2013, explaining that the notice requirement would not take effect March 1 so that the notice could be coordinated with HHS's educational efforts and Treasury guidance. Delaying the effective date to October 1, 2013, provided employers sufficient time to comply with the notice requirements while ensuring that employees received the information at a meaningful time coordinated with the open enrollment period for the Marketplace.

information linked to the other agencies, webinar trainings, and consumer and participant assistance.

We work with the SBA in a number of ways to reach small business owners. Our staff assisted in presentation materials for educational webinars last spring, which the SBA has subsequently promoted to their networks of small business owners. Additionally, we work to co-promote other Affordable Care Act educational opportunities through e-blasts, social media postings, and BusinessUSA, the Federal one-stop shop business information. These coordinated efforts are very effective in letting the small business community know about our outreach events and assistance available from EBSA.

Most recently, EBSA hosted a two-day compliance assistance webcast with representatives from Treasury and HHS on September 17 and 18 titled “The Affordable Care Act Compliance Assistance Webcast.” This webcast, available online, provides employers with practical information, helpful tips, and clarification on the new law. Topics included information on the FLSA notice, implementation of key market reforms, and the new Marketplace and SHOP.

EBSA engages in extensive outreach and compliance assistance activities throughout the year to help with the implementation of the Affordable Care Act and the Marketplace. The following are examples of activities and materials:

- Health Benefits Education Campaign. Through this Campaign, EBSA develops and distributes educational materials and tools and conducts outreach on Federal health care benefits laws for employees, employers, plan administrators, issuers, third party administrators, and state insurance department staff. The Campaign sponsors compliance assistance seminars in coordination with the State Insurance Commissioners across the country to help increase awareness and understanding of the Federal health care benefits laws. The two-day seminars, focusing on small business owners, include presentations from Treasury and HHS (or the State) on the exchanges and the tax credits.
- Panel discussions and other speeches related to Affordable Care Act guidance. EBSA participates in panel discussions across the country providing technical assistance to employers, health plans, issuers, third party administrators, lawyers, and other stakeholders in the regulated community.

Information on EBSA’s upcoming events is available on our website. We also have a dedicated Affordable Care Act web page³ and a consumer page⁴ that together provide a comprehensive compilation of the most up-to-date guidance, tools and resources on the market reforms and the Marketplace, including links to related resources from other agencies and organizations. The dedicated web page has had over 1.5 million visitors and last fiscal year was the most-visited page on EBSA’s website.

³ <http://www.dol.gov/ebsa/healthreform/>

⁴ <http://www.dol.gov/ebsa/healthreform/consumer.html>

In addition to outreach activities, EBSA receives inquiries directly from employers, consumers, providers, insurers, and health benefits attorneys and consultants regarding employer group health plans. Many of the inquiries that EBSA receives are through its website and/or toll free hotline (1-866-444-EBSA) where EBSA's Benefits Advisors are the first point of contact. Other calls received by EBSA are handled directly by EBSA staff who develop the regulations.

EBSA's Benefits Advisors field inquiries related to individuals' health benefits and plan compliance with the requirements of the rules. When EBSA receives a health benefits or compliance inquiry, trained Benefits Advisors effectively use fact-finding techniques and their knowledge of the law to determine the nature of the inquiry and provide a response and/or informal dispute resolution if needed. The Departments have coordinated to assure that inquirers get the most complete response. With training between the Departments, the Benefits Advisors answer many questions and assess if it is necessary to refer inquirers to Treasury or HHS. EBSA's Benefits Advisors have responded to almost 47,000 inquiries related to the Affordable Care Act, including over 9,400 requests for compliance assistance.

Enforcement

The Department and Treasury generally enforce the Affordable Care Act requirements for private, employment-based group health plans. HHS and the States generally have primary enforcement responsibility with respect to health insurance issuers. For consumers with questions or complaints, regardless of which Federal or State Agency they call, the Agencies work together, as appropriate, to ensure violations are addressed.

The Departments receive inquiries and complaints from participants, beneficiaries, providers, and other stakeholders and work with these individuals and the regulated community to correct any violations. Under the Affordable Care Act, there are various provisions that apply to group health plans and health insurance issuers and various protections and benefits for consumers. The Departments are working together with employers, issuers, States, providers and other stakeholders to help them come into compliance with the law.

Our approach is to emphasize assisting (rather than imposing penalties on) plans, issuers and others that are working diligently and in good faith to understand and comply with the new law.

Conclusion

Thank you for the opportunity to testify at this important hearing. The Departments are implementing the Affordable Care Act to work toward better and more affordable health care coverage. We recognize the challenges facing small businesses and are available for outreach and to provide assistance to help them understand and benefit from the law.