

## EMPLOYEE BENEFITS

# Electronic Distribution of Employee Benefit Notices and Disclosures

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A growing number of plan administrators (i.e., employers sponsoring employee benefit plans) are interested in electronically providing plan-related documents/disclosures to plan participants. When assessing whether electronic distribution should be used, plan administrators should consider the nature of the disclosure document and the category of employee(s) receiving the disclosure material. The information below is intended to outline the various electronic disclosure rules as they apply to employee benefit and group health plan-related material. Plan administrators are encouraged to consult with their employee benefits legal counsel for specific guidance regarding their document distribution methods and compliance with the applicable disclosure requirements.

*Note: A chart outlining various employee benefit notices and applicable electronic disclosure requirements can be found at the end of this overview.*

## ERISA Documents

ERISA requires plan administrators to provide various documentation to individuals either automatically or upon request. To help remain compliant in fulfilling their disclosure obligations, the Department of Labor (DOL) allows plan administrators to deliver certain ERISA welfare plan notices and disclosures (e.g., SPDs, SMMs, SARs, etc.) electronically (e.g., via email or by posting the documents on a website) if the delivery satisfies certain requirements under an electronic disclosure safe harbor. Plan administrators should note that even if a plan administrator meets the requirements set forth under the ERISA electronic disclosure safe harbor, the plan administrator must also comply with other ERISA document requirements related to the timing, content, style, etc. of the documents.



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## Safe Harbor – General Disclosure Rules

To fulfill their disclosure obligations under ERISA, whether electronically or otherwise, plan administrators must do the following:

- Use measures reasonably calculated to determine actual receipt of the material by plan participants, beneficiaries and other specified individuals; and
- See that the method(s) used for delivery is likely to result in full distribution.

Specifically, plan administrators electronically furnishing documents must take appropriate and necessary measures reasonably calculated so that the system for furnishing documents:

“(A) Results in actual receipt of transmitted information (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information); and

(B) Protects the confidentiality of personal information relating to the individual’s accounts and benefits (e.g., incorporating into the system measures designed to preclude unauthorized receipt of or access to such information by individuals other than the individual for whom the information is intended).”<sup>1</sup>

The preamble to the DOL regulations provides the following examples of “appropriate and necessary measures to ensure the website system for furnishing documents results in actual receipt.”<sup>2</sup>

- The website homepage should contain a prominent link to the website sections that contain information about the plan.
- The website should include directions on how to obtain a replacement for a lost or forgotten password to the extent one is needed.
- Disclosure documents should remain on the website for a reasonable period of time after participants and beneficiaries are notified of their availability.

In addition, plan administrators using electronic delivery for any recipient must ensure that—

“(ii) The electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the particular document;

(iii) Notice is provided to each participant, beneficiary or other individual, in electronic or non-electronic form, at the time a document is furnished electronically, that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted (e.g., the attached document describes changes in the benefits provided by your plan) and of the right to request and obtain a paper version of such document; and

(iv) Upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents.”<sup>3</sup>

With respect to the requirement included in paragraph (iii), that notice must be provided each time the document is required to be distributed.

The DOL regulations permit plan administrators to include the required notice with other plan materials so long as care is taken for the notice to be sufficiently conspicuous to alert participants and beneficiaries to electronically furnished documents.

Provided these general disclosure requirements are satisfied, plan administrators will need to determine whether the recipient has work-related computer access. For employees without work-related computer access, plan administrators may need to distribute any required disclosure to those employees through a different prescribed method under the rules that secures actual receipt.

<sup>1</sup> 29 CFR § 2520.104b-1(c)

<sup>2</sup> 29 CFR § 2520.104b-1(c)

<sup>3</sup> 29 CFR § 2520.104b-1(c)(1)

## Safe Harbor – Rules for Participants with Work-Related Computer Access

If the above-described general disclosure requirements are satisfied, plan administrators may electronically distribute ERISA documents to participants with work-related computer access. Under the safe harbor, a participant is considered to have work-related computer access if they can effectively access electronic documents at any location where the participant is reasonably expected to perform their job duties and access to the employer/plan sponsor's electronic information system is an integral part of those duties.

Whether access to the employer's computer system is an integral part of a participant's employment duties will depend on the facts and circumstances. For example, participants who are required to clock in at a computer kiosk but have no further use of a computer for their employment duties may not be considered as having access to a computer as part of their daily job duties and therefore do not satisfy this standard.<sup>4</sup>

<sup>4</sup> The DOL notes that "making electronic information systems available in common areas of the workplace (e.g., computer kiosks) is not, in the Department's view, a permissible means by which to deliver documents required to be furnished to participants." Preamble to DOL Electronic Disclosure Regulation, 67 Fed. Reg. 17264, 17265 (Apr. 9, 2002)

## Safe Harbor – Rules for Participants Without Work-Related Computer Access

If the general disclosure requirements are satisfied, plan administrators may electronically distribute ERISA documents to participants without work-related computer access so long as the participant **affirmatively consents** (electronically or otherwise) to receiving the electronic document and other requirements are satisfied. New consent must be obtained whenever the method to receive the disclosures is changed.

The safe harbor as it applies to individuals without work-related computer access is satisfied when the disclosure is sent "through the Internet or other electronic communication system" only if the participant has affirmatively consented "in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used to provide the information that is the subject of the consent, and has provided an address for the receipt of electronically furnished documents."<sup>5</sup>

The plan administrator must include within the consent that is furnished to the individual (which can be provided to the recipient either in electronic or non-electronic form) clear and conspicuous statements that indicate the following:

- The types of documents to which the consent would apply.
- That consent can be withdrawn at any time without charge.
- The procedures for withdrawing consent and updating the participant's, beneficiary's or other individual's address for receipt of electronically furnished documents or other information.
- 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.
- Any hardware and software requirements for accessing and retaining the documents.

Plan administrators must keep in mind that this information is still required whenever the employer is obtaining renewed consent.

<sup>5</sup> DOL Reg. §2520.104b-1(c)(2)(ii)(B)

<sup>6</sup> DOL Reg. §2520.104b-1(c)(2)(ii)



## COBRA Notices

If the DOL electronic delivery safe harbor discussed above is satisfied, plan administrators may use electronic distribution to satisfy their notice obligations under COBRA.<sup>7</sup> However, plan administrators will need to consult with legal counsel to determine whether the use of the DOL safe harbor is sufficient to distribute COBRA notices to certain individuals who are not active employees.

- **Initial Notice** – When coverage commences, the COBRA initial notice must be provided to both the covered employee and covered spouse. Because covered spouses generally do not have work-related access to the employer’s computer system, affirmative consent must be obtained from covered spouses before using electronic distribution. While the COBRA regulations authorize a single notice to be used when the covered employee and spouse reside at the same address, it is unclear whether this would apply to a shared email address. If the safe harbor is met with respect to both the covered employee and covered spouse, it’s possible a single notice could be furnished to a shared home email address. However, given the administrative burden of obtaining affirmative consent from covered spouses, providing the COBRA initial notice via first-class mail is generally considered best practice.
- **Election Notice** – For the same reasons addressed above concerning the COBRA initial notice, it may be difficult for plan administrators to satisfy the ERISA electronic delivery safe harbor when distributing COBRA election notices. The election notice must be furnished to qualified beneficiaries who experience a qualifying event, including former employees, covered spouses, and covered dependents, who typically do not have work-related access to the employer’s computer system. Therefore, to furnish election notices via electronic delivery to these individuals, the DOL safe harbor’s consent requirements must be satisfied.

<sup>7</sup> Although the DOL safe harbor does not directly apply to governmental plans that are subject to COBRA, HHS relies on the COBRA regulations issued by the DOL and IRS. Accordingly, governmental plans should be able to use the DOL safe harbor with respect to distribution of COBRA notices.

## HIPAA Notices

### Notice of Privacy Practices

Under HIPAA’s privacy rules, covered entities (including group health plans) must provide a Notice of Privacy Practices to individuals whose protected health information (PHI) will be used or maintained by the covered entity (i.e., the group health plan).

If the health plan maintains a website that provides information about the health plan’s benefits, the notice must be prominently posted on the website and available electronically through the website. Note that because an employer acting as the plan sponsor is not a covered entity, an employer is not required to post the notice on the company’s general business website. Instead, the requirement would only apply where the *group health plan* has its own website.

For individuals entitled to receive the notice, the health plan may provide the notice to the individual by email if the individual agrees to have the notice delivered to them electronically and such agreement has not been withdrawn. If, after receiving consent for electronic delivery of the notice, the notice is delivered by the covered entity and it discovers that the email transmission has failed, a paper copy of the notice must be provided to the covered individual.<sup>8</sup> A covered entity can include additional materials in the email, but the notice may not be combined in a single document with a HIPAA authorization.<sup>9</sup> It is also important to note that there is no safe harbor allowing electronic delivery to a covered individual with access to a computer as part of their daily job duties, so consent must be received by the covered entity to deliver the notice electronically to a covered individual.

Group health plans must continue to notify/remind covered individuals of the availability of the Notice of Privacy Practices every three years. Although the Office for Civil Rights (OCR) of the Department of Health and Human Services previously has informally indicated that the reminder might be sent electronically to a covered individual if the individual has consented to electronic delivery of the Notice of Privacy Practices and such agreement has not been withdrawn, a group health plan should seek the guidance of legal counsel before following this approach.<sup>10</sup>

<sup>8</sup> 45 CFR §164.520(c)(3)

<sup>9</sup> 67 Fed. Reg. 53181, 53243 (Aug. 14, 2002)

<sup>10</sup> ABA Joint Committee on Employee Benefits, *Technical Session Between the Department of Health and Human Services and the Joint Committee on Employee Benefits*, Q/A-3 (May 2, 2006)

## Notice of Special Enrollment Rights

Group health plans must furnish employees a Notice of Special Enrollment Rights at or before the time the employee is initially offered the opportunity to enroll in the group health plan. An employer can deliver the Notice of Special Enrollment Rights to employees electronically so long as it has satisfied the ERISA electronic disclosure delivery safe harbor requirements (described earlier) in certain situations. However, because the notice is also required under the Internal Revenue Code (IRC) and Public Health Services Act (PHSA), respectively, which IRS and HHS regulate, it is uncertain whether compliance with the ERISA electronic delivery safe harbor rules would satisfy the notification obligations applicable under the IRS or PHSA.



## Summary of Benefits and Coverage (SBC)

Before enrollment (or re-enrollment) in a group health plan, a plan must provide to all eligible and enrolled participants and beneficiaries an SBC describing the benefits and coverage under the applicable plan or coverage. The DOL, HHS, and Treasury issued guidance that allows health plans to deliver SBCs electronically to eligible/enrolled participants and beneficiaries so long as the health plan satisfies certain requirements under the electronic delivery safe harbors below.

- **In connection with online enrollment** – “SBCs may be provided electronically to participants and beneficiaries in connection with their online enrollment or online renewal of coverage under the plan. SBCs may also be provided electronically to individuals who request an SBC online. In either case, individuals must have the option to receive a paper copy of the SBC upon request.”<sup>11</sup>
- **No online enrollment** – For group health plans subject to ERISA or the IRC, the SBC may be provided electronically to a participant or beneficiary who is covered under the plan if the DOL’s safe harbor requirements addressed above are satisfied. For participants and beneficiaries who are eligible but not enrolled in coverage, the SBC may be provided electronically if (1) the format is readily accessible, (2) the SBC is provided in paper form free of charge upon request, and (3) in a case in which the electronic form is an internet posting, the plan or issuer timely notifies the individual in paper form or email that the documents are available on the internet, provides the internet address, and notifies the individual that the documents are available in paper form upon request.<sup>12</sup>

<sup>11</sup> [FAQs About Affordable Care Act Implementation Part IX, Q/A-1.](#)

<sup>12</sup> [DOL Reg. § 2590.715-2715\(a\)\(4\)\(ii\)\(A\)](#)

## Marketplace Notice

Employers subject to the Fair Labor Standard Act (FLSA) must provide new employees with a notice containing information about health insurance marketplaces and plan options. This Marketplace Notice may be provided electronically to new employees if the ERISA electronic delivery safe harbor requirements are met.<sup>13</sup>

<sup>13</sup> [Technical Release No. 2013-02](#)

## Medicare Part D Creditable (or Non-Creditable) Coverage Notice

Plan sponsors may provide the Medicare Part D creditable or non-creditable prescription drug coverage disclosure to participants electronically if the DOL's electronic disclosure safe harbor requirements are satisfied. CMS guidance notes that the safe harbor requirements "allow the entity sponsoring a group health plan to provide a creditable coverage disclosure notice electronically to plan participants who have the ability to access electronic documents at their regular place of work if they have access to the plan sponsor's electronic information system on a daily basis as part of their work duties."<sup>14</sup> CMS guidance further indicates that "if this electronic method of disclosure is chosen, the plan sponsor must inform the plan participant that the participant is responsible for providing a copy of the electronic disclosure to their Medicare-eligible dependents covered under the group health plan."<sup>15</sup>

CMS guidance also indicates that plans may provide the disclosure to retirees<sup>16</sup> electronically if the Medicare-eligible individual has indicated to the entity that they have adequate access to electronic information. However, before individuals agree to receive their information via electronic means, they must be informed of their right to obtain a paper version, how to withdraw their consent, how to update address information and any hardware or software requirements needed to access and retain the Medicare Part D creditable/non-creditable coverage disclosure.

According to the CMS guidance, "if the individual consents to an electronic transfer of the notice, a valid email address must be provided to the entity and the consent from the individual must be submitted electronically to the entity." The guidance adds that "in addition to having the disclosure notice sent to the individual's email address, the notice (except for personalized notices) must be posted on the entity's website, if applicable, with a link on the entity's home page to the creditable coverage disclosure notice." However, the guidance does not provide additional details on how to satisfy this requirement.

<sup>14</sup> [Disclosure of Creditable Coverage to Medicare Part D Eligible Individuals Guidance](#)

<sup>15</sup> [Disclosure of Creditable Coverage to Medicare Part D Eligible Individuals Guidance](#)

<sup>16</sup> While the CMS notice only refers to retirees, a plan sponsor may want to consult with legal counsel to determine if this alternative basis for using electronic distribution could apply to any participant who does not access to the plan sponsor's electronic information system on a daily basis as part of their work duties.

## IRS Forms 1095-B and 1095-C

Employers may satisfy their obligation to furnish Forms 1095-B/1095-C to individuals by providing the statements electronically if the employer obtains affirmative consent from the individual to receive the statement electronically. To provide a 1095-B or 1095-C to employees electronically, the consent must relate specifically to receiving Form 1095-B/1095-C. Individuals may consent on paper or electronically (e.g., via email). However, if consent is on paper, the individual must confirm the consent electronically. A statement may be furnished electronically by email or by informing the individual how to access the statement on the ALE member's website.<sup>17</sup>

Final IRS regulations permit Applicable Large Employers (ALEs) to use an alternative manner of furnishing Form 1095-C (or Form 1095-B) to non-full-time employees and non-employees enrolled in the employer's self-insured health coverage. The alternative manner of furnishing statements does not apply to ALEs providing Form 1095-C to full-time employees. To take advantage of the alternative manner of furnishing statements, the employer must satisfy the following requirements:

- Prominently post on the employer's website a "clear and conspicuous" notice in plain language that is "reasonably accessible to all individuals" with information about how an individual can request the form and must furnish the form within 30 days after an individual's request is received; and
- Post the notice on the employer's website by the deadline for furnishing statements and keep the notice in the same location on the website until October 15 of the year following the calendar year to which the statement relates.<sup>18</sup>

<sup>17</sup> [2022 Instructions for Forms 1094-C and 1095-C and 2022 Instructions for Forms 1094-B and 1095-B](#)

<sup>18</sup> [2022 Instructions for Forms 1094-C and 1095-C](#)

## Disclosure Notice

## Is electronic disclosure permitted?

SPD, SMM, SAR

Yes, if the ERISA electronic disclosure safe harbor requirements are satisfied.

COBRA Initial Notice

Yes, if the ERISA electronic disclosure safe harbor requirements are satisfied.

COBRA Election Notice

Yes, if the ERISA electronic disclosure safe harbor requirements are satisfied.

HIPAA Notice of Privacy Practices

Yes, if the individual agrees to receive the notice electronically.

HIPAA Notice of Special Enrollment Rights

Yes, for plans subject to ERISA if the DOL electronic disclosure safe harbor requirements are satisfied.

Summary of Benefits and Coverage (SBC)

Yes, but specific requirements will depend on whether the SBC is provided in connection with online enrollment.

Exchange (Marketplace) Notice

Yes, if the ERISA electronic disclosure safe harbor requirements are satisfied.

Medicare Part D Creditable (or Non-Creditable) Coverage

Yes, if the ERISA electronic disclosure safe harbor requirements are satisfied.

Forms 1095-B or 1095-C

Yes, if the employer obtains affirmative consent from the individual to receive the Form electronically.





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