12-6-2012

Electronic Disclosure of ERISA Plan Communications

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Quick Summary of Electronic Disclosure Rules for ERISA Plan Communications

WHAT	Employers who sponsor ERISA benefit plans can distribute ERISA-required documents and communications electronically to plan participants. See specific rule below for electronic distribution of the Summary of Benefits and Coverage (SBC) required by the Affordable Care Act.
WHO	-For participants who have work-related computer access to the employer's electronic information system as an integral part of their duties: the employer can distribute documents electronically without first obtaining the participant's written consent. -For participants who do not have work-related computer access to the employer's electronic information system as an integral part of their duties: the employer must distribute documents in paper format until it obtains such participant's prior written consent to receive them electronically, plus additional requirements (see below).
WHEN	DOL "safe harbor" for electronic notice/disclosure became effective for plan years beginning on or after October 9, 2002 (January 1, 2003 for calendar-year plan years).

Overview of ERISA Electronic Disclosure/Notice Rules

ERISA plan administrators may distribute ERISA-required communications *from* the plan to participants and beneficiaries in either paper or electronic format. The Department of Labor (DOL) "safe harbor" rule for electronic distribution provides that if certain requirements are met, employers can send such communications to employees who have work-related computer access to the employer's electronic information system, even if the employees have not given their prior consent to receive documents electronically. However, affirmative prior consent *is required* from employees with who do not have work-related computer access and from non-employees (such as COBRA qualified beneficiaries). This Leavitt White Paper summarizes the electronic disclosure requirements.

Types of Documents that can be Sent Electronically

The DOL's electronic disclosure rules apply to all types of ERISA-required communications *from* the plan, including open enrollment materials, Summary Plan Descriptions (SPDs), Summaries of Material Modifications (SMMs), Summary Annual Reports (SARs), QMCSO notices, COBRA notices, HIPAA certificates of creditable coverage, and also 401(k) plan notices such as "blackout period" notices, 404(c) notices, and information on participant loans. The new Summary of Benefits and Coverage (SBC) under the Affordable Care Act may be distributed electronically in accordance with the DOL safe harbor rule. Additionally, the DOL expanded electronic distribution of SBCs to individuals without work-related access by providing a second safe harbor. This is detailed below in the section on Electronic Distribution of SBCs.

Types of Electronic Media

The DOL regulations list the following examples of types of electronic media plan sponsors can use to deliver ERISA plan communications: e-mail, attachment to e-mail, posting on the plan sponsor's website or Intranet, removable media such as a flash drive, CD-ROM, DVD or disk. The regulations do not limit the list to *only* these media types, but list these as examples.

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General Rule for Electronic Distribution

There are two categories of recipients: those with work-related computer access to the employer's intranet, and those without work-related access. The specific requirements detailed below in this article must be met, but the general rule is that:

- For employees with work-related computer access: an employer may distribute documents and notices electronically without obtaining employee consent.
- For individuals without work-related computer access: an employer must provide paper copies of documents and notices, unless the employee affirmatively consents to electronic distribution beforehand and provides an electronic address, and the employer provides the information specified below before the individual's consent is obtained.

Core Requirements

The following core requirements must be met when providing documents and notices electronically, to either category of recipient:

- The plan administrator must use appropriate and necessary means to ensure that the electronic distribution method results in actual receipt of the information.
- The electronically-furnished documents must meet all requirements that are otherwise applicable (such as requirements on format and timing).
- The plan administrator must notify each recipient, at the time of electronically furnishing the information, of the significance of the document and of the recipient's right to request a paper version of the document, and whether an additional charge will apply. (See sample language at the end of this article.)

Participants With Work-related Computer Access

An employer may distribute documents and notices electronically without obtaining employee consent if the above three core requirements are met *and*:

- The employees can access documents at any location where they are reasonably expected to perform employment duties, and
- The employees' access to the electronic information system is an integral part of their employment duties. (It is *not* required that employees be able to print out the documents but only to access them.)

Individuals Without Work-related Computer Access

For individuals who do not have work-related computer access and who do not affirmatively consent to electronic disclosure, the plan sponsor must provide paper copies of the documents or notices and generally cannot charge an additional amount to do so.

Specifically, an employer may distribute documents and notices electronically to individuals who do *not* have work-related access to the employer's computer system only if all three of the following requirements are met:

- The above three core requirements are met
- The individuals affirmatively consent to electronic disclosure and provide an address to which the documents can be delivered electronically
    - If communications will be *sent* via the Internet (rather than just providing a link that recipients can click on to obtain a copy), an employer can ensure this requirement is met if it requires individuals to affirmatively consent via email *from the email address* at which they agree to receive the information.
- *Before* consent is obtained the plan sponsor must provide a statement that includes the following specific information:
    - the types of documents the plan sponsor will provide electronically;
    - that the individual can change his/her mind and subsequently withdraw consent;
    - the procedures for withdrawing consent and updating information (e.g., changing the address at which electronic disclosure will be received);

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- that the individual has the right to request a paper version and whether a charge applies (no charge applies in the case of SPDs); and
- what electronic delivery system will be used and what hardware and software will be needed to use it. (If these requirements change, the employer must send a revised statement with the new information and must obtain a new consent from the individual.)

Electronic Distribution of SBCs

As noted previously, electronic distribution of SBCs generally follows the DOL safe harbors noted above, *except* that the DOL has provided an additional safe harbor for SBCs that liberalizes the circumstances under which the SBC may be provided electronically. (This is in ACA FAQs Part IX, May 11, 2012, accessible at: http://www.dol.gov/ebsa/faqs/faq-aca9.html). Under this additional safe harbor, an employer can distribute the SBC without the prior consent of an individual who does not have work-related computer access when:

- the individual enrolls online or renews their coverage online, or
- the individual requests an SBC online.

In either case, the individual must have the option to receive a paper copy upon request.

Sample Language for Notice of Electronic Delivery of Open Enrollment Materials

An employer who delivers the Open Enrollment materials electronically by sending an email with a link to the Open Enrollment materials on the employer's or third party's website might want to say something like the following:

> Subject Line: Important! Link to the 2013 Open Enrollment Materials for your Benefit Plan
>
> The following link is to the 2013 Open Enrollment Materials for your Health Benefit Plan from Company X. These important materials explain your benefit options for the upcoming plan year, the costs of each benefit for different tiers of coverage, and allow you to enroll in your benefits for the upcoming plan year. Please review this information carefully with your family members who are also eligible for coverage under this Health Plan, and be sure to take any necessary enrollment action **no later than [DATE]!** If you want a paper version of the enrollment materials, please request one from [insert contact information]. There is no additional charge for it. If you have any questions please contact [insert contact information].

Sample Language for Notice of Electronic Delivery of SPD

An employer who delivers the SPD electronically by sending an email with a link to the SPD on the employer website might want to say something like the following:

> Subject Line: Important! Link to the Summary Plan Description (SPD) for your Benefit Plan
>
> The following link is to a copy of the updated (2013) Summary Plan Description (SPD) for your Health Benefit Plan from Company X. This important document explains the terms and conditions of your Health Plan, including eligibility, coverage amounts and exclusions. Please share this with your family members who are also covered under this Health Plan. If you want a paper version of the SPD, please request one from [insert contact information]. There is no additional charge for it.

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