

Legislative Brief

Electronic Distribution of ERISA Disclosures



Department of Labor (DOL) regulations contain a safe harbor under which ERISA plans may use electronic means to distribute certain documents and other required ERISA information. Thus, summary plan descriptions (SPDs), summaries of material modifications (SMMs), summary annual reports (SARs), COBRA notices, qualified domestic relations orders (QDROs), and qualified medical child support orders (QMCSOs), for example, can all be distributed electronically if certain conditions are met. This issue of the Benefit Management Solutions Inc. Legislative Brief summarizes the regulations permitting electronic distribution of disclosures required under Title I of ERISA.

What type of disclosures can a plan administrator send electronically?

The regulations allow plan administrators to electronically send disclosures required under Title I of ERISA. Such disclosures include:

- SPDs, SMMs, and SARs,
- Individual benefit statements,
- COBRA notifications,
- QDRO notifications,
- QMCSO notices,
- Information regarding participant loans under ERISA 401(b)(1), and
- HIPAA certificates of creditable coverage.¹

May plan administrators electronically distribute ERISA disclosures to all recipients?

The regulations set forth guidelines for providing disclosures to a) employees with work-related computer access, and b) other plan participants and beneficiaries who consent to receive disclosures electronically.

Employees With Work-Related Computer Access

ERISA disclosures may be delivered electronically to employees that

- have the ability to effectively access documents furnished in electronic form at any location where the employee is reasonably expected to perform his duties, *and*
- are expected to have access to the employer's electronic information system as an integral part of those duties.²

Beneficiaries and Other Plan Participants Who Consent to Receive Disclosures Electronically

A plan administrator must obtain written consent prior to electronically delivering ERISA disclosures to beneficiaries and other plan participants who do not have work-related access to a computer. The consent may be received in either electronic or paper form. Prior to consenting, an individual must be given a clear and conspicuous statement that explains:

- The types of documents to which the consent will apply;
- That consent can be withdrawn at any time without charge;
- The procedures for withdrawing consent and for updating the address used for receipt of electronically furnished documents;

¹ The electronic distribution standards do not alter any requirements related to what individuals are entitled to a disclosure, the content of the disclosure, or the timing of the disclosure.

² Merely providing employees access to a computer in a common area (e.g., computer kiosks) is not a permissible means by which to deliver documents required to be furnished to plan participants.

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- 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; and
- Hardware or software needed to access and retain the documents delivered electronically.

Where the electronic distribution is made through the Internet, the individual must affirmatively consent in a manner that reasonably demonstrates his or her ability to access information in the electronic form that would be used.

If the plan administrator changes its hardware or software requirements, it must provide a new notice and obtain a new consent.

What general disclosure requirements apply to all electronic disclosures?

Plan administrators are required to use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. The regulations provide some guidance on what measures are reasonably calculated to ensure actual receipt when electronic delivery is used.

- **Notices.** A notice must be sent either electronically or in paper form to each plan participant or beneficiary at the time the document is provided electronically. The notice must a) indicate the significance of the document when it is not otherwise reasonably evident as transmitted, and b) explain the participant's right to request a paper copy.
- **Confirmation of Receipt.** The plan administrator must make use of electronic mail features such as return-receipt or notice that the email was not delivered. The plan must also conduct periodic reviews to confirm receipt of the transmitted information.
- **Confidentiality.** When personal information pertaining to an individual's benefits or accounts is transmitted electronically, steps must be taken to protect the confidentiality of the information.
- **Style, Format and Content Requirements.** Documents delivered electronically must continue to be furnished in a manner consistent with the applicable style, format and content requirements contained within ERISA. For example, summary plan descriptions provided electronically must contain all the disclosures otherwise required by ERISA's disclosure requirements. The DOL's comments within the preamble to the regulations indicate that the appearance of paper and electronic versions need not be identical.
- **Paper Copy.** Plan participants and beneficiaries are entitled to receive a paper copy of any ERISA disclosure provided electronically. Where a plan participant or beneficiary requests a paper copy of a document originally provided electronically, the general rules governing whether a plan administrator may or may not charge for paper copies apply.

Can benefit and claim determinations be provided electronically?

Yes. The regulations allow that benefit and claims determinations related to a specific individual may be communicated electronically to that individual. However, where the information contained within the communication is confidential in nature or protected health information subject to the HIPAA Privacy Rules, the plan administrator must take appropriate and necessary steps to ensure that the information remains confidential. The regulations do not provide any guidance on what measures must be used to protect the confidentiality of this information.

What forms of electronic disclosure are permissible?

The regulations do not require the use of any specific form of electronic media. Examples of permissible forms of electronic disclosure include delivery of documents by email, attachment to an email, posting documents on a company Web site, or on CD-ROM or DVD.

May a plan administrator electronically deliver ERISA notices by placing the information on a company Web site?

Under the guidelines contained within the regulations, merely placing an SPD on a company Web site available to employees will not **by itself** satisfy ERISA's disclosure requirements. The plan administrator must also send a notice, either electronically or in paper form, that notifies the employee that the SPD is available on the Web site. A plan administrator that intends to distribute SPDs, SMMs, and SARs electronically might do the following:

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- Post SPDs, SMMs, and SARs on a company Web site available to all employees.
- Obtain consent to electronically deliver SPDs, SMMs, and SARs from employees and COBRA participants that do not have regular work-related computer access. For example, employees working for a manufacturer in the plant may agree to access the Web site from his or her home computer.
- Send an email notice to *all* employees that have work-related computer access or that have provided consent *each* time an SPD, SMM, or SAR is posted on the Web site. Use email features such as return receipt and notice of non-delivery.
- Continue to provide in paper form copies of SPDs, SMMs, and SARs to employees that do not have regular work-related computer access and that have not provided consent.
- Continue to provide in paper form copies of SPDs, SMMs, and SARs upon request free of charge.

Note: The plan administrator is generally not required to distribute SPDs, SMMs, or SARs to each beneficiary under the plan. Therefore, the plan administrator is not required to obtain consent from each beneficiary under the plan (e.g., spouses, dependents).

May a plan administrator electronically deliver COBRA notices by placing the information on a company Web site or sending them via email?

Yes, the rules allow plan administrators to provide COBRA notices electronically. However, because COBRA notices must be provided via first-class mail to the home address where a spouse or dependent is also covered under the plan, the plan administrator must obtain consent from the spouse or dependent before delivering COBRA notices electronically. Therefore, providing COBRA notices electronically may not be as practical as electronically delivering SPDs, SMMs, or SARs.

Please contact your Benefit Management Solutions Inc. representative with any questions.

RHK 10/02; JMS 11/08

Important Information Regarding Your Benefits

Dear Plan Participant:

As a plan participant, you are entitled to a comprehensive description of your rights and obligations under the [group health plan - *list all that apply*]. We've recently posted a copy of the summary plan description (SPD) to our Web site at [www.myresourcesite.com]. In order to ensure that you fully understand the benefits available to you and your obligations as a plan participant, it is imperative that you familiarize yourself with the information contained within the SPD.

If you would like to receive a paper copy of the SPD, you may email [hr@company.com] or call [444-444-4444] and one will be provided to you free of charge.

[Company Group Health Plan]

[Date]

Sample Consent for Electronic Delivery to Beneficiaries and Other Plan Participants without Work-Related Computer Access

Consent to Receive Electronic Notices

Name		Social Security #
<input type="checkbox"/> Health <input type="checkbox"/> Dental <input type="checkbox"/> Vision <input type="checkbox"/> Other _____		Email Address
Employee Address		
City	State	Zip

I understand that:

- The following documents and/or notices may be provided to me electronically:
 - Summary Plan Descriptions
 - Summaries of Material Modifications
 - Summary Annual Reports
 - COBRA Notices
- I may provide notice of a revised email address or revoke my consent at any time without charge by sending an email to [hr@company.com] or calling [444-444-4444].
- I am entitled to request and obtain a paper copy of any electronically furnished document free of charge by contacting [hr@company.com] or calling [444-444-4444].
- In order to access information provided electronically, I must have
 - A computer with Internet access,
 - An email account that allows me to send and receive emails,
 - Microsoft Word 2000 (or higher) or Adobe Acrobat Reader 6.0 (or higher).

I hereby agree to electronic delivery of notices provided to me.

Signature

Date

Please return to:
Attn: HR, ABC Company
City, State ZIP