

COMPLIANCE OVERVIEW

Provided by Higginbotham

Health Plan Notices – Rules for Electronic Delivery

Employers are increasingly using electronic media in connection with their employee benefit plans, including their group health plans. In general, federal law allows employers to provide most health plan notices electronically, provided they comply with certain rules regarding electronic delivery.

Department of Labor (DOL) regulations contain a safe harbor under which employers may use electronic means to distribute certain documents required under the Employee Retirement Income Security Act of 1974 (ERISA), such as summary plan descriptions (SPDs), summaries of material modifications (SMMs) and summary annual reports (SARs). Certain other health plan notices, such as the annual Women’s Health and Cancer Rights Act (WHCRA) notice and Medicare Part D notice, may also be provided electronically using the DOL’s safe harbor.

Other health plan notices, such as the summary of benefits and coverage (SBC), have their own rules for electronic delivery. This Compliance Overview provides general information regarding electronic disclosure of health plan notices.

LINKS AND RESOURCES

- DOL’s [safe harbor regulations](#) for electronic delivery
- [Final rule](#) on the SBC and Uniform Glossary
- CMS’ [guidance](#) on providing Medicare Part D notices electronically

HIGHLIGHTS

Safe Harbor for Electronic Delivery

The DOL’s safe harbor for electronic delivery applies to:

- ERISA disclosures, such as SPDs, SMMs and SARs
- Annual WHCRA notice
- Annual CHIP notice
- Annual Medicare Part D notice
- HIPAA special enrollment notice
- Exchange notice

Other Rules for Electronic Delivery

Different rules apply to the electronic delivery of these notices:

- SBC
- HIPAA privacy notice



ERISA DISCLOSURES – SAFE HARBOR RULES

ERISA requires employers that sponsor group health plans to provide certain notices and disclosures to plan participants and beneficiaries. These disclosures include the following:

- ✓ SPD;
- ✓ SMM;
- ✓ SAR;
- ✓ Any documents relating to the plan (upon a participant’s written request); and
- ✓ Benefit claims and appeals decisions.

Under ERISA, employers must use **delivery methods reasonably calculated to ensure actual receipt** of this information by plan participants and beneficiaries. Employers may satisfy this delivery method requirement by mailing the notices to employees’ homes, distributing the notices to employees at work or including the notices in a company newsletter or publication.

In 2002, the DOL [established](#) a “safe harbor” for using **electronic media** to satisfy ERISA’s delivery method requirements. This includes delivering documents by email, using a company website to post documents and providing documents on other electronic media, such as magnetic disk or DVD. Employers that comply with the safe harbor’s requirements for electronic disclosures will satisfy ERISA’s delivery method requirement.

Covered Recipients

The DOL’s safe harbor allows employers to distribute ERISA disclosure electronically to: (1) employees with **work-related computer access**; and (2) other plan participants and beneficiaries who **consent** to receive disclosures electronically.

Employees with work-related computer access

An employee has work-related computer access if he or she:

- Has the ability to effectively access documents furnished in electronic form at any location where employees are reasonably expected to perform their duties; and
- Is expected to have access to the employer's electronic information system as an integral part of those duties.

While employees who work remotely may qualify as having work-related computer access, employees whose only access to the employer’s network is through a computer kiosk in a common area will not qualify.

Other plan participants and beneficiaries

An employer 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;
- 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. A sample consent form is provided at the end of this document.

Requirements for Electronic Delivery

In addition to the consent requirement described above for individuals without work-related computer access, the DOL's safe harbor imposes the following requirements on electronic delivery of ERISA disclosures.

Notice

A notice must be sent either electronically or in paper form to plan participants and beneficiaries at the time the document is provided electronically. The notice must:

- ✓ Indicate the significance of the document when it is not otherwise apparent (for example, for an SMM—"the attached document describes changes in your plan benefits"); and
- ✓ Explain the participant's right to request a paper copy.

This notice is required each time an ERISA disclosure is provided electronically. According to the DOL, furnishing a general notice on a periodic basis is not an acceptable way to alert participants about the significance of a document. This notice may be included with other disclosures that are made at the same time, as long as the notice is sufficiently conspicuous to alert participants and beneficiaries to the electronic disclosure. A sample notice is provided at the end of this document.

Actual Receipt

Employers must take steps to ensure that the electronic delivery results in actual receipt. For example, this may include using electronic mail features, such as a return receipt or notice that the email was not delivered, or conducting periodic reviews or surveys 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.

Paper Copy

Plan participants and beneficiaries are entitled to receive a paper copy of any ERISA disclosure provided electronically.

Electronic Delivery – Rules for Posting Documents to Website

The DOL's safe harbor allows employers to provide ERISA-required notices by posting them on a company website, provided the employer complies with all of the requirements for electronic delivery.

This means that the employer must provide a written or electronic notice to plan participants and beneficiaries when the document is posted that describes the document's significance and the right to receive a paper copy. Employers must also take steps to ensure actual receipt of the document.

According to the DOL, these steps may include adding a prominent link to the document on the company's main website, providing directions for retrieving lost passwords and keeping the document posted for a reasonable period of time following the notice to plan participants.

OTHER HEALTH PLAN NOTICES

In addition to ERISA-required disclosures, employers may provide certain other health plan notices electronically. As explained below, while the DOL's safe harbor rules apply to many other types of health plan notices, some notices have their own rules for electronic delivery.

Other Health Plan Notices Subject to the DOL's Safe Harbor Rules

The following health plan notices may also be distributed electronically by following the DOL's safe harbor rules:

- ✓ **Annual CHIP notice** (for health plans that cover residents of states that provide a premium assistance subsidy under a state Medicaid or CHIP plan);

- ✓ Annual WHCRA notice;
- ✓ HIPAA special enrollment notice; and
- ✓ Exchange notice.

In addition, the DOL's safe harbor rules for electronic delivery apply to notices required under the Consolidated Omnibus Budget Reconciliation Act (**COBRA**) and **Medicare Part D**; however, as described below, there are some additional considerations for these notices.

COBRA Notices

Employers must provide COBRA notices to nonemployees in certain situations. For example, the [COBRA General Notice](#) must be provided to covered employees **and spouses** within 90 days of initial plan participation. A single General Notice may be mailed to a covered employee and his or her spouse if they reside at the same address. However, if employers use electronic delivery, they must follow the DOL's rules for obtaining consent prior to using electronic delivery for nonemployees, such as spouses. It is not enough to electronically provide the General Notice to employees with instructions to share it with spouses. Due to this complexity, employers may opt to mail COBRA notices instead of using electronic delivery.

Medicare Part D Notices

According to the Centers for Medicare and Medicaid Services (CMS), group health plan sponsors may deliver the Medicare Part D notices electronically if they follow the DOL's standards for electronic disclosure. In addition, if the notices are provided electronically, the employer must **inform the employees** that they are responsible for providing a copy of the electronic disclosure to their Medicare-eligible dependents covered under the group health plan.

Health Plan Notices Subject to Different Rules for Electronic Delivery

HIPAA Privacy Notice

The [HIPAA Privacy Rules](#) include specific requirements for electronic delivery of a covered entity's notice of privacy practices (or privacy notice). Under these rules, if an employer's group health plan has a website that includes information on the plan's services or benefits, the notice of privacy practices must be posted on the website and it must be electronically available through the website.

In addition, the privacy notice may be electronically distributed via email to participants who have agreed to receive an electronic notice and have not withdrawn their agreement. The health plan must provide a participant with a paper copy of the privacy notice if it discovers that the electronic delivery has failed.

Summary of Benefits and Coverage

The SBC may be provided electronically to participants and beneficiaries in connection with their **online enrollment or online renewal of coverage** under the plan. SBCs also may be provided electronically to

participants and beneficiaries who request an SBC online. In either case, the individual must have the option to receive a paper copy upon request.

If the rules for online enrollment do not apply, there are two additional rules for electronic distribution of the SBC. These rules may apply, for example, if a plan does not have an online enrollment system or if the plan allows paper or telephone enrollment in addition to online enrollment.

- ✓ *Individuals Covered Under the Plan* – The SBC may be delivered electronically to participants and beneficiaries who are already covered under the group health plan if the DOL’s safe harbor for electronic delivery is satisfied.
- ✓ *Eligible Individuals Not Enrolled* – For participants and beneficiaries who are eligible but not enrolled for coverage, the SBC may be provided electronically if:
 - The format is readily accessible;
 - The SBC is provided in paper form, free of charge, upon request; and
 - If the electronic form is an internet posting, the plan timely notifies the individual in paper form (such as a postcard) 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. The DOL and other federal agencies have provided sample language to meet this notification requirement. This sample language is provided below.

SAMPLE CONSENT AND NOTICES

Sample Consent Form for Individuals Without Work-related Computer Access

Consent to Receive Electronic Health Plan Notices

Name		ID #
Email Address:		
Mailing Address:		
City	State	Zip

I consent to electronic delivery of health plan notices and disclosures, as detailed below:

- The following documents and/or notices may be provided to me electronically at the email address provided above:
 - Summary plan descriptions and summaries of material modifications;
 - Medicare Part D notices;
 - CHIP notice and Women’s Health and Cancer Rights Act notice;
 - COBRA notices;
 - Summary of Benefits and Coverage; and
 - Notice of Health Insurance Marketplace Coverage Options.
- I may revoke my consent at any time without charge by sending an email to [hr@company.com] or calling [XXX-XXX-XXXX].
- I understand that if my email address changes, I must contact [hr@company.com] or call [XXX-XXX-XXXX] and provide my updated address.
- 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 [XXX-XXX-XXXX].
- 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; and
 - Microsoft Word or PDF viewer.

Signature

Date

Sample Notice for Providing SPD Electronically

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]. We've recently posted a copy of the summary plan description (SPD) to our website at [www.website.com]. In order to ensure that you fully understand the benefits available to you and your obligations as a plan participant, it is important 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 [XXX-XXX-XXXX] and one will be provided to you free of charge.

[Company Group Health Plan] [Date]

Sample Notice for Providing SBC Electronically (Individuals Not Enrolled)

Availability of Summary Health Information

As an employee, the health benefits available to you represent a significant component of your compensation package. They also provide important protection for you and your family in the case of illness or injury.

Your plan offers a series of health coverage options. Choosing a health coverage option is an important decision. To help you make an informed choice, your plan makes available a Summary of Benefits and Coverage (SBC), which summarizes important information about any health coverage option in a standard format, to help you compare across options.

The SBC is available on the web at www.website.com/SBC. A paper copy is also available, free of charge, by calling 1-XXX-XXX-XXXX (a toll-free number).