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ERISA Electronic Disclosure Rules

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Under the Employee Retirement Income Security Act of 1974 (ERISA), employers (plan administrators) are required to disclose certain plan information through documents such as **summary plan descriptions (SPDs), summary of material modifications (SMMs), summary annual reports (SARs), and other materials**. Printing and mailing these documents to all plan participants can be expensive, so more and more employers are switching to an electronic delivery method. However, there are common mistakes employers make during this process. Outlined below are the rules regarding delivery options and what employers need to know to ensure compliance.

Acceptable Distribution Methods

The regulations issued by the Department of Labor (DOL) contain several delivery methods acceptable for use by employers.

- In-hand delivery to employees at their worksites
- Special insert in company publications (if certain conditions are satisfied)
- First-class mail
- Second- or third-class mail if return and forwarding postage are guaranteed, and address corrections are requested

The DOL regulations also offer a **safe harbor for employers to deliver documents electronically**. The regulations do not include a specific electronic format that must be used. However, they do list some acceptable methods, such as:

- Email
- Company's website
- Intranet site
- Electronic media (e.g., CD-ROM or DVD)

Since the regulations were issued in 2002 and technology has advanced immensely (e.g., benefits administration systems, flash drives, cloud services, etc.), the DOL has indicated it is considering updating the rules. No further guidance has been provided thus far.

Electronic Delivery Guidelines

The **safe harbor** includes specific guidelines that employers must follow. A common mistake employers make is to assume they can distribute the documents electronically to *all* employees. However, it is unlikely that this method is permissible for their entire workforce.

The regulations show two categories of recipients: **(1)** Employees with work-related computer access; and **(2)** Employees without work-related computer access. Only recipients in category 1 are eligible to receive the documents electronically automatically. For recipients in category 2, the employer must first obtain the recipients' written consent.

Category 1: *Employees with Work-Related Computer Access*

Employees with work-related access can receive ERISA-required disclosures without providing written consent to the employer. These employees must be able to access documents electronically at **any location** where they are reasonably expected to perform their job duties, and access to the electronic information system must be an **integral part of their job duties** (e.g., office staff, managers, and supervisors). Simply providing a computer kiosk in a common area at the workplace for employees does not satisfy the safe harbor requirements.

Category 2: *Employees without Work-Related Computer Access*

Employees without work-related computer access (e.g., truck drivers or manufacturing employees working on the plant floor) can also receive ERISA-required disclosures electronically **if they provide written consent to the employer**. This also applies to non-employees such as COBRA-qualified beneficiaries and retirees. The DOL regulations state that the consent must include specific information, including:

- The types of documents that will be provided electronically;
- The employee's right to withdraw consent at any time without a change;
- The procedures for withdrawing consent and updating information, i.e., updating the address for receiving electronic disclosure;
- The right to request a paper version and its cost, if any; and
- The hardware and software requirements needed to access the electronic document.

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The consent must be collected before the employer can use the electronic distribution method for these individuals. Gathering the consent forms initially can be cumbersome, so to simplify the process, **employers can include a copy in their open enrollment materials or during their onboarding process for new hires**.

When delivering the ERISA-required documents, an employer must use methods to ensure actual receipt of the documents. For this reason, employers should use the *return receipt email feature, the undelivered email feature, or conduct periodic reviews or surveys to confirm receipt*.

Notice to Plan Participants

A common mistake employers make is to post the documents to their intranet site or benefits administration system and assume that is where their obligations end. In addition to electronically posting the documents, employers must also alert employees **once the ERISA-required documents are made available**. The alert needs to be in the form of a notice that includes the *significance of the documents, where and how to access them, and the employee's right to receive paper copies at no cost*.

The notice can be provided in open enrollment communications if all employees receive a copy and the documents have already been posted (made available electronically). A new notice must be sent to employees if documents are added later or moved to a different location. Also, if the notice includes any of the employees' personal information, the employer must take reasonable and appropriate steps to safeguard the confidentiality of the data.

Employer Considerations

Employers that are deciding whether to use an electronic delivery method for ERISA-required documents should consider the following:

- What does your employee population look like (how many employees use a computer as an *integral* part of their job duties and who does not)?
- Is the cost savings enough to outweigh the additional administrative burdens?
- Is there an option to outsource the distribution process to a third party? (Note: This does not result in any relief of the employer's compliance liability.)
- Are the insurance carrier or third-party administrator (TPA) documents available electronically?
- Does the system have the capability to protect any employee information included

in the documents?

- Is the delivery method able to identify employees that successfully received the documents?
- How will the ERISA-related documents and materials be delivered to employees not eligible for the safe harbor?

Regardless of the employer's delivery method, they must remember to retain copies of all communications for at least **eight years!**

Available Resource

Final Rules Relating to the Use of Electronic Communication and Recordkeeping Technologies
29 CFR §2520.104 (4/9/02)