

# ELECTRONIC DISTRIBUTION RULES: A GUIDE FOR EMPLOYERS

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## OVERVIEW

Employers that sponsor group health plans have compliance obligations regarding the distribution of various materials to prospective and actual plan participants. This publication discusses distribution rules for notices and disclosures required by group health plans. It includes a **Sample Employee Communication** (Appendix A); and a **Sample Employee Consent to Receive Plan Disclosures Electronically** (Appendix B), as may be required under certain circumstances explained further below.

Employers should recognize that compliance with the DOL's electronic distribution rules also necessitates compliance with the timing of the distribution of required notices. Importantly, notices should be provided during any required time frame to ensure that the provision of the notice satisfies the regulatory requirement. Notices provided at times other than when required may not satisfy the regulatory requirement even if they are provided according to the DOL's electronic distribution rules. For details regarding when specific group health plan regulatory compliance notices must be distributed, including whether they can be distributed electronically, see PPI publications, **Required Group Health Plan Notices Overview** and **Required Group Health Plan Notices Chart**, address the notice requirements in detail.

## DISTRIBUTION RULES

The Department of Labor (DOL) disclosure rules require that the plan sponsor (i.e., the entity responsible for managing the plan; generally, the employer) "shall use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals." Depending on the type of notice or disclosure, delivery methods can include hand delivery, mail delivery and electronic delivery. Certain restrictions may apply, as discussed in greater detail below.

### Hand Delivery

DOL rules permit hand delivery of notices. Although the DOL rules do not precisely describe what constitutes hand delivery, they clarify that merely placing copies of a notice or disclosure in a common area (such as an employee lunchroom) is not sufficient. Employers that rely on hand delivery should maintain business records to demonstrate that notices and disclosures were distributed timely and were received by all intended recipients. Further, it is advisable to obtain the employee's signature confirming receipt. Given the administrative challenges of hand delivery, this method is rarely used except in limited circumstances (such as when notices are distributed at a meeting for which company minutes provide a reliable record of the action and the attendees).

### Mail Delivery

DOL rules permit mail distribution of notices. While notices can be distributed via first-, second-, or third-class mail, first-class mail is the best practice for mail delivery of required group health plan notices. Employers must ensure that the mailing list is accurate and up-to-date. Where second- or third-class mail is used, employers must guarantee return/forwarding postage and must request address corrections.



If notices are being distributed by mail without using return receipt, delivery confirmation or signature confirmation services, best practices call for employers to document their procedures, keep copies of address lists and notices, and record the dates that the documents were mailed to specific current and former employees, as applicable.

### **Electronic Delivery**

DOL rules permit electronic delivery of notices and disclosures for ERISA health and welfare benefit plans, provided the delivery follows the DOL's electronic disclosure safe harbor guidelines for such plans. In general, the safe harbor guidelines distinguish between two categories of employees: 1) employees who have computer access as an integral part of their job and 2) employees who do not have computer access as an integral part of their job.

Employees who merely have a work email or who have access to a computer station at work (including clock-in locations/kiosks), but who cannot access electronic documents at their normal work locations, are considered to not have computer access as an integral part of their job. These employees, including certain categories of non-employees (such as COBRA qualified beneficiaries and covered retirees), must provide consent to receive plan disclosures electronically in order to meet the DOL safe harbor for electronic delivery.

A consent to receive plan disclosures electronically must explain what documents will be distributed electronically, that the consent can be withdrawn at any time, the procedures for withdrawing consent, the right to request paper copies of the document (and any applicable fees), and what software may be required to access the documents. Further, employers can obtain such consent electronically as long as the consent explains the above details. If an individual who does not meet the DOL safe harbor for electronic delivery does not provide consent to receive plan disclosures electronically, then electronic distribution is not permissible and the employer should mail the individual a hard copy or provide it through another verified delivery method. For further details, see the Sample Employee Communication (Appendix A) and the Sample Employee Consent to Receive Plan Disclosures Electronically (Appendix B).

In contrast, employees who have computer access as an integral part of their job generally meet the DOL safe harbor and are not required to provide consent to receive notices and disclosures electronically. These are often employees who work at computers daily and have the ability to access electronic documents at the location where they normally work. Employers should consider their workforce and determine when consent may be required.

Once consent is obtained (as applicable), the electronic distribution safe harbor further requires that:

- Electronic materials must be prepared and furnished in accordance with other applicable requirements (e.g., timing and format requirements).
- A notice must be provided to each recipient at the time the electronic document is furnished describing the significance of the document and the right to request and obtain a paper version of the document.
- A paper version of the electronic document must be provided on request, and no charge may be imposed if the document must otherwise be provided without charge.
- When a disclosure includes personal information relating to an individual's accounts and benefits, employers must take reasonable and appropriate steps to safeguard the confidentiality of the information.

Electronic delivery of notices and disclosures can include posting the notices to a company intranet or benefits portal as well as sending the notices via email (among other electronic means). Importantly, these measures alone do not satisfy the DOL's distribution requirements. Employers must also notify employees that the notice has been posted or distributed via email and must describe the significance of the notice and the employee's right to request a paper copy. Further, employers should use "appropriate and necessary" means to ensure employees' receipt of the notice of an electronic posting. Such means could include using return receipt or notice of undelivered email features, or conducting periodic surveys to confirm receipt.

Electronic distribution methods can provide strong proof of delivery as long as the electronic recordkeeping system does not allow alteration of documents, is properly backed up, permits recipients to print a legible paper copy and permits employers to retrieve and inspect records when necessary. Note, however, that while the trend continues for providing notices electronically, this method (often called "e-delivery") may not be appropriate for notices that must be delivered to former employees or to enrolled dependents of active or former employees. For example, the COBRA initial notice must be sent to covered spouses and domestic partners (as well as to covered employees) upon enrollment in the plan. In this instance, providing electronic distribution exclusively to the participant may not satisfy the COBRA notice requirements. See the PPI publication **Required Group Health Plan Notices Chart** for detailed information about the permissibility of providing required notices via e-delivery.

## PROOF OF DELIVERY

ERISA requires that employers must be able to show that they used an acceptable distribution method and that such method was “reasonably calculated to ensure actual receipt.” While there is no requirement to obtain the participant’s acknowledgement that the notice was received (i.e., proof of delivery), whether notices or disclosures were timely furnished can be an important issue in benefits litigation. Therefore, employers should be prepared to show that they used an acceptable distribution method. Importantly, employers should routinely document all methods of delivery used for each required notice and should retain these records in accordance with the employer’s record retention policy. In general, records related to ERISA plans should be retained for eight years.

## SUMMARY

Employers that wish to distribute required group health plan notices electronically, as the vast majority of employers now do to improve efficiency and reduce costs, must ensure that their notice distribution practices are consistent with the DOL’s electronic delivery safe harbor. They must also ensure that required notices are distributed at appropriate intervals in the employment and benefits enrollment cycle.

## APPENDIX A

### Sample Employee Communication: Statement Regarding Electronic Disclosures

Individuals entitled to receive benefits under the [EMPLOYER Benefits Plan] (the Plan) are also entitled to be furnished with certain documents required by ERISA. [EMPLOYER] intends to provide ERISA-required and other mandatory documents to you by electronic delivery. The documents may include:

- The Summary Plan Description (SPD);
- Any required Summary of Material Modifications (SMMs);
- The Summary Annual Report (SAR);
- Any documents required to be furnished under ERISA § 104(b)(4) on request by a participant or beneficiary under the Plan or made available under ERISA § 104(b)(2);
- Summary of Benefits and Coverage (SBC); and
- Any required federal notices such as Notice of the Health Insurance Marketplace, Medicare Part D Creditable Coverage Disclosure, HIPAA Notice of Privacy Practices, Medicaid and the Children's Health Insurance Program (CHIP), and Women's Health and Cancer Rights Act, among others.

**Electronic Delivery Method to Be Used:** These documents will be furnished to you in each case as an attachment to an email sent to your work-issued email address of record or, if you do not have computer access as an integral part of your job, to the email address you specify to us in a written Consent to Receive Plan Disclosures Electronically. The attachment will be in [FORMAT] (e.g., Microsoft Word or PDF). To access the email and attached document, you must have 1) a computer with internet access; 2) a program installed on that computer allowing you to send and receive emails; and 3) the application program allowing you to open and read the attached document. To retain a copy of the email and attached document for future reference, you must either 1) be able to print a copy on a printer attached to the computer; or 2) save a copy in electronic form onto a backup system external to your computer's hard drive. If any of these requirements change in a way that creates a material risk that you will no longer be able to access and retain electronically transmitted documents, you will be furnished with a paper copy of the notice and required to provide another consent for receiving documents electronically.

**What You Must Do:** To receive documents electronically, you must do the following: [This section should be tailored to how the employer is collecting the consent. For example, if the employer is obtaining consent through a benefits administration system, the steps below should outline specifically what the participant must do in order to provide consent.]

1. Complete and return the Consent to Receive [EMPLOYER Benefit Plan] Disclosures Electronically by sending an email message to [EMPLOYER EMAIL CONTACT] that indicates in the subject line "Consent for Electronic Disclosure" and includes in the body the complete text of the Consent to Receive [EMPLOYER Benefit Plan] Disclosures Electronically. (You may withdraw this consent at any time by sending an email message to [EMPLOYER EMAIL CONTACT] that indicates in the subject line "Consent Withdrawn for Electronic Disclosure" and includes in the body your full name, address and phone number.)
2. Provide us with an email address to which electronic documents should be sent. To update your email address, you must send an email message to [EMPLOYER EMAIL CONTACT] that indicates in the subject line "Change in Email Address for Electronic Disclosure."

**Your Right to a Paper Copy:** You have a right to request and obtain a paper version of any electronically transmitted document. To request a paper copy, contact the plan sponsor at [EMPLOYER EMAIL CONTACT or PHONE NUMBER].

## APPENDIX B

### Sample Employee Consent to Receive Plan Disclosures Electronically

I have read and received the Statement Regarding Electronic Disclosures (the Statement).

I consent to receiving the type of documents described in the Statement by electronic means at my work-issued email address of record. If a work-issued email address does not exist, then I consent to receiving the type of documents described in the Statement by electronic means at the email address I provided below. I understand that if my email address changes, I must notify the Human Resources department by sending a message to [EMPLOYER EMAIL CONTACT].

I confirm that I have the ability to access information in the electronic form that is described in the Statement. I understand that I will receive copies of the types of documents described in the Statement only in the electronic form described there unless I exercise my right to affirmatively request a paper copy of any such document.

I understand that I can withdraw this consent at any time by sending an email message to the Human Resources department at [EMPLOYER EMAIL CONTACT] that indicates "Consent Withdrawn for Electronic Disclosure" in the subject line and includes in the body my full name, address and phone number.

Print Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Email Address: \_\_\_\_\_

Address: \_\_\_\_\_

Date: \_\_\_\_\_

Phone Number: \_\_\_\_\_