

## **Electronic Disclosure of ERISA-Required Documents**

ERISA plans considering using electronic delivery for SPDs or other plan disclosure documents required under Title 1 of ERISA (including SMMs, SARs, QMCSO notices, COBRA notices, HIPAA certificates of creditable coverage) should follow the DOL's electronic disclosure safe harbor requirements to ensure that the DOL will find the delivery method to be "reasonably calculated to ensure actual receipt." The electronic disclosure safe harbor only applies to disclosures from the plan and not to communications from the participants or beneficiaries or between plan administrators and employers.

### **General Electronic Disclosure Safe Harbor Provisions**

Under the safe harbor, a plan must:

1. Take appropriate and necessary measures to ensure that the system for furnishing documents results in actual receipt by participants (such as through the use of a return receipt electronic mail feature or periodic reviews or surveys by the plan administrator to confirm the integrity of the delivery system).
2. Furnish documents in a manner consistent with the style, format and content requirements applicable to the specific document.
3. At the time the electronic document is furnished (each time electronic disclosure is used), notify each participant through electronic means or in writing (clearly and conspicuously) of the document that is being electronically furnished and the significance of the document.
4. Notify the participants (each time electronic disclosure is used) of their right to request and receive a paper copy of each such document from the plan administrator and if the copy will be provided free of charge.

With respect to disclosures that are confidential in nature (i.e. relate to individuals and their accounts and benefits), the plan administrator must also take appropriate measures to ensure that the system for furnishing such information protects the confidentiality of the information.

If using a company website for electronic disclosures, not only must the provisions above be met, but the following requirements would also apply:

1. The website homepage should contain a prominent link to the website sections that contain information about the plan.
2. The website should include directions on how to obtain a replacement for a lost or forgotten password to the extent one is needed.
3. Disclosure documents should remain on the website for a reasonable period of time after participants and beneficiaries are notified of their availability.

## **Electronic Disclosure Safe Harbor Extends to Two Categories of Individuals**

Assuming the provisions above are met, electronic disclosure may be made to two categories of recipients:

1. Participants with work-related computer access, including those who work at home or travel. These individuals must meet two criteria:
  - They must have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform their duties as an employee.
  - Access to the employer/plan sponsor's electronic information system must be an integral part of their employment duties.
2. Individuals without work-related computer access who consent to electronic disclosure.
  - For disclosures made through the internet or other electronic communication network, individuals in this category must provide an address for receipt of the documents and must consent electronically in a way that demonstrates their ability to access information in the electronic form being used.
  - The consent statement must: a.) identify the documents or categories of documents to which the consent applies b.) explain that consent may be withdrawn at any time without charge and provide the procedures for withdrawing or updating address or other information c.) explain the individual's right to request a paper copy of the electronically furnished document, including whether the paper version will be free of charge d.) identify any software and hardware requirements to access and retain the identified document(s) that will be electronically delivered.
  - A revised consent form must be provided any time the hardware or software requirements change, and the individual must provide renewed consent.

Individuals not falling into one of the two categories above cannot receive disclosures electronically under the safe harbor.

### **HIPAA Privacy Notice**

HIPAA privacy notices do not fall under DOL's electronic disclosure requirements. They have their own set of electronic disclosure rules, so plan administrators should evaluate electronic distribution of privacy notices separately.

### **Other Communications Not Under DOL Safe Harbor**

Treasury regulations cover the electronic disclosure for communications required under the Code or other relevant regulations, including notices and participant elections under a section 125 cafeteria plan. These electronic disclosure regulations can be found in the [Electronic Signatures in Global and National Commerce Act](#).