**NOTICES FOR OPEN ENROLLMENT AND NEW HIRES**

**Overview**: An employer should include certain required notices in the employee benefits enrollment guide or as a supplement to the benefits enrollment summary information (i.e., a legal notice packet, whether paper or electronic). Notices appropriate for a legal notice packet include disclosures required ‘prior to enrollment’ and/or ‘annually.’

**Applies to:**

* Large employers with fully-insured and self-funded health plans
* Small employers with fully-insured and level-funded health plans

**Go Deeper:**

Employers are required to provide certain notices to employees and plan participants at specific intervals, generally prior to enrollment, which encompasses open enrollment and new hire enrollment, or at least annually.

Following are notices an employer plan sponsor should include in the open enrollment or new hire employee benefits guide or summary information provided to employees. Model notices are provided by the Departments and updated periodically:

* Summary of Benefits and Coverage (SBC)
* Employer CHIP Notice
* Women’s Health and Cancer Rights Act (WHCRA) Annual Notice
* Wellness Program Notices (under HIPAA, GINA or the ADA, if applicable)
* Medicare Part D Creditable or Non-Creditable Coverage Notice (must be sent before 10/15, but should also be included in enrollment materials)
* Notice of HIPAA Special Enrollment Rights
* Marketplace Coverage Notice (also required within 14 days of hire, including full-time *and* part-time employees).
* Fixed (Hospital) Indemnity Notice (if offering a fixed hospital indemnity policy)
* No Surprises Act Notice (unless the carrier or TPA posts publicly on their website)
* Right to Designate a Primary Care Provider, OB/GYN or Pediatrician (for a plan that requires designating a PCP)
* Grandfathered Plan Notice (for a plan that remains grandfathered)
* Illinois Essential Health Benefits Notice (given to employees residing in Illinois)
* Notice of Privacy Practices (in some cases) \*
* Summary of Material Modifications (including material reductions) \*\*

*\*Fully-insured group health plans that do not create or receive protected health information (PHI), other than summary health and enrollment/dis-enrollment information, are not required to give this notice. However, fully-insured plans that create or receive PHI (such as having PHI in a claim analytics drill-down system), or employers who sponsor a health FSA or HRA, must keep the notice and provide it to any person upon request. Or easier, they can just provide the notice of privacy practices.*

*\*\*Employers who communicate material changes for the coming year in open enrollment materials should include language to notify participants that it also constitutes an SMM. This is an effective way of letting participants know about the changes while satisfying the SMM requirement.*

In contrast, there are two notices that might be better left out of open enrollment materials. The first is the COBRA Initial Notice because it must be given to enrolled employees and spouses within 90 days of plan participation, preferably sent via first-class mail. Similarly, the “wrap” document and summary plan description (SPD), along with the booklet or certificate of each plan it wraps around, must be given within 90 days of plan enrollment, but it can be provided earlier if it helps employees make more informed decisions.

**Electronic Disclosure Safe Harbor**

The DOL safe harbor describes conditions where ERISA plans may provide documents electronically, including most notices (e.g., Summary of Benefits and Coverage, Medicare Part D, Special Enrollment Rights, CHIP, etc.) and the “wrap” Summary Plan Description (SPD). Under this safe harbor, plan administrators must use a method reasonably calculated to ensure actual receipt of the notice or document. For example, the administrator could use a read-receipt, notice of undelivered e-mail or run periodic reviews to confirm receipt of any transmitted information.

The rules identify two categories of employees when determining whether electronic distribution is appropriate:

**Category 1**: Participants with work-related computer access as an integral part of their employment duties\*; or

**Category 2**: Participants with no work-related computer access, but who affirmatively consent to receive documents electronically.

*\*Note, the first category would not necessarily include employees who have access to a computer station/kiosk or who have been given a company-issued email or access to an HRIS platform. Instead, these employees must be able to access electronic documents at a location where they usually work, and the electronic system is an integral part of their employment duties. Therefore, the employer needs to carefully review the nature of their employees’ duties and determine into which category employees fit.*

If employees fit into the second category, these workers must give affirmative consent to their employer to send the documents electronically by sending an authorization from the email address they prefer. However, the employer must provide a notice prior to, or as a part of that request for consent, that includes the following:

* an explanation that the documents will be available electronically
* a notice that the employee's consent for electronic documents can be withdrawn without charge
* the procedures for withdrawing consent and updating information
* the right to request a paper copy and if a charge applies (note: no charge may be imposed for an SPD because it must be provided without charge)
* description of the electronic delivery system and the software needed to access (note, the whole process of providing notice and receiving active consent has to be redone if the electronic delivery system and software changes)

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If an employee in the second category does not give consent, or withdraws consent, then the employer should mail a paper copy or distribute it through some other verifiable delivery method.

Regardless of which category employees fall under, the recipient must be told of the significance of the document and of the right to request and obtain a paper version. In other words, the employer needs to tell them what it is and how to ask for a paper copy. They should not, under any circumstance, just post the notices or SPD to a company website or shared portal without taking measures to ensure actual receipt.

**Consequences of Non-Compliance:**

Several notices and disclosures carry potential fines for violations:

* Potential fine up to $110 per day for failure to provide written requested ERISA plan documents, Summary Plan Descriptions, Summary of Material Modifications, etc. within 30 days.
* Potential fine of up to $190 per day ($1,906 per request) for failure to furnish employee benefit plan documents to the DOL upon request.
* Potential fine of $141 per day per participant for failure to inform employees of Medicaid/CHIP coverage opportunities.
* Potential fine of up to $1,406 per failure to provide the summary of benefits and coverage (SBC), plus excise taxes under the Code of $100 per day per person to whom the failure relates.
* Potential fine of up to $100 per person per day also applies for failure to provide:
  + Provider Choice notice (if plan requires designating a PCP)
  + WHCRA annual notice
  + Hospital Indemnity Notice
  + Failure to comply with non-grandfathered plan rules when the plan has failed to disclose grandfathered status (as failing to disclose causes the plan to lose grandfathered status).
  + HIPAA Wellness Notice (also potential lawsuits for failure to disclose wellness plan rules and reasonable alternatives)

While there is not a direct penalty outlined for not complying with the DOL electronic safe harbor rule for health and welfare plans, failing to properly distribute plan documents electronically can result in enforcement actions from the DOL, including potential penalties of up to $110 per day if a participant requests a document and it is not provided a copy within 30 days; this could significantly impact an employer's ability to defend benefit claims in a lawsuit due to improper disclosure.

**Practical Implications for Employers:**

Employers need to review their enrollment materials and ensure all applicable notices are provided to employees and other participants (e.g., COBRA qualified beneficiaries and covered retirees). Notices should be reviewed, kept up to date and refreshed at least once per year.

Also, employers relying on the DOL electronic disclosure safe harbor should keep records of when and how notices and plan documents were electronically delivered to participants. This includes verifying that employees have adequate access to electronic documents and providing proper notice/consent regarding electronic delivery. If an employee requests a plan document, provide it within the 30-day timeframe to avoid daily penalties.