**ELECTRONIC DISTRIBUTION SAFE HARBOR**

**Overview**: An employer is generally permitted to provide important documents and notices electronically to employees under the DOL electronic disclosure safe harbor rules. The DOL safe harbor gives certain circumstances where ERISA plans may disclose documents electronically, including the Summary Plan Description (SPD). Under this safe harbor, plan administrators must use a method reasonably calculated to ensure actual receipt of the document.

**Applies To:**

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

**Go Deeper:**

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.

***Sample Notice of Important Documents:***

*This notice is to inform you of the availability of* ***important benefit documents****. In addition to those documents provided upon enrollment, more details can be found in the summary plan description, summary of material modifications, insurance contracts and other supporting documents.*

*[Insert company name] has created a [Insert specifics – such as the share file on the company website] where all documents can be viewed.*

*or*

*[Insert company name] has attached these documents for your convenience.*

*If you wish to receive a hard copy of this information, at no cost, please contact [insert contact person, name, number and/or email] with your preference.*

In contrast, the COBRA General Initial Notice might be better left out of any electronic notice distribution. The COBRA Initial Notice must be given to enrolled employees and spouses within 90 days of plan participation, preferably sent via first-class mail. Thus, instead of providing the COBRA notices electronically or by hand delivery, employers should consider mailing the COBRA notices within the timeframes, through either use of a COBRA third party administrator or internal COBRA procedure.

**Consequences of Non-Compliance:**

While there is not a direct penalty outlined for failure to comply 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) in a method reasonably calculated to ensure actual receipt. The two categories of employees should be carefully considered when determining whether electronic documents can be provided, or if certain employees or beneficiaries must be asked to provide consent to receive electronic documents.

In addition, 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.