

Electronic Disclosure A Summary of Relevant Parts of the Regulations Summer 2009

Electronic disclosure is a convenient and cost-saving way to satisfy the disclosure requirements of ERISA (e.g. SPDs, SMMs and SARs). However, it's important to understand the requirements of the regulations.

Types of Documents

The regulations permit the use of electronic documents to satisfy any ERISA Title I disclosure, including SPDs, SMMs and SARs. This also includes benefit statements, investment related information under Section 404(c), information regarding plan loans and any other information required to be furnished or made available for inspection when requested by a participant or beneficiary, as well as disclosures and notices related to qualified domestic relations orders and qualified medical child support orders, COBRA notices, certificates of creditable coverage, notices of special enrollment rights and pre-existing conditions under HIPAA and notifications of claims decisions. This summary focuses on SPDs and SMMs.

General Requirements

ERISA plan sponsors are not required to follow the safe harbor requirements outlined in the proposed or final rules for electronic disclosure of ERISA plan information. However, electronic disclosures meeting the conditions of the safe harbor are deemed to satisfy the general disclosure requirements under DOL Reg. Sec. 2520.104b-1. An employer must satisfy the following general requirements for a plan to fall within the safe harbor for using electronic media for ERISA disclosure:

1. **Prove Receipt** – An employer must have a process for verifying that the system for furnishing documents results in actual receipt of transmitted information, such as e-mails containing a return-receipt or periodic reviews or surveys to confirm receipt of transmitted information;
2. **Protect Confidentiality** – An employer must take "appropriate and necessary" measures to protect the confidentiality of personal information relating to an individual's accounts and benefits (for example, the system must include measures to prevent unauthorized access or receipt by those other than the intended recipient). Features to ensure this could include the use of personal identification numbers (PINs) or passwords;
3. **Meet ERISA's Requirements** – Electronically delivered documents must comply with existing format, content and style requirements.
4. **Advise of Importance** – When documents are furnished electronically, each intended recipient must be notified (either through electronic or non-electronic means) of the significance of the document when it is not otherwise readily apparent and of the participant's right to receive a hard copy from the plan on request.
5. **Provide Print when Requested** – An employer must provide hard copies on request.

But there is more.

Different Rules for Different Recipients

The regulations have different requirements for different participants, most notably in the area of consent.

Regular Access to Company Computer System = No Consent Needed

An employer can use electronic delivery of disclosure documents for participants whose duties require regular access to the employer's computer information system from any location where the participant is reasonably expected to perform his or her job (including access from home). No consent from the participant is needed.

All Others = Consent Needed

For all other participants, beneficiaries and other individuals, the plan administrator must:

- Get consent (electronic or paper) from the individual to deliver disclosure documents electronically;
- Either through the individual's electronic consent or some other communication with the employer, demonstrate that the individual has the ability to access information in the electronic form;
- Be provided with an address for receipt of electronic documents.

In addition, before an individual consents, the plan administrator must provide a statement (electronic or paper) that indicates:

- The types of documents to which the consent applies;
- That the consent can be withdrawn at any time and at no cost;
- The procedures for withdrawing consent and for updating the individual's address for electronic receipt of disclosure documents;
- The right to request a paper copy of electronic documents and a statement as to whether such paper copies will be provided free of charge;
- Any hardware or software requirements for accessing and retaining the documents.

If there is a change in hardware or software requirements at a later date (that create a material risk that an individual will not be able to access or retain documents furnished electronically), the plan administrator must provide a notice to individuals describing the new hardware or software requirements and advising them that they have the right to withdraw their previous consent free of charge. The plan administrator must then get consent once again.

Practical Considerations

The rules specifically address a number of practical matters that may be of interest:

- **No Computer Kiosks** -- Computer kiosks may not be used to deliver disclosure documents for employees who do not use computers in the course of performing their job.
- **CDs** – Documents can be provided on CD as long as they are accompanied by a paper notice and meet all of the other safe harbor rules. This could provide some saving in mailing costs, but web-based documents, discussed next, provide the most.
- **Web-based Documents** – This seems the most technologically relevant media for employers. Documents maintained in a separate section of a company's website can meet the safe harbor requirements. The general requirements, listed on page 1, must still be met AND the participant must either be one for whom no consent is necessary or the participant must have provided consent. To ensure delivery, a company may want to consider providing email addresses to employees. Those email addresses allow for automatic forwarding to any address the employee chooses, while allowing the company to retain a consistent, valid email address once consent is given.

Wrap Up

For employers with significant employee groups who have daily access to the company's computer system, web-based distribution of documents could save considerable time and money (both print and mailing costs). We would recommend maintaining SPDs and notices in one section of the website. Since employers must have some method of notifying employees of the availability of documents, consider simple E-mail notification at each employee's workstation. For employee groups who do not have daily access to the company's system, we recommend getting consent from employees to deliver electronically. Again, to ensure a valid email address, employers may want to issue a company email address. An ongoing campaign can be developed to get consent and can be tied to popular initiatives, such as the green initiative. An employer also should include a request for consent at every opportunity, such as annual enrollment, newsletters, mailing of SARs and SPDs.

For participants and beneficiaries who are not employees (retirees, COBRA participants, etc.), one has to decide if the administrative requirements completely offset the ease and cost saving potential of electronic disclosure. It is clearly do-able, but involves a certain amount of data collection and maintenance (consent, email addresses) that could be more problematic for an employer to maintain for this group than for employees.

Even though an employer provides all disclosure electronically, the employer will always have to print a certain quantity of SPDs, SMMs, etc. in order to provide them upon request. However, one should consider changing the production qualities of such printed materials to also reduce costs – for example, provide simple laser printed streaming documents from the online documents – in order to encourage use of the online documents.

Electronic SPDs, SMMs and other disclosures can save an employer time and money and increase the use of materials by employees. Available 24/7, easy to find information and easily updated, they make sense in this electronic world.

Please note: This is not (and is not intended to be) a legal interpretation of the regulations or legal advice. This is simply our understanding of the regulations. You should consult your ERISA legal advisor if you have questions about complying with ERISA's disclosure requirements via electronic means.