

# Compliance Alert!

## Properly Distributing ERISA Health and Welfare Plan Materials



### Quick Facts:

- Sponsors of plans subject to the Employee Retirement Income Security Act (ERISA) must disclose certain materials to plan participants.
- Certain materials must be provided under specific guidelines, including strict rules for electronic delivery.
- Merely posting materials on a web site without proactively notifying employees is not compliant.
- It is convenient to provide required health plan notices along with enrollment materials, but plan administrators must understand and follow ERISA's distribution rules to ensure compliant and timely delivery.

### Introduction

Health and welfare benefit plan sponsors subject to the Employee Retirement and Income Security Act (ERISA) must disclose certain materials to plan participants. Department of Labor (DOL) regulations specifically contain a safe harbor under which plan sponsors may use electronic means to distribute certain documents and other information required under ERISA. Additionally, many other federal laws require that employer plan sponsors notify employees about certain plan information and their rights and obligations under those plans. While non-ERISA plan sponsors are not generally subject to the rules described in this article, some voluntarily follow the described protocols.

Most health plan notices must be distributed to employees before or at the time of enrollment. Consequently, most employers provide these materials to employees at open enrollment or during the new hire enrollment. However, it's important to understand the notice distribution rules to identify a compliant strategy that coordinates with a company's enrollment process. This enrollment checklist provides guidance for conveying enrollment information in a compelling and compliant manner.

### Required benefit materials

Employer plan sponsors must distribute the following benefit materials to employees and other plan participants. (Certain other documents must be provided only upon written request; for example, the ERISA plan document and Form 5500, if applicable.)

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- Health Plan Enrollment Notices (e.g., Medicare Part D, Newborns' and Mothers' Health Protection Act Notice)
- Notice of HIPAA Privacy Practices
- Summaries of Benefits and Coverage (SBCs)
- Summary Plan Descriptions (SPDs)
- Benefit summaries (EOCs, certificates, etc.) that supplement a "wrap-plan" SPD
- Summaries of Material Modifications (SMMs)
- Summaries of Material Reductions (SMRs)
- Summary Annual Reports (SARs)
- Qualified Medical Child Support Order notices (QMCSOs)
- COBRA notices
- Notice of Marketplace Coverage

Although COBRA notices may be distributed electronically, we recommend mailing to ensure that spouses and dependents receive the notice. (Plus, participants may no longer have access to their work e-mail, rendering this option moot). In addition, spouses and dependents must provide advance consent to receive the notices electronically. Therefore, providing COBRA notices electronically may not be as practical as other materials. Special, more relaxed rules apply to SBCs. See "Special Distribution Rules for SBCs," below for more details.



## Permitted distribution methods

An employer may distribute required materials in any one of three ways:

- U.S. mail
- hand-delivery (e.g., to mailboxes at work)
- electronically

Plan sponsors generally favor electronic distribution because of the cost savings, convenience, and desire to reduce paper waste. However, electronic delivery may not be possible for all companies or all employee groups.

## DOL safe harbor for electronic distribution

Plan sponsors who distribute materials electronically (e.g., by e-mail, by CD, on thumb-drive, etc.) will be deemed compliant with ERISA's distribution requirements if they follow the DOL safe harbor outlined below. It is not sufficient merely to post materials on a web site without proactively notifying employees as detailed below.

The safe harbor contains rules for providing disclosures to:

- employees with work-related computer access; and
- other plan participants and beneficiaries who do not have work-related computer access.

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## Rule 1: Employees with work-related computer access

Notices and disclosures may be delivered electronically to employees who:

- are expected to have access to the employer's electronic information system as an integral part of
- their regular job duties; and
- can effectively access documents furnished in electronic form at any location where they are reasonably expected to perform those duties.

Note that access only to a kiosk or computer shared occasionally by employees to access email is not considered regular access.

### Steps to comply with rule 1

- Notify employees about the availability of the documents, attaching them to your correspondence, and about the significance of the material. Include a statement that a paper copies are available on request. This is required each time a notice is provided electronically.
- Take steps to ensure actual receipt of the above notice (such as return-receipt requested emails). If an email is returned, attempt delivery to another email address or send via U.S. mail.

Plan sponsors commonly distribute the materials by email (attachment), and include links to the materials posted on a benefits portal or webpage. See the sample email message below for delivery of an SPD (Note: This sample can be modified for other materials).

### Important Information Regarding Your Benefits

Dear Plan Participant:

As a plan participant, you are entitled to a comprehensive description of your rights and obligations under the [group health plan]. We've recently posted a copy of the summary plan description (SPD) to our website at [web portal address], in addition to attaching it to this email. So you fully understand the benefits available to you and your obligations as a plan participant, you should familiarize yourself with the information contained in the SPD.

If you would like to receive a paper copy of the SPD, you may email [email address] or call [phone number] and we will provide one free of charge.

[Employer Name]

[Date]

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## Rule 2: Employees and plan participants without work-related computer access

For employees or plan participants (e.g., employees on leaves of absence, COBRA beneficiaries, retirees) without regular access to the employer's email system, the plan sponsor must first obtain the participant's consent to receive materials via electronic media or by email. ***[Naturally, this does not satisfy the DOL's requirements for notice or distribution, but, for employers that are opposed to printing and mailing thousands of pages of materials that many (if not most) participants will not read, the following may offer a path to satisfy participant's questions and concerns].*** For example, most corporate employees use email as an integral part of their work, but retail, construction or manufacturing employees may not. A plan sponsor may use a combination of distribution methods (e.g., email for corporate, U.S. mail for retail workers).

### Steps to comply with rule 2

To obtain consent from employees or plan participants without work-related computer access, provide the following information to the individual in a consent form:

- describe the type and significance of the material to be disclosed;
- describe the individual's right to consent to electronic delivery (and right to withhold or withdraw consent) and the individual's right to request a paper copy free of charge; and
- communicate software and hardware requirements (and any changes in such requirements in the future).

Also:

- If the materials will be distributed via an electronic communication system (e.g., email), the individual's advance consent must be obtained using the same electronic system; or
- If the materials will be distributed in physical form (e.g., CD, thumb drive), the individual may provide advance consent electronically (e.g., email, online form) or on a paper form.

For individuals without regular access to the employer's email system as part of their job duties, the "inform and obtain consent" rules are cumbersome, and consent may be difficult to achieve and track. For that reason, most plan sponsors choose to provide such employees paper notices and disclosures by either U.S. mail or hand delivery.

### Special distribution rules for SBCs

The rules for distributing SBCs electronically are somewhat more relaxed than the rules for the other materials described above.

- For enrolled participants, SBCs may be provided electronically by following the DOL safe harbor for ERISA disclosures, as described above.
- For eligible participants who are not enrolled in the plan, it is sufficient to post the SBCs online, provided that the participant receives an e-card or postcard explaining availability of the SBCs and the internet address. The federal rules offer sample language (shown below) to notify participants about online SBCs, although plan sponsors can modify the text.

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## If posted on the internet, the SBC must be:

- in a readily accessible format;
- placed in a prominent and readily accessible location;
- in an electronic form that can be electronically retained and printed;
- consistent with the appearance, content, and language requirements for SBCs; and
- provided in paper form upon request, without charge. Notification regarding the availability of the electronic SBC in paper form must be provided to participants.

Below is a sample notification provided by the DOL.

### Availability of Summary Health Information

As an employee, the health benefits available to you represent a significant component of your compensation package. They also provide important protection for you and your family in the case of illness or injury.

Your plan offers a series of health coverage options. Choosing a health coverage option is an important decision. To help you make an informed choice, your plan makes available a Summary of Benefits and Coverage (SBC), which summarizes important information about any health coverage option in a standard format, to help you compare across options.

The SBC is available on the web at [www.website.com/SBC](http://www.website.com/SBC). A paper copy is also available, free of charge, by calling [phone number].

## Conclusion

It's important to understand the various distribution rules and the timing requirements to ensure compliant distribution of required notices and disclosures. The approach for providing the required materials and other employee communications requires careful, strategic planning and periodic review.

Please contact a member of your AssuredPartners account team for assistance with these efforts.