

# LEGISLATIVE BRIEF

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## Electronic Distribution of ERISA Disclosures

Department of Labor (DOL) [regulations](#) contain a safe harbor under which ERISA plans may use electronic means to distribute certain documents and other required ERISA information. For example, summary plan descriptions (SPDs), summaries of material modifications (SMMs), summary annual reports (SARs), COBRA notices, qualified domestic relations orders (QDROs) and qualified medical child support orders (QMCSOs) can all be distributed electronically if certain conditions are met.

The Affordable Care Act (ACA) creates additional disclosure requirements for group health plans and employers, such as the summary of benefits and coverage (SBC) and a notice about the ACA's health insurance Exchanges (Exchange Notice). The SBC and the Exchange Notice may be distributed electronically if certain requirements are met.

### WHAT TYPE OF DISCLOSURES CAN A PLAN ADMINISTRATOR SEND ELECTRONICALLY?

The DOL's safe harbor regulations allow plan administrators to electronically send disclosures required under Title I of ERISA. These disclosures include:

SPDs, SMMs and SARs	QMCSO notices
COBRA notifications	HIPAA certificates of creditable coverage

Also, employers that satisfy the DOL's safe harbor requirements may distribute the **Exchange Notice** electronically. As described more below, a different set of rules applies for electronic distribution of the **SBC** to participants and beneficiaries. In general, these rules make it fairly simple for the SBC to be provided electronically to participants and beneficiaries in connection with their online enrollment or online request for an SBC.

The requirements for sending documents electronically do not change any standards regarding who is entitled to a disclosure, the content of the disclosure or the timing of the disclosure.

### DOL SAFE HARBOR FOR ELECTRONIC DISCLOSURE

#### ***May Plan Administrators Electronically Distribute ERISA Disclosures To All Recipients?***

The regulations contain guidelines for providing disclosures to: (1) employees with **work-related computer access**; and (2) other plan participants and beneficiaries who **consent** to receive disclosures electronically.

#### *Employees with Work-related Computer Access*

ERISA disclosures may be delivered electronically to employees that:

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

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Merely providing employees with access to a computer in a common area (for example, a computer kiosk) is not a permissible means to electronically furnish ERISA-required documents.

## *Beneficiaries and Other Plan Participants Who Consent to Receive Disclosures Electronically*

A plan administrator must obtain **written consent** prior to electronically delivering ERISA disclosures to beneficiaries and other plan participants who do not have work-related access to a computer. The consent may be received in either electronic or paper form.

Prior to consenting, an individual must be given a clear and conspicuous statement that explains:

- The types of documents to which the consent will apply;
- That consent can be withdrawn at any time without charge;
- The procedures for withdrawing consent and for updating the address used for receipt of electronically furnished documents;
- The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and
- Hardware or software needed to access and retain the documents delivered electronically.

Where the electronic distribution is made through the Internet, the individual must affirmatively consent in a manner that reasonably demonstrates his or her ability to access information in the electronic form that would be used.


If the plan administrator changes its hardware or software requirements, it must provide a new notice and obtain a new consent.

## ***What General Disclosure Requirements Apply To All Electronic Disclosures?***

Plan administrators are required to use measures reasonably calculated to ensure **actual receipt** of the material by plan participants and beneficiaries. The regulations provide some guidance on what measures are reasonably calculated to ensure actual receipt when electronic delivery is used.

### *Notices*

A notice must be sent either electronically or in paper form to each plan participant or beneficiary at the time the document is provided electronically.

- The notice must:** 
- Indicate the significance of the document when it is not otherwise reasonably evident as transmitted; and
  - Explain the participant's right to request a paper copy.

### *Confirmation of Receipt*

The plan administrator must make use of electronic mail features such as return-receipt or notice that the e-mail was not delivered. The plan must also conduct periodic reviews to confirm receipt of the transmitted information.

### *Confidentiality*

When personal information pertaining to an individual's benefits or accounts is transmitted electronically, steps must be taken to protect the confidentiality of the information.

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## *Style, Format and Content Requirements*

Documents delivered electronically must continue to be furnished in a manner consistent with the applicable style, format and content requirements contained within ERISA. For example, summary plan descriptions provided electronically must contain all the disclosures otherwise required by ERISA's disclosure requirements. The DOL has indicated that the appearance of paper and electronic versions need not be identical.

## *Paper Copy*

Plan participants and beneficiaries are entitled to receive a paper copy of any ERISA disclosure provided electronically. Where a plan participant or beneficiary requests a paper copy of a document originally provided electronically, the general rules governing whether a plan administrator may or may not charge for paper copies apply.

## **Can Benefit and Claim Determinations Be Provided Electronically?**

Yes. The regulations provide that benefit and claims determinations related to a specific individual may be communicated electronically to that individual. However, where the information contained within the communication is confidential in nature or protected health information subject to the HIPAA Privacy Rules, the plan administrator must take appropriate and necessary steps to ensure that the information remains confidential.

## **What Forms of Electronic Disclosure Are Permissible?**

The regulations do not require the use of any specific form of electronic media. Examples of permissible forms of electronic disclosure include delivery of documents by e-mail, attachment to an e-mail, posting documents on a company website, or on CD-ROM or DVD.

## **May a Plan Administrator Electronically Deliver ERISA Notices By Placing the Information on a Company Website?**

Under the guidelines contained within the regulations, merely placing an SPD on a company website available to employees will not by itself satisfy ERISA's disclosure Requirements. The plan administrator must also send a notice, either electronically or in paper form, that notifies the employee that the SPD is available on the website.

A plan administrator that intends to distribute SPDs, SMMs and SARs electronically might do the following:

- Post SPDs, SMMs and SARs on a company website available to all employees;
- Obtain consent to electronically deliver SPDs, SMMs and SARs from employees and COBRA participants that do not have regular work-related computer access. For example, employees working for a manufacturer in the plant may agree to access the website from his or her home computer;
- Send an e-mail notice to all employees that have work-related computer access or that have provided consent each time an SPD, SMM or SAR is posted on the website. Use e-mail features such as return receipt and notice of non-delivery;
- Continue to provide in paper form copies of SPDs, SMMs and SARs to employees that do not have regular work-related computer access and that have not provided consent; and
- Continue to provide in paper form copies of SPDs, SMMs and SARs upon request free of charge.

Note: The plan administrator is generally not required to distribute SPDs, SMMs or SARs to each beneficiary under the plan. Therefore, the plan administrator is not required to obtain consent from each beneficiary under the plan (for example, spouses and dependent children).

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## **May a Plan Administrator Electronically Deliver COBRA Notices By Placing the Information on a Company Website or Sending Them Via E-Mail?**

Yes, the rules allow plan administrators to provide COBRA notices electronically.

However, because COBRA notices must be provided via first-class mail to the home address where a spouse or dependent is also covered under the plan, the plan administrator must obtain consent from the spouse or dependent before delivering COBRA notices electronically. Therefore, providing COBRA notices electronically may not be as practical as electronically delivering SPDs, SMMs or SARs.

## **DO SPECIAL RULES APPLY TO THE SBC?**

The SBC must be provided by a group health plan or issuer to participants and beneficiaries in connection with enrollment and renewal and upon request. It may be provided in either paper or electronic form (such as by e-mail or an Internet posting). The requirements for electronic delivery of the SBC generally depend on whether the SBC is provided in connection with an online enrollment or under other circumstances.

Also, the **uniform glossary** is a separate document that is a companion to the SBC. The SBC must include an Internet address for obtaining the uniform glossary, a contact phone number to obtain a paper copy of the uniform glossary and a disclosure that paper copies are available.

### **Online Enrollment**

[Frequently Asked Questions](#) (FAQs) on ACA implementation establish a safe harbor for electronic delivery of the SBC in connection with online enrollment. Under this safe harbor, the SBC may be provided electronically to participants and beneficiaries in connection with their **online enrollment or online renewal of coverage** under the plan. SBCs also may be provided electronically to participants and beneficiaries who request an SBC online.

In either case, the individual must have the option to receive a paper copy upon request.

### **Other Circumstances**

If the online enrollment safe harbor does not apply, the [final regulations](#) contain two rules for electronic distribution of the SBC. These rules may apply, for example, if a plan does not have an online enrollment system or if the plan allows paper or telephone enrollment in addition to online enrollment.

#### *Individuals Covered under the Plan*

The SBC may be delivered electronically to participants and beneficiaries who are already covered under the group health plan if the DOL's safe harbor for electronic disclosure is satisfied.

#### *Eligible Individuals Not Enrolled*

For participants and beneficiaries who are eligible but not enrolled for coverage, the SBC may be provided electronically if:

- The format is readily accessible;
- The SBC is provided in paper form free of charge upon request; and
- If the electronic form is an Internet posting, the plan or issuer timely notifies the individual in paper form (such as a postcard) or e-mail that the documents are available on the Internet, provides the Internet address and notifies the individual that the documents are available in paper form upon request.

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Federal agencies have provided, as an example, the following language to meet the requirement to provide a postcard or an e-mail to inform employees of the SBC's availability. Plans have flexibility with this language and may choose to tailor it in many ways.

## **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 1-XXX-XXX-XXXX (a toll-free number).

## **UPDATED GUIDANCE**

The DOL's regulations on electronic distribution of ERISA disclosures are over a decade old. In April 2011, the DOL issued a [request for information](#) on the use of electronic media for disclosures to participants and beneficiaries. Given the advances in technology that have taken place since 2002, the DOL has indicated that it is considering making updates to the electronic distribution rules.

## **DOL SAFE HARBOR—SAMPLE NOTICE AND CONSENT**

*Sample E-mail Notice for Use with Each Electronic Disclosure*

### **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 [[www.myresourcesite.com](http://www.myresourcesite.com)]. In order to ensure that you fully understand the benefits available to you and your obligations as a plan participant, it is imperative that you familiarize yourself with the information contained within the SPD.

If you would like to receive a paper copy of the SPD, you may e-mail [[hr@company.com](mailto:hr@company.com)] or call [444-444-4444] and one will be provided to you free of charge.

[Company Group Health Plan] [Date]

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Sample Consent for Electronic Delivery to Those without Work-related Computer Access

## Consent to Receive Electronic Notices

Name		Identification #
<input type="checkbox"/> Health <input type="checkbox"/> Dental <input type="checkbox"/> Vision <input type="checkbox"/> Other _____		E-mail Address
Employee Address		
City	State	Zip

I understand that:

1. The following documents and/or notices may be provided to me electronically:
  - Summary Plan Descriptions;
  - Summaries of Material Modifications;
  - Summary Annual Reports;
  - COBRA Notices;
  - HIPAA Certificates;
  - Summary of Benefits and Coverage; and
  - Notice of Health Insurance Exchanges.
2. I may provide notice of a revised e-mail address or revoke my consent at any time without charge by sending an e-mail to [hr@company.com] or calling [444-444-4444].
3. I am entitled to request and obtain a paper copy of any electronically furnished document free of charge by contacting [hr@company.com] or calling [444-444-4444].
4. In order to access information provided electronically, I must have
  - A computer with Internet access;
  - An e-mail account that allows me to send and receive e-mails; and
  - Microsoft Word or Adobe Acrobat Reader.

I agree to electronic delivery of notices provided to me.

**Signature**

**Date**

Please return to:

Attn: HR, ABC Company

City. State ZIP

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