

Summary of notice distribution requirements

Delivery Rules for ERISA Documents

The following information is applicable to the delivery of certain ERISA-required disclosures (referred to as “ERISA documents”) that must be furnished to plan participants, such as SPDs, SMMs (including SMRs), SARs, and plan documents (upon request). Separate delivery rules apply to other required disclosure notices such as COBRA, HIPAA Portability and Privacy and Medicare Part D.

ERISA documents must be delivered to plan participants (and beneficiaries, in some cases) in a way “reasonably calculated to ensure actual receipt of the material” using a method “likely to result in full distribution.” The Department of Labor (DOL) provides several examples of acceptable distribution methods, which are considered “safe harbors” permitted by the regulations. Other methods not specifically permitted by the regulations may be allowed if they are “reasonably calculated to ensure actual receipt of the material.” Whatever method is chosen, a plan should be prepared to prove that it followed an acceptable method of delivery.

Electronic delivery

Update: For the period between March 1, 2020 and 60 days after the end of the National Emergency (“outbreak period”), employers have extra time to provide certain ERISA-required notices and disclosures (including SPDs, SMMs, COBRA notices, etc.) —though in no case will the relief extend to any individual’s deadline for longer than one year. For more information, see this [GRIST](#). In addition, employers may utilize electronic alternative disclosure methods (e.g., email, text messaging, continuous access websites); even if those methods are not otherwise permitted under current rules (described below). Nevertheless, during the outbreak period, employers must act in good faith and provide notices and disclosures as soon as administratively practicable under the circumstances. For more information, contact your Mercer consultant.

Individuals covered by the safe harbor

- E-delivery is permitted for two main categories of individuals:
 - Participants who use the employer’s electronic information system as an “integral part” of their jobs and who can effectively access electronic documents at any location where they are reasonably expected to perform their duties as employees, and
 - Other participants and beneficiaries or other persons – If they affirmatively consent to receive documents through electronic media (see special requirements for affirmative consent, below).

Basic safe harbor requirements (for either category of individuals described above)

- The plan administrator must take appropriate steps to ensure that the system results in actual receipt of the information (for example, using return-receipt or notice of undelivered mail features, or conducting periodic reviews or surveys to confirm receipt of the information).
- The plan administrator must take appropriate steps to ensure that the system protects the confidentiality of personal information relating to the individual's accounts and benefits (for example, incorporating measures designed to preclude unauthorized receipt or access by anyone other than the intended recipient).
- At the time the electronic document is furnished, each recipient must receive notice – in writing or electronically – of the significance of the document when it's not otherwise evident (for example, explaining that a document attached to an e-mail contains plan benefit changes), and the individual's right to receive a paper version upon request.
- The electronic documents must be prepared and furnished according to the applicable ERISA style, format, and content requirements.
- Paper versions must be furnished upon request.

The DOL recommends that if ERISA documents are posted on a company's main website, the home page should contain a prominent link to the plan information sections and include directions on how to obtain replacements for lost or forgotten passwords, if applicable.

Special requirements for affirmative consent

- Affirmative consent, in addition to the basic safe harbor requirements described above, is required for e-delivery of documents to participants who don't use the employer's electronic information system as an integral part of their job, or to beneficiaries or other individuals entitled to ERISA documents (e.g., QDRO alternate payees, COBRA qualified beneficiaries persons on leave of absence).
- Before affirmatively consenting, the individual must receive a clear statement in writing or electronically that explains:
 - The types of documents covered by the consent,
 - That consent may be withdrawn at any time without charge,
 - How to withdraw consent and update the individual's address for receipt of the electronic documents,
 - The right to request and obtain a paper version of the electronic document,
 - Whether the paper version will be provided free of charge, and
 - Any hardware and software requirements to access and retain the documents.
- Affirmative consent must be provided electronically:
 - If documents will be furnished through the Internet or other electronic communication network, the recipient must provide an address for the receipt of the electronic documents (i.e., an email address), and **must consent electronically** – in a manner that shows that he or she can access information in the electronic form that will be used to provide the documents.

- After affirmative consent is given, if a change in hardware and software requirements creates a material risk that the individual won't be able to access or retain the electronic document, the following steps apply:
 - The plan administrator must provide the individual with a statement of the revised hardware or software requirements,
 - The plan administrator must give the individual the right to withdraw consent, without charge and without conditions that weren't disclosed at time of initial consent, and
 - The individual must provide new consent.

Hand delivery

Hand delivery of ERISA documents at the worksite is permitted – but it is not acceptable to place copies of the documents in a place frequented by participants. The regulations do not otherwise describe what constitutes in-hand delivery. However, intra-office mail or personal hand delivery is generally considered to meet the approval of the regulation. In-hand delivery is not an effective option for participants who are not actively working (e.g., retirees, COBRA qualified beneficiaries, persons on leave, etc.).

Mail delivery

ERISA documents may be sent by first-, second-, or third-class mail. If first-class mail is used, a plan may rely on the “presumption of receipt doctrine.” That is, first-class mail is deemed received, and requires less proof regarding delivery than second- and third-class mail. If second- and third-class mail is used, return/forwarding postage must be guaranteed and address corrections must be required.

Newsletter delivery

ERISA documents may be furnished as a special insert in a union or company publication if:

- The mailing list of the publication is complete and up to date;
- There is a notice prominently displayed on the publications cover that the document is contained in the issue; and
- Steps are taken to ensure delivery to participants who may not be on the mailing list.

Distribution to participants who are not on the mailing list (e.g., retirees, COBRA qualified beneficiaries, persons on leave, etc.) would need to be provided via another methodology that would ensure delivery.

Rules for distribution of the notice of HIPAA privacy practices

A plan must provide the privacy notice to each enrollee. Merely posting a paper notice in a public place without furnishing copies to individuals will not suffice. If the sponsor maintains a website that contains information about the plan, the notice must be posted prominently on the website in addition to being distributed to each enrollee.

A plan can satisfy the distribution requirement using any of these methods:

- Hand-delivery
- First-class mail
- Electronic distribution (via email), but only if the following requirements are met:
 - The enrollee agrees to electronic notice and such consent has not been withdrawn. If the plan knows that the e-mail transmission has failed, a paper copy of the notice must be provided.
 - The recipient of the electronic notice has the right to obtain a paper copy upon request.

If the plan maintains a web site that provides information about benefits, the notice must be prominently posted on the web site and made available electronically through the web site.