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PROVIDING ERISA-REQUIRED DOCUMENTS ELECTRONICALLY

Background

Department of Labor (DOL) regulations permit disclosure of ERISA-required documents electronically, in certain circumstances. These documents include summary plan descriptions (SPDs), summary annual reports (SARs), summaries of material modifications (SMMs) or reductions in benefits (SMRs), and COBRA notices.

Beginning in late 2012, these documents also include four-page summaries of benefits and coverage (SBCs), although—as explained near the end of this monograph—there are two sets of rules regarding electronic distribution of SBCs: electronic distribution to current enrollees must comply with one set of rules, while distribution to individuals who are eligible for coverage but not yet enrolled must comply with a different set of rules.

A plan administrator (typically, the employer) must take care to ensure that the methods by which it electronically furnishes these documents comply with applicable requirements.

Employers will find compliance with respect to some employees easier than with respect to others, and find compliance easier with respect to employees than with respect to non-employees such as retirees and COBRA beneficiaries. They will also find compliance easier with respect to some documents (such as SPDs, SMMs, SMRs and SARs) as opposed to others, such as SBCs and COBRA notices, which often must go to a wider audience.

There are two general methods by which a plan administrator may make electronic disclosures. There is a third—and far easier method—for electronically distributing four-page SBCs to individuals who are eligible for coverage but not yet enrolled.

But let’s look initially at the first two methods, which may be used for distributing SPDs, SMMs, SARs, SBCs to individuals who are enrolled in coverage, COBRA notices, and other ERISA-required disclosures.
Providing ERISA-Required Documents Electronically

Method 1: Making Electronic Disclosures to Employees Who Use the Employer’s Computer Network as an Integral Part of Their Duties

The easiest method (Method 1) applies with respect to plan participants who are employees and able to access the electronic documents on information systems (i.e., the employer’s computer system) as an integral part of their duties. Thus, it is easier for an employer to furnish disclosures electronically to employees who, for example, have a desktop or laptop computer at their workstations; that is, the employee has network access where he or she is “reasonably expected to perform his or her duties as an employee.”

Simply providing kiosks at worksites where electronic information networks or systems are not otherwise an integral part of workers’ duties will not allow the plan sponsor to use Method 1, at least with respect to those employees who have access to the kiosks but no access to the sponsor’s computer network as an integral part of their duties. For these employees, the employer will have to supply paper versions, or attempt to use Method 2, described later.

Method 1: How to Do it

- As with paper disclosures, the plan administrator must use an electronic disclosure method that is “reasonably calculated to ensure actual receipt.” As a general rule this is not supposed to mean that the administrator must guarantee receipt. But in the world of electronic disclosures, DOL regulations say the administrator is required to use methods that “ensure… the system for furnishing documents results in actual receipt of the transmitted information and documents” (emphasis supplied).

We understand this to mean that the administrator is not required to demonstrate that every individual necessarily receives the disclosure, but is required to demonstrate that, generally, its electronic disclosure method is resulting in actual receipt. Here’s how:

- The administrator must issue a notice each time an electronic disclosure is made, letting participants know about the electronic disclosure, the significance of the disclosure, and their right to obtain a paper copy without charge. The notice itself may be electronic, such as an e-mail. The notice does not have to be a separate, stand-alone notice. It may be part of a larger e-mail message that includes other disclosures, but the notice about the ERISA-required disclosure must be “prominent.”
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Example: The administrator sends participants an e-mail, attaching an electronic version of the disclosure document, such as an SPD or SAR, letting the participant know the significance of the attachment and the participant’s right to a paper copy (or letting participants know that the disclosure document is available for retrieval on the employer’s webpage; see the Example below for additional requirements in that event).

Again, the administrator must be able to verify that its electronic disclosure method is resulting in “actual receipt” of the electronic notice and related disclosures. To accomplish this, employers typically use an e-mail “return receipt” feature, where either the recipients affirmatively acknowledge receipt or the e-mail system generates a report showing who opened the e-mail and whose e-mail was returned unopened. Alternatively, the plan administrator periodically conducts reviews or surveys to confirm receipt of electronically-transmitted information.

Where an employer intends to post electronic disclosures (such as an SPD or SAR) on the employer’s webpage, the effort entails a two-step process.

- First, participants must receive notice in writing or electronically, as described in the first bulleted paragraph above, about the posting. The notice must explain the disclosure’s significance and the participant’s right to a paper copy.
- Second, the website home page should contain a link to the website section that contains information about the plan, and directions about how to obtain a replacement for a lost or forgotten password (if applicable). The electronic disclosure should remain available on the webpage for a reasonable period of time, to allow for retrieval by participants.

Example: A plan administrator wishes to “distribute” the plan’s SPD, to participants who access the employer’s computer system as an integral part of their duties, by posting the SPD to the employer’s intranet. The employer sends these participants an e-mail, alerting them to the availability of the SPD on the intranet. The e-mail contains a link to the appropriate intranet page, and explains both the significance of the SPD and the right to obtain a paper copy. The employer’s e-mail system allows the employer to determine who received and opened the e-mail.

- The plan administrator must endeavor to ensure the confidentiality of personal information.
- The plan must prepare and furnish the electronic disclosure document in a manner that is consistent with applicable style, format and content requirements for such documents furnished in paper format (in other words, the electronic document must contain the same information that a paper document of the same type is required to contain).
Method 2: Furnishing Electronic Disclosures to Employees Who Do Not Use the Employer’s Computer Network as an Integral Part of Their Duties, and to Former Employees, Retirees, COBRA Beneficiaries, Etc.

With respect to non-employee participants and beneficiaries, and to employees who do not meet the “integral part of their duties” standard, additional rules apply. These rules will typically apply, for example, where there are plan participants who are blue collar employees without network access as an integral part of their duties, where participants are retirees or COBRA beneficiaries, and where there are other individuals (e.g., former spouses buying COBRA coverage or dependents living outside the employee’s home) who are entitled to a particular disclosure.

Method 2: How to Do it

For these people, DOL regulations mandate that in addition to the requirements reflected in the bulleted lists above (under Method 1: How to Do it), such people must affirmatively consent to electronic disclosure. Prior to consenting, these individuals must be furnished a statement indicating:

➤ The types of documents to which the consent would apply (e.g., an SAR, SPD, etc.);
➤ That consent may be withdrawn at any time;
➤ The procedures for withdrawing consent and updating e-mail addresses, as applicable;
➤ The right to request and obtain paper copies of any documents free of charge; and
➤ Any software or hardware requirements for accessing and retaining the documents.

As a practical matter, it is difficult for plan administrators to supply electronic disclosures via Method 2. Plan administrators typically conclude that it is easier, with respect to individuals who are entitled to a disclosure and who do not access the employer’s computer system as an integral part of their duties, to simply provide paper copies of documents to such people.
Method 3: Electronic Distribution of New 4-Page Summaries of Benefits and Coverage

The Patient Protection and Affordable Care Act of 2010, the federal health reform law, requires many health plans to supply enrollees and individuals who are merely eligible for coverage with four-page summaries of the various coverage options available to them. Plans will often distribute hard copies of these summaries of benefits and coverage (SBCs), but it’s also possible to satisfy the disclosure obligation electronically. The rules regarding electronic disclosure of SBCs vary depending on whether the individual is currently enrolled, or whether the individual is merely eligible for coverage and not enrolled.

Electronic Disclosure of SBCs to Enrolled Individuals

Plans are required to supply SBCs at various times to current enrollees. If the plan wishes to make these disclosures electronically, it must satisfy Method 1 or Method 2 above.

But an easier method applies for disclosure of SBCs to individuals who are merely eligible for coverage but not yet enrolled.

Electronic Disclosure of SBCs to Individuals Who Are Eligible but Not Enrolled

Plans are also required to make SBCs available to individuals who are eligible for coverage but not yet enrolled. Here, disclosure becomes easier. According to final regulations issued by federal agencies, the plan satisfies its disclosure obligation by providing paper versions, or by making electronic versions “readily accessible” and supplying a paper version upon request.

The electronic version may simply be posted on an Internet page, as long as the plan notifies the eligible individuals via e-mail or in writing (say, on a postcard) advising the individuals that the documents are available on the Internet, providing the Internet address and notifying the individual that the documents are available in paper form upon request. The plan administrator’s obligations are not entirely clear where the administrator may be aware that many in its workforce don’t have Internet access at their homes. In that case it’s not clear whether the online documents are “readily accessible” even though the administrator sends a postcard to the employees’ homes advising them about how to access the documents online. Here, the administrator might be required to mail copies of the relevant SBCs.
Consequences of Non-Compliance

If the plan administrator does not adhere to the DOL standards when making an electronic disclosure, an affected participant or beneficiary may assert that the plan simply failed to make the required disclosure. For example, if the administrator fails to follow these guidelines when attempting to electronically distribute a summary plan description, a participant will have an easier time arguing in court that he or she never received the SPD, and therefore the plan should not be able to deny the participant’s medical claim.

In addition, there are significant monetary penalties, ranging from $110 per day (for many ERISA-required documents) to $1,000 per violation (in the case of SBCs) for failure to timely make disclosures required by various provisions of the ERISA law in a timely fashion.
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