

ELECTRONIC DELIVERY OF SPD & ANNUAL NOTICES

Under Department of Labor (“DOL”) regulations applicable to ERISA plans, a plan administrator may distribute Summary Plan Descriptions (“SPDs”) and other ERISA-required disclosures electronically, but significant administrative requirements may apply depending on the nature of the employer’s workforce.

Categories of Individuals to Whom Electronic Distribution Is Permitted

On-site access. The first category consists of participants who (1) can effectively access electronic documents at any location where they are reasonably expected to perform their work duties, and (2) for whom *access to the employer’s electronic information system is an integral part of those duties*. The DOL has emphasized the second element of this definition, noting that “a computer kiosk in a common area at a participant’s workplace . . . is *not* an appropriate means by which to deliver documents required to be furnished to participants.”

Electronic distribution beyond the worksite. The second category consists of all other participants and is not based on access to the employer’s electronic information system. Because furnishing plan documents to this category of individuals contemplates electronic distribution of plan documents beyond the workplace, the DOL imposes significant additional conditions that a plan administrator must satisfy before electronic distribution is permitted.

- The plan administrator must obtain the *affirmative consent* of the participant to receive the documents electronically, and such consent must not have been withdrawn;
- *Prior to consenting* the participant must be provided with a clear and conspicuous statement indicating each of the following: (1) the type of documents to which the requested consent would apply; (2) that the participant may withdraw his or her consent at any time and without charge; (3) the procedures for such a withdrawal of consent, and for updating the participant’s electronic address for receipt of plan documents or other plan-related information; (4) that the participant has a right to obtain a paper copy of any electronically-furnished document, and an explanation of whether there will be a charge for such a paper copy; and (5) an explanation of any hardware and software requirements for accessing and retaining the furnished documents; and
- If the documents are to be provided over the Internet (vs. the employer’s own electronic information system), (1) the required consent must be provided electronically, in a manner that “reasonably demonstrates” the participant’s ability to access the documents in the form in which the plan administrator will furnish them; and (2) the participant must have provided an address for electronic receipt of the documents.

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Disclosure Requirements

For both categories of participants, the plan administrator must take appropriate and necessary measures to ensure that the system for furnishing documents does the following:

- Results in actual receipt of the information transmitted (recommend return-receipt email confirmation, notice of undelivered email, and/or periodic surveys to confirm receipt); and
- Protects the confidentiality of personal information relating to the participant's accounts and benefits (recommend password-protected account).

The electronically-delivered documents must conform to the style, format, and content requirements applicable to the particular document. If the significance of the document is not reasonably evident as transmitted, the plan administrator must provide notice to the participant at the time a document is furnished that (1) explains the significance of the document, and (2) informs the participant of his or her right to request and obtain a paper version. The plan administrator must, upon a participant's request, provide a paper version of the particular document.

Use of Company Website

If using a company website for electronic distribution, the DOL regulations specifically require that:

- the website homepage should contain a prominent link to the website sections that contain information about the plan;
- the website should include directions on how to obtain a replacement for a lost or forgotten password, to the extent one is needed; and
- disclosure documents should remain on the website for a reasonable period of time after participants are notified of their availability.