

Distributing Materials Electronically

This guide to some frequently asked questions regarding distributing materials electronically will help you understand when you can provide plan-related information to participants either online or via email.

Q: Can materials be delivered to participants electronically?

A: Yes. The Department of Labor (DOL) and the Internal Revenue Service (IRS) have separate rules for disclosing certain retirement plan information electronically. The DOL has established safe harbor rules for all retirement plans covered by the Employee Retirement Income Security Act (ERISA).

Q: Which documents fall under the DOL rules for electronic delivery?

A: The DOL safe harbor rules for electronic delivery apply to most disclosures required by ERISA, including:

- Summary plan descriptions (SPDs)
- Summary of material modifications (SMMs)
- Summary annual reports (SARs)
- Notices required by the Sarbanes-Oxley Act when a blackout — defined as a suspension of participants' and beneficiaries' rights to diversify or direct investments, or obtain a loan or distribution — will last for three consecutive business days or more
- Individual benefit statements
- Investment-related information in participant-directed individual account plans that intend to comply with ERISA section 404(c)
- Qualified domestic relations order (QDRO) notifications
- Information that ERISA requires to be furnished or made available upon participant or beneficiary request
- Participant fee disclosures intended to comply with ERISA section 404(a)(5)

Q: What are the DOL requirements for electronic delivery of documents?

A: The DOL requirements for electronic delivery are:

- Style, format and content
- Delivery
- Notice
- Confidentiality
- Consent

Style, format and content

All electronic documents must be prepared and furnished in a manner consistent with the style, format and content requirements for paper documents.

Delivery

Electronic delivery systems must contain features to ensure receipt of the documents or to notify the sender if they are not. For example, return receipt or notice of undelivered or undeliverable emails. Periodic reviews or surveys confirming that documents were received should be conducted. In order to provide plan documents via a company website, the website home page must display a prominent link to the areas with plan information.

Notice

At the time the document is furnished, plan administrators must inform recipients of the significance of the documents provided electronically, and must notify them that a paper version of the document is available upon request. Plan administrators must provide paper copies of electronically-transmitted documents to participants and beneficiaries who request them.

Confidentiality

Electronic delivery systems must protect the confidentiality of personal account and benefit information. These systems must prevent unauthorized receipt of or access to confidential information.

Consent

The DOL's safe harbor rules for electronic delivery of documents divide recipients into two groups.

The first group includes participants who have the ability to effectively access documents furnished in electronic form at any location where the participants are reasonably expected to perform their duties as employees if access to the employer's or plan sponsor's electronic information system is an integral part of those duties. Consent from these participants is not required.

The second group includes other participants, beneficiaries and anyone else entitled to documents under ERISA, including, but not limited to, alternate payees.

Q: What are the consent requirements for this second group?

A: Prior to consenting, they must be provided, in electronic or non-electronic form, a clear and conspicuous statement indicating:

- The types of documents to which the consent would apply
- That consent can be withdrawn at any time without charge

- The procedures for withdrawing consent and for updating their address for receipt of electronically furnished documents or other information
- 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 (a paper version of the SPD and/or SMM must be provided free of charge)
- Any hardware and software requirements for accessing and retaining the documents

They must affirmatively consent, in electronic or non-electronic form, to receiving documents through electronic media and have not withdrawn such consent.

If the information is going to be furnished through the Internet or other electronic communication network, they must affirmatively consent or confirm consent electronically, in a manner that reasonably demonstrates their ability to access information in the electronic form that will be used to provide the document and has provided an address for the receipt of electronically furnished documents.

After they consent, if a change in hardware or software requirements needed to access or retain the electronic documents creates a material risk that they will be unable to access or retain electronically furnished documents, they:

- Must be provided with a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents
- Must be given the right to withdraw consent without charge and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent
- Must again consent, in accordance with the requirements described above, to the receipt of documents through electronic media

Q: Which documents fall under the IRS rules for electronic delivery?

A: The IRS rules for electronic delivery apply to:

- Notices of distribution choices and the participant's right to defer distributions of vested benefits of more than \$5,000 until normal retirement age
- Notices explaining a participant's right to elect a direct rollover to another retirement plan or an IRA and the tax effects of that rollover, as well as tax rules applicable to other distribution options available
- Notices of a participant's right to waive income tax withholding on certain distributions
- Safe harbor 401(k) plan notices

Q: What are the IRS requirements for electronic delivery of notices?

A: The IRS requirement for electronic delivery consists of:

- The timing and content rules that otherwise apply to the notice, election or consent must be met
- The electronic system must be designed to provide the information in a manner that is no less understandable than if provided on a written paper document
- The electronic system must alert the participant when the notice is provided of the significance of the information and provide any instructions needed to access the notice
- The electronic record of an applicable notice or participant election must be retained so that it can be accurately reproduced for later reference

The IRS permits two methods of providing applicable notices to participants.

Consumer Consent Method

Under this method, the plan must provide the participant with a disclosure statement that describes:

- The scope of the consent — Whether the consent to receive a notice electronically applies only to that notice or to other notices that will be distributed while the person is a participant. For example, it would have to explain whether the consent will

apply to just to the safe harbor notice or to all future plan notices

- The participant's right to withdraw consent to receive the notice electronically
- The participant's right to request to receive a paper copy of the notice, plus any fees for receiving paper
- The hardware and software requirements for accessing the notice for updating information to contact the participant electronically
- Procedures for updating information to contact the participant electronically

The participant must then consent to receive the notice electronically before the plan provides the notice. The consent must either:

- Be made electronically in a way that demonstrates the participant can access the notice in the electronic form that will be used to provide the notice
- Be made using a written paper document, but only if the participant then confirms his or her consent electronically in a way that demonstrates the participant can access the notice in the electronic form used to provide it

The consent may not be provided verbally.

Consumer Consent Exemption Method

Under this method, affirmative consent from the participant is not required, provided that the participant is "effectively able" to access the notice electronically. The plan must inform the participant that a paper version of the notice will be provided at no charge upon request.

Conclusion

As you can see, electronic delivery of notices, reports and documents involves more than sending to a participant as an email with an attachment. Please ensure that you have adequate procedures and processes in place to ensure you satisfy these requirements.



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