

# CLIENT ALERT

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## IMPORTANT INFORMATION IF YOU PROVIDE MATERIAL TO YOUR EMPLOYEES USING ELECTRONIC MEDIA

Due to increasing notification responsibilities, more employers are providing ERISA required documents via electronic media. (Email, Intranet Site, External Internet sites, Online enrollment sites, Payroll sites) While this is certainly more efficient and saves on cost, employers must follow the rules that surround electronic disclosure of documents. The update in 2020 to the safe harbor disclosure regulations for electronic distribution of documents pertained only to retirement documents and not to welfare plan documents. The Department of Labor's Safe Harbor requirements for welfare plans have not been updated and must be met to be in compliance. [The 2002 Safe Harbor Guidelines for Welfare Benefit Plans should be reviewed in its entirety and can be accessed here.](#)

In general, under ERISA, employers must take appropriate and necessary measures to assure that there is a reasonable expectation that the material is received by plan participants. Under the electronic safe harbor guidelines, there are two sets of requirements, one for employees that routinely have access to electronic documents as in integral part of their jobs and those who do not which would also include other individuals who are not employees, like beneficiaries, dependents and COBRA participants.

### **Employees with Access to Electronic Media at Work must:**

- Have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his/her duties as an employee; and
- With respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of their duties.

**Employees without Access to Electronic Media at Work as well as employees who rely on a computer kiosk at the employer's location must:**

- Affirmatively give consent for the material to be sent electronically.
- Provide an address in order to receive electronically furnished documents.
- Must reasonably demonstrate their ability to access information in the electronic form that will be used.
- Prior to consent, must be furnished with a pre-consent statement that must be provided in a “clear and conspicuous” manner indicating:
  1. The types of documents to which the consent would apply;
  2. That consent can be withdrawn at any time without charge and instructions for withdrawing consent;
  3. The procedures to update a participant's, beneficiary's or other individual's address for receipt of electronically furnished documents or other information;
  4. 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
  5. Any hardware and software requirements for accessing and retaining the documents.

**Notice Requirements**

- A notice must be provided to each participant in electronic or non-electronic form at the time a document is furnished electronically. Documents may be included as an attachment to an email or as a link to a website where the documents can be accessed. The notice must explain the significance of the document when it is not otherwise reasonably evident, (for example, the attached document describes changes in the benefits provided by your plan).
- A notice must be provided each time a document is provided electronically.
- A statement that the participant has the right to request and obtain a paper version of the document.
- When notices are posted to a website, employers must take steps to ensure actual receipt of the document, including:
  1. Adding to the website home page a link to the section containing the document(s).
  2. If a password is required, directions to retrieve forgotten passwords

3. Keeping the document posted for a reasonable period of time following the notice to plan participants.

### **Additional Considerations**

Part of this safe harbor is a requirement that electronic furnishing of documents must be sent by method or methods of delivery likely to result in full distribution. Part of Full distribution means employees, dependents, and other non-employees as applicable.

There are certain documents that should be provided in a way that other covered members of a participant's family are reasonably expected to see them. The initial notice of COBRA rights and the Medicare D Creditable Coverage Notice are two examples.

The initial notice of COBRA rights spells out a dependent's obligations to the plan if the dependent loses eligibility under a COBRA qualifying plan. Providing this electronically to the employee means that there is no reasonable expectation that a spouse or child over 18 will read the notice. We advise mailing the Initial Notice of COBRA Rights to the employee's home. Note that where you know a covered dependent lives at a different address, this notice must be sent there as well.

Similarly, the Medicare D notice may not be read by a spouse or a dependent child over 18 who may be eligible for Medicare due to age or disability. CMS has provided guidance for those plan sponsors who wish to provide the Medicare D notice in electronic form. We suggest employers review the [guidance](#) to ensure that they meet the required electronic distribution method should they choose not to mail this notice.

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