

BENEFIT ADVISOR

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ELECTRONIC DISTRIBUTION RULES

Human Resource departments are well aware of the many employee notices required for various benefit plans. The number has increased dramatically over the last 30 years. Below are just a few of these notices:

- ERISA plans must supply Summary Plan Descriptions (SPDs) and Summary Annual Returns (SARs)
- Health plans must provide a Summary of Benefits and Coverage (SBCs)
- COBRA requires employers to send a number of notices to health plan participants and qualified beneficiaries
- FMLA requires employers to send specific notices to employees
- HIPAA requires Privacy Notices

Employers over the last decade have been moving more and more to communicating with employees electronically. In many organizations, it is more efficient and cost effective than paper communications. Many employers conduct enrollment electronically and would like to send required

notices electronically as well. Can electronic communications meet the required distribution rules? That question, unfortunately, has a very complicated answer.

The government does not have one set of electronic delivery rules for all required benefit plan notices. It would be much easier if it did. For some notices, it is fairly easy to meet the electronic delivery requirements. For others, it is easier to just send paper copies.

This *Benefit Advisor* will recap various required notices. It details the general delivery requirements and spells out electronic delivery rules.

ERISA ELECTRONIC DISTRIBUTION SAFE HARBOR

Some notices have to satisfy ERISA's electronic delivery requirements. ERISA has an electronic distribution safe harbor. If a plan follows the safe harbor rules, it can deliver required notices electronically. The safe harbor spells out different requirements for employees with and without work-related access to a computer.

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We welcome your comments and suggestions regarding this issue of our Benefit Advisor. For more information, please contact your Account Manager or visit our website at www.mma-mi.com.

Employees with Work-Related Access

Employees with work-related access must:

- Be able to access documents electronically from anywhere they could be reasonably expected to work.
- Use an electronic information system as an integral part of their jobs.

An employer can send various ERISA notices to these employees electronically. The electronic delivery must meet the requirements discussed below.

Employees do not need access to a printer for these notices, but they must have access to a paper copy at no charge. In general, employee consent is not required to deliver notices electronically. (HIPAA Privacy Notices are the exception).

Employees without Work-Related Access

Employers can still deliver documents electronically even to employees without work-related computer access. These employees must give their consent to receive documents electronically.

The consent process requires the following:

1. Employee must provide an electronic address for the delivery of documents.



2. Employer must provide a statement that details:
 - a. The types of documents to be delivered electronically.
 - b. Notice that consent to receive documents electronically can be withdrawn without charge.
 - c. The procedures for withdrawing consent and for updating information.
 - d. The right to request a paper copy and whether a charge applies.
 - e. The electronic delivery system and what hardware and/or software is required.
3. Once employees are able to read the statement details, they can consent electronically.

Requirements for Electronic Disclosure

In addition to obtaining consent, if necessary, an employer must:

- Use a process that reasonably ensures employees actually receive the electronic statement. For example, employers should have a method to account for any bounced back emails if they use email to deliver the documents.

- Inform employees when they send documents electronically of the significance of the document and the employee's right to request and receive a paper copy of the document free of charge.
- Take reasonable steps to safeguard confidential information when a notice contains personal information on an employee's accounts or benefits.

Many ERISA required documents can be sent electronically as long as employers meet these requirements for employees with and without electronic access.

REQUIRED NOTICES/ DISCLOSURES AND ELECTRONIC DELIVERY RULES

The chart on pages 3-6 summarizes required notices/disclosures and the electronic delivery rules.

REQUIRED NOTICES/DISCLOSURES AND ELECTRONIC DELIVERY RULES

NOTICE/ DISCLOSURE	GENERAL PURPOSE/TIMING	ELECTRONIC DELIVERY REQUIREMENTS
Summary Plan Description (SPD)	Required by ERISA. Describes plan provisions/rules. Must be provided within 90 days after employee becomes covered.	Follow ERISA electronic distribution safe harbor rules.
Summary of Material Modification (SMM)	SMMs provide details on material changes to ERISA plans. If the modifications made are reductions in the level of service or benefits provided, then the SMM need to be provided within 60 days. For other changes, SMMs need to be provided within 210 days after the end of the plan year in which the modifications were made.	Follow ERISA electronic distribution safe harbor rules.
Summary Annual Report (SAR)	For plans required to file a Form 5500, a summary of 5500 information must be provided to participants. This summary is called the Summary Annual Report (SAR). The SAR must be provided within nine months from the close of the plan year (no later than September 30 for calendar year plans).	Follow ERISA electronic distribution safe harbor rules.
HIPAA/Medicaid Special Enrollment Rights Notice	HIPAA requires employers to send a special enrollment notice at or before the time an employee can initially enroll in an employee health plan. It should be included in new hire and open enrollment communications.	<ul style="list-style-type: none"> • Can be provided in SPD. • Follow ERISA electronic distribution safe harbor rules.
Medicare Part D Creditable Coverage Notice	Must be provided annually to Medicare eligible plan participants. Can be included with other communication materials such as new hire communications and open enrollment materials.	<ul style="list-style-type: none"> • Follow ERISA electronic distribution safe harbor rules. • Instruct employee to share with any dependents that may be Medicare eligible.
Notice of Availability of Health Insurance Exchange	Informs employee about the Marketplace. Must be provided within 14 days of a new employee's start date.	Follow ERISA electronic distribution safe harbor rules.
Newborns' and Mothers' Health Protection Act	This notice may be included in the SPD.	Follow ERISA electronic distribution safe harbor rules.
CHIP Notice	The CHIP Notice informs eligible employees of their possible right to receive financial assistance through Medicaid and the Children's Health Insurance Program (CHIP) to pay for premiums for health coverage under the employer's plan, if such assistance is currently available in the states in which employees reside. The CHIP Notice must be sent annually - to each employee who is or might become eligible for employer group health benefits. You can include this annual notice as part of your Open Enrollment packet.	<ul style="list-style-type: none"> • Follow ERISA electronic distribution safe harbor rules or • CHIP Notice may be mailed to eligible employees by first-class mail.
Summary of Benefits & Coverage (SBC)	SBCs are required by the ACA and designed to provide consistent benefit summaries across plans. They must be provided: <ul style="list-style-type: none"> • When a participant is initially eligible for coverage. The SBCs for all benefit plans available to the employee must be provided. • By the first day of coverage (if there are changes to the SBC). Only the SBC for the plan elected must be provided. • When an event triggers HIPAA special enrollment rights. The SBCs for all benefit plans available to the employee must be provided. • At annual enrollment. Only the SBC for the plan elected must be provided. Others must be made available upon request. • Upon request: Within seven business days after receiving the request. 	The administrator must take appropriate, reasonable steps to make sure the employee receives the document. <ul style="list-style-type: none"> • An administrator can use return-receipt or a notice of undeliverable electronic mail. The administrator can periodically survey to confirm that information is being received. • The system must protect confidential personal information transmitted (which should not be in an issue with SBCs). • The document meets the style, format and content requirements. • Beneficiaries or participants are notified electronically or in a non-electronic format that this is an important document and they can request a paper copy.

NOTICE/ DISCLOSURE	GENERAL PURPOSE/TIMING	ELECTRONIC DELIVERY REQUIREMENTS
<p>Summary of Benefits & Coverage (SBC) (CONT.)</p>		<ul style="list-style-type: none"> • A paper copy must be furnished upon request. <p>A “safe harbor” is provided, allowing employers to deliver documents electronically if employees can effectively access documents at the work location where they perform their duties. Employees must have access to the employer’s electronic information system as part of their duties.</p> <p>If employees do not have access at work, the employer can obtain their consent to receiving the documents electronically. The consent form must state:</p> <ul style="list-style-type: none"> • The types of documents to which consent applies. • Employees can withdraw consent at any time. • How to withdraw consent. • The right to a free paper copy. • The hardware or software required to access documents.
<p>ADA/GINA Notice for Wellness Incentives</p>	<p>Provided if incentives are offered to complete a health exam, biometric screenings or a health assessment. It must be provided before an individual participates in exam, screening or health assessment.</p> <p>It must be provided annually if incentives for the exam, screening and health assessment are offered annually.</p>	<p>Can be given in any format that will be effective in reaching employees being offered an opportunity to participate in the wellness program. For example, it may be a hard copy or part of an email sent to all employees with a subject line that clearly identifies the information being communicated (e.g., “Notice Concerning Employee Wellness Program”). Avoid including a lot of unrelated information that may cause employees to ignore or misunderstand the notice. Notices distributed electronically should be formatted so that employees who use screen reading programs can read them.</p>
<p>1095 C Forms</p>	<p>These forms need to be provided annually to full-time employees (or part-time employees covered by a self-funded group health plan).</p> <p>Need to be provided only if employer is an Applicable Large Employer (ALE) – 50 or more full-time and full-time equivalent employees.</p>	<ul style="list-style-type: none"> • These forms can be sent electronically. • An employer must obtain affirmative consent to furnish a statement electronically. This requirement ensures that electronic statements are furnished only to individuals who are able to access them. The consent must relate specifically to receiving this form electronically. An employee may consent on paper or electronically. If employees consent on paper, they must confirm the consent electronically. An electronic statement may be sent by email or it can explain how to access the statement on the employer’s website. Specific information on consent to furnish statements electronically can be found at https://www.law.cornell.edu/cfr/text/26/301.6056-2.

NOTICE/ DISCLOSURE	GENERAL PURPOSE/TIMING	ELECTRONIC DELIVERY REQUIREMENTS
<p>HIPAA Privacy Notice</p>	<p>Notice describes employees' rights regarding PHI and how employers will use and protect PHI.</p> <p>Must be distributed:</p> <ul style="list-style-type: none"> • At initial enrollment in health plan • Within 60 days of a material change to the notice • Reminder that Notice is available, once every three years 	<ul style="list-style-type: none"> • The HIPAA rules for privacy notices are more restrictive than other ERISA documents. • Employers must obtain consent from each employee to deliver the document electronically. • Consent must include any hardware or software requirements. • It must also inform employees that they can withdraw consent at any time.
<p>HIPAA Notice of Breach of Unsecured PHI</p>	<p>If a breach of unsecured PHI occurs, the health plan has 60 days after discovering the breach to notify individuals affected.</p> <p>Breach notification must also be made to DHHS. Timing of this notification depends on the number of people affected.</p>	<ul style="list-style-type: none"> • Notification can be sent electronically if the participant consents. • Breach notifications to DHHS must be submitted electronically at https://www.hhs.gov/hipaa/for-professionals/breach-notification/breach-reporting/index.html.
<p>COBRA – General Notice</p>	<p>The General Notice must be provided to potential COBRA qualified beneficiaries within 90 days of coverage.</p> <p>This notice must be delivered to employee and spouse if both enroll for the health plan.</p>	<ul style="list-style-type: none"> • The ERISA electronic distribution safe harbor rules could be followed to allow for these general notices to be received electronically. • This may not make sense, because electronically delivering notice to the employee does not meet the requirement to deliver the notice to the spouse. • You would need to obtain consent to send to spouse electronically. • If spouse is added after employee enrolls (new marriage, at open enrollment), a general notice of COBRA rights needs to be sent to spouse.
<p>COBRA Qualifying Event/Election Notice</p>	<p>If the employer has an outside COBRA administrator, then the employer has 30 days to notify the administrator of the qualifying event.</p> <p>At that point, the administrator has 14 days to send out the election notice (mailed first class to the qualified beneficiary's last known address).</p> <p>If the employer administers COBRA in-house, then the employer appears to have a maximum of 44 days to send the COBRA election notice, measured from the later of the coverage loss date or the qualifying event. However, it is best to send the election notice as soon as possible.</p>	<ul style="list-style-type: none"> • These notices can be delivered electronically but it is NOT practical. • Since very few COBRA qualified beneficiaries will remain employees (and some qualified beneficiaries are not even employees), consent is required. • Consent would need to be obtained through mailed documents. • More logical to simply send COBRA qualifying and election notices by first class mail.
<p>COBRA Termination Notice</p>	<p>If COBRA terminates before the end of the maximum coverage period, the administrator must send a notice of termination. This notice should be sent as soon as possible, and include the reason for COBRA termination, the date coverage terminated and information about conversion or any alternative coverage rights.</p>	<ul style="list-style-type: none"> • These notices can be delivered electronically but it is NOT practical. • Since very few COBRA qualified beneficiaries will remain employees (and some qualified beneficiaries are not even employees), consent will be required. • Consent would need to be secured through mailed documents • It is more logical to simply send COBRA termination notices via first class mail.

NOTICE/ DISCLOSURE	GENERAL PURPOSE/TIMING	ELECTRONIC DELIVERY REQUIREMENTS
FMLA General Notice	FMLA General Notice takes 2 forms- 1. Required poster 2. Descriptions of employee benefits and leave rights typically included in employee handbooks Should be provided near the date of hire.	<ul style="list-style-type: none"> Electronic posting of the policy is permitted if: <ul style="list-style-type: none"> Posting is conspicuous on employer's website Accessible to all applicants and current employees All employees have access to a computer at workplace
FMLA Notice of Eligibility – Rights and Responsibilities	Employer should provide these notices within 5 days of a request for leave.	<ul style="list-style-type: none"> The regulations state these may be delivered via first-class mail or electronically. No specific rules on what would constitute electronic delivery – greater focus on content of notices. For an electronic delivery, make sure the process has a delivery verification feature or a return undelivered functionality.
FMLA Designation Notice	Employer should provide this notice within 5 days of a leave being approved as FMLA.	<ul style="list-style-type: none"> The regulations state these may be delivered via first-class mail or electronically. No specific rules on what would constitute electronic delivery – greater emphasis on including all required information in the notice For electronic delivery, make sure the process has a delivery verification feature or a return undelivered functionality.
Women's Health and Cancer Rights Act	This notice must be included in new hire and annual enrollment materials. The notice can be included in the SPD, if the plan distributes the SPD at enrollment. Employer should include notice in annual open enrollment materials.	<ul style="list-style-type: none"> The regulations require that the "delivery method used must be calculated to ensure actual receipt of the material and full distribution." The annual notice and notice included in the SPD should follow the ERISA electronic distribution safe harbor rules.

Many employers deliver documents and communications electronically through their benefit administration system or the human resources information system. When this approach is taken, employers must be careful. Different notices have different delivery requirements. If all employees enroll electronically, some employees will likely not meet the "at work" access requirements under ERISA. It is good practice when certain notices are provided via the benefit administration system to secure consent from all employees. Most benefit administration systems will allow

you to build a consent verification process into the enrollment tool.

Employers also need to be mindful if they handle new hire or mid-year enrollments differently. Some employers will only conduct open enrollment electronically and handle mid-year and new hire communications and enrollment on paper. If this is the case, they need to make sure they are providing the communications needed at the time properly. Notices can still be delivered electronically outside the enrollment system, but it must follow the requirements outlined above.

Note a general consent built into an enrollment system is not sufficient for electronic distribution of a 1095 C Form or a W-2 Form. To deliver these electronically, you must secure independent consent associated with each form.

As you consider electronic distribution, don't forget non-employees that may need to receive documents. This may include retirees or COBRA qualified

beneficiaries, who likely do not have access to your electronic systems. Your best practice may be to deliver required notices via first class mail.



Employers should review their processes for delivering required notices. If they deliver a notice electronically, they should ensure they are following the electronic delivery requirements for that notice.

It may be wise for employers to create an electronic distribution procedures document. The document can

spell out the specific procedures for delivering notices electronically. The document should verify the process in case of an audit. It will also ensure employers are following the correct process for each required notice.

If you have any questions, please contact your Marsh & McLennan Agency | Michigan Account Manager. [MMA](#)

CONCLUDING THOUGHTS

Many employers now communicate with employees electronically. It is efficient and saves money. However, most federally required notices have to meet some electronic delivery rules to ensure employees actually receive the materials. As the table in this *Benefit Advisor* shows, different notices have different requirements for electronic delivery.

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