

Summary of Employee Retirement Income Security Act's (ERISA's) Reporting and Disclosure Rules

ERISA's safe harbor for disclosure through electronic media, such as email and Web postings, has a number of requirements. If an employer follows the safe harbor, it is, for the most part, assured that the Department of Labor (DOL) would find that it is in compliance with the reporting and disclosure requirements of ERISA.

Aon has taken steps to encourage simplification of these rules. Aon initially submitted comments to the DOL on June 3, 2011. Aon sent a letter to Secretary Alexander Acosta on May 22, 2017 requesting simplification of the electronic distribution as a result of the Trump Administration's Executive Order regarding regulatory reduction and also testified to the DOL ERISA Advisory Council on August 22, 2017 on related matters. To date, the safe harbor remains as outlined in this summary.

General Rule¹

As a general rule, the method must be reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. It must be sent by a method of delivery likely to result in full distribution to everyone covered by the plan and beneficiaries receiving benefits under the plan (other than beneficiaries under a welfare plan). In other words, while one distribution method might work for one group of individuals (e.g., employees), another method may need to be used to ensure receipt by another group (e.g., retirees).

COVID-19 Relief²

The DOL announced an extension of deadlines for furnishing other required notices or disclosures to plan participants, beneficiaries, and other persons so that plan fiduciaries and plan sponsors have additional time to meet their obligations under ERISA during the national emergency involving COVID-19.

Generally, a plan and its responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 national emergency (currently scheduled to end as of October 23, 2020), if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.

Examples of Acceptable Methods of Delivery

- In-hand delivery to an employee at his or her worksite:
 - However, merely placing the material in a place frequented by employees is not an acceptable method. Again, you need to ensure that individuals who are not "at work" would receive the update (e.g., retirees or individuals who are not assigned to a computer/desk, through another acceptable means, such as the mail).

¹ Aon is not in the practice of law. This bulletin is intended to provide a general overview of the Reporting and Disclosure rules under ERISA.

² EBSA Disaster Relief Notice 2020-01.

- Periodicals:
 - Furnishing Summary Plan Descriptions (SPDs) or Summary Material Modifications (SMMs) as a special insert in a periodical distributed to employees, such as a union newspaper or a company publication is acceptable. However, the distribution list for the periodical must be comprehensive and a prominent notice on the front page must advise readers that the issue contains an insert with important information about rights under the plan and ERISA which should be read and retained for future reference.
- Mail:
 - First class mail is an acceptable method of distribution. In addition, second or third class mail may be used if return and forwarding postage is guaranteed and address correction is requested. If it is returned with an address correction, it must be delivered a second time by first class mail or personal delivery at the employee's worksite.
- Electronic Distribution:

The following electronic distribution safe harbor is only available with respect to a participant who:

1. Has the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee.
2. *With respect to whom access to the employer's electronic information system is a part of those duties.*

The distribution of an SPD or SMM or other ERISA required materials (e.g., federal DOL notices) through electronic media will be deemed to be furnished in accordance with the ERISA disclosure requirements if the following safe harbor standards are met:

- The administrator of the plan takes measures to ensure that the system used to distribute this information electronically results in actual receipt of such information by the participant or beneficiary and protects the confidentiality of personal information. Examples given by the DOL include a return-receipt electronic mail feature or periodic reviews or surveys to confirm the integrity of the delivery system.
- The document that is distributed electronically is prepared in a manner consistent with the style, format, and content requirements applicable to that document.
- Each participant receiving the document electronically is provided a notice, electronically or on paper, at the time a document is furnished electronically, apprising the participant of the significance of the document (e.g., the attached document describes changes in the benefits provided by your plan) and of the participant's right to request and receive a paper copy of the document which will be furnished free of charge.
- Upon request, the participant, beneficiary or other individual is furnished a paper version of the SPD or SMM.

What if the employee / participant does not have a computer as part of his/her ordinary work duties as explained in the red text?

If a participant does not meet the above requirement in *red italics* (e.g., a retiree, a terminated employee, a union employee who works in the field, a health care provider who works in the field, a dependent) then, additional requirements must be met, as follows:

- The participant must have affirmatively consented, in electronic or non-electronic form, to receive the documents through electronic media (and has not withdrawn the consent);

- In the case of documents to be furnished through the Internet or other electronic communication network, a participant has **affirmatively** consented or confirmed consent electronically, in a manner that demonstrates the individual's ability to access information in the electronic form that will be used to provide the information and has provided an address for the receipt of such documents;
- Prior to consenting, is provided, in electronic or non-electronic form, a 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 the participant's, beneficiary's or other individual's address for receipt of electronically furnished documents.
 - The right to request a paper copy (and whether it will be free of charge).
 - Any hardware or software requirements for accessing and retaining the documents.
Note: *Additional details apply if these requirements change.*

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