

Employee Benefits Update

DOL Issues Final Regs Governing Electronic Disclosures

harbor under which plan administrators can satisfy ERISA's plan disclosure obligations through electronic means. Below is a summary of the new regulations along with a description of how the final regulations differ from the proposed regulations that were previously issued by the DOL.

Types of Documents Permitted to be Distributed Electronically

The final regulations permit electronic distribution of any report, statement, notice or document required to be furnished under Title I of ERISA. This would include:

- summary plan descriptions (SPDs)
- summaries of material modification (SMMs)
- summary annual reports (SARs)
- COBRA notices
- HIPAA certificates of creditable coverage
- qualified medical child support order (QMCSO) notices
- qualified domestic relations order (QDRO) notices
- individual benefit statements
- decisions on benefit claims

This is a significant expansion from the scope of the proposed regulations, which only authorized electronic distribution of SPDs, SMMs and SARs. However, the expanded scope does not include disclosures required by Part 2 or Part 3 of ERISA because the Department of the Treasury—not the DOL—has regulatory authority for those parts of ERISA.

Categories of Individuals Eligible to Receive Electronic Disclosures

The final regulations permit electronic distribution of documents to two categories of individuals:

- Participants who have the ability to effectively access the documents from any location where they are reasonably expected to perform their duties as employees and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties.

On April 9, 2002, the Department of Labor (DOL) issued final regulations governing the electronic distribution of plan materials. The final regulations, which are effective October 9, 2002, establish a safe

- Participants, beneficiaries and other persons entitled to plan disclosures under Title I of ERISA (such as a QDRO alternative payee or a COBRA qualified beneficiary) who consent to receive documents electronically.

The proposed regulations permitted distribution only to the first category and imposed the requirement that participants have the ability to access the electronic documents at their "worksite." The final regulations eliminated the term "worksite," thereby permitting participants who work at home or travel to be eligible to receive electronic documents as long as such participants have ready access to the employer's information system. However, the preamble to the regulations specifically rejects the "kiosk" option where computer terminals are available at centralized locations for portions of the workforce for whom computers are not part of their job. The final regulations also eliminated the requirement that a participant be able to readily convert the electronic document to paper form free of charge.

The second category is new. It permits an employer to electronically distribute documents outside the workplace, or to employees lacking computer access at the workplace, as long as the individual consents.

Obtaining Consent to Distribute Electronically

There are numerous requirements to obtain the consent of an individual to receive documents in electronic form.

If the plan administrator furnishes the documents through an electronic communication network, the individual receiving the document must provide an e-mail address for the electronic receipt of the documents and must affirmatively consent or confirm consent electronically in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used. In some instances, such as where the means of electronic distribution is through CD-ROM or DVD or similar media not dependent on electronic transmission, the e-mail requirement does not apply.

Additionally, in all cases, prior to obtaining consent, the plan administrator must provide in electronic or non-electronic form, a clear and conspicuous statement explaining:

- the types of documents to which the consent will apply,
- that the consent may be withdrawn at any time without charge,
- the procedures for withdrawing consent and for updating the individual's e-mail address,
- 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
- any hardware and software required to access and retain the documents.

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If a change in hardware or software requirements needed to electronically access the documents creates a material risk that an individual will not be able to receive the documents, the individual must be notified and given the right to withdraw his or her consent.

General Obligations for All Electronic Distributions

The final regulations also set forth general requirements for all electronic disclosures to individuals in both the first and second categories:

- A plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the system for electronically furnishing documents results in actual receipt of the transmitted documents (such as using return receipt e-mail or periodic reviews) and protects the confidentiality of personal information relating to the individual's accounts and benefits.
- The electronically furnished documents must be prepared and furnished in a manner consistent with the applicable style, format and content requirements imposed by ERISA.
- The plan administrator must also provide notice in electronic or non-electronic form at the time a document is furnished electronically to each individual receiving the document apprising the individual of the significance of the document when not otherwise reasonably evident and of the right to request a paper version of such document.
- If requested by an individual, the plan administrator must furnish a paper version of the electronic document to that individual.

Conclusion

The final regulations significantly expand the types of documents that can be distributed electronically, which should lead to cost savings and efficiencies for plan administrators. If you have any questions about the final regulations, please contact the attorney you work with in the Employee Benefits Department. You can also call Mike Punt, our department's Communications Coordinator, at 612-340-2867 to be connected to an attorney.

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