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## EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

**ELECTRONIC DELIVERY RULES FOR BENEFIT PLAN COMMUNICATIONS**

The Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code (“IRC”) require a number of participant notices, disclosures, elections, and consents to be provided in writing. The Internal Revenue Service (“IRS”) and the Department of Labor (“DOL”) have each promulgated regulations that permit these documents to be disseminated electronically as long as certain conditions are met. In addition, the Department of Health and Human Services (“HHS”), pursuant to its authority under the Health Insurance Portability and Accountability Act (“HIPAA”), has promulgated regulations regarding electronic disclosure of the notices of privacy practices.

**Department of Labor Rules**

The DOL distribution regulations apply to communications over which the DOL has regulatory authority under Title I of ERISA. Communications subject to DOL rules include:

- Summary plan descriptions (“SPDs”) and summaries of material modifications (“SMMs”)
- Blackout notices
- QDIA notices
- Annual funding notices
- Notices of funding-based benefit restrictions
- Summary annual reports
- Retirement plan benefit statements
- Participant fee disclosures
- Automatic enrollment notices
- Notices of the right to divest employer securities
- Claims notices
- Notices relating to QDROs and QMCSOs
- COBRA notices
- Summaries of Benefits and Coverage (group health plans)
- Notices of health insurance marketplace (“exchange notices”)
- HIPAA (excluding privacy notices, which are subject to special rules), WHCRA and various other health/welfare plan notices

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In connection with certain qualified plan terminations, the Pension Benefit Guaranty Corporation (“PBGC”) requires distribution of a plan termination notice. The PBGC’s standards for disclosure in general and electronic disclosure in particular are consistent with DOL standards.

### *General DOL Standard for Distribution of Disclosures*

In general, the DOL requires that a plan administrator must use “measures reasonably calculated to ensure actual receipt” of the material being distributed. Delivery in person or by first-class mail is always acceptable. Distribution by second- or third-class mail is acceptable if certain precautions are taken. However, it is never acceptable just to place copies in locations frequented by plan participants.

The DOL offers three regulatory safe harbors for electronic distribution of documents in keeping with the “reasonably calculated to ensure actual receipt” standard. Two of those safe harbors (one allowing for electronic disclosure for employees who are “wired at work” and one allowing for electronic disclosure to individuals who consent in keeping with regulatory standards) have been in effect for many years, and the third was approved in 2020 to allow for disclosure to retirement plan participants and beneficiaries who do not affirmatively opt for paper disclosures, if certain standards are met.

### *Safe Harbors for “Wired at Work” and “Consent” Groups*

In order for the safe harbor to apply, the recipient must fall into one of the following categories:

- “Wired at Work:” Access to the employer’s electronic information system is an integral part of his/her duties as an employee, and he/she has the ability to access electronic documents at any location where he/she is reasonably expected to perform his or her duties as an employee. This standard effectively requires that the individual have access to a personal computer workstation or some comparable level of technology in the course of his/her employment, since the DOL has said that providing an electronic document through a common area computer, such as a kiosk, would not satisfy the safe harbor.
- Provision of Affirmative Consent: He/she has consented to receive disclosure in electronic form in accordance with DOL consent requirements.<sup>1</sup> The consent requirements state that the recipient must:
  - Have affirmatively consented (electronically or non-electronically) to electronic disclosure and not have withdrawn the consent.
  - Have reasonably demonstrated (via an electronic consent process or electronic affirmation of consent) the ability to access information in the relevant electronic form.

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<sup>1</sup> It has become common for 401(k) plan recordkeepers to support the computer systems necessary to obtain and track consent to electronic disclosure. For plans and disclosures not covered by a recordkeeper’s consent system, however, most employers find the consent requirements impractical, and have limited electronic disclosure to active employees with their own computer workstations who regularly use the electronic information system in the course of their employment. The 2020 regulations may be a particularly helpful alternative to the consent rules for employers who have electronic contact information for employees who do not use the employer’s electronic information system as a regular part of their duties and/or do not have their own workstations, such as in the manufacturing, retail and hospitality industries.

- Have provided an address for receipt of the electronic document.
- Prior to consenting, have been provided with:
  - An explanation of the type of documents to be provided electronically and of the right to withdraw consent to electronic disclosure at any time.
  - Information on how to withdraw consent or update contact information.
  - A statement of the right to request a paper copy (and whether that paper copy will be provided free of charge).
  - A description of the hardware and software requirements for accessing the documents. If the hardware/software requirements change in a way that creates a material risk that the recipient will not be able to access or retain documents, the consenting recipient must be provided with an explanation of the change, must be given the right to withdraw consent, and must again consent to electronic disclosure.

If the individual is eligible for electronic disclosure under one of these two safe harbors, communications can be provided electronically under the following rules:

- The electronic document must comply with all applicable legal requirements regarding style, format and content. For example, an electronic SPD must comply with the requirement that it be written in a manner calculated to be understood by the average plan participant and contain all the information that the regulations require an SPD to contain.
- If it is not reasonably evident from the transmittal, the electronic system must alert the recipient to the significance of the information contained in the electronic document. For example, in the case of a SMM posted to a website, the plan administrator might send an email stating that, “A Summary of Material Modifications for [plan name] is available at [link/URL]. This Summary of Material Modifications updates your Summary Plan Description to reflect changes in your Plan benefits. You should read this document carefully, and file it with your Summary Plan Description in a safe place.”
- The electronic system must be reasonably calculated to ensure actual receipt of the document. For example, this could be accomplished by use of return-receipt notice or undeliverable email features, or by conducting periodic surveys regarding receipt.
- The distribution must protect the confidentiality of personal information, if applicable. For example, if a plan allows participants to obtain benefit statements online, that function should require use of a personal password or PIN before a statement is made available, and should take appropriate precautions against efforts to hack the system.
- Upon request, the participant must be furnished with a paper version of the electronic document. The paper disclosure must be provided free of charge if the disclosure is a communication required to be furnished free of charge by ERISA (such as a participant’s initial copy of an SPD). Individuals receiving electronic communications must be informed of this right.

### *2020 DOL Electronic Safe Harbor*

The 2020 regulations allow plan administrators who satisfy certain conditions to provide plan participants and beneficiaries in retirement plans with a notice that certain disclosures will be made available on a website, or be furnished via email. Participants who wish to continue receiving paper copies may continue to do so by requesting paper copies and opting out of electronic delivery entirely. At present, the 2020 safe harbor is not available for health and welfare plan participants. Before disclosures can be provided electronically, the plan administrator must do the following:

- Have valid electronic contact information for the recipient that will allow receipt of the disclosures in the intended methodology of communication (e.g., an email address for email communications, or a mobile phone number for text messages, etc.), and that contact information must either have been provided by the recipient, or provided by the employer for work-related reasons (and not just for the disclosure of benefit plan information).
- Provide the intended disclosure recipient with a *paper* notice of the plan administrator's intention to provide electronic benefit plan disclosures to the specified electronic address, and that notice must include:
  - Identification of the electronic contact address that will be used.
  - Instructions necessary to access the documents.
  - A statement that the disclosures are not required to be available on the plan's website for more than a year (or, if later, until the date the disclosure is superseded by a later version).
  - An explanation of the right to request and receive a free paper copy of a disclosure and instructions on how to exercise this right.
  - An explanation of the right to opt out (free of charge) of electronic delivery altogether and instructions on how to exercise this right.
- If documents are going to be provided via a website, mobile platform or similar mechanism, make sure the website/mobile platform/etc. will be able to retain the documents for at least a year (or until superseded, if later) and that it also will make the documents available for permanent electronic retention, protect confidential information, provide the documents in a widely available format that is suitable for both online and print reading and make the documents searchable (text must be searchable by numbers, letters and words).
- If documents are going to be provided in the body of, or as attachments to, an email rather than via posting to a website, mobile platform or something similar, the plan administrator must ensure that the document format will be widely available and suitable for both online and print reading, allow permanent electronic retention of the document, make the documents searchable by numbers, letters and words, and protect confidential information.

#### **"Notice of Internet Availability"**

Plan administrators are required to furnish to each individual a Notice of Internet Availability ("NOIA") for each document. The NOIA must meet the following requirements:

**Timing.** The NOIA must be given at the time the document is made available on the website or by email. The plan administrator can provide a single annual NOIA for SPDs (but not SMMs that update an SPD) and annual notices that do not require action by any particular deadline, but must provide a separate time-of-disclosure NOIA for any other documents until/unless the DOL or IRS approve additional documents for inclusion in an annual NOIA.

**Content.** The NOIA must include only the following (with the exception of logos, pictures, or other similar design elements, which are permissible so long as they are not misleading):

- A prominent statement such as a title, legend, or subject line that reads: “Disclosure About Your Retirement Plan.”
- The following statement: “Important information about your retirement plan is now available. Please review this information.”
- An identification of the document by name (for example, a statement that reads: “Your Quarterly Benefit Statement is Now Available”) and a brief description of the document if identification only by name would not reasonably convey the nature of the document.
  - For example, a NOIA announcing “your quarterly benefit statement” ordinarily would not need a brief description because the name of the document should adequately describe its contents, but most participants would not intuitively understand the purpose of a “blackout” notice just by reading the document name.
- An internet website address that is “sufficiently specific” to provide ready access to the document.
  - A website address (or hyperlink) will satisfy this requirement if it leads the individual directly to the document.
  - A website address (or hyperlink) will also satisfy this requirement if the address leads the individual to a login page that provides a prominent link to the document. (The link does not need to be available prior to the individual’s completion of the login process.)
- A statement of the individual’s right to request and obtain a paper version of the document, free of charge, and an explanation of how to exercise this right.
- A statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of documents, and an explanation of how to exercise this right.
- A cautionary statement that the plan administrator is not required to make the document available indefinitely but that the document will be available on the website for not less than one year (or until it is superseded by a subsequent version of the document, if later).
- A telephone number to contact the plan administrator or other designated representative of the plan.
- If desired by the plan administrator, a statement (which must be accurate and not misleading) as to whether action by the individual is invited or required in response to the document and how to take that action, or that no action is required.

***Form and Manner of Furnishing.*** The NOIA must:

- Be sent electronically to the electronic address provided by the individual (or by the employer, in the case of a work-related address), with appropriate safeguards to ensure receipt and appropriate follow-up in the event of notice of non-delivery.
- Be written in a manner calculated to be understood by the average plan participant.
- Be given separately from any other documents or disclosures.

### **Combined NOIA**

Under the 2020 safe harbor regulations, some documents may be combined under one NOIA because they are recurring and are triggered only by the passage of time. A combined NOIA must be furnished at least once each plan year, no more than 14 months following the prior year's notice. Such documents include:

- SPDs.
- Any document or information that must be furnished annually, rather than upon the occurrence of a particular event, and does not require action by an individual by a particular deadline.
- Any document, not in the first and second categories, if authorized in writing by the Secretary of Labor, by regulation or otherwise.
- Any applicable notice required by the IRC, if authorized in writing by the Secretary of the Treasury.

### **Sending the Document Directly to the Individual in an Email**

If the plan administrator sends the document in an email directly to the individual, no NOIA is necessary. However, the email must be written in a manner reasonably calculated to be understood by the average plan participant and must include:

- The document in the body of the email or as an attachment.
- A subject line that reads: "Disclosure about your retirement plan."
- An identification or brief description of the document, if the document is an attachment.
- A statement of the right to request a paper copy of document.
- A telephone number to contact the plan administrator or other designated representative of the plan.

As noted above, the document itself must be:

- Written in a manner reasonably calculated to be understood by the average plan participant.
- Presented in a widely available format or formats that are suitable to be read online, printed clearly on paper, and permanently retained in an electronic format that satisfies these requirements.
- Searchable electronically by number, letter, or words.

### Ongoing Procedural Safeguards

- As always, the plan administrator must take reasonable steps to make sure disclosures are received, and must follow up if it has cause for concern that electronic contact information may no longer be valid.
  - If an employee who was receiving disclosures at a work-related address terminates employment, the plan administrator must obtain an updated electronic address or provide paper disclosures going forward.
  - If a plan administrator no longer has a valid electronic contact address, the plan administrator must provide paper disclosures going forward.
- The plan administrator must ensure that disclosures provided via a website/mobile platform/etc. (rather than as part of the body of or attached to an e-mail) remain on the website/mobile platform/etc. for the requisite length of time and that participants/beneficiaries have the requisite access to those documents (occasional reasonable downtime due to system outages or maintenance is permissible).
- The plan administrator must have a reasonable procedure for processing participants' and beneficiaries' elections to opt out of electronic disclosures and to receive a paper copy of a particular disclosure (no more than one free paper copy is required of any given document, however). The individual must be able to opt out of electronic delivery globally and receive all documents in paper form.
  - Procedures are not reasonable if they contain any provision, or are administered in a way, that unduly inhibits or hampers the initiation or processing of a request or election.
- The plan administrator is required to take measures reasonably calculated to protect the security and privacy of individuals' information.

### Special Rules for Particular Types of Communications

Prior to the release of the 2020 regulations, the DOL had issued simplified electronic disclosure standards for certain types of communications that plans were permitted (but not required) to use in place of the usual rules. The 2020 regulations revoke those special rules, but allow plans to continue using them until January 27, 2022 (18 months after the regulatory effective date of July 27, 2020) if they wish to do so. Those simplified rules work as follows:

#### *Retirement Plan Benefit Statements*

The simplified rules for retirement plan benefit statements allow compliance with either the usual DOL electronic disclosure rules or the IRS' electronic disclosure rules (discussed below), or with a simplified safe harbor rule that allows provision of statements via a secure-access website. Compliance with the secure-website safe harbor requires that participants have continuous access to benefit statement information, be notified at least annually of the ability to access the benefit statement via the website, and have the right to request a paper copy of the statement free of charge.

### *Fee Disclosures*

Defined contribution plans (such as 401(k) plans) which allow participants to direct investments must provide participants and beneficiaries with specified information about the plan's investments and fees when they commence participation. An updated notice is required once a year (no later than 14 months after the prior issuance of the disclosures) and certain individualized information is required quarterly. The quarterly information is usually provided in conjunction with the participant's or beneficiary's quarterly benefit statement, and can be provided in accordance with the rules applicable to benefit statements in that case. In addition, a simplified safe harbor is available for fee disclosures during the 18-month transition period as follows:

- The plan must have obtained the participant or beneficiary's email address in accordance with DOL guidelines. Those guidelines require the email address to be provided voluntarily, and require the plan to provide the following information when requesting the email address:
  - A statement that providing an email address is voluntary, but that if an email address is provided, the disclosures will be made electronically.
  - Identification of the disclosures that will be made electronically and how they can be accessed.
  - A statement that the participant or beneficiary can request a paper copy of the information free of charge, and instructions on how to exercise that right.
  - A statement that the participant or beneficiary may opt out of electronic disclosures at any time, and instructions on how to exercise that right.
  - An explanation as to how the participant or beneficiary can update his/her email address.
- The plan must provide an annual electronic distribution notice, which must be sent in paper form unless there is evidence that the participant or beneficiary has interacted electronically with the plan since the previous notice was provided.
- The plan administrator must ensure that the electronic delivery system results in actual receipt of the information (for example, through a "return receipt" feature).
- The delivery system must protect the confidentiality of personal information.
- All notices must be written in a manner that will be understood by the average plan participant.

### *Special Rule Applicable to Summary of Benefits and Coverage ("SBC")*

Group health plans must provide certain information regarding the plan in the form of an SBC. For participants and beneficiaries who are *already covered* under the group health plan, an SBC may be distributed electronically if the DOL's ordinary "wired at work" or consent safe harbor rules are met. In addition, even if the ordinary safe harbor rules are not met, an SBC may be distributed electronically to participants who enroll or renew coverage online. For participants and beneficiaries who are *eligible for but not enrolled in coverage*, the SBC may be distributed electronically if the format is readily accessible (e.g., use of HTML, Word or PDF format, etc.) and a paper copy is provided free of charge upon request. If the SBC is provided via an internet posting, the plan must timely advise the individual in paper form or email that the

document is available on the internet, provide the internet address, and advise the individual that the documents are available in hardcopy format upon request.

## **HHS Rules**

### ***Special Rule Applicable to HIPAA Notices of Privacy Practices***

If the group health plan maintains a website that provides information about benefits, the plan must prominently post its notice of privacy practices on the website; in the event of a material change to the notice, the plan must prominently post the change or its revised notice on its website by the effective date of the change.

A plan must also provide the notice to new enrollees and, in the event of a material change to the notice, it must provide the revised notice (or information about the material change) to individuals covered under the plan. These disclosure obligations can be satisfied via email delivery only if the individual consents. In the event that electronic delivery fails, a paper copy must be provided, and an individual retains the right to request a paper copy.

## **Internal Revenue Service Rules**

The IRS generally has jurisdiction over participant notices, consents, and elections required under the IRC. In particular, IRS rules apply to distribution of the following types of documents:

- Safe harbor notices
- QACA/EACA autoenrollment notices
- Determination letter application notice to interested parties
- Distribution notices, including QJSA/QPSA waivers (special rules apply if notarization is required) and special tax notices
- 204(h) notices (special standards regarding confirmation of receipt apply)
- Cafeteria plan, EAP, and HSA notices, as well as notices for certain accident and health plans (excluding those under the jurisdiction of the DOL) and transportation fringe benefit plans

In a similar fashion to the DOL's "wired at work" and "consent" safe harbors described above, the IRS rules create two classes of individuals eligible for electronic disclosure: those for whom no consent is needed in order to distribute documents electronically and those for whom advance consent must be obtained prior to electronic distribution.

When it comes to the consent requirements, the IRS rules are similar to the DOL's consent rules. The IRS requires a plan to give an individual the following information prior to obtaining his/her consent to electronic disclosure:

- A description of the scope of the consent, so that the recipient knows whether the consent is specific to a particular disclosure or covers all or some other disclosures.
- A statement of the individual's right to withdraw consent to receive disclosures electronically.

- A statement of the individual's right to receive a paper copy of any document, including the individual's right to request a paper copy (as well as a description of applicable fees).
- A description of any hardware/software requirements (with an update and a statement of the right to withdraw consent to be provided in the event of any changes that create a material risk that the individual will no longer be able to access or retain the disclosure, and reaffirmation of consent required following the change).
- A description of the procedure for updating information to contact the participant electronically.

Consent must be given electronically, or given on paper but confirmed electronically in a manner that confirms the recipient's ability to access the electronic system. Consent does not cover oral disclosures (including recordings).

However, disclosure can be provided electronically *without* consent, and can even be provided in the form of an audio recording if appropriate to the communication content, if the following conditions are met:

- The recipient has an effective ability to access the medium through which the notice is provided. Whether a participant has an "effective ability to access" the medium is determined based on the surrounding facts and circumstances. Limiting electronic disclosure to individuals who satisfy the DOL's "wired at work" standard is the safest approach, but other individuals may qualify.<sup>2</sup>
- At the time the notice is provided, the recipient is advised of the right to receive a paper copy free of charge, and a free paper copy must be provided if requested.

Like the DOL, the IRS also sets standards regarding the manner in which disclosures can be distributed electronically. All electronic disclosures must meet the following general criteria:

- 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 information in a manner that is no less understandable than if provided on a written paper document.
- The electronic system must be designed to alert the participant, at the time the notice is provided, to the significance of the information and provide any instructions needed to access the notice.
- The electronic notice/election must be maintained in a form capable of being retained and accurately reproduced for later reference.

In addition, electronic benefit elections and consents must meet special requirements as well as satisfying the usual rules:

- The electronic system used must be reasonably designed to preclude any person other than the appropriate individual from making the election.

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<sup>2</sup> According to the preamble to the DOL's 2020 regulations, the 2020 DOL regulations were intended to align more closely with the IRS "effective ability to access" standard. The preamble also says that the IRS intends to issue additional guidance in the wake of the DOL's rule.

- The electronic system must provide a reasonable opportunity for the participant to review, confirm, modify or rescind the terms of the election before it becomes effective.
- Within a reasonable time, the participant must receive confirmation of his/her election.
- Electronic notarization is permitted, but any signature required to be notarized or acknowledged by a plan representative must be witnessed in the physical presence of a notary public or plan representative.<sup>3</sup>

If you have any questions regarding this LEGALcurrents, please contact any member of the [Employee Benefits and Executive Compensation](#) group at 585.232.6500, 716.853.1616, or visit [www.hselaw.com](http://www.hselaw.com).

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<sup>3</sup> Special notarization rules are in effect for 2020, due to the COVID-19 pandemic. See our newsletter at <https://hselaw.com/news-and-information/legalcurrents/1985-irs-relaxes-physical-presence-requirements-for-notarization-for-retirement-plan-elections-spousal-consent-during-2020>.