



## Commonwealth Benefits Group

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HEALTHCARE REFORM UPDATE 2014-10



### Delivering Participant Materials

The Department of Labor (DOL) requires that participant notices and other plan information ("disclosures") be provided in a way that is reasonably calculated to ensure delivery to all plan participants. The Department of Health and Human Service (HHS) typically follows the DOL's rules. There are two primary ways to deliver plan information -- by paper and electronically.

In most instances the information only needs to be provided to the plan participant, who is then expected to share the information with a covered spouse or children. If the employer is aware that the participant and the dependent spouse or child are living apart, a separate disclosure generally should be provided to the dependent. (College students are considered to be living at home for purposes of this rule.)

#### Paper Delivery

Paper delivery methods include sending the information through the U.S. mail, via interoffice mail, as an insert to company publications, or by hand. If mailing, the information may be sent first class. Alternatively, the information may be sent second or third class if return/forwarding postage is guaranteed and address correction is requested.

Information may be sent through inter-office mail as long as that system operates effectively. It also may be hand delivered or included as an insert with a paycheck.

Simply placing the information in a common area, like a lunchroom, is not adequate.

The UBA Compliance Center helps you stay up to date on regulatory changes to help simplify your job and mitigate compliance risk.



This information is general and is provided for educational purposes only. It reflects UBA's understanding of the available guidance as of the date shown and is subject to change. It is not intended to provide legal advice. You should not act on this information without consulting legal counsel or other knowledgeable advisors.

## Electronic Delivery

Employers may send the following types of information electronically, as long as the electronic distribution requirements described below are met:

- Summary Plan Descriptions (SPDs) and Summaries of Material Modifications (SMMs)
- Summary of Benefits and Coverage (SBC)
- Summary Annual Report (SAR)
- COBRA notifications
- Qualified medical child support order (QMCSO) notices
- HIPAA certificates of creditable coverage
- Annual notices (such as Medicare Part D, CHIP, Women's Health and Cancer Rights, and the governmental plan HIPAA opt-out)
- Notices regarding a plan's grandfathered status or a reasonable alternative under a wellness program

The DOL divides potential recipients of electronic disclosures into two groups -- those with work-related computer usage, and those who do not use computers as part of their jobs. An employee is considered to have work-related computer usage if:

- The employee is able to access documents that are sent in electronic format at any location where the employee performs his or her job duties, and
- The employee is expected to access the employer's electronic information system as part of his or her key job duties

An employee who uses a computer as part of his or her job does not need to consent to receive disclosures electronically.

Individuals who do not access a computer as part of their work for the employer must specifically consent to receive disclosures electronically. This would include retirees, as well as active employees in many types of jobs. The written consent requirements are fairly complicated. Prior to providing consent, an individual must be given a clear statement that explains:

- The types of documents to which the consent will apply
- That the consent can be withdrawn at any time without charge
- The procedures for withdrawing consent and for updating the address used for receipt of electronically furnished documents
- The right to request and obtain a paper version of an electronically distributed document, and whether the paper version will be provided at no charge
- The hardware or software needed to access and retain the documents delivered electronically

The individual must provide an email address for delivery of the documents. The individual must provide consent in a manner that demonstrates his or her ability to access the information in the electronic format that will be used, so many employers require that the consent be provided electronically.

The employer must provide participants with annual notices describing the way in which the participant can opt out of the electronic distribution process. This notice must be furnished in paper form unless the plan has had electronic interaction with the participant since the initial or last annual notice was distributed. If the plan administrator changes its software and hardware requirements, it must provide a new notice and obtain a new consent.

An employer may not simply provide a kiosk for employees who do not use computers as part of their jobs. Likewise, it may not provide thumb

drives of documents to employees who do not use computers as part of their jobs unless it obtains the employee's consent.

An employer is not required to use the same distribution method for all participants, so it may provide disclosures electronically to employees who use computers as part of their jobs and disclosures by paper to participants who do not use computers to perform their jobs.

There are no restrictions on the types of electronic media that may be used. For example, the employer may provide the notice within an email, attach the disclosure to an email, post the disclosure on a company website or in an Employee Benefit Center (EBC), or provide a DVD, CD-ROM, or thumb drive. An employer may not simply post the disclosure to its website, intranet, or EBC, however -- it also must send a notice, either electronically or in paper form, that notifies the participant that the disclosure is available, how to access it, and the significance of the disclosure. The participant also must be told that a paper copy is available at no cost, with instructions on how to request a paper copy. For example, the notification might say:

Important Information for All Participants in the ABC Health Plan

ABC Company has posted an updated Summary Plan Description on our intranet in the Company Benefits folder. The Summary Plan Description describes the benefits that are available under the group medical plan. The SPD has been updated to reflect our deductibles and out-of-pocket maximums for 2015. We encourage you to read the SPD at your earliest convenience.

You have the right to receive a paper copy of the SPD at no cost to you. To request a paper copy contact Jane Doe at [janed@abc.com](mailto:janed@abc.com) or at 555-111-0000. Also feel free to contact Jane if you have questions about your benefits.

The posting notice must be sent each time there is a new posting of information -- an annual notification that plan disclosures are located in a particular place is not enough.

An electronic disclosure must include the same information that would be included in a paper version of the disclosure. The employer must use its best efforts to ensure that there is actual receipt of the notice, such as by using the return receipt or notice of undelivered email feature. If a communication is returned, the employer must take steps to find an alternate address and re-send the information. Any confidential participant information must be protected.

Whether provided electronically or in paper, employers should maintain copies of all plan disclosures sent, including the date sent and which individuals or employee groups received the information.