

Distributing Materials Electronically

Plan sponsors often ask if they can deliver notices and other plan communications electronically. The short answer is, “it depends.” This document contains questions and answers related to electronic delivery of plan-related information that will help you determine whether you meet the requirements for electronic delivery.

Q: Can materials be delivered to participants electronically?

A: Yes. The Department of labor (DOL) and the Internal Revenue Service (IRS) have separate rules for disclosing certain retirement plan information electronically. The DOL has established safe harbor rules for all retirement plans covered by the Employee Retirement Income Security Act of 1974 (ERISA). The original DOL safe harbor regulations were published in 2002 and the DOL released another set of safe harbor regulations on May 21, 2020. The two safe harbors are not mutually exclusive – one or the other, or both may be used simultaneously with respect to different disclosures, or even different populations of participants.

Q: Which documents fall under the DOL rules for electronic delivery?

A: The DOL safe harbor rules for electronic delivery apply to most disclosures required by ERISA, including:

- Summary plan descriptions (SPDs)
- Summary of material modifications (SMMs)
- Summary annual reports (SARs)
- Notices required by the Sarbanes-Oxley Act when a blackout – defined as a suspension of participants’ and beneficiaries’ rights to diversify or direct investments, or obtain a loan or distribution – will last for three consecutive business days or more
- Individual benefit statements

- Investment-related information in participant-directed individual account plans that intend to comply with ERISA section 404(c)
- Qualified domestic relation order (QDRO) notifications
- Information that ERISA requires to be furnished or made available upon participant or beneficiary request
- Participant fee disclosures intended to comply with ERISA section 404(a)(5)

Q: What are the 2002 safe harbor DOL requirements for electronic delivery of documents?

A: The DOL requirements for electronic delivery are:

- Style, format and content
- Delivery
- Notice
- Confidentiality
- Consent

Style, format and content

All electronic documents must be prepared and furnished in a manner consistent with the style, format and content requirements for paper documents.

Delivery

Electronic delivery systems must contain features to ensure receipt of the documents or to notify the sender if they are not. For example, return receipt

or notice of undelivered or undeliverable emails. Periodic reviews or survey confirming that documents were received should be conducted. In order to provide plan documents via a company website, the website home page must display a prominent link to the areas with plan information.

Notice

At the time the document is furnished, plan administrators must inform recipients of the significance of the documents provided electronically and must notify them that a paper version of the document is available upon request. Plan administrators must provide paper copies of electronically-transmitted documents to participants and beneficiaries who request them.

Confidentiality

Electronic delivery systems must protect the confidentiality of personal account and benefit information. These systems must prevent unauthorized receipt of or access to confidential information.

Consent

The DOL's safe harbor rules for electronic delivery of documents divide recipients into two groups.

The first group includes participants who have the ability to effectively access documents furnished in electronic form at any location where the participants are reasonably expected to perform their duties as employees if access to the employer's or plan sponsor's electronic information system is an integral part of those duties. Consent from these participants is not required.

The second group includes other participants, beneficiaries and anyone else entitled to documents under ERISA, including, but not limited to, alternate payees.

Q: What are the consent requirements for the second group?

A: Prior to consenting, they must be provided, in electronic or non-electronic form, a clear and conspicuous statement that indicates:

- 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 their address for receipt of electronically furnished documents or other information
- 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 (a paper version of the SPD and/or SMM must be provided free of charge)
- Any hardware and software requirements for accessing and retaining the documents

They must affirmatively consent, in electronic or non-electronic form, to receiving documents through electronic media and have not withdrawn such consent.

If the information is going to be furnished through the internet or other electronic communication network, they must affirmatively consent or confirm consent electronically, in a manner that reasonably demonstrates their ability to access information in the electronic form that will be used to provide the document and has provided an address for the receipt of electronically furnished documents.

After they consent, if a change in hardware or software requirements needed to access or retain the electronic documents creates a material risk that they will be unable to access or retain electronically furnished documents, they:

- Must be provided with a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents
- Must be given the right to withdraw consent without charge and without the imposition of

any condition or consequence that was not disclosed at the time of the initial consent

- Must again consent, in accordance with the requirements described above, to the receipt of documents through electronic media

Q: What are the 2020 DOL requirements for electronic delivery of documents?

A: The 2020 DOL requirements for electronic delivery allow a plan sponsor to deliver materials by posting to a website or sending documents as an attachment to an email. The 2020 rules are similar to the 2002 rules in terms of:

- Style, format and content
- Delivery
- Confidentiality

The regulations differ in terms of:

- Notice
- Consent

Notice

An initial “notice” indicating that the plan will select as a default electronic delivery of required disclosure must be given in paper form:

- This initial notice must be provided to all existing employees who will receive electronic notices, and all new hires (before any notices to them are due)
- This initial notice must be clear and concise, indicate the electronic address that will be used, contain instructions on how to access the covered documents and provide directions for individuals to “opt-out” (i.e., globally) of electronic delivery of notices and the right to receive free of charge a paper copy of the covered documents

If using the “notice and access” approach, a subsequent notice (NOIA) must be delivered electronically to each employee prior to the due date for their receipt of any covered document. The NOIA can only contain the following (items in quotes that specific language must be used):

- A prominent title, subject line or legend indicating “Disclosure about Your Retirement Plan”

- A statement that reads “Important information about your retirement plan is available. Please review this information.”
- A list of the covered documents by name or a brief description if not self-evident by name
- The telephone number to contact the Plan Administrator or other designated representative of the plan
- The website address with instructions on how to access the covered documents or a direct hyperlink to the covered documents
- Disclosures posted on the website must remain until (at least) they are superseded by a subsequent (annual) disclosure. Event-driven disclosures (e.g., blackout notices) must remain until after the expiration of the event.

Consent

The 2020 disclosure rules provide an “opt-out” option as opposed to the 2002 rule that provides for “opt-in”.

The following requirements apply to both methods of electronic delivery (i.e., posting to a website and email) and to all those entitled to receive disclosures, including terminated employees.

- A statement of the right to receive free of charge a paper copy of the particular disclosure referenced in this notice and an explanation of the process to do so
- A statement of how to “globally opt-out” of electronic delivery of future notices

Q: Which documents fall under the IRS rules for electronic delivery?

A: The IRS requirements for electronic delivery apply to:

- Notices of distribution choices and the participant’s right to defer distributions of vested benefits of more than \$5,000 until normal retirement age
- Notices explaining a participant’s right to elect a direct rollover to another retirement plan or an IRA and the tax effects of that rollover, as well as tax rules applicable to other distribution options available
- Notices of a participant’s right to waive income tax withholding on certain distributions

- Safe harbor 401(k) notices

Q: What are the IRS requirements for electronic delivery of notices?

A: The IRS requirement for electronic delivery consists of:

- 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 the information in a manner that is no less understandable than if provided on a written paper document
- The electronic system must alert the participant of the significance of the information and provide any instructions needed to access the notice
- The electronic record of an applicable notice or participant election must be retained so that it can be accurately reproduced for later reference

The IRS permits two methods of providing applicable notices to participants.

Consumer Consent Method

Under this method, the plan must provide the participant with a disclosure statement that describes:

- The scope of the consent – whether the consent to receive a notice electronically applies only to that notice or to the other notices that will be distributed while the person is a participant. For example, it would have to explain whether the consent will apply just to the safe harbor notice or to all future plan notices
- The participant’s right to withdraw consent to receive the notice electronically
- The participant’s right to request to receive a paper copy of the notice, plus any fees for receiving paper
- The hardware and software requirements for accessing the notice for updating information to contact the participant electronically
- Procedures for updating information to contact the participant electronically

- The participant must then consent to receive the notice electronically before the plan provides the notice. This consent must either:
- Be made electronically in a way that demonstrates the participant can access the notice in the electronic form that will be used to provide the notice
- Be made using a written paper document, but only if the participant then confirms his or her consent electronically in a way that demonstrates the participant can access the notice in the electronic form used to provide it.

The consent may not be provided verbally.

Consumer Credit Exemption Method

Under this method, affirmative consent from the participant is not required, provided that the participant is “effectively able” to access the notice electronically. The plan must inform the participant that a paper version of the notice will be provided at no charge upon request.

Conclusion

As you can see, electronic delivery of notices, reports and documents involves more than sending an email to a participant with an attachment. Please ensure that you have adequate procedures and processes in place to ensure you satisfy these requirements.

Learn more at www.oneamerica.com

Administrative and recordkeeping services provided by American United Life Insurance Company® (AUL) or McCready and Keene, Inc. or OneAmerica Retirement Services LLC, companies of OneAmerica which are not broker/dealers or investment advisors.

Neither American United Life Insurance Company® (AUL), OneAmerica Securities, McCready and Keene, Inc., OneAmerica Retirement Services LLC nor their representatives provide tax, legal, fiduciary or investment advice. For answers to specific questions and before making any decisions, please consult a qualified financial professional, attorney or tax advisor.