



Compliance Corner Webinar:

Electronic Disclosures

August 15, 2019

- Q1. Q:** How should an employer who has manufacturing and trucking employees in many different locations and states provide electronic SPDs and Notices? They prefer not to print and mail 1,000 copies of paper materials, due to paper use and mailing costs. Can they just mail a post card telling them to ask their manager for copies and go to the company intranet for the documents?
- A:** The employer is required to provide these documents via hand-delivery or mail unless the employee meets the qualifications for electronic delivery as outlined in the webinar. They are not able to satisfy this requirement by mailing a post card. Most employers in this situation will collect consent forms from such employees so that they can be provided electronically. A common approach is to do launch a campaign to encourage signing up for paperless disclosures, often with prizes (e.g., a drawing for gift cards), and then asking for them from new hires as part of their onboarding process. Those who do not (or refuse to) sign up should be provided paper copies. Clients should review the options for online enrollment systems. Several have the ability to gather employee consent for electronic delivery. Ensure that the consent has the safe harbor language included for compliance.
- Q2. Q:** With COBRA, are you recommending two separate notices be mailed to employee and spouse or can a single mailing be sent to employee & spouse or the Family?
- A:** A separate mailing is required for the employee (can include dependent children) and the spouse. An employer can mail a COBRA notice to "Employee and Family" if they wish to notify all family members at the same time. A separate COBRA notice is also required for any dependent children with a different address than the employee.
- Q3. Q:** Is it acceptable if the notices are placed in a portal and the employees receive a notice explaining where to find them? They wouldn't need an authorization from the employee, correct?
- A:** This is acceptable if the employee has work-related computer access to the notices. Those employees without work-related computer access would require an authorization. Note that the notice explaining where to find the notices must meet the Safe Harbor requirements, as discussed in the webinar. See QA #21 for additional details.
- Q4. Q:** May an employee or beneficiary request required documents from prior years? If so how many years back may they request and can you charge for these?
- A:** An employer is required to keep records for at least 7 years and would be required to provide the requested documents. A reasonable charge may be applied to some of the records with some exceptions (i.e. Summary of Benefits and Coverage).



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Q5. **Q:** Does NAHU have a sample consent form to receive electronic delivery of documents?

A: **Medicare Part D Creditable Coverage Notice :** <https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/Model-Notice-Letters.html>

Special Enrollment Rights Notice, Reasonable Alternative Wellness Notice, Newborns' Act, Women's Health and Cancer Rights Act, Grandfathered Health Plans: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide-appendix-c.pdf>

Privacy Notice: <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/model-notices-privacy-practices/index.html>

Wellness – ADA: <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

Children's Health Insurance Program (CHIP): <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/chipra/model-notice.pdf>

COBRA General Notice: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/cobra/model-general-notice.doc>

Q6. **Q:** Was there any discussion with these electronic notices, being able to get consent to text some of these notices?

A: There is no mention of texting capabilities in the electronic distribution safe harbor rules released in 2002. While an employer could devise a text-based distribution system that is "reasonably calculated to ensure actual receipt" (and therefore would meet the plan administrator's fiduciary duties), it would not be protected by the Safe Harbor. The burden of proof that actual delivery occurred would therefore be placed on the employer in the event this came into dispute, such as in a participate lawsuit.

Q7. **Q:** Can the different consents to receive documents all be put on one form?

A: A separate consent form is required for the Form 1095 and another for W-2 statements.

Q8. **Q:** Can HIPAA Notice be delivered electronically other ways than the website? Does it have to be done on the website?

A: The HIPAA notice follows the rules for paper and electronic delivery. In addition, if a company's health plan has a website with information regarding the plan services and benefits (intranet or benefit portal) the notice MUST be posted on the website.

Q9. **Q:** We were told that there is no ERISA law the requires a "Plan Document" separate from the SPD, Even though the DOL may request a Plan Document thru the course of an audit.

A: Many ERISA plans only have one document which serves as both the plan document and the summary plan description. The document should meet all of the content requirements of ERISA and must be written in a language easily understood by the participant. The document must clearly state that the document serves as both the plan document and SPD. The document must be formally adopted by the plan sponsor with a signature page.



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- Q10. **Q:** Why do public school districts and municipalities not have to comply with ERISA? Shouldn't they be providing an SPD too?
- A:** While these entities are not subject to ERISA rules we strongly suggest a document that outlines the benefits, processes and procedures of the plan. It is imperative to remove all language referencing ERISA and avoid using the term plan document or SPD. Suggested name: Benefit Plan, Summary Descriptions, Plan Descriptions. Language could be added to explicitly state that the plan does not believe itself to be subject to ERISA due to a governmental plan/church plan exemption.
- Q11. **Q:** Is the Initial COBRA notice an absolute requirement to be delivered? What penalties apply if not delivered?
- A:** Yes. The initial COBRA notice is a requirement. Failure to send a notice can result in an employer penalty of \$110 per day, per notice, per affected beneficiary.
- Q12. **Q:** Are SARs required for an amended 5500?
- A:** A new SAR is required for any material change.
- Q13. **Q:** How long have all these notices been required? And is this for all size groups offering benefit packages?
- A:** There are varying effective dates for the notices outlined in the webinar. The most recent were added under ACA requirements: Marketplace Notice, Grandfathered Plan Notice, Wellness Reasonable Alternative Notice. Notices are required regardless of group size, except as noted in QA #27.
- Q14. **Q:** For the Summary Annual Report, who does the employer receive that document from?
- A:** The employer, or their representative filing the 5500 form, prepares the Summary Annual Report.
- Q15. **Q:** Can all of these notices be done at one time as long as we meet the special Medicare Part D requirements?
- A:** Most notices can be delivered at the same time. Exceptions include the Marketplace Notice (within 14 days of date of hire) and the Medicare Part D notice (prior to October 15 of each year). While some notices can be provided at the time (or even after) enrollment, many must be provided at the time coverage is offered. So if you do provide them all at once you will need to do them when coverage is offered, both at the beginning of Open Enrollment and then also to new hires or the otherwise newly eligible.
- Q16. **Q:** If a provider requests a copy of the SPD from the employer, does it have to be provided, or just if the employee requests it?
- A:** The SPD should be requested by, and delivered to, the employee or their legal representative. It must also be provided as part of a DOL audit, or when ordered by a court, for example during the discovery phase of a lawsuit. There is no obligation to provide it to anyone else.
- Q17. **Q:** Our brokerage uses an online Benefits Administration system where employees can enroll in benefits; notify employers and carriers of life events, etc. We post compliance documents here so do the documents still need to be available on the employer site?
- A:** The benefit portal would be sufficient for posting the benefit plan documents. Employees without work-related computer access need to consent to delivery prior to posting in the benefit portal.



Q18. **Q:** How many, and, which languages must the notices be posted in?

A: Requirements differ depending upon the size of the employer.

For plan covering fewer than 100 participants at the start of the plan year

The foreign language requirements below apply if $\geq 25\%$ of the participants are literate only in the same foreign language.

For plan covering 100 or more participants at the start of the plan year

The foreign language requirements below apply if either

- 500 or more participants are only literate in the same foreign language, or
- 10% or more of all plan participants are only literate in the same foreign language

General Requirements – SPDs/SMMs

In all cases, the Summary Plan Description (SPD) and any applicable Summaries of Material Modifications (SMMs) are only required to prominently display a notice in the foreign language common to the participants, offering them assistance and clearly stating the procedures the participants must follow to obtain assistance. Note that the actual assistance does not require providing an SPD in the foreign language common to the participants. However, the plan administrator must provide the assistance in the foreign language common to the participants and must give the participants a reasonable chance to become informed of their rights and obligations under the plan.

Foreign Notice Requirements for SBCs

Summaries of Benefits and Coverage (SBCs) are subject to the same requirement that applies to appeal notices, specifically that they be provided in a “culturally and linguistically appropriate manner.” These rules require that in specified counties of United States, plans must provide interpretive services and written translations upon request in certain (identified) non-English languages. The applicable counties are those in which at least 10% of the population residing in the county is literate only in the same non-English language. This determination is based on U.S. Census data and initially included four languages: Spanish, Chinese, Tagalog, Navajo. This list of applicable counties and languages is subject to annual updates. <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/cfas-data.html>

To comply with this requirement, SBCs sent to addresses in an applicable county must include a one-sentence statement (on the page with “Your Rights to Continue Coverage” and “Your Grievance and Appeals Rights”) clearly indicating how to access the language services provided by the plan. Written translations of the SBC must be provided upon request in the required non-English languages. In this regard, written translations of the SBC template and uniform glossary in the four applicable languages are available on the HHS website and an oral translation (in MP3 format) is available in Navajo.



Q19. **Q:** So, although the notices are sent via employee's work email, if they have a spouse and/or dependents on the plan, all of the notices have to be sent out separately to them?

A: Separate spousal notifications are only required for COBRA notices. However, employers may address the COBRA notice to employee name and spouse and remain compliant. Separate dependent notices are required if the dependent has a different address from the employee. It is also considered a best practice that when providing a Notice of Creditable (or Non-Creditable) Coverage electronically, you should explicitly advise the employee or primary insured to share it with any family members who are or who will be Medicare eligible in the upcoming 12 months.

Q20. **Q:** Where can I find the ERISA Rules?

A: The rules for electronic delivery of benefit plan notices can be found at

<https://www.federalregister.gov/documents/2002/04/09/02-8499/final-rules-relating-to-use-of-electronic-communication-and-recordkeeping-technologies-by-employee>

Q21. **Q:** Is there a particular form or verbiage required for an employee to sign to agree to get electronic notices?

A: The EBSA has not provided a model consent form. To be compliant it must merely include all of the necessary elements, including...

1. The **types of documents** to which the consent applies,
2. That **consent can be withdrawn** at any time without charge,
3. The **procedures for withdrawing consent** as well as for updating the participant's, beneficiary's or other individual's email address,
4. The **right to request and obtain a paper version**, including mention as to whether or not the paper version will be provided free of charge (note that copying fees are prohibited for some items), and
5. Any **hardware and software requirements** for accessing and retaining the documents (i.e. a PDF viewer, MS Word, etc.; a change in such requirements would require that a new consent form be obtained).

Q22. **Q:** If all employees have computer access then posting on intranet is ok? Do they need to tell employees that notices are available on intranet?

A: Posting without meeting the notification requirements would not meet the requirements of the Safe Harbor. Specifically, they must also be sent a notification which is sufficiently conspicuous and, when not apparent, apprizes the recipient of the significance of the documents being provided. The notice of availability must also remind the participant that they have a right request a paper copy and whether or not there is a reasonable copying fee (which itself is not permitted for some items, including SPDs/SMMs, SARs and SBCs). Please note that a company kiosk would not meet the requirements of work-related computer access. Once met, the documents may be posted to the website. An employee notice should be sent when documents are first posted or updated.



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- Q23. **Q:** You spoke about having information on company portals, etc. I am wondering if the online enrollment platforms, such as Ease, Navigator, etc., will suffice to provide a lot of these documents.
A: Yes. Benefit enrollment platforms are acceptable if the employee has work-related computer access or has provided written consent for electronic delivery. You must also provide a so-called Notice of Availability meeting Safe Harbor requirements (see Question22).
- Q24. **Q:** Many of these notices are too difficult for the average participant to understand. Are regulators considering how to simplify these?
A: Most of the notices are provides in sample templates. The language may be altered to ensure participant understanding. Legal review of draft language is recommended. Please note that the NAHU Employer Working Group's Electronic Distribution Subgroup has submitted suggestions for improvement to regulators. It may be delayed again, but we are hoping for some regulatory relief as soon as December 2019.
- Q25. **Q:** Can the Medicare Part D notice be sent via an employer benefit portal, via the communications portion? Or should it be addressed separately to each employee?
A: The notice can be posted in the portal but a separate notice to notify employees of the posted is required. See Question 22.
- Q26. **Q:** Do you have a guide for when a particular notice must be translated?
A: See Question 18, above. The rules for providing notices in a "culturally and linguistically appropriate manner" can be found at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/cfas-data.html>.
- Q27. **Q:** What specific reporting requirements are required for employers with fewer than 20 employees?
A: Examples of notices NOT required because of employer (or plan) size are:
- COBRA notices (if not subject to COBRA)
 - FMLA General Notice (if not subject to the FMLA)
 - Summary Annual Report (if a 5500 was not filed or the plan is otherwise not required to provide a SAR).

Otherwise, plans of all sizes must provide:

- Summary of Benefits and Coverage (SBC)
- Summary Plan Description (SPD)
 - Wrap document
 - Employer Certificate of Coverage/benefit booklet
 - Any applicable Summary of Material Modification (SMM)
- HIPAA Special Enrollment Notice,
- Notice of (Non-)Creditable Coverage
- Newborns' Notice (in the SPD),
- Women's Health and Cancer Rights Act (WHCRA) Notice
- Employer Children's Health Insurance Program (CHIP) Notice.



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Other notices and disclosures are required based on the plan's specific circumstances, not the employer size. For example, employers of all sizes must typically provide the following notices when applicable:

- Notice of Patient Protections & Selection of Providers
- Notice of Grandfather Status
- HIPAA Notice of Privacy Practices
- Michelle's Law Notice
- Wellness Program "Alternative Standard Disclosure"
- GINA Notices

Q28. Q: Can you have the notices posted on an electronic enrollment platform during open enrollment? This would allow all notices to be provided electronically during open enrollment. Employees must check a box acknowledging they have viewed the document.

A: The benefit portal would be sufficient for posting the benefit plan documents. Employees without work-related computer access need to consent to delivery prior to posting in the benefit portal. The Marketplace Notice and the Medicare Part D notice have time delivery requirements that may not align with the open enrollment notices.

Q29. Q: What groups/plans are required to have 5500 forms?

A: In general, plans with more than 100 participants are required to file the 5500 form. Participants in this context are primary subscribers, such as employees, retirees, and former employees enrolled in COBRA. Covered dependents are not counted as participants. Employers should contact their tax or legal consultant for verification.

Q30. Q: The SPD or SPD Wrap must go to all participants regardless of whether or not they request it. Correct?

A: Correct

Q31. Q: Does mailing a CD or flash drive require satisfaction of electronic distribution safe harbor requirements or is it simply considered a mailing and falls under those requirements

A: Mailing a CD or flash drive is acceptable. Employees should sign a consent form that outlines their ability to view the information in the format sent. Paper copies should be provided to any participant without a completed consent form.

Q32. Q: Is there one location to get all of these compliance documents?

A: Due to the complexity of the requirements there is no one-size fits all template that exists. Any set of notices must be tailor-made based on the specific characteristics of the plan. There are many compliance solution vendors, law firms and others selling and customizing compliance documents. Many brokers will develop their own versions, for sale to clients or as a value-added service. NAHU-discounted services may be available through ACA Compliance Solution Services, CXC Solutions, HR Service, Inc., TASC and Zywave. Some third-party administrators, online CRM solutions and enrollment services may also provide compliance assistance.