

# Guidelines for Distributing ERISA Required Disclosures



ERISA requires that group health plan documents be given to employees in a way that ensures they actually receive them. This includes documents like the *Summary Plan Description* (SPD) and *Summary of Material Modifications* (SMM). These rules are called the Distribution Rules.

Following these rules helps employees understand their benefits, rights, and responsibilities. If employers don't follow these rules, they can face significant penalties, such as daily fines or unexpected benefit costs.

Read on for an overview of four methods plan sponsors can use to meet the Distribution Rules. Paper distribution and the Wired at Work Safe Harbor are the most cautious approaches from a compliance perspective. Following the Department of Labor's rules for retirement plans or distributing electronically without using the safe harbor is more aggressive but could be found to be compliant. We encourage employers interested in a more aggressive approach to consult with their legal counsel.

## Distribution Methods

### Paper Distribution

A plan sponsor can give ERISA-required documents to employees by handing them out in person or mailing them to their current addresses. However, this method can be expensive because of the costs for printing, delivering, mailing, and record keeping.

### Electronic/Paper Distribution Following the "Wired at Work" Safe Harbor

The Department of Labor has a "safe harbor" that lets employers send important ERISA documents electronically to employees who use a computer at work and rely on the employer's computer systems for their job. This is easy for companies with office workers or professionals. However, for employees who don't use computers regularly, like those in construction, manufacturing, or retail, employers must provide paper documents unless the employee agrees to get them electronically. This can be challenging for those employers to manage.

The Wired at Work safe harbor is described further on Page 2.

### Electronic Distribution Following the Department of Labor's Rules for Retirement Plans

In 2020, the Department of Labor published new rules making it easier to send 401(k) plan information electronically. These rules don't apply to group health plans, but some employers might still use them for health plans instead of the Wired at Work safe harbor.

The rules for 401(k) plans let employers email plan information directly to an email address given by the company or the employee. They also allow employers to post the information on a website or platform like an Intranet, as long as they follow a "notice-and-access" system.

The 401(k) plan disclosure rules are described further on Page 3.

### Electronic Distribution Following General Distribution Rules

Some employers might choose to send ERISA-required documents electronically using a method they believe employees will actually get them. They might do this even if it doesn't follow the Wired at Work safe harbor or 401(k) plan disclosure rules. For example, if they usually send important information to employees electronically by email and feel confident that this method works well, they might use it for ERISA documents too.

# Wired at Work Safe Harbor Requirements

The Wired at Work safe harbor has different sets of requirements depending on the type of employee.

## Employees with Regular Computer Access

You may distribute ERISA-required documents electronically to employees who meet <b>both</b> of these criteria:	
Employee has ready access to their employer's computer system in the same area where the employee is expected to perform their duties (employees using a shared computer or central kiosk do not qualify), and	Employee must access their employer's computer system as an integral part of their duties (may include a remote worker who routinely accesses the system from home).

## Employees without Regular Computer Access

You may distribute ERISA-required documents electronically to employees if you meet <b>both</b> of these criteria:	
Use the employee's work email address, or an email address provided by the employee, to which benefit plan documents can be delivered, and	Obtain the employee's written consent agreeing to electronic delivery of benefit plan documents via a method that demonstrates their ability to receive electronic documents (the easiest way to do this is require that consent be provided electronically, such as via email). Before obtaining the employee's consent, you must disclose the following: <ul style="list-style-type: none"><li>• The types of documents will be provided electronically</li><li>• What system requirements (hardware or software) is needed to receive the disclosures – if system requirements change, these participants must be notified of the change and their right to withdraw consent, and they must complete a new consent form</li><li>• That consent can be withdrawn at any time at no cost and how to withdraw it</li><li>• How to update their information for receiving electronic disclosures</li><li>• The right to request a paper copy and if a charge (not always allowed) applies</li></ul>

## How You Must Disclose Electronically Under the Wired at Work Safe Harbor

- Every time you send an ERISA-required disclosure electronically to a qualifying employee as described above, you must notify them of the significance of the benefit plan disclosure and their right to receive a paper copy upon request at no charge.
- You must take appropriate means to ensure that your system for electronic distribution of ERISA-required documents results in actual receipt of the documents (e.g., using return receipt or notice of undelivered email features, or conducting periodic reviews or surveys to confirm receipt of transmitted information).

## 401(k) Plan Electronic Disclosure Rules

You may distribute required 401(k) documents electronically to employees as long as your company meets the following requirements:

1. Your company uses a company-provided email address or an email address provided by the employee, and
2. Your company must have a system that will alert you of an invalid or inoperable email address, and
3. You provide a paper notice prior to beginning electronic distribution that explains the new electronic delivery method. The notice must contain the following information:
  - a. An explanation that covered documents will be furnished electronically
  - b. The electronic address to which covered documents will be sent
  - c. Instructions for accessing the covered documents
  - d. A cautionary statement that covered documents posted to a website may not be available for more than one year or, if later, the date they are superseded by a subsequent version
  - e. An explanation of the individual's right to request a paper copy of covered documents for free, including how to do so
  - f. An explanation of the individual's right to opt out of electronic delivery for all covered documents for free, including how to do so

### How You Must Disclose Electronically Under the 401(k) Electronic Disclosure Rules

You may email documents directly to plan participants and the email must meet the following requirements:

#### Option 1: Direct Email Method

You may email documents directly to plan participants and the email must meet the following requirements:

1. Have a subject line that reads: "Disclosures About Your Retirement Plan."
2. Include the following:
  - a. A prominent statement (such as a title or subject line) that reads: "Disclosure About Your Retirement Plan."
  - b. A statement that reads: "Important information about your retirement plan is available. Please review this information."
  - c. Identification of the document by name, and, if not clear solely from the name, a brief description of the document.
  - d. The website address - or a hyperlink to the address - where the document is available. The website address or hyperlink must be "sufficiently specific" to provide "ready access" to the document.
  - e. An explanation of the individual's right to request a paper copy of the document for free, including how to do so
  - f. An explanation of the individual's right to opt out of electronic delivery for all covered documents for free, including how to do so
  - g. A telephone number to contact the employer or other designated plan representative.
3. Be written in a manner calculated to be understood by the average plan participant.

#### Option 2: Notice-and-Access Method

You may post documents to a website or other online platform (e.g., an Intranet) if you meet the following requirements:

- Notice of Internet Availability - Employees must receive an electronic (not paper) *Notice of Internet Availability (NOIA)* each time a covered document is posted to the website. It must contain the same items that must be included when you email documents directly (see Option 1 above) as well as a cautionary statement that the document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version.
- Combining NOIAs – In general, employers must provide a separate NOIA for each covered document. However, employers can combine all or some of the following documents in an annual notice:
  - The *Summary Plan Description (SPD)*
  - Any covered document or information that must be furnished annually and does not require individuals to take any action by a particular deadline (e.g., fee disclosures, QDIA notices).
  - Any other covered document authorized by DOL or IRS.

The combined NOIA must be provided once each plan year and no more than 14 months after the prior plan year's notice was given.

- Website standards – Employers must take measures reasonably calculated to ensure that covered documents are:
  - Posted to the website no later than their ERISA-mandated deadline.
  - Available for at least one year or until superseded by a revised version in later years.
  - Presented in an understandable format.
  - Suitable for both online viewing and printing.
  - Electronically searchable.
  - Presented in a format that allows the document to be permanently retained electronically.