



ELECTRONIC DELIVERY

Both the Department of Labor (“DOL”) and the Treasury have their own regulation for the use of electronic delivery of participant communications. Participant communications required by Title I of the Employee Retirement Income Security Act (“ERISA”) must follow the DOL regulation and participant communications required by the Treasury must follow the Treasury regulation.

This guide is intended to assist you, as a plan sponsor or plan fiduciary to make informed choices about using electronic methods to provide information to your plan’s participants. Below are the requirements of each agency’s regulation.

DOL RULES FOR ELECTRONIC DELIVERY

DOL Reg. §2520.104b-1(c) covers the rules for the use of electronic delivery of documents required to be furnished to participants under Title I of ERISA including Summary Plan Description, Summary of Material Modifications, Summary Annual Report, participant benefit statements, participant fee disclosure and investment related information to meet the requirements of a participant-directed account under 404(c).

The DOL provides a safe harbor plan administrators may rely on for delivering plan information electronically. Use of the safe harbor requirements provide compliance with the legal requirement of delivering plan information by a method reasonably calculated to ensure actual receipt of the information.

Electronic Delivery Safe Harbor Requirements – all requirements listed below must be met.

- Appropriate steps and necessary measures must be taken to ensure that the system for furnishing electronic documents results in the actual receipt by participants (i.e. electronic return-receipt, periodic delivery system review/survey).
 - The system used for providing electronic delivery must be designed to protect the confidentiality of personal and account information.
 - A participant receiving an electronically delivered document must, at the time the document is delivered, be advised as to the significance of the document and the right to request a paper when the document is delivered.
 - The electronically-delivered documents must be prepared and furnished in a manner consistent with the style, format, and content requirements applicable to that particular document.
 - The participant must be provided a paper version of the document upon request.
- provided, and that receipt of the plan information electronically is voluntary.
 - The types of plan information documents being sent, the importance of the information and how the information may be accessed.
 - Provide the option to opt-out of receiving information electronically at any time without a fee.
 - List the process to updated or change email address information.
 - List hardware and software requirements to access and retain the documents.
- If documents will be provided over the Internet, these persons must demonstrate the ability to access the information either by consenting or confirming the consent electronically.
 - Persons must be notified of revised hardware/software requirements for accessing and retaining documents and to receive a statement of their rights and the need to reaffirm consent.

There are two categories of persons who may receive documents by electronic delivery.

1. Current employees who are “wired at work” who:

- Have the ability to effectively access electronic documents at any location where the participant performs duties as an employee and
- Using the employer’s electronic information system must be an integral part of the employee’s duty.

2. Participants, beneficiaries (“persons”), etc. who don’t meet the criteria above who:

- Provide affirmative consent to receive documents electronically.
- Before providing consent these persons must receive an Initial Notice. This notice must include (but not limited to):
 - Statement that these persons will be sent plan information electronically to the email address

Annual Re-affirmation

Annually (every calendar year, plan year or other 12-month period chosen by the plan administrator), information describing the ability to opt out of the electronic delivery process must be provided to these persons in paper form unless the plan has had electronic interaction with a person since the initial or most recent annual notice was delivered.

Examples of “electronic interaction” include but are not limited to:

- Participant or beneficiary updating, resubmitting or confirming his/her email address to the plan;
- Participant or beneficiary sending an electronic message to the plan;
- Logging onto to a secure continuous access website housing plan information;
- The receipt and opening of an electronic message sent by the plan to a participant or beneficiary.

TREASURY RULES FOR ELECTRONIC DELIVERY

Treasury regulation 1.401(a)-21 covers the rules for providing paperless transactions. Some of the participant communications that may be delivered electronically include (but not limited to) participant distribution notice and consent, spousal consent, safe harbor 401(k) and auto enrollment notices, election to receive a participant loan and the loan agreement. Also any document, notice or election under the plan which is not required in writing may use this rule (i.e. participant enrollments, contribution elections, beneficiary designations (other than spousal consent)).

General Method Requirements – the system, consent and notice requirements for the Treasury Rules are substantially similar to the DOL’s Electronic Delivery Safe Harbor above.

- Furnishing electronic documents results in the actual receipt by participants (i.e. electronic return-receipt).
- Protect the confidentiality of personal and account information.
- Furnished in a manner consistent with the style, format, and content requirements applicable to that particular document.
- Participant must be advised of the significance of the document and the right to request a paper copy, at the time the document is delivered.
- Participant may request a paper version of the document free of charge.

Participant Consent Requirements

- All requirements listed above under the General Method Requirements must be met.
- Participants must affirmatively consent to electronic delivery in a manner that demonstrates they can access the information in the electronic medium¹ that will be used.
- A disclosure statement explaining the participant’s rights must be furnished before the participant gives affirmative consent.
- If a participant withdraws consent prior to notice of the documents being delivered electronically, then electronic delivery cannot be used.
- Participants must be notified of hardware/software changes that may create the participants inability to access the documents, or receive notice including the need to reaffirm consent based on the change.

Alternative Method Requirements

Information may be delivered through any electronic medium so long as the participant has effective access to the electronic delivery system that will be used. To rely on the Alternative Method, at the time the information is delivered, participants must be notified that they may request, free of charge, a paper copy of the information.

CONSIDERATIONS

- Plan administrators must have some evidence that the delivery system will permit access to the information. It is not sufficient to send an e-mail to a last known e-mail address.
- Electronic delivery is not an all or nothing method. Plan administrators have the option to deliver plan information to employees with computer access at work and to participants who have provided affirmative consent to receive plan information and also send information by first class mail to employees who do not have regular computer access at work and to other persons.
- The Treasury Rules are less restrictive than the DOL’s; therefore meeting the rules of the DOL’s Safe Harbor will generally satisfy the Treasury Rules regarding electronic delivery.

USE CAUTION

The information provided in this guide should not be construed as legal approval by Randall + Hurley as to your company’s appropriateness in using electronic delivery of plan information to participants. Both regulations are complex and should be reviewed based on your company’s facts and circumstance by the plan sponsor and the plan’s attorney.

¹ Electronic medium includes (but not limited to) documents provided through a company website, delivered as e-mail attachments, on magnetic tape or CD-ROM.