

# COMPLIANT DISTRIBUTION OF DOCUMENTS AND NOTICES

A GUIDE FOR EMPLOYEE BENEFITS PROFESSIONALS



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# TODAY'S TOPICS

- Why Document Distribution Matters
- DOL's Electronic Distribution Safe Harbor
- Electronic Distribution Rules for SBCs
- Best Practices & Recommendations



# WHAT IS COMPLIANCE ALL ABOUT?



FEDERAL LAWS GOVERNING  
EMPLOYER SPONSORED HEALTH &  
WELFARE PLANS



COMPLEX. CONFUSING.  
CONSTANTLY CHANGING.



GREAT OPPORTUNITY TO BE A  
PROBLEM-SOLVER AND  
SOLUTION-PROVIDER

## LET'S TAKE A POLL

**How often do you receive questions about the rules for distributing documents?**

ACTIVE ENGAGEMENT IN THE  
DISTRIBUTION OF DOCUMENTS—USING  
A COMPLIANT METHOD—IS CRITICAL TO  
EVERY EMPLOYER'S COMPLIANCE  
PROGRAM

# PART 1

## Why Document Distribution Matters



# CONGRATULATIONS, MR. EMPLOYER!

You have been selected by the federal government to deliver hundreds of pages of hard-to-define and continuously changing documentation to a very important group of people: your employees and their beneficiaries. Most of the recipients do not want it, will not read it, and are promptly going to throw it away.

Beware: failure in this mission will be costly!  
**We will be checking.**

# WHY IS COMPLIANCE IMPORTANT?

Enforcement Happens and the Penalties are Real

Enforcement Activity for EBSA Fiscal Year	Recoveries from Enforcement Actions	Monetary Benefit Recoveries from Informal Complaint Resolution	Civil Investigations Closed with Results	Criminal Investigations: Individuals with Guilty Pleas or Convictions	Number of Individuals Indicted
<b>2020</b>	\$3.12 Billion	\$456.0 Million	754	59	70
<b>2019</b>	\$2.57 Billion	\$510.0 Million	770	80	76
<b>2018</b>	\$1.1 Billion	\$443.2 Million	860	87	142
<b>2017</b>	\$682.3 Million	\$418.7 Million	1,114	79	113
<b>2016</b>	\$352.0 Million	\$394.2 Million	1,356	75	96
<b>2015</b>	\$265.3 Million	\$402.9 Million	1,640	67	61

Published Results of EBSA Enforcement Activities

# POTENTIAL PENALTIES

<b>Plan Documents</b>	<ul style="list-style-type: none"><li>• Most violations - \$100 to \$110/day per affected participant</li><li>• Failure to provide SPD or SMM when requested by DOL - \$161 per day</li></ul>
<b>Required Notices</b>	<ul style="list-style-type: none"><li>• SBC - \$1,190 per willful failure to provide to participants</li><li>• CHIPRA - \$120/day for failure to provide notice</li><li>• COBRA - \$100 to \$110/day per affected person</li></ul>

**Observers of DOL welfare plan audits have noted that document distribution is a major area of focus**

**Potential lawsuits and whistleblower activities bring additional risk**

# THE TYPICAL WELFARE PLAN SHOULD HAVE THE FOLLOWING DOCUMENTS:

- POP or Cafeteria Plan
- Wrap Document/SPD
- Certificates of Coverage
- SBCs
- Notices
- HIPAA Privacy Policy (required for self-funded employers)





## OTHER IMPORTANT DOCUMENTS INCLUDE:

- The Benefits Guide
- Employee Handbook
- Employer Policies & Procedures, etc.

# MANY TYPES OF DOCUMENTS MUST BE DISTRIBUTED

Type of Document or Notice	Recommendation
Summary of Benefits & Coverage ( <b>SBC</b> ) as required by ACA	Paper or Electronic Delivery (special rules apply)
<b>SPD, SMM, SMR, and SAR</b> as required by ERISA (including <b>Certificates of Coverage</b> )	Paper or Electronic Delivery (follow DOL safe harbor rule)
Various ERISA, ACA, Medicare Part D and HIPAA Special Enrollment Rights <b>Notices</b> and Other Health Plan <b>Notices</b>	
HIPAA <b>Notice of Privacy Practices</b>	
<b>COBRA Notices</b>	First Class Mail with Proof of Mailing (plus DOL safe harbor as backup)

**The DOL Safe Harbor for Electronic Distribution became effective in 2002**  
(Happy 19<sup>th</sup> Birthday, Safe Harbor Rules!)

# SURVEYING THE REGULATORY ENVIRONMENT

- 2002 DOL Safe Harbor (outdated but still in force)
- 2012 Final Rule for SBC Distribution (more recent but limited in application)
  - Built on DOL Safe Harbor with relaxed rules for electronic distribution
  - Did not actually update the Safe Harbor, technically only applies to SBC
- 2020 Updates to the DOL Safe Harbor
  - Only applicable to Retirement Plans

Bottom Line: No “safe” way around the 2002 DOL Safe Harbor

## PART 2

### DOL's Electronic Distribution Safe Harbor



# THE GENERAL REQUIREMENT

**Documents must be distributed in a manner “reasonably calculated to ensure actual receipt” of the material**

# DOL SAFE HARBOR: REQUIREMENTS

Electronic Distribution Requires:

Work-Related  
Computer Access

Or

Affirmative Consent

## **Electronic Distribution Options:**

- Email Notice with Attachments
- Electronic Notice of Online Availability
- Written Notice of Online Availability

# DOL SAFE HARBOR

## When providing materials electronically:

### Requirements:

- Follow **style, format and content requirements** applicable to the documents
- Inform participants of the **significance of the documents**
- Inform participants of their right to **request and obtain a paper version** of the documents



### Recommendations:

- Use delivery-receipts
- Conduct periodic reviews/surveys
- Carefully track and document distribution activities (names, dates, materials distributed, method used)

Do not just “post” documents online or make them “available.” Actively distribute the documents.

# DOL SAFE HARBOR: AFFIRMATIVE CONSENT

**Affirmative Consent** is required if:

- An individual **does not have the ability to effectively access** documents furnished in electronic form at any location where the individual is reasonably expected to perform his or her duties as an employee
- Or if access to the employer's electronic information system is **not an integral part of the individual's job duties**

If documents are provided through the internet or some other type of electronic communication network, consent must be given in a manner that **reasonably demonstrates the individual's ability to access** information in the electronic form that will be used to provide the information.

# DOL SAFE HARBOR: AFFIRMATIVE CONSENT

Prior to consenting, the individual must be provided a clear and conspicuous statement indicating:

- 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 the individual's contact information
- The **right to request and obtain a paper version** and whether the paper version will be provided free of charge
- Any **hardware and software requirements** for accessing and retaining the documents

# SAMPLE AFFIRMATIVE CONSENT FORM

## Consent to Receive Electronic Delivery of Summary Plan Descriptions and Other Notices

Name	Employee ID (if applicable)
Email Address (if applicable) – Please write clearly	

I understand that:

The following documents and/or notices may be provided to me electronically or by paper copy:

Summary Plan Descriptions, Summaries of Benefits and Coverage, Summaries of Material Modification, Summary Annual Reports, COBRA Notices, HIPAA Certificates and other benefit plan documents and notices.

I may provide notice of a revised email address or revoke my consent at any time without charge by sending an email to [hr@company.com] or by submitting a written request to Human Resources.

I am entitled to request and obtain a paper copy of any electronically furnished document free of charge by contacting [hr@company.com] or by submitting a written request to Human Resources.

In order to access information provided electronically, I must have

1. A computer with Internet access
2. An email account that allows me to send and receive e-mails
3. Microsoft Word (or software capable of opening Word documents) and Adobe Acrobat Reader (or other software capable of opening PDF documents).

I agree to receive the documents listed above by electronic delivery to the email address I have provided on this form.

\_\_\_\_\_  
Signature of Employee:

\_\_\_\_\_  
Date:

**If you would like to receive a paper copy of these documents, you may email [hr@company.com] or submit a written request to Human Resources and one will be provided to you free of charge.**

Please return this form to:

ATTN: Human Resources

Company Name

City, State, ZIP



## PART 3

### Electronic Distribution Rules for SBCs

# FINAL RULE FOR DISTRIBUTION OF SBC

## Broader Allowance for Electronic Distribution

- SBC may be provided as part of an online enrollment process
- DOL safe harbor approach may be used for individuals who are already enrolled
- Eligible individuals who are not enrolled may be notified about the electronic availability of the SBC in written form, including distribution of a postcard
- Offer of a paper copy is still required in all cases

Safest & easiest way is to ignore this and use the DOL safe harbor for all open enrollment documents including SBCs



# PART 4

## Best Practices

# STRATEGY FOR COMPLIANT DISTRIBUTION

- A** **Actively distribute** by notifying recipients
- U** **Unify the process** by providing all documents and notices at the same time and in the same way to all employees each year (open enrollment)
- D** **Document** the actions taken (who, what, when, where, how)
- I** **Include model language** to meet safe harbor requirements
- T** **Timely distribution** is crucial

# RECOMMENDATIONS & BEST PRACTICES

## Proposed Strategy for Employers:

1. Understand the rules
2. Map out objectives
3. Take safe & effective action

## Using a “Safe Harbor Plus” Approach:

- Take action **in addition to** the safe harbor—not **instead of** the safe harbor
- Stay **within** safe harbor to be safe—then go **beyond** safe harbor to be effective

# RECOMMENDATIONS & BEST PRACTICES

## Action Items

- Keep this presentation available for reference
- Make sure each employer has up-to-date plan documents
- Review each employer's available distribution tools & options
- Guide each employer toward a safe & effective distribution method

## LET'S TAKE A POLL

**How many of your clients distribute documents and notices using a fully compliant approach?**

# Thank you!

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## Questions?