



DOL Finalizes Rules for Electronic Delivery of Documents and Information Under ERISA

By Henry A. Hernandez

The Employee Retirement Income Security Act of 1974, as amended (“ERISA”), requires that employers provide certain information and documents to benefit plan participants and beneficiaries. The Department of Labor (DOL) recently issued rules for delivering information and documents electronically. The rules are effective for plan years starting on or after October 9, 2002. For calendar year plans, electronic delivery under the new rules can begin January 1, 2003.

I. Coverage of Rules

The rules allow electronic delivery of all documents that must be furnished or made available to participants and beneficiaries under ERISA. Such documents include:

- summary plan descriptions, summaries of material modifications, summary annual reports;
- HIPAA notices of creditable coverage;
- the newly-required notices regarding “blackout periods” during which participants’ rights to direct or diversify investments and obtain loans or distributions under the plan may be temporarily suspended;
- individual benefit statements;
- investment-related information for participant-directed accounts to comply with section 404(c) of ERISA;
- notifications intended to comply with COBRA, qualified domestic relations orders and qualified medical child support orders;
- benefit determination notices provided pursuant to ERISA’s claims procedure requirements;
- information concerning participant loans; and
- information required to be furnished or made available for inspection under ERISA in response to a request from a participant or beneficiary of the plan.

The rules are limited to disclosures that plans are required to make *to* participants and beneficiaries under ERISA and do not extend to other communications under ERISA such as communications *from* participants or beneficiaries to a plan (e.g., beneficiary designations,



distribution elections, or spousal consents) or to communications between plan administrators and employers or other plan sponsors. The rules also do not cover matters that are under the jurisdiction of the Internal Revenue Service such as the requirements for plan loan agreements.*

II. Individuals Automatically Covered by the Rules

The rules automatically extend to any employee who can access electronic documents at any location where he or she works and whose access to the employer's electronic information system is an integral part of his or her duties. For example, an employee who regularly works at a computer and revises documents that he receives through his employer's e-mail system is automatically covered by the rules, and the employer may deliver summary plan descriptions and summary annual reports to the employee by e-mail. However, a field worker, such as a driver or salesperson who does not have regular access to the employer's e-mail system is not automatically covered by the rules. Such an employee, as described in Part III, must consent to receive documents electronically, even if the employer installs a computer kiosk in common areas frequented by the employee.

III. Individuals Not Automatically Covered by Rules

There are additional requirements that must be met if the employer wants to deliver documents electronically to an individual whose duties do not require him or her to regularly access the employer's electronic information system. In order to use electronic delivery for such an individual, all of the following requirements must be met:

- The individual must affirmatively consent to receive documents electronically.
- If documents are to be provided via the Internet or some other electronic communication network, the individual must provide an e-mail address to which the documents will be delivered and must consent electronically in a manner that demonstrates his or her ability to access the documents in the electronic medium to be used.
- Prior to providing consent, the individual must be given a clear and conspicuous statement in hard copy describing the documents covered by the consent, the software and hardware requirements for electronic delivery and for retention of the documents and an explanation of the individual's right to revoke his or her consent and to receive paper versions of the documents. The statement also must describe the procedures for revoking consent to receive documents electronically and updating e-mail addresses and other relevant information.

* Under final IRS regulations, a loan agreement does not have to be signed by the participant if the agreement is enforceable under state law without a signature and can be in an electronic medium that is reasonably accessible to the participant or the beneficiary and that is provided under a system that satisfies certain requirements. Treas. Regs. § 72(p)-1, Q&A-2.



- If software or hardware requirements are changed and the change creates a risk that the individual will not be able to access the documents electronically, then the individual must be provided with a new paper statement describing the new software or hardware requirements and the individual's right to withdraw his or her consent to receive documents electronically. After the statement has been provided, the individual must again affirmatively consent to receive documents electronically.

IV. Overall Requirements for Electronic Delivery

In order to deliver documents and information electronically, the rules require that *all* of the following requirements be met:

- The plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of the transmitted information (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information) and protects the confidentiality of personal information relating to individuals' accounts and benefits.
- The electronic documents must be prepared and provided in a manner that is consistent with the style, format and content requirements that specifically apply to the document under ERISA.
- At the time that the electronic document is provided, an electronic or paper notice must be provided to the individual that describes the significance of the electronic document when it is not reasonably evident as transmitted (e.g., "the attached document describes changes in the benefits provided by the plan").
- At the time the electronic document is provided, an electronic or paper notice must be provided to the individual that describes the individual's right to request and to obtain a paper version of the electronic document.
- Upon request, the individual must be furnished a paper version of the electronic document, and the employer may impose a reasonable charge for the paper version if ERISA permits such a charge with respect to the particular document.

V. Disclosure through Websites or Intranets

The rules permit disclosure of plan information through a separate section of a plan sponsor's website or Intranet that is easily accessible from its home page with access generally restricted to employees and others by passwords or PIN requirements. A plan administrator relying on disclosure through a website or Intranet must satisfy all of the requirements described in Part IV and, in addition, must:



- notify participants and beneficiaries of the availability of the particular disclosure document and its significance by sending a written or electronic notice that directs them to the document on the website; and
- take appropriate and necessary measures to ensure that the website system results in actual receipt (e.g., the website homepage should contain a prominent link to the website sections that contain information about the plan and directions on how to obtain a replacement for a lost or forgotten password, and the disclosure documents should remain on the website for a reasonable period of time after participants and beneficiaries have been notified of their availability).

Electronic delivery can greatly simplify and expedite compliance with ERISA's disclosure requirements. We would be glad to assist in implementing such a program in your company. Any questions about the final regulations can be directed to Henry Hernandez or any member of the Executive Compensation & Benefits Practice Section.