

APRIL 20, 2020

## **FROST INSURANCE COMPLIANCE TIP**

### **AN OVERVIEW OF THE DOL'S ELECTRONIC DISCLOSURE SAFE HARBOR FOR EMPLOYER-SPONSORED GROUP HEALTH PLANS**

The safe harbor is designed to help plan sponsors ensure that plan participants actually receive important plan information when it is provided electronically.

#### **BACKGROUND**

On April 9, 2002, the Department of Labor (DOL) amended existing regulations<sup>1</sup> governing the delivery of information required to be furnished to participants and beneficiaries in employer-sponsored group health plans. These regulations established a new safe harbor which, for the first time, allowed employers to use electronic media to satisfy many of the notice requirements that apply to employers sponsoring group health plans. Prior to that date, employers and plan administrators relied on guidance issued in 1977, which simply required plan administrators to use delivery methods reasonably calculated to ensure actual receipt of such information by plan participants, beneficiaries and other specified individuals.<sup>2</sup> Under the 1977 guidance, employers usually sent notifications by first-class mail, which could result in significant costs when taking into account stamp prices, administrative time and the cost of producing paper documents and booklets in order to comply with federal notice requirements.

A 2013 U.S. Census Bureau report highlighted the fact that there has been a substantial increase in access to and utilization of electronic media. The Census Bureau reported that an estimated 143.9 million private sector workers have access to the Internet.<sup>3</sup> The DOL has even embraced forms of social networking such as Facebook, Twitter and its own blog to communicate its messages and rulemaking activities to interested parties.<sup>4</sup> With the significant increases in electronic media accessibility, employers are exploring using email, internet, intranet and online enrollment systems to reduce printing and mailing costs when communicating federally mandated notifications for health benefit plans.

Following the enactment of the Patient and Protection and Affordable Care Act (commonly referred to as the ACA) on March 23, 2010, employers sponsoring group health plans have even more notice requirements to comply with in order to stay compliant regarding group health plans. ACA, also known as health care reform, imposed notice requirements on both employers and insurers. This white paper provides an overview of the safe harbor regulations to help ensure that employers are following the DOL's guidelines.

#### **RECENT DEVELOPMENTS**

In the *Federal Register* issued October 23, 2019<sup>5</sup> the proposed new rule to expand and modify existing rules governing the electronic distribution of employee benefit plan information. The DOL asked the public to comment on whether the current electronic safe harbor under ERISA should be revised and, if so, what changes should be made. The DOL also asked for feedback on whether the safe harbor should include different rules for different types of employee benefit plans or different types of disclosures. The comment period closed on November 22, 2019. The proposed new rule would only be applicable to retirement plan disclosures and is thought to be consistent with Executive Order 13847, issued on August 31, 2018. To date, the proposed rule does not address modification or expansion of disclosure rules for group health plans.

#### **GENERAL REQUIREMENTS**

The DOL's electronic disclosure safe harbor requires employers to perform a step-by-step analysis to determine when electronic disclosure is appropriate. Before delving into this analysis, and regardless of the method used for distribution, all employers and plan administrators must satisfy certain general requirements.

- 1. The materials must be prepared and furnished in accordance with otherwise applicable requirements.<sup>6</sup>**

The fact that the material is being prepared and delivered electronically does not change the requirements of the notice or disclosure itself. If the law mandates a certain font size, specific text or required statement, the electronic version must meet the same requirements.

**2. Each recipient must be notified at the time the electronic document is furnished of the significance of the document and of the right to request and obtain a paper version of the document.**

This statement is required each time an electronic disclosure is made. Furnishing a general notice on a periodic basis that a paper copy may be requested does not satisfy this requirement. If multiple documents are being distributed at the same time, the plan administrator is allowed to include this notice only once, provided that the notice is conspicuous.<sup>7</sup>

**3. A paper version of the electronic document must be available on request, and no charge may be imposed if the document in question is one that must otherwise be provided without charge.<sup>8</sup>**

A plan administrator may charge for copying costs (but not handling or postage charges) in limited situations for documents provided in response to a written participant or beneficiary request, but most other categories or welfare plan documents must be provided without charge.

**4. If the disclosure includes personal information relating to an individual's accounts and benefits, the plan administrator must take reasonable and appropriate steps to safeguard the confidentiality of the information.**

This requirement may come into play when a company wishes to post benefits-related information to an intranet or company website. In this case, employers should implement password and PIN requirements that cannot be easily guessed by employees.

### ELECTRONIC DISCLOSURE STEP-BY-STEP ANALYSIS

If the employer sponsoring the group health plan has met the above general requirements, the next part of the process to comply with the safe harbor guidelines is to engage in a step-by-step analysis. There are two major categories under this analysis:

- Category 1 is for participants with work-related computer access
- Category 2 is for participants with no work-related computer access

Whether an employer will need to follow the steps outlined in Category 1, 2 or both will largely depend on the makeup of the employer's workforce.

#### CATEGORY 1: PARTICIPANTS WITH WORK-RELATED COMPUTER ACCESS

**Step 1**

Identify who can receive electronic disclosure under this category.

- Participants who have the ability to access documents at any location where the participant may be reasonably expected to perform employment duties  
**Example:** A home office where the employee logs in and performs work remotely.
- Participants for whom access to an electronic information system is an integral part of their employment duties

**If individuals qualify as both of the above, proceed to Step 3.**

**Step 2**

Identify who cannot receive electronic disclosure under this category.

- Participants who do not have access to the employer's computer system as part of integral employment duties
- Non-employees such as COBRA beneficiaries and retirees
- A spouse whose husband or wife has access to the electronic system as part of the husband or wife's employment duties
- Participants in an employment environment where the employer makes documents available in a place frequented by many employees  
**Example:** An employer sets up a computer kiosk for all employees to share. Some employees use it and others do not.

**If individuals meet any of the above, STOP and consider Category 2.**

<p><b>Step 3</b> Determine if advance notice is required.</p>	<p>No. Under this category, no advance notice is required. <b>Proceed to Step 4.</b></p>
<p><b>Step 4</b> Is consent required?</p>	<p>No. By virtue of having access to electronic information system as part of integral employment duties, employers are not required to receive consent for employees with such access. <b>Proceed to Step 5.</b></p>
<p><b>Step 5</b> Identify the electronic methods permitted.</p>	<p>Email, email attachment, use of company website (requirements must be satisfied), providing documents on flash drive, CD and DVD are permitted electronic disclosure methods. <b>Proceed to Step 6.</b></p>
<p><b>Step 6</b> Determine if additional steps are needed to post to company website.</p>	<p>Information can be disclosed electronically for this category of participants, but additional requirements must be satisfied before employers post such information to a website. The plan administrator must do all of the following:</p> <ul style="list-style-type: none"> <li>• Use appropriate and necessary means to ensure that posting the documents on a company’s website results in actual receipt</li> </ul> <p>Examples of appropriate and necessary include:</p> <ul style="list-style-type: none"> <li>– Adding a prominent link from the website’s homepage to the separate section that contains the documents</li> <li>– Providing directions on the website for how to replace a lost or forgotten password</li> <li>– Maintaining the documents on the website for a reasonable period of time following notice to employees of their availability</li> <li>– Prepare and furnish the documents in accordance with all applicable requirements, including timing and format requirements</li> <li>– Provide a written or electronic notice to employees directing them to the website at the time the document is posted and describing the document’s significance and the employee’s right to request a paper copy</li> <li>– Provide a paper copy of the document on request without charge</li> </ul> <p><b>Proceed to Step 7.</b></p>
<p><b>Step 7</b> Repeat steps each time notice is provided.</p>	<p>Refer to General Requirement 2, which says the recipient must be notified each time the electronic document is furnished of the significance of the document and of the right to request and obtain a paper version of the document.<sup>10</sup></p>

**CATEGORY 2: PARTICIPANTS WITH NO WORK-RELATED COMPUTER ACCESS**

<p><b>Step 1</b> Identify who can receive electronic</p>	<ul style="list-style-type: none"> <li>• Participants who do not have access to the employer’s computer system as part of integral employment duties</li> <li>• Non-employees such as COBRA beneficiaries and retirees</li> </ul>
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disclosure under this category.	<ul style="list-style-type: none"> <li>• A spouse whose husband or wife has access to the electronic system as part of the husband or wife’s employment duties</li> <li>• Participants in an employment environment where the employer makes documents available in a place frequented by employees</li> </ul> <p><b>If individuals meet any of the above, proceed to Step 2.</b></p>
<p><b>Step 2</b> Identify who cannot receive electronic disclosure under this category.</p>	<p>Any participant can receive electronic disclosure under this category if the employer satisfies the remaining steps.</p> <p><b>Proceed to Step 3.</b></p>
<p><b>Step 3</b> Determine if advance notice is required.</p>	<p>Yes. Before consent is obtained (next step), the employer must provide the individual with a statement that explains all of the following:</p> <ul style="list-style-type: none"> <li>• The types of documents that will be provided electronically</li> <li>• That consent can be withdrawn without charge</li> <li>• The procedures for withdrawing consent and updating information (e.g., address for receiving electronic disclosure)</li> <li>• The employee’s right to request a paper version and to know whether a charge applies</li> <li>• The electronic delivery system and what hardware and software will be needed to use it<sup>9</sup></li> </ul> <p><b>Proceed to Step 4.</b></p>
<p><b>Step 4</b> Is consent required?</p>	<p>Yes. Individuals must affirmatively consent to electronic disclosure. Level of consent depends on which method for disclosure is used:</p> <ul style="list-style-type: none"> <li>• If via internet or other electronic communication system, the individual must affirmatively consent “in a manner that reasonably demonstrates the individual’s ability to access information in the electronic form that will be used.” In other words, such an individual should consent electronically via a website or email</li> <li>• If through CD, DVD or other media device, an individual does not need to provide electronic consent and need not provide an email address</li> </ul> <p><b>Proceed to Step 5.</b></p>
<p><b>Step 5</b> Identify the electronic methods permitted.</p>	<p>Email, email attachment, use of company website (requirements must be satisfied), providing documents on flash drive, CD and DVD are permitted electronic disclosure methods.</p> <p><b>Proceed to Step 6.</b></p>
<p><b>Step 6</b> Determine if additional steps are needed to post to company website.</p>	<p>Web disclosure is only available when employees have provided an alternate email address or have consented to using the internet. Web disclosure is not available to employees who have only provided consent to receive disclosure through a CD, DVD or media device.</p> <p>Additional requirements must be satisfied when posting to a website. The plan administrator must do all of the following:</p>

	<ul style="list-style-type: none"> <li>• Use appropriate and necessary means to ensure that posting the documents on a company’s website results in actual receipt.</li> </ul> <p>Examples of appropriate and necessary include:</p> <ul style="list-style-type: none"> <li>– Adding a prominent link from the website’s homepage to the separate section that contains the documents</li> <li>– Providing directions on the website for how to replace a lost or forgotten password</li> <li>– Maintaining the documents on the website for a reasonable period of time following notice to employees of their availability</li> <li>– Prepare and furnish the documents in accordance with all applicable requirements, including timing and format requirements</li> <li>– Provide a written or electronic notice to employees directing them to the website at the time the document is posted and describing the document’s significance and the employee’s right to request a paper copy</li> <li>– Provide a paper copy of the document on request without charge</li> </ul> <p><b>Proceed to Step 7.</b></p>
<p><b>Step 7</b> Repeat steps each time notice is provided.</p>	<p>Under General Requirement 2, the recipient must be notified each time the electronic document is furnished of the significance of the document and of the right to request and obtain a paper version of the document. If system hardware or software requirements change, the employer must provide a revised statement to the recipient and obtain renewed consent from the individual.<sup>10</sup></p>

## DISCLOSURES COVERED BY THE SAFE HARBOR

If the employer sponsoring the group health plan has met the above general requirements, the next part of the process to comply with the safe harbor guidelines is to engage in a step-by-step analysis. There are two major categories under this analysis:

Here is a listing of ERISA-required group health plan disclosures that are explicitly covered by the DOL’s electronic disclosure safe harbor:

- Summary Plan Description (SPD)
- Summary of Material Modification (SMM)
- Summary Annual Report (SAR)
- Summary of Benefits and Coverage (SBC) (only private sector and church plans can use this safe harbor, also some limitations exist)
- ERISA claims notices
- COBRA notices (some limitations exist)
- HIPAA notices such as employer CHIP notice (some limitations exist)
- Newborns’ and Mothers’ Health Protection Act (by virtue of being provided in SPD)
- Notice of Marketplace/Exchange Coverage
- Qualified Medical Child Support Order (QMCSO) notices (some limitations exist)
- Written ERISA plan documents
- Women’s Health and Cancer Rights Act (WHCRA)

## DOL ELECTRONIC DISCLOSURE SAFE HARBOR PERMITTED, BUT ADDITIONAL CONSIDERATIONS NEEDED

The following documents are permitted to be provided electronically, but due to the nature of the documents and other factors, employers administering group health plans must carefully consider the administrative burdens associated with providing the documents electronically. It is generally recommended to use first-class mail rather than electronic disclosure for the reasons below.

NOTICE	REASON TO DISCLOSE BY MAIL RATHER THAN ELECTRONICALLY
COBRA Initial Notice	<p>This notice is required to be given to both covered employees and their covered spouses at the time coverage commences. Since a spouse generally cannot access an employee's work email, providing the notice to the employee's work email will not satisfy this requirement. The alternatives include either:</p> <ul style="list-style-type: none"> <li>• Providing the notice at a joint home email address, if both the employee and spouse satisfy the consent requirements to receive the materials at a home email address</li> <li>• Providing the notice electronically to the employee at work and on paper via first-class mail at a home address or through a personal email address provided by the spouse</li> </ul>
COBRA Election Notice	<p>This notice must be provided to qualified beneficiaries who experience a qualifying event. Common qualifying events include termination of employment, reduction of hours, divorce, death and a child aging out of the plan, among others. Such qualifying events make it difficult for a plan administrator to provide notice at a work email address due to the nature of the event, and trying to locate a personal email address and receive consent may delay the timing of the notice. While electronic disclosure is technically allowed, the reasons above make first-class mail the recommended approach.</p>
Medicare Part D Creditable/Non-Creditable Disclosure Notice to Eligible Individuals	<p>CMS issued guidance indicating that group health plan sponsors may use the DOL's electronic disclosure safe harbor described in this white paper to provide disclosure notices to Part D-eligible individuals. As a result, group health plan sponsors would determine which category applies to their workforce and apply the step-by-step procedures accordingly. Frost Insurance has a separate document on this requirement. Please ask your advisor for a copy.</p>
Summary of Benefits and Coverage (SBC)	<p>This requirement includes providing a four-page SBC to participants and beneficiaries, for each benefit package in which they are eligible. The SBC must also be provided to COBRA beneficiaries, again for each benefit package in which they are eligible.</p> <p>The SBC has several distribution deadlines, including:</p> <ul style="list-style-type: none"> <li>• At initial enrollment: The SBC for each benefit package that the participant or beneficiary is eligible for must be included as part of enrollment materials.</li> <li>• At open enrollment/renewal: The SBC must be provided as soon as practicable, but no later than seven business days after the issuance of the policy. If active enrollment is required, the SBC must be provided at the same time open enrollment materials are distributed. There is a special rule that allows the plan to only provide the SBC that the participant is currently enrolled in, but other SBCs for other benefit packages must be available upon request.</li> </ul>

- At special enrollment: The SBC for the plan in which a participant enrolled following a HIPAA special enrollment right must be made available within 90 days after the enrollment (the same timeframe to provide an SPD).
- Upon request: The SBC must be provided no later than seven business days following the request.

For each of the categories above, and for plans and insurers subject to ERISA or the IRS Code (church plans not subject to ERISA), the SBC may be provided electronically to covered participants and beneficiaries if the requirements of the DOL's electronic disclosure safe harbor are met. Note that as a best practice, plan sponsors may wish to add appropriate language to enrollment forms and plan procedures to alert participants that an SBC furnished to a participant will also be considered provided to beneficiaries, unless the plan is advised of a different address for a beneficiary.

For participants using an online enrollment system for either initial or open enrollment, as long as the participant has the option to receive a paper copy of the SBC upon request, they can receive the SBC in connection with their enrollment in the plan online. If they are currently enrolled in a plan, this is the only SBC they have to receive. If they are not currently enrolled, all SBCs must be made available. This rule is not available to those who enroll using phone or paper methods. Again, plan sponsors should indicate that an SBC furnished to a participant will also be considered provided to beneficiaries.

For participants who are not using an online enrollment system, the SBC may be provided electronically if the format is readily accessible and a paper form is provided free of charge upon request. All SBCs for all benefit packages available under the plan may be provided via internet if participants and beneficiaries are notified in paper form (such as with a postcard) or via email that the documents are available on the internet. It must include the internet address and indicate that the documents are available in paper form upon request. Model language is available see: FAQs About Affordable Care Act Implementation Part VIII, Q/A-12: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/aca-implementation-faqs>

For non-federal governmental plans, the SBC may be provided electronically if either the substance of the provisions of the DOL's electronic disclosure rule are met or if the provisions governing electronic disclosure in the individual insurance market are met.

Note that a new SBC version is required for the first open enrollment period that begins on or after April 1, 2017.

Notice of Marketplace/Exchange Coverage

This notice first applied October 1, 2013, and applies on a continuous basis to all newly hired employees within 14 days of their hire date. The distribution requirement states that essentially all employers – not only those that offer employee benefit plans – must provide current employees and all new hires a written notice about the health coverage options available through healthcare.gov. This notice may be provided electronically if the requirements of the DOL's electronic disclosure safe harbor are met.

QMCSO Notifications

This notification faces similar issues to the ones outlined above under COBRA Initial Notice. The QMCSO notification also includes eligibility information which constitutes protected health information (PHI) under HIPAA's privacy rules.

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## OTHER REQUIRED NOTICES THAT FALL OUTSIDE OF ERISA REQUIREMENTS

The following list of notices is governed not solely under ERISA but also under the Internal Revenue Code (IRC) and the Public Health Service Act (PHSA). Both the IRS and U.S. Department of Health and Human Services (HHS) have regulatory authority over this list of notices in addition to the DOL's regulatory authority under ERISA.

The fact that these notices are found in several areas of the law creates a technical question as to whether compliance with DOL regulations on electronic disclosure constitutes compliance with the IRS or HHS. The answer is not yet clear. Employers should use the DOL's electronic disclosure safe harbor only after discussing with their legal counsel.

HIPAA Notice of Special Enrollment Rights	This notice must be provided to an employee at or before the time the employee enrolls in the plan. Since the notice generally will be given after the employee has started work, the method of complying with the regulations will depend on whether the employee has work-related computer access, and whether the employee is immediately eligible for coverage.
HIPAA Notice of Privacy Practices (and Notice of Availability of Notice of Privacy Practices)	<p>Covered entities, including self-insured group health plans and fully insured "hands on" employers, are required to provide a notice of privacy practices to each individual who is the subject of PHI that describes:</p> <ul style="list-style-type: none"><li>• The uses and disclosures of PHI that may be made by the covered entity</li><li>• The individual's rights</li><li>• The covered entity's legal duties with respect to the PHI</li></ul> <p>In addition, at least once every three years, group health plans must notify individuals who are covered by the plan that the privacy notice is available and how to obtain the notice. For employees, the burden of complying with the regulations will depend on whether the employee has work related computer access. For non-employees, the consent requirement of the regulations will have to be met. The same considerations applicable to distribution of the COBRA Election Notice apply here.</p>
Michelle's Law	Michelle's Law addresses the situation of seriously ill college students who must take a medically necessary leave of absence, up to one year, that would otherwise result in a loss of student status for health coverage purposes. A notice must be provided, along with any notice regarding a requirement of student status for coverage under the plan. While most plans will have removed the student status requirement due to changes under PPACA, group health plans in states that have a lengthier coverage requirement for students past age 26 must comply with this requirement. Texas does not impose such a requirement.
Health Care Reform Disclosure	No specific guidance on electronic disclosures for health care reform required notices has been issued. Some notices may be provided within an SPD, such as Patient Protections and Grandfathered Status. For these, it is assumed that the electronic disclosure regulations that apply to an SPD as outlined above would apply. For others, such as the Rescission of Coverage, it is less clear.

## EMPLOYER DOCUMENTATION REQUIREMENT

Regardless of which category of participants an employer's workforce is made up of, or which type of electronic disclosure the employer is using, there is always a requirement that employers retain adequate documentation and logs to prove their compliance with the law. Following this electronic disclosure safe harbor does not provide relief from this requirement.

When an employer sends any type of electronic disclosure, the employer must maintain a log with the employee's name, date sent and method used, as well as proof of mailing, if any. All of this information must be kept on file in the event of an audit.



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## FREQUENTLY ASKED QUESTIONS

### WHAT EXACTLY IS ELECTRONIC MEDIA?

Electronic media includes any form of communication that makes use of an electronic system to provide notice to a recipient or to enable a participant election or consent. The preamble to the regulations provides several examples but does not limit electronic disclosure to any particular kind or method. Examples could include an employer's internal intranet that is only accessible to employees, an external internet site that may require an employee to log in using a password to access employee benefit plan information, an insurance carrier's website (also usually requires a password for plan specific information), an online benefits enrollment system, or a simple email or secure message sent to employees. The method used to communicate the electronic media can include email, email attachments, posting documents to a company website, or including documents on a disk, CD, DVD or USB flash drive.

### CAN AN EMPLOYER POST DISCLOSURES ON ITS WEBSITE AND SATISFY THE ELECTRONIC DISCLOSURE SAFE HARBOR?

No. The safe harbor rules require the employer to ensure actual receipt of the documents. Merely posting a notice on a website will not satisfy this requirement. An employer that wishes to comply with its notice obligations by posting the document on its website must also provide either a written or electronic notice to employees directing them to the website.<sup>11</sup> The notice must also describe the significance of the document, give participants the right to request a paper copy and offer to provide a paper copy upon request without charge.

Additionally, making sure the posting on the company's website results in actual receipt may include taking steps such as:

- Including a prominent link on the homepage to bring a viewer's attention to the section containing employee benefit disclosures
- Providing directions, if needed, on how to reset a forgotten password if one is needed to access the document
- Maintaining the documents for a reasonable period of time following the notice to employees of the document's availability

For questions relating to the electronic safe harbor rules, please contact your dedicated Frost Insurance advisor. If you're not currently working with a Frost advisor on your business insurance needs, give us a call at (866) 227-2099. We'd love to earn your business.

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<sup>1</sup> 29 CFR 2520.104b-1 found at <https://www.gpo.gov/fdsys/pkg/FR-2002-04-09/pdf/02-8499.pdf>

<sup>2</sup> 29 CFR 2520.104b-1(b)(1)

<sup>3</sup> <https://www.census.gov/topics/population/computer-internet.html>

<sup>4</sup> [social.dol.gov](https://social.dol.gov)

<sup>5</sup> <https://www.govinfo.gov/content/pkg/FR-2019-10-23/pdf/2019-22901.pdf>

<sup>6</sup> DOL Reg. §2520.104b-1(c)(1)(ii).

<sup>7</sup> Preamble to DOL Electronic Disclosure Regulation, 67 Fed. Reg. 17264, 17267. April 9, 2002.

<sup>8</sup> DOL Reg. §2520.104b-1(c)(1)(iv).

<sup>9</sup> DOL Reg. §2520.104b-1(c)(2)(ii).

<sup>10</sup> DOL Reg. §2520.104b-1(c)(2)(ii).

<sup>11</sup> Preamble to DOL Electronic Disclosure Regulation. 67 Fed. Reg. 17264, 17268. April 9, 2002.