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is presented by Spencer Fane Britt & Browne LLP
in conjunction with United Benefit Advisors

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Electronic Distribution of Participant Communications

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Agenda



- ▶ DOL Rules
- ▶ IRS Rules
- ▶ Practical Issues
- ▶ Questions

Electronic Distribution - Advantages

- ▶ Current economic conditions have forced plan sponsors to look for opportunities to reduce benefit costs
- ▶ Save printing costs by complying with DOL electronic distribution rules for SPDs, SMMs, and SARs
- ▶ Updates can be made electronically — and incorporated directly into the text of the document — so that employees can always access a single document containing all of the latest provisions.

Participant Communications

- ▶ ERISA Reporting & Disclosure
 - Annual Report – Form 5500
 - Summary Plan Description (SPD)
 - Summary of Material Modification (SMM)
 - Summary Annual Reports (SAR)
- ▶ Department of Labor regulations provide rules for electronic distribution
 - 29 C.F.R. § 2520.104b-1

Participant Communications

- ▶ DOL Regulations also apply to:
 - COBRA notices
 - Qualified Domestic Relations Orders (QDROs)
 - Qualified Medical Child Support Orders (QMCSOs)
 - HIPAA certificates of creditable coverage

DOL Distribution Rules - Generally

- ▶ ERISA generally requires that SPDs, SARs, and SMMs must be “furnished” to each plan participant (and each beneficiary *receiving* benefits under plan)
- ▶ DOL regulations interpret this to mean that an employer cannot merely make paper copies available or post an electronic version on the company Intranet
- ▶ Such documents must be actually *delivered* to the participants

Electronic Distribution

- ▶ DOL has issued regulations that provide a safe harbor for electronic distribution
 - Format requirement
 - Disclosure requirement
 - Consent and Notice requirements

Methods of Electronic Distribution

- ▶ Regulations do not require the use of any specific form of electronic media
- ▶ Examples of permissible forms of electronic distribution include delivery of documents by email, attachment to an email, posting documents on a company Web site, or on CD-ROM or DVD.

Electronic Format

- ▶ Electronic documents must conform to the applicable style, format, and content requirements
 - Electronic document does not need to be identical to the paper version
 - Interactive technologies (e.g., hyperlinks) are acceptable
- ▶ Practical Tip – If the electronic and paper versions are different, create a process to verify that there are no substantive differences between paper and electronic

Electronic Disclosure



- ▶ Must take appropriate and necessary measures to ensure that the system results in actual receipt of the information (e.g., return receipt email confirmation or periodic reviews)
- ▶ Must protect the confidentiality of personal information (e.g., password protection) for communications like benefit statements or claim determinations
- ▶ Must be prepared and furnished in manner consistent with style, format, and content requirements applicable to document (e.g. SPD, SMM, SAR)

Heads-Up Notice



- ▶ Indicate the significance of document (if not reasonably evident)
- ▶ Informs the participant of right to request and receive a paper copy, free of charge
- ▶ Notice can be provided electronically (e.g., e-mail) or in writing

Electronic Delivery

▶ On-site Access

- Participants who can effectively access electronic documents at any location where they are reasonably expected to perform their work duties and for whom access to the employer's electronic information system is an integral part of those duties
- Not a kiosk

Electronic Delivery

- ▶ Distribution beyond the workplace
 - Must obtain affirmative consent
 - Consent must not have been withdrawn
 - Consent must be provided electronically, in a manner that reasonably demonstrates participant's ability to access documents in the form in which they are being furnished (not applicable to distribution via CD or DVD)
 - Participant must have provided an address for electronic receipt

Electronic Delivery - Consent

- ▶ Prior to consent, participants must be informed of:
 - The types of documents to which the consent will apply
 - The participant's right to withdraw consent at any time
 - Procedures for withdrawing consent and updating address
 - Right to request paper
 - Hardware and software requirements

Electronic Delivery - Consent

- ▶ Platform and Format changes
 - Consent for electronic delivery is platform-specific
 - If there is a change in software (e.g., pdf to html), or a format change (e.g, dvd to e-mail), must seek new consent
 - Including reader software in the distribution is insufficient

Electronic Delivery - Website

- ▶ Homepage must contain prominent link
- ▶ Website must include instructions on how to obtain replacement for lost or forgotten password
- ▶ Documents must remain on website for reasonable period of time after participants are notified of their availability

IRS Rules

- ▶ IRS has its own set of rules governing electronic notices, consents, and elections
- ▶ 401(k) loans
- ▶ Rollover notices and withholding notices
- ▶ QJSA notices and spousal consents
- ▶ 204(h) notices
- ▶ Notice to Interested Parties

IRS Rules - Delivery

- ▶ Recipient must be able to effectively access electronic system used to deliver notice
- ▶ Recipient must be advised of right to receive paper copy

IRS Rules - Elections

- ▶ System must be reasonably designed to preclude an unauthorized person from making election
- ▶ Individual must have reasonable opportunity to review, confirm, modify, or rescind election
- ▶ Individual must receive confirmation of election (electronic or paper)
- ▶ Must still obtain witness to electronic signature in some instances (e.g., spousal consent)

Practical Issues - Reliance

- ▶ Danger of overreliance on electronic version
 - Gertjeansen v. Kemper Insurance Companies, Inc. (9th Cir.)
 - Held “Firestone” language in electronic SPD not sufficient
 - Court might not recognize clarifying language in electronic SPD
 - In the event of benefits related litigation, failure to meet safe harbor requirements could expose employer to penalty (\$110 per day) for failure to provide SPD upon request

Practical Issues - Beneficiaries

- ▶ Plan Administrator is generally not required to distribute SPDs, SMMs, or SARs to each welfare plan beneficiary under the plan (e.g. spouses, dependents)
- ▶ Therefore, the plan administrator is not required to obtain consent from each beneficiary under the plan
- ▶ Exception: COBRA notices

Practical Issues – COBRA Notices

- ▶ Rules allow plan administrators to provide COBRA notices electronically
- ▶ COBRA notices must be provided via first-class mail to the home address where a spouse or dependent is also covered under the plan
- ▶ Plan administrator must obtain consent from the spouse or dependent before delivering COBRA notices electronically

Practical Issues - Which Distribution Method is Best?

- ▶ Distribution via e-mail or on the Internet entails administrative burdens that may outweigh the cost savings (consent must be obtained electronically)
- ▶ Distribution via CD or DVD does not obligate plan administrators to obtain consent electronically (Plan Administrator's measures to ensure receipt could be as simple as a contemporaneous record of all recipients who have been furnished the CD or DVD)

Practical Issues – Beneficiary Designations

- ▶ Neither DOL nor IRS rules apply
- ▶ Federal E-SIGN law applies
- ▶ Electronic signatures and on-line transactions are given the same legal force and effect as those created or entered into on paper
- ▶ Does not dictate the type of technology the parties may use to create an electronic signature (e.g., digital signature, PIN, acceptance button, etc.)

Practical Issues – Record Retention

- ▶ ERISA requires certain records to be maintained for at least 6 years
- ▶ May need to keep past versions of SPDs and SMMs for longer period of time in order to accurately determine benefits



Thank you for your participation.

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