



## Electronic Disclosure of Required Health & Welfare Plan Notices

This resource provides the electronic disclosure rules for health & welfare related federal notices for both ERISA and non-ERISA plans.

Fundamentally, employers and plans must provide notices related to their health and welfare plans that fall into six categories – ERISA; Patient Protection and Affordable Care Act (ACA); COBRA; HIPAA (both Portability and Privacy and Security); Internal Revenue Code (IRC) disclosures; and Other Notices required under several different federal laws. Following is a summary of the types of notices that fall into each of the six categories and how those notices may be provided electronically.

### Summary of Required Participant Notices by Type

As discussed below, the rules regarding electronic delivery of required information vary by the type of plan and notice. Employers have a variety of options to deliver materials electronically depending on the circumstances. However, some notices require prior consent from the recipient before electronic distribution. The below chart summarizes which types of notices require prior consent. The specific rules are explained further in separate sections below the chart.

Applicable Law	Notice	ERISA Consent Requirements	Non-ERISA Consent Requirements
<b>ERISA</b>	All notices required by ERISA (SPDs, SMMs, SMRs, SARs)	<p>Prior consent only required for individuals without worksite access to electronic materials</p> <p>Prior consent is not required for individuals with worksite access to electronic materials</p>	Not applicable to non-ERISA plans; however, these rules may be used by non-ERISA plans to prove disclosure, as noted below.
<b>ACA</b>	Marketplace	<p>Use the ERISA disclosure rules:</p> <ul style="list-style-type: none"> <li>Employees with worksite access do not have to provide consent to receive Marketplace notice if using ERISA disclosure rules.</li> </ul>	<p>Non-ERISA plans may use the ERISA rules.</p> <p>Non-federal governmental plans may also follow the electronic disclosure rules that apply in the individual insurance market.</p>

Applicable Law	Notice	ERISA Consent Requirements	Non-ERISA Consent Requirements
		<ul style="list-style-type: none"> <li>Employees without worksite access may only receive electronically after providing consent.</li> </ul>	
	Summary of Benefits and Coverage (SBC)	<ul style="list-style-type: none"> <li>Electronic delivery permitted for participants who enroll online or who request the SBC online.</li> <li>Individuals with worksite access do not have to provide consent to receive SBC.</li> <li>Individuals without worksite access may receive only after providing consent using ERISA disclosure rules.</li> <li>Internet posting permitted as long as employees notified in writing that material available and internet address provided.</li> </ul>	<p>Non-ERISA plans may use the ERISA rules.</p> <p>Self-insured non-federal governmental plans may also use the state's rules for individual medical insurance.</p>
	Grandfather Status	<p>Use the ERISA disclosure rules:</p> <ul style="list-style-type: none"> <li>Prior consent only required for individuals without worksite access to electronic materials</li> <li>Prior consent is not required for individuals with worksite access to electronic materials.</li> </ul>	Non-ERISA plans may use the ERISA rules.
	Patient Protection Notice	<p>Use the ERISA disclosure rules:</p> <ul style="list-style-type: none"> <li>Prior consent only required for individuals without worksite access to electronic materials</li> <li>Prior consent is not required for individuals</li> </ul>	Non-ERISA plans may use the ERISA rules.

Applicable Law	Notice	ERISA Consent Requirements	Non-ERISA Consent Requirements
		with worksite access to electronic materials.	
	No Surprises Act	Post notice on public website of the plan. No requirement to disclose individually except on EOBs.	Post notice on public website of the plan. No requirement to disclose individually except on EOBs.
<b>COBRA</b>	<p>COBRA general/initial notice</p> <p>Election notice</p> <p>Notice of unavailability</p> <p>Notices of early termination</p>	<p>Electronic disclosure may be problematic. Read the COBRA section below for more detail.</p> <p>For electronic disclosure, use the ERISA disclosure rules:</p> <ul style="list-style-type: none"> <li>• Prior consent only required for individuals without worksite access to electronic materials</li> <li>• Prior consent is not required for individuals with worksite access to electronic materials.</li> </ul>	<p>Non-ERISA plans may use the ERISA rules.</p> <p>Church plans are not subject to COBRA.</p>
<b>HIPAA</b>	Children’s Health Insurance Program Reauthorization Act (CHIP)	<p>Use the ERISA disclosure rules:</p> <ul style="list-style-type: none"> <li>• Prior consent only required for individuals without worksite access to electronic materials</li> <li>• Prior consent is not required for individuals with worksite access to electronic materials.</li> </ul>	Non-ERISA plans may use the ERISA rules.
	HIPAA Special Enrollment Rights	<p>Use the ERISA disclosure rules:</p> <ul style="list-style-type: none"> <li>• Prior consent only required for individuals without worksite access to electronic materials</li> <li>• Prior consent is not required for individuals</li> </ul>	Non-ERISA plans may use the ERISA rules.

Applicable Law	Notice	ERISA Consent Requirements	Non-ERISA Consent Requirements
		with worksite access to electronic materials.	
	Self-insured non-federal government plan HIPAA Opt-Out Election Notice	Not applicable to ERISA plans.	Notices may be sent via email if ERISA disclosure rules are satisfied.
	Notice of Privacy Practices and Reminder	Prior consent required for all recipients. Notice may only be distributed via email when distributing electronically.	Prior consent required for all recipients. Notice may only be distributed via email when distributing electronically.
<b>IRS</b>	Forms 1095-B or -C	May be provide electronically if employee has consented electronically and not withdrawn the consent before the statement is furnished.  The consent may be provided via paper provided the employee confirms consent electronically in a way that shows that the employee can access the Form in the electronic format in which it will be furnished.	Same rules apply for non-ERISA plans. See column to the left for specific rules.
	Evergreen cafeteria plan election notice	Prior consent not required for those with effective access to electronic materials  Prior consent only required for individuals without effective access to electronic materials.  The consent may be provided via paper provided the employer confirms consent electronically in a way that shows that the employee can access the Form in the	Same rules apply to non-ERISA plans. See column to the left for specific rules.

Applicable Law	Notice	ERISA Consent Requirements	Non-ERISA Consent Requirements
		electronic format in which it will be furnished.	
<b>Other Notices</b>	Part D Certificate of Creditable (or Non-Creditable) Coverage	May be sent electronically using the ERISA disclosure rules.	Non-ERISA plans may use the ERISA rules.
	Michelle's Law	May be sent electronically using the ERISA disclosure rules.  Limited applicability. See Michelle's Law section below.	Non-ERISA plans may use the ERISA rules.  Limited applicability. See Michelle's Law section below.
	Wellness Program notices required by HIPAA/ACA, ADA, & GINA	HIPAA/ACA Notice: ERISA plans may use the ERISA disclosure rules.  ADA & GINA Notices: may be sent electronically in any format that will be effective in reaching employees. Email may be used if the subject line refers to the wellness program.	HIPAA/ACA Notice: non-ERISA plans may use the ERISA disclosure rules.  ADA & GINA Notices: may be sent electronically in any format that will be effective in reaching employees. Email may be used if the subject line refers to the wellness program.
	Newborns' and Mothers' Health Protection Act Disclosure	Plans subject to ERISA will generally include the Newborns' and Mothers' Health Protection Act notice in their SPDs.  ERISA plans should follow the ERISA disclosure rules.	Non-ERISA plans will provide the notice in their plan documents.  Plans may follow the ERISA disclosure rules.
	Women's Health and Cancer Rights Act	ERISA plans should follow the ERISA disclosure rules.	Non-ERISA plans may use ERISA disclosure rules.

## Requirements by Type of Notice

### ERISA

**Applies to:** private employers, including for profit and non-profit (e.g., corporations, S-Corporations, LLCs, etc.) that sponsor health or welfare benefits for their employees and electing church plans (i.e., church plans that have made an IRC 410(d) election to be subject to ERISA).

Information that needs to be provided to newly eligible employees (returning employees and newly hired employees) includes:

- A Summary Plan Description (SPD) – or comparable document for non-ERISA plans – for health and welfare and cafeteria plans
- Summaries of Material Modification (SMMs) or Material Reduction (SMRs) that have not been incorporated into an SPD, and
- Summary Annual Report (SAR) for insured and funded plans required to file Form 5500

There are additional notices required by ERISA, such as a HIPAA special enrollment rights notice, a CHIP notice, and the Women’s Health and Cancer Right Act Notice. These notices are also required for non-ERISA plans and are discussed below. Each section indicates which notices are subject to the ERISA disclosure rules.

The SPD must be provided within 90 days for newly covered participants and within 120 days for new plans. Updated SPDs are also required every five years if material changes are made, or within 10 years if no material changes are made.

An SMM is provided within 210 days after the plan year in which a material modification occurs. An SMR is required for material reductions to the plan and must be provided within 60 days after the plan sponsor amends the plan. There is no model form for the SMM or SMR, so employers are generally free to choose the content of those notices. As a best practice, the notice should communicate what plan is affected by the change, when the change is effective, a contact information for questions, and that the SMM or SMR should be kept with the most recently issued SPD to provide a complete summary of the plan. Practically, it is typically easier to align changes with annual enrollment and use the annual enrollment guide as the SMM or SMR by inserting language in the annual enrollment guide that designates it as an SMM or SMR.

The SAR must be provided to participants if the employer has a plan that is insured or funded and is required to file Form 5500. Self-insured health and welfare plans with 100 or more participants on the first day of the plan year are required to file Form 5500, but are not required to provide an SAR. The content that must be included in the SAR is provided in the Department of Labor (DOL) [SAR template](#).

Employers may also distribute additional materials such as enrollment guides or workbooks used to help employees understand the employers' plans and make benefit selections.

Given the complexities involved in using different methods for different types of notices, many employers (including those not subject to ERISA) use the ERISA requirements for electronic disclosure for the majority of their notices. Employers who use this approach will want to make sure that they are complying with all of the requirements for the ERISA requirements for electronic disclosure, which can be burdensome.

For individuals who do not have worksite access, the ERISA requirements provide that the individual must consent in a manner intended to demonstrate the individual's ability to access the materials. While individuals may be willing to provide their personal email address to receive the materials, employers often find that many employees do not consent in a manner that demonstrates the individual's ability to access information in the electronic format used thereby causing the delivery to fail to satisfy all of the electronic disclosure requirements.

Employers have found the following approaches to be useful for some of their employees who do not have worksite access.

- **Requesting consent when employees are newly hired.** Some employers have addressed this challenge by asking individuals to consent when they are newly hired as employees, as they are more likely to consent in a manner that demonstrates the individual's ability to access information in the electronic form that will be used.
- **Requesting consent as part of open enrollment.** Employers can often increase the number of employees who can be provided materials electronically by requesting consent annually as part of open enrollment for those who have not previously consented in accordance with the requirements.
- **Providing materials in person.** As an alternative to electronic disclosures, some employers bring copies of the required notices to in-person open enrollment meetings. Employees are provided with the materials and sign an acknowledgment that the materials have been provided to them. Employees who do not wish to retain these materials often leave them at the meetings and employers can provide these paper copies to other employees. Under this approach, employers will typically also

have these materials available electronically and also provide them to employees who request them in the future.

Please note that the following approaches **do not** satisfy the ERISA requirements **unless** additional conditions are satisfied.

- Posting materials on a company website or in a benefits administration system. Under this approach, the employer must also notify employees that the materials are available. If the employees do not have worksite access, the employer would also need the employee's consent for electronic distribution.
- Sending a postcard with a link to a company website or benefits administration system.
- Putting materials in a break room for employees to take if wanted.
- Having materials available at open enrollment meetings (unless the conditions described above are satisfied).
- Having a kiosk where employees can print materials.

Given the challenges that can arise with electronic distributions of materials, employers will want to work closely with their consultants to make sure that they are satisfying all of the requirements.

For plans subject to ERISA, the DOL guidelines specify how plan materials may be distributed electronically. In general, electronic disclosures must satisfy four general requirements:

- The plan must use reasonable measures to insure receipt of the materials, such as an automatic notice of non-delivery from an email system or periodic surveys to confirm receipt.
- The style, format, and contents requirements for ERISA disclosures applies.
- Paper copies of the documents must be available upon request, generally at no charge.
- The plan must take reasonable and appropriate steps to safeguard the confidentiality of the information when a disclosure includes personal information relating to an employee's accounts and benefits.

The DOL regulations contain different requirements for distributing materials to individuals who have worksite access to electronic materials, and others who do not have worksite access, as well as a safe harbor for use of the employer's website. Below, we address each set of rules.





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## Individuals with Worksite Access may receive ERISA notices without providing prior consent

Documents may be provided electronically automatically (i.e., without prior consent) to an employee who regularly accesses the employer's electronic system as an integral part of the employee's job. Access may be at an employer's worksite, or it may be from home for workers who telework.

To determine whether individuals have worksite access, employers should consider: (1) the individual's ability to access documents at any location where he or she is reasonably expected to perform job duties; (2) the frequency with which an individual uses a computer to perform his or her daily job duties; and (3) the likelihood an individual would be able to access documents if provided electronically. Traditionally, workers such as assembly line workers or cashiers would likely not have worksite access. Workers who report to an employer's office regularly and use their computers to access the employer's electronic system on a daily basis generally have access.

Recent changes in the way employers conduct business may result in fewer employees with worksite access. Some employees who reported to a worksite where they had regular computer access may not be able to go to their worksites. Others may be working remotely such as from home, but may only be able to connect with work via phone or email using their home computers. In other cases, the employer may have enabled more employees to telework and as a result, more employees have regular, albeit remote, access to the employer's electronic system.

So long as an employee has worksite access as described above, then an employer may disclose appropriate notices electronically without prior consent from the employee.

## Individuals without Worksite Access may only receive ERISA notices after providing consent

Documents may be provided electronically to an individual without worksite access only if the individual receives a pre-consent statement with specific information, and affirmatively consents to receiving the electronic material in a manner that demonstrates the individual's ability to access information in the electronic form that will be used.

Individuals without worksite access may include the following:

- Employees who do not access the employer's electronic information system as an integral part of their job duties – whether from a worksite or teleworking from home;

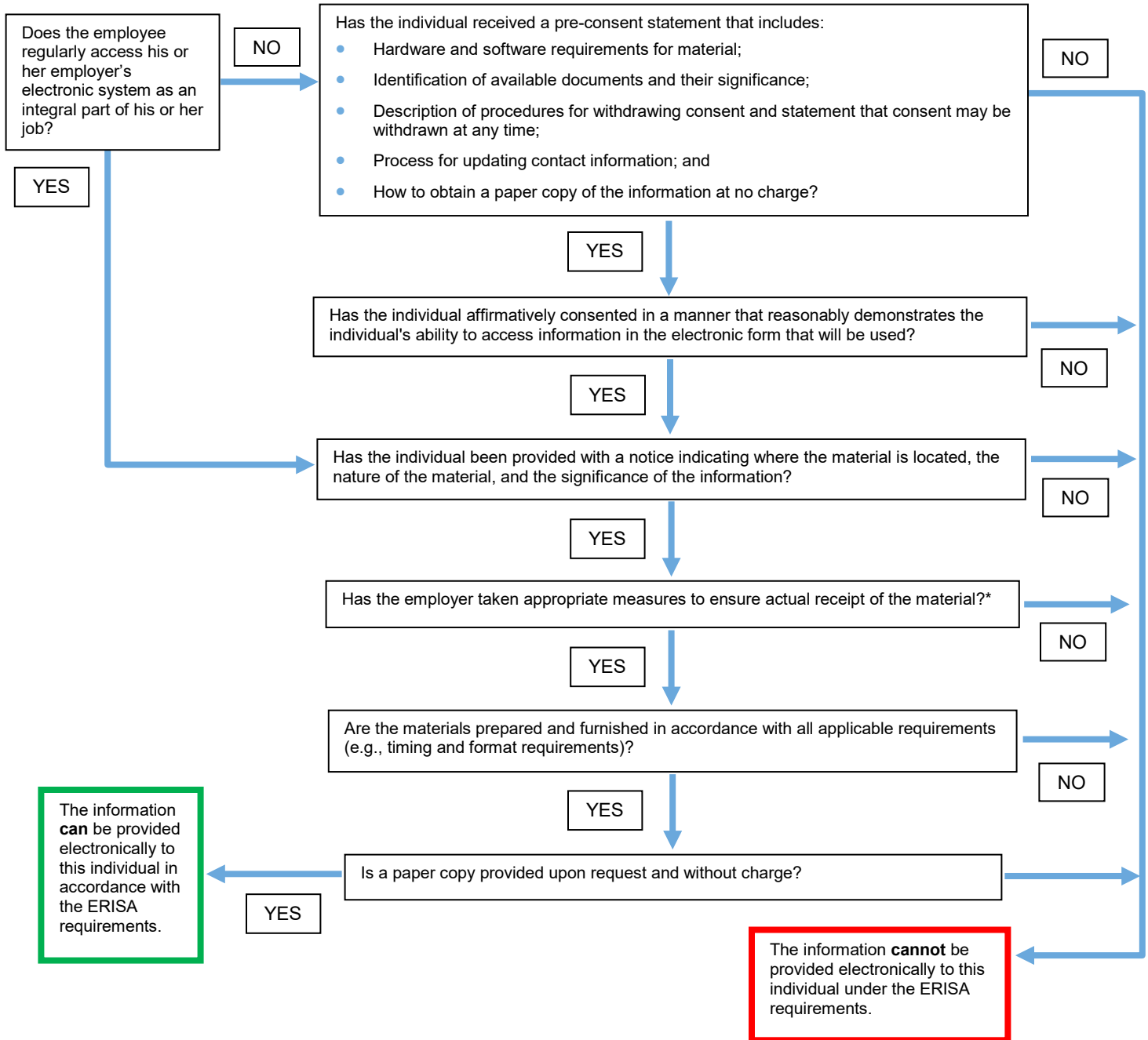
- Employees on a leave of absence such as Family Medical Leave Act (FMLA) leave;
- COBRA Qualified Beneficiaries;
- Former employees such as retirees;
- Alternate recipients under Qualified Medical Child Support Orders (QMCSOs); and
- Other individuals covered under the plan who may need to receive an SPD, such as surviving spouses.

The pre-consent statement may be provided in electronic or non-electronic form; however, individuals must consent “in a manner that reasonably demonstrates the individual’s ability to access information in the electronic form that will be used.” For example, if the employer plans to send electronic material through e-mail, the individual should consent electronically through email. The pre-consent statement must include all of the following information:

- The hardware and software requirements for receiving and viewing the material.
- Identification of the documents available with a description of the significance of those documents.
- A description of the procedures for withdrawing consent with a statement that consent may be withdrawn at any time.
- The process for updating contact information such as an email address.
- How to obtain a paper copy of the information at no charge.

If there is a change in either the hardware or software requirements that may materially affect the transmission of the electronic information, the employer must notify participants about the change in the requirements, remind individuals about their right to withdraw consent without penalty, and obtain a new consent form using the modified system.

## ERISA Requirements for Electronic Disclosure Flow Chart



\*The DOL regulations indicate that "actual receipt" could include: (1) Adding a prominent link from the website's homepage to the separate section that contains the material; (2) Providing directions on the website for how to replace a lost or forgotten password to the extent one is needed; and/or (3) Maintaining the material on the website for a reasonable period of time following notice to employees of their availability.

## Posting on Employer's Website

Employers can provide ERISA required disclosures on their websites provided that the four general requirements (e.g., the style, format and contents for ERISA disclosures applies) listed on page 6 are satisfied, and:

- The individual is provided with a notice indicating where the material is located, the nature of the material, and the significance of the information. For example, the employer may send an email or a postcard alerting the participant to the material that is being posted to the website.
- The employer takes appropriate measures to ensure actual receipt of the material.
- The materials are prepared and furnished in accordance with all applicable requirements (e.g., timing and format requirements).
- A paper copy is provided upon request and without charge.

The DOL regulations indicate that “actual receipt” could include:

- Adding a prominent link from the website's homepage to the separate section that contains the material.
- Providing directions on the website for how to replace a lost or forgotten password to the extent one is needed.
- Maintaining the material on the website for a reasonable period of time following notice to employees of their availability.

Employers that choose to post material on their websites that may include confidential information must take additional steps to safeguard any personal information.

The DOL regulations include an example of material contained in a separate section of an employer's website, which is easily accessible from the employer's home page. The separate section is restricted with access based on the use of either a password or PIN. However, no formal guidance has been provided on what constitutes adequate safeguards.

Note: Posting information to a website without also sending a separate notification such as an email or post-card alerting the participant will not be sufficient. Failure to provide notice of the posting is similar to just putting materials in a breakroom where they are available to employees which is not an acceptable method of distributing materials under the DOL regulations.



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Gallagher's article "[Electronic Communication Rules and Sample Language](#)" contains a description of the rules, sample language, and a sample consent that may be modified and used when distributing ERISA disclosures electronically. In some cases, an employer may not be able to provide materials electronically. In those situations, employers will need to provide paper materials via the U.S. mail.

## ACA

**Applies to:** all group health plans sponsored by private employers, non-federal governmental employers, and church plans that are not excepted benefits<sup>1</sup> or retiree-only plans.

With the exception of the Marketplace notices, these notices must be provided when an employee becomes eligible for the plan and annually. The SSBC must also be provided when there is a mid-plan year material change that affects the contents of the SBC.

Notices include the following:

- Marketplace notice
- SBC for each medical plan option
- Notice of grandfathered status (if applicable)
- Patient protection notice
- No Surprises Act notice

### **Marketplace Notice**

The Marketplace Notice must be provided by all employers subject to the Fair Labor Standards Act (FLSA) to all newly hired employees within 14 days of hire. Two model notices are available; one for employers that [offer a medical plan](#) and one for employers that [do not offer a medical plan](#).

### **SBC**

The SBC must be created using the DOL's template. The DOL website contains the template with specific instructions for creating the SBC. For some fully insured plans, the insurer may create the SBC, but it will generally be the employer that must distribute the SBC. Employers with self-insured plans must both create and distribute an SBC.

ERISA plans must follow the DOL rules for electronic disclosure of the SBC.

Non-ERISA plans such as non-federal governmental and church plans may satisfy the notice requirement by using the ERISA rules. Alternatively, non-federal governmental plans may satisfy the distribution requirement by following the rules for electronic disclosure that apply in the individual insurance market.

The SBC must be provided to the participant; separate notices for other family members are not required unless the plan is aware of the fact that a family member has a different address.

### ***Grandfathered Notice***

For grandfathered medical plans, the notice of grandfathered status must be provided annually and may be provided in the SPD or similar document for non-ERISA plans. [Sample language](#) is available. In addition, plans that lose grandfathered status must notify employees that the plan's grandfathered status has been lost.

### ***Patient Protection Notice***

All group health plans must provide a Patient Protection Notice. This notice summarizes the rules for the selection of a Primary Care Physician (PCP) (including pediatrician) where designation of a PCP is required by the plan, coverage for routine obstetrical and gynecological services, and a description of minimum coverage of services in an out-of-network hospital emergency room. The notice must be provided annually and may be provided via the SPD (or similar document for non-ERISA plans). The DOL has provided [sample language](#).

Prior to 2022, only non-grandfathered group health plans were required to provide this notice.

### ***No Surprises Act Notice***

Beginning in plan years on or after January 1, 2022, a group health plan must make publicly available, post on a public website of the plan, and include in the explanations of benefit (EOBs) the protections against surprise billing under both the federal No Surprises Act and any applicable state surprise billing laws. There is no requirement to disclose this notice annually. A model notice is available.

## **Electronic Distribution Rules**

### ***Marketplace Notice***

The Marketplace Notice may be provided electronically as long as the ERISA requirements for electronic disclosure are satisfied.



## **Summary of Benefits and Coverage (SBC)**

Gallagher has created a [summary of the electronic distribution requirements for providing the SBC](#), which includes a flowchart and describes separately the rules for private, non-federal governmental and church plans.

Electronic delivery is permitted for participants who enroll online and for individuals (employees or family members) who request the SBC online. In either case, the plan must provide a paper copy if requested. For employees covered under the plan who do not enroll online, the SBC may be distributed using the ERISA rules for electronic disclosure. For employees eligible, but not enrolled, the SBC may be provided electronically if the format used is readily accessible and a paper version is provided upon request at no charge. In addition, an Internet posting is permitted as long as employees are notified in a paper form such as a postcard or via email that the material is available on the Internet along with the Internet address. In all cases, paper copies must be provided upon request at no charge.

Self-insured non-federal governmental plans may either use the ERISA rules or the rules required for individual health insurance.

## **Grandfathered Notice**

Grandfathered medical plans subject to ERISA must use the DOL's rules for electronic disclosure for distribution of the grandfather plan status notice. Non-ERISA plans may also use the DOL's rules.

## **Patient Protection Notice**

Group health plans subject to ERISA must use the DOL's rules for electronic disclosure. Non-ERISA plans may also use the DOL's rules.

## **No Surprises Act**

There is no requirement to individually disclose this notice except on EOBs. Employers sponsoring group health plans should post the notice on the public website of the plan.



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## COBRA

**Applies to:** all group health plans sponsored by private and public employers that have at least 20 employees. Church plans are exempt from COBRA.

The COBRA rules apply to all health coverage including excepted benefits such as dental, vision, hearing, health FSA, EAP, wellness programs, and onsite clinics. The primary required notices are:

- General/initial notice
- Election notice
- Notice of unavailability
- Notices of early termination

The COBRA general/initial notice must be distributed to the employee upon enrollment, or the employee and the employee's spouse if the spouse is covered. The election notice or notice of unavailability of COBRA continuation must be provided when the plan receives a notice of a qualifying event such as termination of employment or divorce. The notice of early termination of COBRA coverage must be sent if coverage will be terminated before the end of the 18, 29, or 36 month maximum period. Model [general/initial](#) and [election](#) notices are available on the DOL's website. The DOL has not provided samples for the other two notices. However, Gallagher has [sample language](#) that you may wish to use.

## Electronic Distribution Rules

For all plans subject to ERISA, COBRA notices may be sent electronically using the DOL's rules described earlier. Non-ERISA plans may also use those rules.

While allowed, electronic distribution may be problematic. For example, the initial COBRA notice must be provided to the employee and, if enrolled, to the spouse. In many cases, the employer can provide the initial notice to the employee using the employer's email system or intranet, but will not be able to provide the notice to the employee's spouse using the same system. The employer would need to provide a pre-consent notice and obtain an electronic consent from the spouse to use electronic delivery. When there is a qualifying event, the plan must provide an election notice to each qualified beneficiary. Providing election notices to other COBRA qualified beneficiaries, such as the employee's spouse and any adult dependents, would also require following the electronic notice and consent rules for each qualified beneficiary.



Provision of the election notice using the employer's intranet or email may not work where the qualifying event is the termination of employment. Sending an election notice to the employee under other circumstances – such as a loss of coverage when the employee's hours are reduced – may be feasible.

## HIPAA Portability

**Applies to:** all group health plans that are not excepted benefits or a retiree-only plan. Self-insured, non-federal governmental plans that choose to opt-out of certain HIPAA portability requirements use the Self-Insured Non-Federal Governmental Plan HIPAA Opt-Out Election Notice below.

HIPAA portability regulations contain several requirements applicable to medical plans including special enrollment rights for employees in the event of marriage, birth, or adoption (including placement) of a child, loss of other medical coverage, gain of eligibility for premium assistance under Medicaid or CHIP, or loss of eligibility under Medicaid or CHIP. HIPAA Privacy regulations contain specific rules designed to protect the privacy of an employee and beneficiary's protected health information (PHI). PHI includes the employee's (or a beneficiary's) individually identifiable health information that is received, maintained, or transmitted by a health plan.

HIPAA rules require employers sponsoring medical plans (portability rules) to provide the following notices to employees enrolled in the plan:

- Children's Health Insurance Program Reauthorization Act (CHIP)
- HIPAA Special Enrollment Rights
- HIPAA Opt-Out Election Notice (Self-insured non-federal governmental plans only)

### **CHIP**

The CHIP notice provides contact information for State Children's Health Insurance Program in the employee's state. Employers must provide this notice to employees eligible for their medical plan on an annual basis. A [model notice](#), which is available on the DOL's website, is updated annually.

### **Special Enrollment Rights**

Employers are required to provide employees with a notice explaining their HIPAA special enrollment rights in the event of marriage, birth or adoption (including placement) of a child, the loss of other medical coverage, gain of premium assistance under Medicaid or CHIP, or loss of eligibility under Medicaid or CHIP.. Employees must

be given a notice when they first become eligible to enroll in the medical plan. Appropriate language must also be contained in an ERISA plan's SPD (or similar document for non-ERISA plans). [Sample language](#) is available.

### ***Self-Insured Non-Federal Governmental Plan Opt-Out Election Notice***

Self-insured medical plans sponsored by non-federal governmental employers are permitted to opt-out of several of HIPAA's portability requirements.<sup>1</sup> However, in order to make an election to opt-out the plan must notify the Consumer Information and Insurance Oversight (CCIIO), which is part of the Centers for Medicare and Medicaid Services, and plan participants both when the election is made and on an annual basis.

Gallagher has a [page](#) dedicated to the Self-Insured Non-Federal Governmental Plan Opt-Out.

The employer must provide initial and annual notices before the first day of the plan year to which the election applies. The notice should be provided to enrollees and identify the provisions for which the plan is electing the exemption, that the federal law provides the right to elect an exemption and that the plan has elected the exemption, identify which parts of the plan are subject to the election, and identify which provisions continue to apply to the plan. A [model notice](#) is available. The plan will be in compliance if it prints the notice prominently in a benefits summary provided at the time of enrollment and annually.

### **Electronic Distribution Rules**

CHIP and HIPAA special enrollment right notices may be provided electronically. Plans subject to ERISA need to follow the DOL's requirements for electronic distribution discussed earlier. Non-ERISA plans may also choose to use those rules.

Non-federal governmental employers with self-insured medical plans that have elected to opt-out of one or more of the HIPAA portability requirements may notify affected enrollees electronically via email if the CCIIO's requirements for electronic distribution are satisfied. Initial notices must be provided prior to the first day of the plan year, and renewal notices must be provided no later than the last day of each plan year. A [model notice](#) is available.

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<sup>1</sup> These plans may opt out of the requirements under the Mental Health Parity and Addiction Equity Act, Michelle's Law, the Women's Health and Cancer Rights Act, and the Newborns' and Mothers' Health Protection Act.

## HIPAA Privacy Notices

**Applies to:** all health plans, with an exception for self-administered plans with less than 50 participants

Health plans are required to provide the following privacy notices:

- Notice of Privacy Practices
- Notice of the availability of the Notice of Privacy Practices

Employers with self-insured health plans, and insured health plans with access to PHI, must distribute a Notice of Privacy Practices (NPP) to employees when they enroll in any of the employer's health plans. The NPP describes how the plan may use and disclose PHI and includes information about the plan's legal obligation to safeguard employees' (and other covered individuals') PHI. Every three years the employer must provide a notice to covered employees about the availability of the NPP. Finally, the employer must provide a new NPP when the contents of the NPP have been changed.

### Electronic Distribution Rules

The NPP may be provided electronically via email if (and only if) the employee has agreed to receive the notice electronically and the agreement has not been withdrawn before the NPP is sent. Note that the NPP may only be distributed via email. It is not sufficient simply to post a copy of the NPP on an electronic enrollment portal or link to the NPP from an enrollment platform landing page. The NPP or a link to the NPP must be provided via email.

If the plan knows that the email transmission did not reach the employee, the plan must provide a paper copy to the employee. The NPP does not have to be provided as a separate document; it may be included with other materials such as an SPD or enrollment materials, but if it is provided electronically with those materials, the prior consent standard must be met. If the health plan has a website, the NPP must be posted on the health plan's website. If the employer maintains a website for its business, it does not have to post the NPP on that site. Gallagher created [a sample consent form](#) that may be modified, as appropriate, and used to obtain consent to provide the HIPAA NPP electronically.

## IRS Required Forms and Notice

**Applies to:** all employers, although variations exist within each type of disclosure. See below for more detail.

Several types of IRS Notices are not necessarily required when an employee first enrolls in benefits, but for purposes of easing an employer's administrative burdens, the employer may wish to obtain consent to provide those notices electronically in conjunction with enrollment for the following categories of notices:

- Forms 1095 (coverage and/or offers of coverage)
- Evergreen election notice under a cafeteria plan

### ***Forms 1095-B and 1095-C***

Employers that are applicable large employers subject to ACA's Employer Mandate and employers with self-insured medical plans must provide Forms 1095, which may be either statements of self-insured medical coverage provided to employees and family members or statements about offers of coverage to full-time employees (Forms 1095-B or 1095-C). Statements for the previous calendar year must be provided by January 31 of the subsequent year. Beginning with tax years beginning after December 31, 2020, proposed regulations an automatic 30-day extension, requiring the notice to be provided by March 2 of each year.

### ***Cafeteria Plan Evergreen Election Notice***

Some cafeteria plans are limited to pre-tax employee contributions for coverage under a single plan. Employers offering these plans may not have a formal annual enrollment. Once an employee makes his or her choice, that election remains in effect until the employee affirmatively changes it – often called an “evergreen” election. For cafeteria plans that use an evergreen election, IRS rules require that the employer distribute a notice to employees annually advising employees of their right to make an election change.

## Electronic Distribution Rules

Employers may furnish copies of statements – Forms 1095-B or 1095-C – electronically if the employee consents to electronic distribution. The employer must obtain the employee's consent in a way that demonstrates that the employee can effectively access the statement. Gallagher has created a [sample procedure with sample language](#) that can be used as a starting point to create a compliant procedure.



The required annual notice for cafeteria plans that use an evergreen election may be provided electronically if the employee has consented electronically. Employee consent is not required if the employee has the effective ability to access the electronic medium (for example, the employer's own email system) that will be used to provide the notice. The electronic confirmation must be accompanied by a statement that the employee may request a paper copy at no charge.

## Employee Consent Requirements

Where employee consent is required, the employee must consent to electronic delivery and before consenting must be provided with a statement that includes the following:

- The employee has the right to receive the notice in a paper document rather than electronically.
- The employee still has the right to receive a paper copy after consenting and receiving the electronic notice. The plan may charge a reasonable fee for the paper document. The amount of the fee must be disclosed in the pre-consent statement.
- The employee may withdraw consent (to receive any notice electronically) on a prospective basis.
- The scope of the consent the employee is being asked to provide. For example, whether the consent is just for this notice, or whether it also applies to future notices.
- Procedures for updating his/her electronic confirmation information (e.g., email address).
- The hardware and software needed to access and retain the notice.

The employee's consent to receiving these documents electronically must be obtained using one of two methods:

- the employee consents electronically in a manner that demonstrates that he or she can access the material in the electronic medium that will be used to send the material; or
- the employee consents using a paper document if the employee confirms consent electronically in a manner that reasonably demonstrates that the employee can access the electronic confirmation in the electronic format that will be used.

## Employee Enrollment in a Cafeteria Plan

In addition, when a plan uses electronic enrollment the following additional requirements apply:

- The employee must be able to effectively able to access the electronic medium being used to make the elections.
- The electronic system must be reasonably designed to prevent any person other than the employee (or other participant such as a COBRA qualified beneficiary) from making an election such as by use of a password or PIN.
- The system must give the participant making the election a reasonable opportunity to review, confirm, modify or rescind the election before it becomes effective.
- The employee must receive a confirmation notice of the election. The confirmation can be provided electronically or as a paper document. The confirmation must be delivered within a reasonable period. For example, the participant should have enough time after receiving the confirmation to correct mistakes.
- The employee must have the right to receive the confirmation in a paper document rather than electronically.

The employer will need to track participant elections and consolidate the results of both paper and electronic elections into files – either electronic or paper – and transmit enrollment data to claim administrators and other vendors, such as Pharmacy Benefit Managers, who will need to upload the enrollment data into their systems. Human Resources will also need to share the information with payroll so that salary reduction (pre-tax) and/or deduction (after-tax) amounts can be entered into the payroll system. To the extent that an employer is able to conduct enrollment electronically, these final stages of the enrollment process will be much easier to manage.

## Other Required Notices

Several additional notices are required for many, but not all, employers under several different federal laws. The following notices are required for both ERISA and non-ERISA plans:

- Part D Certificate of Creditable (or Non-Creditable) Coverage
- Michelle's Law Notice<sup>2</sup>
- Wellness Program notices required by HIPAA/ACA, ADA, and GINA
- Newborns and Mothers Health Protection Act Disclosure (NMHPA)<sup>3</sup>
- Women's Health and Cancer Rights Act<sup>3</sup>

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<sup>2</sup> Non-federal governmental employers with self-insured medical plans may elect to opt out of these requirements subject to the notice requirements that apply to HIPAA opt-outs. (See HIPAA section for more information.)



## **Part D Creditable Coverage Notice**

**Applies to:** employers sponsoring medical plans that include coverage for prescription drugs

Employers are required to provide a notice to Medicare-eligible employees that indicates if the employer's drug plan provides "creditable" coverage (i.e., the coverage is at least as valuable as Medicare Part D drug coverage) or if the coverage is "non-creditable."

This notice must be provided when an employee joins the plan and annually prior to the beginning of Medicare's open enrollment period each year. [Model notices and instructions](#) are available on the CMS website.

## **Michelle's Law**

**Applies to:** group health plans that require school enrollment for dependent eligibility. Self-insured non-federal governmental plans may opt-out of this requirement by using the opt-out process and notice as described in the HIPAA Portability section.

Michelle's law requires continuation of health coverage when coverage for children is based on student status. Under the ACA, medical plans must continue coverage until an employee's natural, adopted, step, or foster child attains age 26 and may not require student status. Some plans may provide coverage beyond age 25, but condition coverage at older ages on student status. Plans that include a student status requirement for older children should provide a description of the terms of continuation coverage available during medically necessary leaves of absence. ERISA employers should consider including in their SPD and in the plan's open enrollment materials. No model notice exists.

## **Wellness Program Notices**

**Applies to:** employer-sponsored wellness plans that feature certain designs as described below.

Wellness programs may be subject to rules under HIPAA/ACA, the Americans with Disabilities Act (ADA), and/or the Genetic Information Nondiscrimination Act (GINA). For assistance in determining which wellness rules may apply to a particular type of wellness plan, please see Gallagher's [Flowchart: Navigate Wellness Regulations](#).

The HIPAA wellness notice rules apply to all participants in wellness programs that are related to a health plan or are themselves a health plan. Under HIPAA/ACA rules, a reasonable alternative standard must be provided for individuals who cannot satisfy a standard under a health-contingent wellness program. Notice regarding the availability of a reasonable alternative standard must be disclosed in plan materials such as the SPD and to individuals who fail to satisfy the standard.

The ADA applies if the wellness program includes disability-related inquiries or medical exams including biometric testing. The ADA applies only to employees. [Sample ADA language](#) is available.

GINA applies if the wellness program involves genetic information, for example a wellness program that includes a Health Risk Assessment that asks about family medical history. GINA applies to all participants. [Sample GINA language](#) is available.

Under the EEOC's rules for ADA and GINA, the notice may be given in any format that will be effective in reaching employees.

### ***Newborn and Mothers Health Protection Act***

**Applies to:** all group health plans. Self-insured non-federal governmental plans may opt-out of this requirement by using the opt-out process and notice as described in the HIPAA Portability section.

The NMHPA requires medical plans to cover minimum hospital stays for delivery of a child. Employers sponsoring medical plans are required to provide a disclosure of the NMHPA coverage rights. [Sample language](#) is available.

ERISA plans must include this information in the plan's SPD. Non-ERISA plans are required to include appropriate language in the plan document.

If a self-insured non-federal governmental plan has opted out of this requirement, a notice must be provided to participants when an employee enrolls and at each annual enrollment. (See HIPAA Portability section for more detail) The notice must be printed prominently in the SPD (or equivalent document) provided at initial and annual enrollment

### ***Women's Health and Cancers Rights Act***

**Applies to:** all group health plans. Self-insured non-federal governmental plans may opt-out of this requirement by using the opt-out process and notice as described in the HIPAA Portability section.





WHCRA requires medical plans to cover breast reconstruction following a mastectomy. Employers that sponsor medical plans must provide employees with a notice when the employee enrolls in the medical plan. [Sample language](#) is available.

## Electronic Distribution Rules

For each of these notices, plans subject to ERISA must use the DOL's disclosure rules for these notices. Non-ERISA plans may use the DOL's disclosure rules.

With regard to the creditable coverage notice, CMS has indicated that it prefers that these notices be provided in paper format; however, electronic distribution is permitted if the DOL's rules for electronic disclosure are satisfied.

For the ADA and GINA wellness notices, EEOC FAQs state that it may be provided in hard copy or as part of an email as long as the subject line of the email indicates that the information being communicated relates to the wellness program. In addition, employees with a disability may need to have a notice in another format – such as a large print version for employees with vision impairments. In addition, if notices are distributed electronically, they should be formatted so that employees who use screen-reading programs can read them.

Although electronic disclosure is permissible for alternate recipients under a QMCSO or a NMSN, it may often be impractical. Alternate recipients will not have access to the employer's email system or intranet. Materials provided to an alternate recipient will require a pre-consent notice and consent using the electronic method that will be used to provide plan and enrollment materials. Employers will need to follow the DOL's rules for providing materials to individuals who do not have worksite access. Because the materials to be provided to alternate recipients are different from those for active employees, and the rules for providing materials electronically are more complicated than for active employees, many employers will provide these materials on paper using U.S. mail.

## Employer Action Steps

In the near future, and in some cases for the longer term, employers may need or want to distribute information about their health and welfare benefits plans electronically. Employers that have conducted annual enrollments in person or on paper in the past may want or need to move to an electronic system to the extent possible. Some employers may be in a position to make this a gradual change. Others may not have that option, but may need to move to electronic methods now. Employers facing a change to electronic distribution will want to:

- Create a list of materials that will be distributed electronically,
- Identify groups of individuals for whom is it not practical to use electronic disclosure and determine how materials will be provided,
- Obtain employee consents to provide materials electronically,
- Where feasible obtain consents from other individuals,
- Determine how to provide materials to employees (and others) who do not provide consent,
- Create the electronic versions of materials to be distributed, and
- Determine to what extent enrollment can be performed electronically.

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*The intent of this analysis is to provide general information regarding the provisions of current federal laws and regulation. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Your organization's general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.*