



Participant Disclosures under ERISA

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This presentation is specific to disclosures required under ERISA and DOL regulations. It expressly does not address information required to be provided to participants to comply with the Internal Revenue Code or IRS regulations.

The content in this presentation has been somewhat simplified to enhance understanding and to allow it to fit the time allotted in today's session. Our intent is to provide an overview rather than an exhaustive discussion of the legal requirements. You should review the DOL regulations and/or speak with counsel to ensure a complete understanding of all relevant provisions.

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What are ERISA's Disclosures?

ERISA & related regulations require disclosure of certain information. Specific to individual account plans, these can include:

- Summary Plan Description
- Summary of Material Modifications
- Summary Annual Report
- Benefit Statements
- Notice of Blackout Period
- Notice of Significant Reduction in Future Benefit Accruals – “204(h)”
- Participant Investment and Fee Disclosure – “404a-5”
- 404(c) Notice
- Qualified Default Investment Alternative Notice
- Automatic Contribution Arrangement Notice

Some only need to be provided upon certain events or if the plan employs certain features.

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Who Must Receive Disclosures?

Disclosures must be made available to more than just currently active participants (a.k.a., “employees”).

Ongoing disclosures also must be made to:

- Eligible participants not contributing to a contributory plan
- Terminated participants
 - Those receiving benefit payments
 - Others who either cannot or have not taken their benefits
- Alternate payees who maintain accounts pursuant to QDROs
- Beneficiaries of deceased participants until the account is completely distributed

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Making It Understandable

Disclosures must be written in a manner designed to be understood by the average plan participant

- Avoid jargon and complex sentences
- Provide examples and illustrations when feasible

If MassMutual prepares your plan documents, we furnish sample disclosures that meet these requirements.

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Languages other than English

The plan may be required to provide a supplemental notice or disclosures in languages other than English depending on plan size and demographics

Fewer than 100 participants at the beginning of the plan year	100 or more participants at the beginning of the plan year
Notice in another language is required if 25% or more of participants are literate only in <u>the same</u> non-English language	Notice in another language is required if the number of participants literate only in <u>the same</u> non-English language is at least the lesser of: <ul style="list-style-type: none"> • 500 participants • 10% of total participants

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Methods of Distribution: **Acceptable methods**

- Method chosen must be “reasonably calculated to ensure actual receipt”
- Always acceptable methods:
 - Hand delivery at the workplace
 - First class US mail
- Conditionally acceptable methods:
 - Second or third class US mail
 - Only acceptable if return and forwarding postage is guaranteed and address correction is requested
 - If returned to sender, must be resent to recipient first class or delivered at the worksite

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Methods of Distribution: **Unacceptable methods**



“in no case is it acceptable merely to place copies of the material in a location frequented by participants.”

DOL Reg. §2520.104b-1(b)(1)

Not acceptable to:

- Place on bulletin boards unless specific DOL approval is given
- Place on tables in a lunch or break room
- Employ similar methods

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Electronic Disclosure: 2002 – A Disclosure Odyssey

In 2002, DOL issued new disclosure “Safe Harbors” allowing for electronic disclosure pursuant to specific requirements

- Did not revise:
 - the audience to whom disclosures must be provided
 - readability standards or requirements addressing when information must be provided in a language other than English
 - content requirements or timing requirements for specific disclosures
- **Solely addressed the method of delivery**
- Two new Safe Harbors were created
 - “Wired at Work”
 - “Affirmative Consent”

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Electronic Disclosure: 2002's requirements regardless of method

- System used to furnish disclosures must result in actual receipt
 - Confirm via use of return-receipt, periodic reviews or surveys, etc.
- System used must protect confidentiality of personal information
- Each electronically-delivered document must be consistent with applicable style, format and content requirements
- Individual to be notified when document furnished electronically
 - Stating the significance of the document when it is not otherwise reasonably determinable by the recipient
 - Stating the right to request and obtain a paper version of the document and if requested the recipient is furnished that paper version
- Individual must be able to request and receive paper copy

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“Wired at Work”

- Available for a participant who:
 - Can access documents furnished in electronic form at **any location** where he or she is reasonably expected to perform his or her duties as an employee; and
 - Has access to the employer's or plan sponsor's electronic information system as an integral part of those duties
- Effectively means this method can be used only for employees
 - May only be a subset of employees if not all employees meet the criteria above

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“Affirmative Consent”

- Available for any participant, beneficiary or other person entitled to receive ERISA-mandated disclosures
 - Prior to consent received a document specifying certain items (see next slide)
 - Who has affirmatively consented to receiving documents electronically
 - Consent can via electronic or non-electronic means
 - Has provided an address to which disclosures may be delivered
- And if a change to hardware or software requirements create a material risk the participant won't be able to access or retain documents
 - The participant is informed of the change and
 - Is given the right to withdraw consent

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“Affirmative Consent”: Notification prior to consent

Prior to consenting, the individual must be provided, in electronic or non-electronic form, a clear and conspicuous statement indicating:

- The types of documents to which the consent would apply
- That consent can be withdrawn at any time without charge
- The procedures for withdrawing consent and for updating the address they provide for receipt of electronically furnished documents or other information
- The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and
- Any hardware and software requirements for accessing and retaining the documents



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Electronic Disclosure: 2020 “Refresh”

In 2020, DOL issued additional disclosure safe harbor: “Notice and Access”

- Did not revise:
 - Audience, readability standards, requirements for non-English disclosures, content requirements or timing requirements
- Did revoke prior sub-regulatory guidance
 - Field Advisory Bulletin (“FAB”) 2006-03, FAB 2008-03, Technical Release 2011-03R
 - Allows reliance on that guidance for 18 months – sunsets thereafter
- **Prior safe harbors remain valid**
 - “Wired at Work”
 - “Affirmative Consent”



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“Notice and Access”: Overview

- The new disclosure safe harbor is for **Pension Benefit Plans only**. It is not applicable to Welfare Benefit Plans.
 - Basic process:
 - Initial Notification to affected participants (“Covered Individuals”)
 - Follows a relatively rigorous process (more to come . . .)
 - When disclosures become available, electronically notify the participant and either:
 - Post disclosures to a website and facilitate participant access
OR
 - Include the disclosure in the notification either as embedded content or as an attachment
- Again, a relatively rigorous process is required as will be discussed shortly



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“Notice and Access”: Covered Individuals

- A participant, beneficiary or alternate payee entitled to a Covered Document (to be defined next!)
- Who provides an electronic address
 - E.g., e-mail address, smartphone number (though use of the latter faces an additional hurdle)
 - Can provide the address to the employer, plan sponsor, plan administrator or a designee of any of those
- The employer can assign an address to an employee for “employment-related purposes” that includes a purpose in addition to receipt of disclosures
 - Must be assigned by the **employer** – not the plan sponsor, plan administrator, service provider or a designee.
 - Can't assign addresses to a person without an employment nexus
 - Must take steps upon the employee's termination of employment



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“Notice and Access”: Covered Documents

- Any document or information **required to be furnished** to participants under ERISA Title I
 - E.g., Summary Plan Description (“SPD”)
 - Expressly includes “404a-5” investment and fee disclosure for participant-directed individual account plans
- Does not allow e-delivery of items that are available to participants only upon request
 - E.g., copy of Form 5500
- If a participant requests an additional copy of a disclosure that was required to be furnished, it may be provided electronically.
 - E.g., another copy of the SPD

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“Notice and Access”: Initial Notification overview

- Must be furnished to Covered Individual before the Plan Administrator can rely on the Safe Harbor
 - Notification must be on paper (i.e., “hardcopy”)
 - Only needs to go to Covered Individuals to whom disclosures will be made electronically under this safe harbor
- May be included with other materials – e.g., may be included in the plan’s enrollment materials
- Plan administrator may include content in addition to the required content
 - Must be relevant and accurate
 - Must not be misleading
 - May be enhanced to better communicate the plan’s transition to electronic disclosure

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“Notice and Access”: Initial Notification content requirements

- Statement that covered documents will be sent electronically
- The electronic address that will be used **for the individual**
- any instructions necessary to access the covered documents
- a statement that information is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document
- a statement of the right to request and obtain a paper version of a covered document, free of charge, and an explanation of how to exercise this right
- a statement of the right, free of charge, to opt out of electronic delivery altogether and receive only paper versions of covered documents and an explanation of how to exercise this right.



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“Notice and Access”: Notice of Internet Availability (“NOIA”)

- When a new covered document is made available online, a NOIA is required for each covered document
 - Under some circumstances, it's possible to provide one NOIA addressing multiple covered documents that are provided annually (as we discuss later)
- Must be provided to the applicable electronic address
- Must be provided separately from other documents
- Must contain only the specified content
 - may include pictures, logos, or similar design elements, so long as the design is not inaccurate or misleading and the required content is clear
- Note some of these requirements differ from the Initial Notice!



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“Notice and Access”: Consolidated (annual) NOIA

A single NOIA can be provided to address a combination of:

- The SPD
- Any covered document or information that must be furnished annually, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline
 - E.g., SAR, QDIA Notice, “404a-5 disclosure” and potentially others
- Any other covered document if authorized in writing by the Secretary of Labor
- Any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury

Must be provided at least once every 14 months

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“Notice and Access”: Website standards

- Website means “an internet website, or other internet or electronic-based information repository, such as a mobile application, to which covered individuals have been provided reasonable access.”
- The administrator must take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual
- Each covered document must
 - Be available on the website no later than the date on which it must be furnished under the Act
 - Remain available on the website at least one year or, if later, the date it is superseded by a subsequent version of the covered document

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“Notice and Access”: Website standards (continued)

- Additionally, each covered document must
 - Be presented on the website in a manner calculated to be understood by the average plan participant
 - Be presented on the website in a widely-available format or formats that are suitable to be both read online and printed clearly on paper
 - Be searchable electronically by numbers, letters, or words
 - Must be presented on the website in a widely-available format or formats that allow the covered document to be permanently retained in an electronic format

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“Notice and Access”: Divulging specified information

Item	NOIA when posting the disclosure online	Email when delivering embedded or attached documents
Prominent statement/subject line: "Disclosure About Your Retirement Plan"	Yes	Yes
Statement within the message: "Important information about your retirement plan is available. Please review."	Yes	No
Name of the covered document and a short description if the nature of the covered document is not readily apparent from its name	Yes	Yes if an attachment, no if embedded
The website address where the covered document is available (or a hyperlink to the document)	Yes	No

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“Notice and Access”: Divulging specified information

Item	NOIA when posting the disclosure online	Email when delivering embedded or attached documents
Statement of the right to request a paper version free of charge and how to exercise this right	Yes	Yes
Statement of the right to opt out of e-delivery and receive only paper copies and how to exercise this right	Yes	Yes
Statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document.	Yes	No
Phone number to contact the administrator or other designated plan representative	Yes	Yes

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Comparison: “The Who”

- **“Wired at Work”**

- Only those active employees who meet certain criteria as discussed previously
- Affirmative consent is **NOT** needed

- **“Affirmative Consent”**

- Could be anyone entitled to receive a disclosure
- Affirmative consent **IS** needed, consent can be revoked

- **“Notice and Access”**

- Anyone who furnishes or is appropriately assigned an address by the employer
- Affirmative consent is **NOT** needed, opt-out allowed



This is an overview. Be sure to refer to details provided earlier.

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Comparison: “The What”

- **“Wired at Work”**
 - Disclosures required to be provided to the participant (e.g., SPD)
 - Documents to be provided only upon request (e.g., 5500)
 - Presumably, even documents that would normally only need to be available for on-site review
- **“Affirmative Consent”**
 - Same as above
- **“Notice and Access”**
 - Only disclosures required to be provided to the participant

Most
restrictive
list

This is an overview. Be sure to refer to details provided earlier.

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Comparison: “The How”

- **“Wired at Work”**
 - Relatively flexible notice is required when disclosures are made available
- **“Affirmative Consent”**
 - Relatively flexible notice is required when disclosures are made available
 - Specific disclosure is required before participant consents
- **“Notice and Access”**
 - Detailed notice is required when disclosures are made available
 - Detailed Initial Notification is required in advance

Most
restrictive
criteria

This is an overview. Be sure to refer to details provided earlier.

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