



U.S. Department of Labor  
Office of Regulations and Interpretations  
Employee Benefits Security Administration, Room N-5655  
200 Constitution Ave. NW  
Washington, D.C. 20210

Attn: Electronic Disclosure by Employee Benefit Plans RFI

Dear Sir or Madam:

Thank you for the opportunity to provide our perspective on electronic disclosures provided by employee benefit plan sponsors. As a benefits communication consulting company, our mission is to work with HR/Benefits professionals to develop engaging communication solutions that drive employee understanding of—and participation in—the benefits our clients' organizations provide. The plan sponsors we are proud to call our clients understand that their investments in employee benefit programs yield business value *only if* employees understand, appreciate and use the programs that are part of their benefit package.

In the attached pages, we've answered many of your specific questions. We have also included two articles we have authored on these issues. Taking into consideration all the details aspects of your questions, we'd like to highlight three central issues in this debate:

**Regulations must be written clearly with less room for interpretation than in the past.** Our clients rely on lawyers to ensure that they are complying with the law. Where there is gray in the guidance, most lawyers will opt for a safe approach. We believe companies waste precious time and resources interpreting the regulations—resources better spent on the benefit programs themselves.

**Electronic delivery is better.** We strongly encourage our clients to put all their benefits information on the Internet so employees, retirees, family members and other participants have access to the information they need when they need it. Print disclosures, like SPDs, are out of date before they are mailed, but content management systems allow these valuable resources to be updated quickly and cost-effectively. In today's environment, moving to electronic delivery of legal disclosures makes sense.

**Replacing “legalese” with clear language is a must.** Internal and external counsel often advise benefit managers that they are out of compliance when clear, simple language is used to communicate to participants. We strongly advocate for flexibility in the actual language of disclosures and the need for clear, simple language in all communications.

Thank you again for the opportunity to provide feedback. If we may be of further assistance, please contact us.

Jennifer Benz  
Founder and Chief Strategist  
T: 415.806.3005  
jen@benzcommunications.com

Liz Webler Rowell  
Senior Consultant  
T: 773.931.3487  
liz@benzcommunications.com

## Benz Response to Request for Information Regarding Electronic Disclosure by Employee Benefit Plans [4/7/2011]

[Federal Register: April 7, 2011 (Volume 76, Number 67)] [Proposed Rules]  
 [Page 19285-19290] From the Federal Register Online via GPO Access  
[\[wais.access.gpo.gov\]](http://wais.access.gpo.gov) [DOCID:fr07ap11-10]

Question	Benz Response
<p>6. What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?</p>	<p>Reluctance to deliver more benefit communication electronically has roots in, as you term it, regulatory impediments. Specifically, if a benefits team knows their legal team believes they must deliver some or all legally mandated notices via print, there is a bias toward that single primary delivery system. They prefer not to have information in two places. There is risk and increased costs to developing print and electronic media.</p> <p>Some plan sponsors believe they meet the requirements to deliver almost all communication electronically. Those who do not cite two key aspects of the regulations as impediments:</p> <ul style="list-style-type: none"> <li>• Affirmative consent, particularly among businesses with a manufacturing or service-based population</li> <li>• Software and hardware requirements</li> </ul> <p>As you are likely aware, benefit teams rely on legal expertise that may or may not be experienced in the regulations that govern employee benefit programs. The conservative review of the regulations always results in maintaining print.</p> <p>Providing new, clear regulations that support and guide plan sponsors toward the use of electronic resources is the single most important step leading to more widespread acceptance. It must become the conservative thing to do. Then, employers must work toward engaging their workforce with these new electronic resources by focusing their energies on good design, clear, simple language and unrestricted access for all covered participants.</p>
<p>8. Are there any new or evolving technologies that might impact electronic disclosure in the foreseeable future? [[Page 19289]]</p>	<p>From a plan sponsor perspective, online content management systems are central to cost-effective maintenance. These systems are now prevalent, improving their quality and decreasing their cost than in years past. Many plan sponsors use these systems to maintain SPDs online, in addition to non-mandated educational benefit communication. These kinds of systems can significantly reduce the cost to deliver notices—bringing them down below the current costs for electronic media and well below print costs.</p> <p>From an employee perspective, mobile devices broaden access to electronic media. According to Pew</p>

	<p>Research,<sup>1</sup> mobile Internet access is shrinking the gaps in under-served demographics—it is helping minorities and lower-income Americans get online faster.</p>
<p>13. Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, etc.)? If yes, why, and how should the rules or conditions differ?</p>	<p>No. All participants should have the ability to request print. Today’s active employees are tomorrow’s retirees, and we need to help people get into the habit of requesting what they need without bombarding them with information they don’t want and/or need.</p>
<p>14. To what extent should the Department encourage or require pension and welfare benefit plans to furnish some or all disclosures required under title I of ERISA through a continuous access Web site(s)? In responding to this question, please address whether and how frequently participants and beneficiaries should be notified of their ability to access benefit information at the Web site(s) and the most appropriate means to provide such notice. For example, should participants and beneficiaries receive a monthly notification of their ability to access benefit information or should they receive a notification only when an ERISA-required disclosure is added to the Web site? How should such notifications be furnished (e.g., paper, e-mail, etc.)? Please also address what steps would be needed to ensure that participants and beneficiaries understand how to request and receive paper copies of the disclosures provided on the Web site(s).</p>	<p>This is an important step toward giving employees, retirees, family members and other participants access to the information they need when they need it. The 24/7 nature of American life is the “new normal,” yet we’re still creating barriers to information access for benefits—something that truly touches people’s lives today and in the future. We strongly encourage the Department to implement requirements regarding continuous access websites for several reasons:</p> <ul style="list-style-type: none"> <li>• <b>First, print is temporary and immediately out-of-date where electronic delivery is constant and consistent.</b> For example, SPDs that are several years old can be amended with SMMs. In print, this piecemeal system does not offer employees one authoritative source. Online, however, an SPD can always be current whenever an individual accesses the information. Additionally, old versions of the SPD under older plan years can be archived online in case of disputes.</li> <li>• <b>Technology costs have decreased.</b> Costs to build and maintain a custom website have dropped dramatically, by using free or open-source systems to build the infrastructure. Content management systems eliminate the need for web developers for the day-to-day maintenance of sites.</li> <li>• <b>Employers’ privacy expectations have declined.</b> No longer do employers fear “leaking” benefit program descriptions to their competitors. Even those who do worry about this recognize that technology allows others to distribute and publicize this information beyond their control. In an era of transparency, employers seek to share as much information as possible. We advocate for informational, non-personalized websites without passwords.</li> <li>• <b>Legal notices are often ignored by employees.</b> Legally required notices have become a conversation among and for lawyers. In focus</li> </ul>

<sup>1</sup> <http://pewresearch.org/pubs/1287/wireless-internet-use-mobile-access>

	<p>group after focus group, employees tell us that the most memorable benefits information employ marketing principles. Booklets and websites with clear, simple language and educational graphics actually communicate, and people can remember key messages from them. They cannot, however, recall the content included in legal notices. The Affordable Care Act acknowledges this fundamental issue that people will not engage with something written in “legalese.” When describing the requirements for the new uniform explanation of coverage, the law requires that “[T]he standards shall ensure that the summary is presented in a culturally and linguistically appropriate manner and utilizes terminology understandable by the average plan enrollee.”</p> <ul style="list-style-type: none"> <li>• <b>Compliance communication drains employer resources.</b> When employers focus energy and budget on compliance communication, they invest less in truly effective communication.</li> </ul> <p>While we are strong advocates of a benefits website, we also believe in the importance of mailings to homes. We support one home mailing annually to remind employees of this continuously available benefits website and their right to receive information in print. These mailings to the home are more likely to reach other covered family members. We encourage the Department to provide sample language for this notice but clearly state that the language can be modified. In this notice, participants could “subscribe” to emails or texts notifying them of additional changes to the site. If we do not seek employee engagement, we risk diluting the importance of all these notifications.</p>
<p>18. The Department's current regulation has provisions pertaining to hardware and software requirements for accessing and retaining electronically furnished information. In light of changes in technology, are these provisions adequate to ensure that participants and beneficiaries, especially former employees with rights to benefits under the plan, have compatible hardware and software for receiving the documents distributed to their non-work e-mail accounts?</p>	<p>This particular aspect of the legislation is outdated, and we recommend it be stricken from the regulations. While personal computers are not yet ubiquitous, they are available readily for free to the public, e.g., at schools, libraries, community centers. Smart phones are bridging the digital gap in under-served demographic groups. They are helping minorities and lower-income Americans get online faster, according to a 2009 Pew Research study.<sup>2</sup> As long as their devices are connected to the internet, they can access legal disclosures.</p> <p>While differences do exist between various internet browsers, the differences are cosmetic. Any website built with modern web technology will be viewable on standard internet browsers.</p>

<sup>2</sup> <http://pewresearch.org/pubs/1093/generations-online>

<p>19. Some have indicated that the <b>affirmative consent requirement</b> in the Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d)(1) of E-SIGN.</p>	<p>We agree.</p> <p>For those organizations whose entire or partial workforce lacks a company email address, this affirmative consent requirement is an administrative system that must be established and maintained for this sole purpose. Personal email addresses must continually be updated. The expense—in time and budget—must be weighed against the alternative of using print.</p>
<p>26. If electronic disclosure were the default method for distributing required plan disclosures, and assuming "opting out" were an option, what percentage of participants would likely "opt- out" of electronic disclosure in order to receive paper disclosures? Should participants be informed of increased plan costs, if any, attendant to furnishing paper disclosures at the time they are afforded the option to opt out or into an electronic disclosure regime?</p>	<p>We advocate for transparency with employees particularly when it comes to fees. If consumers want government to mandate certain disclosures, then yes, sharing the associated costs of receiving paper disclosures is appropriate. Benefit reductions are commonplace today. Employees, presented with clear, simple requests, have changed their health care consumption habits to save money for themselves and the plan sponsor. Similarly, employees would think twice before "opting out" of electronic disclosures.</p>
<p>29. Is it more efficient to send an e-mail with the disclosure attached (e.g., as a PDF file) versus a link to a Web site? Which means of furnishing is more secure? Which means of furnishing would increase the likelihood that a worker will receive, read, retain and act upon the disclosure?</p>	<p>As stated in Question 14, websites offer increased flexibility to plan sponsors. We advocate for websites, without passwords, over emailing legal disclosures. Emailing attachments takes up a lot of bandwidth, which many company IT departments fiercely oppose. A link to the website is more practical and user-friendly.</p> <p>Whether or not a worker will receive, read, retain and act upon the disclosure does not hinge on the delivery method. Instead, the language that is used is what makes the difference. Disclosures are typically written in legal English, not common, spoken English. Employees quickly "tune out" communication when they cannot quickly access what the disclosure is about, what actions they should take, and frankly, why they should care.</p>
<p>30. Employee benefit plans often are subject to more than one applicable disclosure law (e.g., ERISA, Internal Revenue Code) and regulatory agency. To what extent would such employee benefit plans benefit from a single electronic disclosure standard?</p>	<p>If we agree that understandable, action-oriented communication is the preferred approach, then one set of regulations would be appreciated. As communication professionals gain mastery of this single set of legal regulations, the need for legal opinions would decline as would plan sponsor costs for those opinions.</p>





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BENEFITS

# How to Translate the DOL Health Care Reform Notices Into English

by Liz Rowell on Aug 5, 2010, 9:07 AM | [0 Comments](#)

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This week I spoke about communicating health care reform at the [IFEBP Benefit Communication and Technology Institute in Boston](#). I talked to a number of highly-engaged folks eager to translate the complicated technical language of benefits into normal, everyday speech.



Like many of us, these people wear many hats and juggle multiple responsibilities. Translating legal notices into plain language sometimes falls to the bottom of the to-do list. These three new notices need work:

- Annual and lifetime limit changes
- Revised dependent eligibility for older kids
- Primary care physician designation and OB/GYN self referral change

So fellow HR practitioners, we submit to you revisions of them. [Please DO involve your lawyers in your final plan. These are legally required disclosures.]

## Notice #1: The new dependent eligibility rules

Here's the legal gobbledegoose from the DOL:

Individuals whose coverage ended, or who were denied coverage (or were not eligible for coverage), because the availability of dependent coverage of children ended before attainment of age 26 are eligible to enroll in [Insert name of group health plan or health insurance coverage]. Individuals may request enrollment for such children for 30 days from the date of notice. Enrollment will be effective retroactively to [insert date that is the first day of the first plan year beginning on or after September 23, 2010]. For more information contact the [insert plan administrator or issuer] at [insert contact information]."

Huh? What was that you said?

American lawyers speak another language in addition to their mother tongue. Most of your employees don't speak it. Try this template language for your enrollment newsletter:

### Is your child uninsured?

*If your child lost eligibility for our health plan when they turned 19 or when they were no longer a full-time student, the rules have changed. If you would like to enroll your child who is under age 26 on our plan, you may do so from [date] to [date] for coverage effective [date].*

## Notice #2: The elimination of lifetime limits

Here's the legal gobbledegoose from the DOL:

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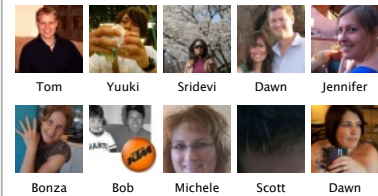
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The lifetime limit on the dollar value of benefits under [Insert name of group health plan or health insurance issuer] no longer applies. Individuals whose coverage ended by reason of reaching a lifetime limit under the plan are eligible to enroll in the plan. Individuals have 30 days from the date of this notice to request enrollment. For more information contact the [insert plan administrator or issuer] at [insert contact information]."

Now, how about this plain-spoken version instead:

**Have you reached the health plan's lifetime limit?**

*In the past, our plans shared in the cost of your health care expenses up to a specific dollar amount of [insert amount] over the course of your lifetime. As of [first day of the first plan year beginning on or after September 23, 2010], our plans no longer have lifetime limits. If you lost eligibility for our health plans when your health care costs reached the lifetime limit, you can now re-enroll in our plans. Learn about how we share in the cost of your health care at [insert name of benefits website or other year-round benefits communication vehicle].*

**Notice #3: Primary care designation notice, if required**

Honestly, this one isn't that bad. And, it's only required for HMO-like plans that require a gatekeeper doctor to coordinate your care — definitely not the majority of plans. It's got three separate parts, that for our purposes, we'll string together.

*[Name of group health plan or health insurance issuer] generally [requires/allows] the designation of a primary care provider. You have the right to designate any primary care provider who participates in our network and who is available to accept you or your family members. [If the plan or health insurance coverage designates a primary care provider automatically, insert: Until you make this designation, [name of group health plan or health insurance issuer] designates one for you.] For information on how to select a primary care provider, and for a list of the participating primary care providers, contact the [plan administrator or issuer] at [insert contact information].*

*For children, you may designate a pediatrician as the primary care provider.*

*You do not need prior authorization from [name of group health plan or issuer] or from any other person (including a primary care provider) in order to obtain access to obstetrical or gynecological care from a health care professional in our network who specializes in obstetrics or gynecology. The health care professional, however, may be required to comply with certain procedures, including obtaining prior authorization for certain services, following a pre-approved treatment plan, or procedures for making referrals. For a list of participating health care professionals who specialize in obstetrics or gynecology, contact the [plan administrator or issuer] at [insert contact information].*

Understandable, but let's see if we can shorten it up a little, and give a little context.

*You should choose a primary care provider or an OB/GYN at enrollment*

*When you choose [name of group health plan] during enrollment, you will be asked to choose the doctor who will coordinate your health care—sometimes called a primary care provider (PCP)—within the plan's network. Your primary doctor may refer you to specialists, when necessary. If you suspect you need the help of a specialist, you'll need your primary doctor to formally refer you to a specialist.*

*There are a few exceptions:*

- **Women:** *You may seek obstetrical or gynecological care without prior permission from your primary care doctor. If necessary, your OB/GYN will coordinate care on your behalf. This might mean complying with certain rules from your health plan, including obtaining prior authorization for certain services, following a pre-approved treatment plan, or following procedures for making referrals.*
- **Children:** *Parents may choose a pediatrician.*

*To see if your current doctor is within the plan's network or to find a new doctor near you, [insert contact information]. If you'd like to change your primary doctor at any time, just [insert contact information] before your next appointment.*

**Common sense caveat:** *This article was originally published by [Benz Communications](#), an*



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employee benefits communication consulting firm. We know benefits. We know what your employees care about. We know how to help you bridge the two. We are not attorneys and nothing in this constitutes legal advice or anything coming close to it. In addition, as we all know, the legislation and regulations are in flux. This information is accurate at the time it was published but you should consult the [HHS website](#) or other sources for the most up-to-date information at the time you communicate to employees.



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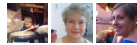
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Liz Rowell joined Benz Communications ([www.benzcommunications.com](http://www.benzcommunications.com)) as a senior writer and consultant after spending eight years at Hewitt Associates, where her work received an IABC award along with numerous other internal commendations. Contact her at [Liz@Benzcommunications.com](mailto:Liz@Benzcommunications.com).

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## Editors Picks



### Why Companies Should Have Their Benefits on the Internet...

*and Why the Excuses They Use Not To Aren't Relevant*

By **Jennifer Benz**, Benz Communications

With all the value an employee benefits website provides – and the cost-effectiveness of one – it's surprising that all large employers don't already have one. Many companies have rationalized that having an enrollment system on the Internet (accessible outside the firewall) is sufficient. Or, that having information on the corporate Intranet is all that's needed for employees to access information and make good decisions. It's not. You need to get the information to the decision maker – who isn't always your employee – and make sure the information is easy to use and engaging to so that it can effectively compete with the social media vying for their attention.

And, while social media – blogs, user forums, Facebook groups, and Twitter – are powerful communications tools with tremendous potential to engage employees and families in their benefits selection process, their strength depends on a strong Internet presence. A branded and accessible website is the best foundation for using social media for employee benefits communication.

Following are the four key reasons companies should create a branded benefits website, and the three excuses companies use to avoid doing so and why these excuses are no longer relevant.

Why companies should have their employee benefits information online:

- **Access.** The most important reason to have employee benefits information online is access. Access for employees, their spouses, domestic partners, parents, and even, sometimes, children – any relation who helps make health care and retirement decisions. Companies keeping information hidden on an Intranet from these audiences are missing an opportunity to engage those using their programs and driving their costs.
- **Branding.** Even a fantastic benefits enrollment platform is limited, in terms of branding, and unlikely to provide information in a way that engages employees and their relations in company-relevant issues. Benefits information – and everything promised employees – must be communicated in a manner that is a direct reflection of the company brand. Typically, this is best accomplished with complete control over a user experience via a website.
- **Recruitment and new hires.** Having a benefits package available online for recruits to review and new hires to become familiar with helps attract key talent and eases new hire orientation. Unlike the "experience" garnered from reviewing written material, a website enables a prospective employee to get "inside" and see firsthand the commitment the company makes to its employees. Companies never fail to be surprised by the value this provides.
- **Social media.** Social media – from blogs to Facebook to Twitter – have tremendous potential to engage employees and families in health care and retirement decision-making. These new tools must be linked to an

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overall communications strategy and a comprehensive online resource to be effective. A branded company website is the best foundation from which to launch a social media campaign.

Companies' primary reasons for not having their benefits information online and why these reasons are no longer relevant:

- **It's confidential.** In fact, it isn't. Once written materials have been distributed to employees, a company's benefits information is in the public realm. This information is not proprietary, nor does it need to be confidential. If there's sensitivity regarding pricing, additional protection may be built in. Personal employee data is not included. Companies can't let the perceived need for confidentiality prevent them from providing a resource that encourages employees and their families to have information and use it. Nor should these sites be password protected. In the time it takes to reset or find a password, an employee could well be lost to any number of social media distractions such as YouTube or Facebook. The best approach is to make access as simple and user-friendly as possible.
- **It's all provided in a printed book.** Unless a company has some portion of its employee population that absolutely does not use or have access to the Internet, it's time to ditch that big printed book and replace it with a benefits website and streamlined printed materials that drive employees to the site. A robust, user-friendly website engages and drives enrollment. It also eliminates the need to justify an annual print budget and companies gain kudos for being more environmentally conscious.
- **It's too expensive.** With all the efficient web development technologies available, it's no longer prohibitively expensive to build a company-customized benefits website – no matter the company size. It's likely that a year or two of print budgets – for those companies still printing a large benefits booklet annually -- would cover the cost of a fully developed website. The results prove it: a benefits website is the most valuable investment a company can make to its communications infrastructure.

*Jennifer Benz is an award-winning communications consultant and writer based in San Francisco. Her firm, Benz Communications, provides full-service employee communication services to Fortune 100 Best Companies to Work For and Fortune 500 leaders. She can be reached at [jen@benzcommunications.com](mailto:jen@benzcommunications.com).*

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