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## Electronic Distribution of Health and Welfare Benefits Documents: Five Steps to Getting It Right in the Affordable Care Act Age

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### INTRODUCTION

Employer-provided health and welfare benefits (including medical, dental, vision, life insurance, and disability insurance) have become commonplace. Employers offer these benefits to attract the best employees as well as avoid penalties under the Affordable Care Act's "Employer Shared Responsibility" mandate.<sup>1</sup>

Employers who offer health and welfare benefits must satisfy a plethora of notice and disclosure requirements (described in more detail below). More and more, employers are deciding to distribute these

documents electronically rather than on paper. While cost is perhaps the most obvious motivation, it is not the only one. Employers are increasingly sensitive to environmental sustainability and stewardship and do not want to "kill more trees." Many employers also cite increased efficiency, accuracy and ease of record-keeping. To employees raised in a digital age, paper of all stripes (think cash, wedding invitations, newspapers) is passé; by distributing electronically, employers are simply keeping up with the times.

But electronic distribution implicates a number of rules under ERISA and the Code. While these requirements are not insurmountable, any employer who wants to use electronic distribution must consider them carefully.

### RELEVANT LAW

Different rules apply depending on the type of document or action. Employee Retirement Income Security Act of 1974 (ERISA)-covered documents (and some non-ERISA documents) are covered under ERISA's distribution rules. Distribution of Forms 1095-B and 1095-C (relating to coverage offered or provided under the Affordable Care Act) are covered under rules promulgated by the Internal Revenue Service (IRS). Finally, Internal Revenue Code (Code) regulations cover electronic benefits elections.

### DISTRIBUTION OF ERISA-COVERED DOCUMENTS

ERISA contains a general rule, as well as an electronic disclosure safe harbor, in each case governing distribution of ERISA-covered documents.<sup>2</sup> Under the general rule, a plan administrator must use measures reasonably calculated to ensure actual receipt of ERISA-covered notices and documents by participants, and notices must be sent by a method or methods of delivery likely to result in full distribution. First class mail satisfies this requirement. It is not acceptable to simply place a box of documents in a location frequented by participants (such as the break room).<sup>3</sup>

Under ERISA's electronic disclosure safe harbor, employers may distribute documents through elec-

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<sup>1</sup> Under §4980H, employers with at least 50 full-time or full-time equivalent employees must either offer affordable, minimum value group medical coverage to full-time employees or risk a steep penalty. These rules have already been covered at length, including Moran, *2015 Health Care Reform Compliance Checklist for Employers*, 6 Pension Benefits Daily (Jan. 9, 2015). Unless otherwise stated, all Section references are to the Internal Revenue Code, as amended, and the Treasury regulations promulgated thereunder.

<sup>2</sup> See below nn. 43–61. These rules may also be used for some non-ERISA documents. See below nn. 59–61.

<sup>3</sup> 29 CFR §2520.104b-1(b)(1).

tronic media so long as certain format and consent requirements (described below) are met.<sup>4</sup> Until the DOL says otherwise, we can read that definition broadly. Under the safe harbor, any delivery system must satisfy the following criteria:

- The document delivery system must result in actual receipt of transmitted information (e.g., by using return-receipt or notice of undelivered electronic mail features, and conducting periodic reviews or surveys to confirm receipt of the transmitted information);<sup>5</sup> and
- The document delivery system must protect the confidentiality of personal information relating to the individual's accounts and benefits (e.g., including the system measures designed to prevent unauthorized receipt of — or access to — such information by individuals other than the individual for whom the information is intended).<sup>6</sup>

Practically, the safe harbor allows employers to send an e-mail with an attached pdf of the documents or with a link to a website containing the documents. Employers can also mail (snail mail) a postcard with electronic links to the documents. However, a mere website posting will not work (employers will never be able to prove that anyone actually knew about, accessed, or read the posting; it is the functional equivalent of the box of documents in the break room).<sup>7</sup>

Whatever electronic method the employer uses, the communication:

- Must be prepared and delivered in a way that is consistent with the style, format, and content requirements applicable to the particular document;<sup>8</sup>
- Must inform the recipient of the significance of the provided document if it is not otherwise reasonably evident as transmitted (e.g., the attached document describes changes in the benefits provided by a plan);<sup>9</sup> and

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<sup>4</sup> 29 CFR §2520.104b-1(c). It is notable that the safe harbor rule does not define “electronic media,” which is probably a good thing, since the rule was originally effective in 1997 and last amended in 2002, before the mass adoption of smartphones and pdfs.

<sup>5</sup> 29 CFR §2520.104b-1(c)(1)(i)(A).

<sup>6</sup> 29 CFR §2520.104b-1(c)(1)(i)(B).

<sup>7</sup> Several court cases have confirmed this conclusion. *See, e.g., Raymond Thomas v. Cigna Group Insurance, et al.*, 2015 BL 55439 (E.D.N.Y. 2015).

<sup>8</sup> 29 CFR §2520.104b-1(c)(1)(ii).

<sup>9</sup> 29 CFR §2520.104b-1(c)(1)(iii).

- Must inform the recipient of the right to receive a paper version of the attached document on request.<sup>10</sup>

Also, upon request, the individual must be furnished a paper version of the electronically furnished documents.<sup>11</sup>

The ERISA safe harbor also contains important consent rules. ERISA documents may be sent electronically *without prior consent* to any individual who: (1) has the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee; and (2) with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties.<sup>12</sup>

But for individuals who do not meet these criteria (i.e., who do not have computer access through work), the safe harbor requires consents as follows:

- The individual must affirmatively consent (in electronic or non-electronic form) to receiving documents through electronic media and must not have withdrawn such consent;<sup>13</sup>
- The consent must be made in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used to provide the information that is the subject of the consent;<sup>14</sup>
- The individual must provide an address for the receipt of electronically furnished documents;<sup>15</sup>
- Prior to consenting, the individual must be provided a clear and conspicuous statement indicating: (1) the types of documents to which the consent would apply; (2) that consent can be withdrawn at any time without charge; (3) the procedures for withdrawing consent and for updating the individual's address for receipt of electronically furnished documents or other information; (4) 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 (5) any hardware and software requirements for accessing and retaining the documents;<sup>16</sup> and
- Following consent, if a change in hardware or software requirements needed to access or retain

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<sup>10</sup> *Id.*

<sup>11</sup> 29 CFR §2520.104b-1(c)(1)(iv).

<sup>12</sup> 29 CFR §2520.104b-1(c)(2)(i).

<sup>13</sup> 29 CFR §2520.104b-1(c)(2)(ii)(A).

<sup>14</sup> 29 CFR §2520.104b-1(c)(2)(ii)(B).

<sup>15</sup> *Id.*

<sup>16</sup> 29 CFR §2520.104b-1(c)(2)(ii)(C).

electronic documents creates a material risk that the individual will be unable to access or retain electronically furnished documents, the individual: (1) must be provided with a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents; (2) must be given the right to withdraw consent without charge and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and (3) must again consent, in accordance with the requirements described above, to the receipt of documents through electronic media.<sup>17</sup>

## DISTRIBUTION OF FORMS 1095-B AND 1095-C

Distribution of Forms 1095-B and 1095-C may also be made electronically under rules similar to the ERISA electronic distribution safe harbor. There are subtle differences and a few key distinctions between the rules though. For example, unlike ERISA distribution, all recipients of electronic distribution of Forms 1095-B and 1095-C must affirmatively consent to electronic distribution, even if they have access to a work computer.<sup>18</sup> Consent to electronic distribution of Forms 1095-B and 1095-C must itself be made electronically, or made on paper but confirmed electronically.<sup>19</sup> In addition, if a 1095-B and 1095-C statement is furnished on a website, the furnisher must notify the recipient, and the notification must include the capitalized statement “IMPORTANT TAX RETURN DOCUMENT AVAILABLE.”<sup>20</sup> Finally, the Form 1095-B and 1095-C electronic distribution rules *are not a safe harbor*; strict adherence is required.

Under these rules:

- The recipient must have affirmatively consented to receive the statement in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished. Alternatively, the consent may be made in a paper document that is confirmed electronically.<sup>21</sup>
- The consent requirement is not satisfied if the consent is withdrawn and the withdrawal takes effect before the statement is furnished. The furnisher may provide that a withdrawal of consent takes effect either on the date the furnisher receives it or on another date (in the case of Form 1095-B, no more than 60 days later). The fur-

nisher also may provide that a recipient’s request for a paper statement will be treated as a withdrawal of the recipient’s consent.<sup>22</sup>

- If a change in the hardware or software required to access the statement creates a material risk that the recipient will not be able to access a statement, a furnisher must, prior to changing the hardware or software, notify the recipient. The notice must describe the revised hardware and software required to access the statement and inform the recipient that a new consent to receive the statement in the revised electronic format must be provided to the furnisher. After implementing the revised hardware or software, the furnisher must obtain from the recipient a new consent or confirmation of consent to receive the statement electronically.<sup>23</sup>
- Prior to, or at the time of, a recipient’s consent, a furnisher must provide to the recipient a clear and conspicuous disclosure statement containing each of the following disclosures:
  - The statement will be furnished on paper if the recipient does not consent to receive it electronically.<sup>24</sup>
  - The scope and duration of the consent. For example, the recipient must be informed whether the consent applies to each statement required to be furnished after the consent is given until it is withdrawn or only to the first statement required to be furnished following the date of the consent.<sup>25</sup>
  - Any procedure for obtaining a paper copy of the recipient’s statement after giving consent and whether a request for a paper statement will be treated as a withdrawal of consent.<sup>26</sup>
  - That —
    - The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, telephone number, and e-mail address is provided in the disclosure statement;
    - The furnisher will confirm the withdrawal and the date on which it takes effect in writing (either electronically or on paper); and
    - A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in the regulations before the date on which the withdrawal of consent takes ef-

<sup>17</sup> 29 CFR §2520.104b-1(c)(2)(ii)(D).

<sup>18</sup> Treas. Reg. §301.6056-2(a)(2)(i), §1.6055-2(a)(2)(i).

<sup>19</sup> *Id.*

<sup>20</sup> Treas. Reg. §301.6056-2(a)(5), §1.6055-2(a)(5).

<sup>21</sup> Treas. Reg. §301.6056-2(a)(2)(i), §1.6055-2(a)(2)(i).

<sup>22</sup> Treas. Reg. §301.6056-2(a)(2)(ii), §1.6055-2(a)(2)(ii).

<sup>23</sup> Treas. Reg. §301.6056-2(a)(2)(iii), §1.6055-2(a)(2)(iii).

<sup>24</sup> Treas. Reg. §301.6056-2(a)(3)(ii), §1.6055-2(a)(3)(ii).

<sup>25</sup> Treas. Reg. §301.6056-2(a)(3)(iii), §1.6055-2(a)(3)(iii).

<sup>26</sup> Treas. Reg. §301.6056-2(a)(3)(iv), §1.6055-2(a)(3)(iv).

fect.<sup>27</sup>

- The conditions under which the furnisher will cease furnishing statements electronically to the recipient (for example, termination of the recipient's employment with a furnisher who is the recipient's employer).<sup>28</sup>
- The procedures for updating the information needed to contact the recipient. The furnisher must inform the recipient of any change in the furnisher's contact information.<sup>29</sup>
- A description of the hardware and software required to access, print, and retain the statement, and the date when the statement will no longer be available on the website. The furnisher must advise the recipient that the statement may be required to be printed and attached to a Federal, State, or local income tax return.<sup>30</sup>
- The electronic version of the statement must contain all required information and comply with applicable published guidance relating to substitute statements to recipients.<sup>31</sup>
- If a statement is furnished on a website, the furnisher must notify the recipient. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement and include the following statement in capital letters, "IMPORTANT TAX RETURN DOCUMENT AVAILABLE." If the notice is provided by electronic mail, this statement must be on the subject line of the electronic mail.<sup>32</sup>
- If an electronic notice is returned as undeliverable, and the furnisher cannot obtain the correct electronic address from the furnisher's records or from the recipient, the furnisher must furnish the notice by mail or in person within 30 days after the electronic notice is returned.<sup>33</sup>
- If the furnisher has corrected a recipient's statement and the original statement was furnished electronically, the furnisher must furnish a corrected statement to the recipient electronically. If the original statement was furnished through a website posting, the furnisher must notify the recipient that it has posted the corrected statement on the website within 30 days of the posting. The corrected statement or the notice must be fur-

nished by mail or in person if —

- An electronic notice of the website posting of an original statement or the corrected statement was returned as undeliverable; and
- The recipient has not provided a new e-mail address.<sup>34</sup>
- Statements furnished on a website must be retained on the website through October 15 of the year following the calendar year to which the statements relate (or the first business day after October 15, if October 15 falls on a Saturday, Sunday, or legal holiday). The furnisher must maintain access to corrected statements that are posted on the website through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15, if October 15 falls on a Saturday, Sunday, or legal holiday) or the date 90 days after the corrected forms are posted, whichever is later.<sup>35</sup>
- A furnisher must furnish a paper statement if a recipient withdraws consent to receive a statement electronically and the withdrawal takes effect before the statement is furnished. A paper statement furnished after the statement due date is timely if furnished within 30 days after the date the furnisher receives the withdrawal of consent.<sup>36</sup>

## ELECTRONIC EMPLOYEE BENEFITS ELECTIONS

Employee benefits elections (for example, elections between cash and benefits under a cafeteria plan) are governed by the following rules.

- The electronic medium under an electronic system used to make a participant election must be a medium that the person who is eligible to make the election is effectively able to access.<sup>37</sup>
- The electronic system used in making participant elections must be reasonably designed to preclude any person other than the appropriate individual from making the election. Whether this condition is satisfied is based on facts and circumstances, including whether the participant election has the potential for a conflict of interest between the individuals involved in the election.<sup>38</sup>
- The electronic system used in making participant elections must provide the person making the par-

<sup>27</sup> Treas. Reg. §301.6056-2(a)(3)(v), §1.6055-2(a)(3)(v).

<sup>28</sup> Treas. Reg. §301.6056-2(a)(3)(vi), §1.6055-2(a)(3)(vi).

<sup>29</sup> Treas. Reg. §301.6056-2(a)(3)(vii), §1.6055-2(a)(3)(vii).

<sup>30</sup> Treas. Reg. §301.6056-2(a)(3)(viii), §1.6055-2(a)(3)(viii).

<sup>31</sup> Treas. Reg. §301.6056-2(a)(4), §1.6055-2(a)(4).

<sup>32</sup> Treas. Reg. §301.6056-2(a)(5)(i), §1.6055-2(a)(5)(i).

<sup>33</sup> Treas. Reg. §301.6056-2(a)(5)(ii), §1.6055-2(a)(5)(ii).

<sup>34</sup> Treas. Reg. §301.6056-2(a)(5)(iii), §1.6055-2(a)(5)(iii).

<sup>35</sup> Treas. Reg. §301.6056-2(a)(6), §1.6055-2(a)(6).

<sup>36</sup> Treas. Reg. §301.6056-2(a)(7), §1.6055-2(a)(7).

<sup>37</sup> Treas. Reg. §1.401(a)-21(d)(2).

<sup>38</sup> Treas. Reg. §1.401(a)-21(d)(3).

participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before the election becomes effective.<sup>39</sup>

- The person making the participant election must receive, within a reasonable time, a confirmation of the election through either a written paper document or an electronic medium which itself satisfies electronic distribution standards.<sup>40</sup>
- The electronic system must be reasonably designed to provide the information in the notice to a recipient in a manner that is no less understandable to the recipient than a written paper document.<sup>41</sup>
- The electronic system must be designed to alert the recipient, at the time an applicable notice is provided, to the significance of the information in the notice (including identification of the subject matter of the notice), and provide any instructions needed to access the notice, in a manner that is readily understandable.<sup>42</sup>

## WHAT IS NEXT? A RECOMMENDED FIVE-STEP PROCESS

### Step One: Identify the Documents to Be Distributed Electronically, and Whether Any Elections Will Be Electronic

As noted above, Forms 1095-B and 1095-C may be distributed electronically under rules particular to those forms. If electronic elections are to be made, the process should follow IRS rules described above.

Documents that may be distributed under ERISA's rules include:

- Documents required under ERISA (applicable to all ERISA-covered plans, regardless of size):
  - Summary Plan description,<sup>43</sup> including claims procedures;<sup>44</sup>
  - Summary annual report;<sup>45</sup>
- Documents required under Part 7 of ERISA (i.e., generally applicable to major medical plans and

not applicable to “excepted benefits”);<sup>46</sup>

- Special enrollment notice;<sup>47</sup>
  - Wellness program model notice (for plans that contain a health-contingent wellness feature);<sup>48</sup>
  - Mandated coverage of post-mastectomy reconstructive surgery (WHCRA) — initial notice and annual notice;<sup>49</sup>
  - Newborns and Mothers Health Protection Act notice;<sup>50</sup>
  - CHIPRA. The Children’s Health Insurance Program Reauthorization Act of 2009 requires employers to provide each employee an annual written notice informing the employee of potential opportunities in the state where the employee resides for premium assistance;<sup>51</sup>
  - Summary of benefits and coverage;<sup>52</sup>
  - Patient protection notice;<sup>53</sup>
  - Grandfathered plan statement;<sup>54</sup> and
  - Certain ad-hoc notices that will vary depending on the employer’s plan design (e.g., GINA notice of research exception,<sup>55</sup> mental health parity notice of increase cost exemption or medical necessity notice,<sup>56</sup> Michelle’s Law notice.<sup>57</sup>)
- COBRA notices (initial notice, election notice, unavailability notice, termination of coverage notice).<sup>58</sup> But note that electronic distribution of COBRA materials may not be the best option, especially if the materials are being provided to former employees.
  - Non-ERISA documents that may be distributed using the ERISA distribution rules include:
    - Affordable Care Act “offer of coverage” under

<sup>39</sup> Treas. Reg. §1.401(a)-21(d)(4).

<sup>40</sup> Treas. Reg. §1.401(a)-21(d)(5).

<sup>41</sup> Treas. Reg. §1.401(a)-21(a)(5)(i).

<sup>42</sup> Treas. Reg. §1.401(a)-21(a)(5)(i).

<sup>43</sup> ERISA §102 and ERISA §104.

<sup>44</sup> ERISA §503.

<sup>45</sup> ERISA §104.

<sup>46</sup> Certain benefits, while not excepted from ERISA entirely, are excepted from certain parts of ERISA (as well as corresponding sections of the Internal Revenue Code and the Public Health Service Act). These include most dental plans, vision plans, long-term care plans, most health care flexible spending accounts, most indemnity and single-disease coverage, life insurance, disability insurance, and some employee assistance plans, among others. See ERISA §733 and related regulations at 29 CFR §2590.732.

<sup>47</sup> ERISA §701(f); 29 CFR §2590.701-6(c).

<sup>48</sup> ERISA §702; 29 CFR §2590.702(f)(6).

<sup>49</sup> ERISA §713(b).

<sup>50</sup> ERISA §711(d).

<sup>51</sup> ERISA §701(f)(3)(B)(i).

<sup>52</sup> 29 CFR §2590.715-2715. Note that additional electronic distribution options may be available for the summary of benefits and coverage. See 29 CFR §2590.715-2715(a)(4).

<sup>53</sup> 29 CFR §2590.715-2719A.

<sup>54</sup> 29 CFR §2590.715-1251(a)(2).

<sup>55</sup> ERISA §702(c)(4).

<sup>56</sup> ERISA §712.

<sup>57</sup> ERISA §714.

<sup>58</sup> See ERISA Part 6 and regulations thereunder.

the employer shared responsibility mandate;<sup>59</sup>

- Fair Labor Standards Act Exchanges notice;<sup>60</sup> and
- Medicare Part D notice to eligible individuals.<sup>61</sup>

## Step Two: Evaluate Potential Notice Recipients

Employers should next evaluate potential recipients of these notices.

- Current employees with access to work computers as a regular part of their jobs. Under the ERISA safe harbor, employers may distribute ERISA notices to these individuals without consent. However, consent must be obtained in order to distribute Forms 1095-B and 1095-C.
- Current employees without access to work computers as a regular part of their jobs. Under the ERISA safe harbor and the Forms 1095-B and 1095-C rules, documents may be distributed to these individuals only with consent. Some examples of industries that typically have cohorts of employees without regular computer access through work may include staffing, automotive sales, hospitality and home health.
  - Note that, if consent is simply not feasible, employers can still send ERISA documents electronically, but the distribution will not satisfy the ERISA safe harbor. If the employer can carefully craft electronic distribution processes so that documents are actually received, however, ERISA's general document distribution rule may be satisfied. However, under no circumstances should Forms 1095-B and 1095-C be distributed electronically without consent.
- Former employees. In all cases, employers should seek consent from these employees before distributing documents electronically. Employers should also carefully consider whether electronic distribution is the best option for these employees. For example, will the employer need to give the former employee continued access to the company intranet in order to access documents?

## Step Three: Prepare an Electronic Distribution Policy

Employers should, with the help of counsel, craft a policy for electronic distribution. The policy should carefully explain the documents to be distributed elec-

tronically and the steps to be followed, including whether consent will be obtained and from whom. The policy will both document the employer's process (in the event of an audit) and serve as roadmap for those individuals who are tasked with document distribution.

In addition, employers should create a version of the policy for distribution to document recipients. The policy can explain to recipients such important points as:

- Why the employer is using electronic distribution (e.g., environmental concerns);
- The consent process (if applicable);
- The employee's right to paper copies of documents, and how to obtain them;
- Which documents will be distributed electronically; and
- Hardware and software needed to access documents.

Employers should consider distributing the employee version of the policy as widely as possible, particularly if the employer does not intend to obtain consents from employees without computer access. Possible "touches" include the employee handbook, open enrollment materials, and the new hire package.

## Step Four: Collect Consents (Where Necessary)

If the employer has decided to follow the ERISA safe harbor, it may need to collect consents from some (or all) recipients, depending on the composition of its workforce. If the employer has decided to distribute Forms 1095-B and 1095-C electronically, it will need to collect consents from all recipients.

## Step Five: Keep Good Records

Employee benefits practitioners are noticing a marked increase in Department of Labor (DOL) audits of health and welfare plans. Notably, the DOL has established a national enforcement project (the "Health Benefits Security Project") meant to police ERISA Part VII violations. As part of its audits, the DOL will likely want to confirm that ERISA notices have been properly distributed to employees and other applicable beneficiaries. We expect the IRS to begin its Affordable Care Act compliance audits sooner rather than later and to similarly focus on whether "offers of coverage" were properly distributed.

Employers should keep the possibility of an audit in mind and assume that, if an audit occurs, the DOL or IRS will want to see evidence that documents were distributed in a compliant fashion. Employers are advised to keep careful records of all document distributions, including the types of documents distributed, the date of distribution, names of recipients, address or e-mail address used, and the manner of distribu-

<sup>59</sup> §4980H(a), §4980H(b); *see also* preamble to final §4980H regulations at T.D. 9655, 79 Fed. Reg. 8544 (Feb. 12, 2014).

<sup>60</sup> Fair Labor Standards Act §18B.

<sup>61</sup> 42 CFR §423.56.

tion. If the employer has collected consents to distribution, the consents should be carefully catalogued and filed.

## **CONCLUSION**

The need to properly distribute health and welfare documents cannot be understated. Penalties for failure to distribute documents range from \$110/day (summary plan description or COBRA) to \$100/day (ERISA Part VII, if enforced by the IRS) to \$2,000 per full-time employee per year (for failure to make a

good “offer of coverage” under the Affordable Care Act) to \$250 per return (for failure to meet the Forms 1095-B and 1095-C notice requirements). The Affordable Care Act has raised the stakes, and the IRS and DOL audit activity is expected to increase in the coming months and years. Electronic disclosure can help employers meet their notice requirements and avoid penalties — but only if done correctly. Employers are encouraged to take the time now to review their electronic distribution practices and confirm compliance.