

Client Alert

June 2020

At Last! DOL Issues New Electronic Disclosure Safe Harbor for Retirement Plans

On May 27, 2020, the US Department of Labor (DOL) published its much anticipated [final rule](#) addressing the new safe harbor for the electronic delivery of ERISA-required retirement plan notices. Overall, the final rule, which becomes effective July 27, 2020 (but may be relied upon immediately) greatly expands electronic delivery of retirement plan notices through the use of internet posting, email and mobile applications and will likely result in welcome cost savings for plans that rely on it. The following outlines the key elements of the new electronic disclosure safe harbor and steps plan administrators will need to take to rely on it.

It is important to note that the 2002 safe harbor rule for electronic disclosures is still in place and the final rules only added an additional safe harbor. Further, the new safe harbor only applies to retirement plans, and not to welfare benefit plans. Lastly, the new rules do not apply to IRS-required notices, such as 401(k) safe harbor notices. Thus, the IRS electronic delivery rules for those items continue to apply.

Covered Individuals

The final rule provides an additional safe harbor that permits electronic disclosure of ERISA-required notices to “covered individuals” – who are participants and beneficiaries for whom the employer, plan sponsor or plan administrator has an electronic address. In general, the safe harbor allows plan administrators to satisfy ERISA’s distribution requirements by making each document available online and providing electronic notice of its availability, as long as the covered individual either:

- Provides an electronic address (such as an email or internet-connected mobile-computing device (e.g., smartphone) number); or
- Is an employee who has been assigned an electronic address (e.g., a work email address) by the employer for the purpose of electronic distribution.

The final rule makes clear that an employer-assigned electronic address must be used for other employment purposes and cannot be assigned solely for purposes of providing documents under the safe harbor. In addition, the preamble to the final rule makes clear that electronic addresses that have been gathered by third-party locator services also cannot be used to meet the safe harbor.

Covered Documents

Any pension benefit plan document required to be furnished under Title I of ERISA is a covered document for purposes of the final rule. As noted above, the final rule does not apply to welfare benefit plan documents or notices. A document that must be provided only upon request is not considered a covered document for these purposes, including plan documents, trust agreements, Form 5500s, and other documents required to be provided pursuant to ERISA section 104(b)(4).

Initial Paper Notice Regarding the Transition to Electronic Disclosure

Before relying on the new safe harbor, a plan administrator must provide an initial *paper* notice to covered individuals that explains the new electronic delivery method. This requirement applies both to existing participants and any employees that become covered individuals after the plan begins using the final rule. This initial notice must:

- Explain that covered documents will be provided electronically to an electronic address,
- Identify the specific electronic address to be used for the individual,
- Include any instructions to access the documents,
- Include a notice that the documents will remain available until the later of one year or the time the document is superseded by a subsequent version of the document,
- Include an explanation of the right to request a paper version of any document and the right to opt out of electronic delivery globally, and
- Explain how an individual can exercise those rights.

Even if plan sponsors are using the prior DOL rules for electronic delivery, this initial notice will still be required if the plan intends to rely on the new safe harbor.

Notice of Internet Availability

Under the final rule, plan administrators must provide notice of internet availability (NOIA) when a new disclosure is available online. The notice itself must contain the following information:

- A prominent statement/heading that reads “Disclosure About Your Retirement Plan,”
- A statement reading “Important information about your retirement plan is available. Please review this information,”
- Identification of the document by name and a brief description of the covered document if the name alone would not convey the nature of the document,
- The website and/or hyperlink where the covered document is available (address or link must be sufficiently specific to provide ready access to the document⁰. The address or link may lead directly to the document, a login page where the link is available. or available immediately after the individual logs in,
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right,
- A statement of the right to opt out of receiving documents electronically and an explanation of how to exercise this right,

- A cautionary statement that the document is not required to be retained on the website longer than one year or, if later, until it is superseded by a new version of the document, and
- A telephone number for the plan administrator or designated plan representative.

The NOIA cannot include anything that is not explicitly required or permitted, but may also include the following (so long as it is not inaccurate or misleading):

- A statement about whether action by the covered individual is invited or required in response to a plan document and how to take such action, or that no action is required.
- Pictures, logos or similar design elements.

Special Rules for Combined Notices of Internet Availability

The plan administrator must generally provide a separate NOIA for each required disclosure. The final rule, however, provides a special provision that allows certain notices to be consolidated. Specifically, one NOIA can be used for one or more of the following documents:

- Summary plan descriptions,
- Covered documents or information that must be furnished annually,
- Any other covered document authorized by the Secretary of Labor, and
- Any applicable notice required by the Code if authorized by the Secretary of the Treasury.

The plan administrator is required to provide this combined notice once per plan year and has 14 months after the date of the prior plan year's combined notice to provide a new one.

Standards for Websites and Mobile Apps

Under the final rule, the plan administrator is responsible for establishing and maintaining the website for disclosures, but may delegate website responsibilities to third parties. However, if this responsibility is delegated, the plan administrator will continue to have fiduciary responsibility for selecting and monitoring any delegated third parties. The plan administrator must take steps to reasonably ensure that:

- The covered document is available no later than the date it is required to be furnished and remains available for at least one year, or, if later, until it is superseded by a subsequent version,
- The covered document is presented in a manner calculated to be understood by the average plan participant,
- The document is maintained in a widely-available format (or formats) suitable for viewing online and can be clearly printed on paper and allow for the document to be permanently retained in an electronic format,
- The covered document is searchable electronically, and
- The website or mobile app protects confidential information.

Standards for Electronic Addresses

The final rule allows plan administrators to send retirement plan disclosures directly to covered individuals' electronic addresses, including email or smartphone number, either directly in the body of the email or as an attachment to the email. If the plan administrator chooses to send the disclosures via email, then the covered individual's email address must either be (1) provided by the employer (but not by the plan administrator or record keeper or otherwise specifically assigned for plan use) or (2) provided by the covered individual. The email must be written in a manner calculated to be understood by the average plan participant and must include:

- A subject line that reads "Disclosure About Your Retirement Plan,"
- If the document is an attachment, an identification of the covered document by name or a brief description of the covered document if identification by name would not reasonably convey the nature of the covered document,
- A statement of the right to request and receive a paper version of the covered document free of charge, and an explanation of how to exercise this right,
- A statement of the right to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right, and
- A telephone number to contact the plan administrator or other designated plan representative.

Plan administrators must ensure that the electronic delivery system alerts them if an electronic address is invalid or inoperable. In that case, the plan administrator must attempt to promptly cure the problem, or treat the covered individual as opting out of electronic delivery and furnish a paper copy of the undelivered document(s) as soon as reasonably practicable.

Special Rules for Terminating Participants

When an individual terminates employment and his or her workplace email was used for delivering covered documents, the plan administrator must either ensure that the workplace address remains accessible or obtain a new address.

Temporary Unavailability of Documents

The regulations recognize that technical issues, scheduled maintenance, and unforeseeable events outside of the plan administrator's control may disrupt availability of covered documents. In these instances, plan administrators will not fail to be in compliance with the final rule so long as plan administrators have reasonable procedures in place to address these contingencies and must make the documents available as soon as possible after the earlier of the time the plan administrator knew or reasonably should know that the documents are temporarily unavailable.

Implications for Plan Sponsors

While the final rule provides a welcome alternative for electronic distribution of retirement plan communications that could produce significant time and cost savings, the changes also place additional administrative burdens on plan administrators to track opt-out requests, terminated employees and undeliverable notices. Plan administrators should carefully review their current distribution procedures for any Title I retirement plan notices and consider whether the plan could comply with requirements to deliver an initial paper notice of reliance on the safe harbor, follow up on undeliverable notifications, administer opt-out requests, and track all employment terminations.

Lastly, although the final rule may be implemented immediately, plans are required to issue a paper initial notice of internet availability in order to rely on the final rule. Pursuant to EBSA Disaster Relief Notice 2020-01, however, DOL announced “good faith” relief from participant-level disclosure deadlines provided that the plan fiduciary provides the disclosure as soon as practicable, including through email, text messaging and continuous access website. This relief applies until 60 days following the announced end of the COVID-19 emergency. As such, plan administrators may want to rely on DOL’s COVID-19 “good faith” relief through the end of this relief before seeking to rely on the final rule.

If you have any questions about implementing the DOL’s new electronic disclosure safe harbor, please contact any of the employee benefits and executive compensation attorneys listed here for assistance.

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