

DOL ISSUES NEW “NOTICE AND ACCESS” SAFE HARBOR RULE FOR ELECTRONIC DELIVERY OF RETIREMENT PLAN DISCLOSURES

Hodgson Russ Employee Benefits Alert
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The U.S. Department of Labor on May 27, 2020 issued final regulations that substantially modernize the rules for the electronic delivery of mandatory retirement plan communications. Previously, the DOL had stringent safe harbor rules for the electronic delivery of plan disclosures, requiring the participant to either: (1) give affirmative consent, or (2) have regular access to a computer as part of his/her job duties. The existing DOL safe harbor rule remains available and is the only safe harbor electronic delivery methodology available for welfare plan disclosures. In contrast, the final regulations create a new “notice and access” electronic disclosure regime, intended to align with the Treasury Department’s electronic media regulations.

When the DOL first issued proposed regulations in October, 2019 (see our article here), the new “notice and access” electronic delivery safe harbor only contemplated disclosure via website posting, following delivery of a required notice. The final regulations incorporate a significant and useful change, the addition of a new electronic delivery method allowing transmission of mandatory retirement plan communications directly to a covered individual’s email address or mobile phone. In other respects, the final regulations align with the proposed regulations.

Two Permissible Methods of Electronic Delivery

The new safe harbor is only available respecting ERISA disclosures required to be made by retirement plans, other than documents furnished upon request. In general, the new safe harbor allows a retirement plan sponsor to notify “covered individuals” that disclosures will be made available on a website, or to transmit plan disclosures directly to an email address or mobile phone. Covered individuals can opt out of electronic delivery and/or receive a paper copy of any plan disclosure free of charge at any time.

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The final regulation defines “covered individual” as a participant, beneficiary or other individual, such as an alternate payee:

1. who is entitled to receive ERISA retirement plan disclosures; and
2. who provides the plan sponsor with an electronic address – an email address or cellphone number – where he/she may receive either a written notice of internet availability, or an email delivering the plan disclosures.

Employers may assign an electronic address to a covered individual, so long as the electronic address is not provided exclusively for the purpose of delivering ERISA retirement plan disclosures.

Initial Paper Notification a Prerequisite to Using the New Electronic Disclosure Rule

Importantly, before a retirement plan administrator may utilize the electronic delivery safe harbor, a paper written notice must be sent to covered individuals. This is the case even if the covered individual has previously received electronic disclosures under the prior DOL safe harbor method (e.g. affirmative consent, or job-related computer access).

The notice must explain the covered individual’s right to receive a paper copy of any required retirement plan disclosure, free of charge, or to opt out of electronic delivery altogether. This initial notice must identify the electronic address (e.g., website or application) that will be used to deliver the documents, and give any instructions necessary for the covered individuals to access the documents. The notice also must advise covered individuals that the documents provided via a website will remain posted for at least a year, or if later, until the disclosure is superseded by a subsequent version.

Providing the Notice of Internet Availability for Website Postings

Plan administrators may host ERISA retirement plan disclosures on an Internet website, or a mobile phone application to which covered individuals have been provided reasonable access. Concurrent with any posting, covered individuals must be provided with a “Notice of Internet Availability” satisfying the following content requirements:

- A prominent statement—for example as a title, legend, or subject line—that reads: “Disclosure About Your Retirement Plan.”
- A statement that reads: “Important information about your retirement plan is now available. Please review this information.”
- An identification of the plan disclosure by name (e.g., for example, “your Quarterly Benefit Statement is now available”) and a brief description of the disclosure, if identification only by name would not reasonably convey the nature of the disclosure.
- The Internet website address, or a hyperlink to such address, where the plan disclosure is available. The website address or hyperlink must lead the covered individual either directly to the plan disclosure or to a login page that provides a prominent link to the disclosure.
- A statement of the right to receive a paper version of the disclosure, free of charge, and an explanation of how to exercise this right.

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- A statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of disclosures, and an explanation of how to exercise this right.
- A cautionary statement that the disclosure 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 disclosure.
- The telephone number for the plan administrator or its designated representative.

The Notice of Internet Availability must be written in a manner calculated to be understood by the average plan participant.

Regarding the presentation of ERISA retirement plan disclosures on a website or application, the documents must be posted on or before the date ERISA requires such documents to be furnished. Documents published on the website must be presented in a format that is legible, searchable, can be printed on paper, and can be permanently retained in an electronic format. In addition, plan administrators must take steps reasonably calculated to ensure the confidentiality of a covered individual's personal information.

Electronic Transmittal to Email

Instead of issuing a Notice of Internet Availability and posting the plan disclosures on a website, retirement plan administrators may transmit the documents directly to the covered individual's email address. The content requirements for the email transmitting the plan disclosure closely follow the regulations regarding the issuance of a Notice of Internet Availability. Rules concerning timeliness, document format requirements, and confidentiality apply to emailed disclosures, which are nearly identical to the rules for documents posted on a website.

The final regulations are effective July 27, 2020.

If you have any questions about the DOL regulations regarding electronic delivery of retirement plan communications, please contact Amy Walters (716.848.1481), Peter Bradley (716.848.1446) or an attorney in our Employee Benefits Practice.

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