

## DOL Publishes Helpful New Electronic Disclosure Rules for Retirement Plans

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Embracing 21<sup>st</sup> century technology, the U.S. Department of Labor (DOL) recently published a final rule that provides a new safe harbor for electronic distribution of disclosures to retirement plan participants and beneficiaries allowing for delivery via either new “notice-and-access” or email methods. This new safe harbor will allow plan sponsors to reduce administrative expenses and make such disclosures more readily available to participants. The DOL’s prior safe harbors for electronic disclosure, which remain available, were often found to be too limiting and onerous to be practical for many plan sponsors.

The new rule currently applies only to disclosures required by ERISA that relate to employee retirement plans, which include the following:

- summary plan description;
- summary of material modifications;
- summary annual report;
- annual funding notice;
- investment disclosures;
- pension benefit statement;
- any document that must be furnished annually and does not require action by a covered individual by a deadline;
- any other document authorized by the DOL; and

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- any notice required under the Tax Code if authorized by the IRS.

Health and welfare plan disclosures are not covered by the new rule, but future guidance in that regard is anticipated.

Under the new safe harbor, a “covered individual” (e.g., any participant, beneficiary or alternate payee) may be provided electronic disclosures if they provide an electronic address, such as an email address or smartphone number, or those who are assigned such an electronic address for employment-related purposes. But before initiating electronic disclosures to covered individuals for the first time, an administrator must issue an initial paper notice to the individuals that contains:

- a statement that covered documents will be furnished electronically to an electronic address;
- identification of that individual’s specific electronic address;
- any instructions necessary to access the covered documents;
- a cautionary 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the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document;
- 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; and
- a statement of the right to opt out of electronic delivery and receive only paper versions of covered documents, free of charge, and an explanation of how to exercise this right.

The initial notice must be written in a manner that may be understood by the average plan participant. Administrators will need to issue this initial paper notice to all current participants and are advised to include such notices in new hire packets for new employees.

### *Notice-and-Access Method*

Under the notice-and-access method of electronic delivery, a plan administrator must have a website available for covered individuals to access covered documents that satisfies a number of easily managed requirements. In addition, an administrator must furnish to covered individuals a notice of internet availability, at the time a covered document is made available on the website, which contains all of the following:

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- a prominent statement (e.g., a title 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 covered document by name and a brief description if identification by name only would not convey the nature of the document;
- the website address, or a hyperlink to such address, where the covered document is available;
- 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 that right;
- a statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise that right;
- a cautionary 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; and
- a telephone number to contact the administrator or a designated representative of the plan.

The notice described above generally must be limited to this specific information and must be provided separately from any other documents or disclosures. A single notice may be used for certain covered documents such as the summary plan description and notices provided on an annual basis so long as the combined notice is provided annually.

Special rules apply with respect to individuals who are terminated and lose access to employer-provided electronic addresses. In such cases, the administrator must ensure continued accuracy and availability of the individual’s electronic address or obtain a new address that allows for electronic delivery of covered documents after termination.

### *Email Delivery Method*

As an alternative to the notice-and-access method described above, the final rule permits an employer to deliver covered documents to covered individuals by sending an email to an address that could be used for the notice-and-access method, in which case the notice of internet availability is not required. However, the email to covered individuals must:

- include the covered document in the body of the email or as an attachment;

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- include a subject line that reads: “Disclosure About Your Retirement Plan”;
- identify and provide a brief description of the document (if necessary, as described above) if the covered document is an attachment;
- provide that the individual has a right to a paper copy of a covered document (as described above);
- provide that the individual has the right to opt out of electronic delivery (as described above); and
- provide a telephone number to contact the administrator or designated representative (as described above).

### *Right to Opt Out of Electronic Delivery*

The plan is required to provide paper versions of covered documents upon specific request, to comply with requests to opt out of electronic disclosure entirely, and to maintain procedures governing these requests. In addition, the system for furnishing a notice must alert the plan fiduciary of an invalid or inoperable address. The plan fiduciary is required to maintain procedures designed to resolve the invalid address such as by sending the notice to a secondary address, obtaining a new address from the individual, or treating the individual as if they opted out of electronic delivery.

### *Effective Date*

The new safe harbor is effective and applicable on July 27, 2020. However, the DOL made clear that it will not take any enforcement action on plan sponsors that rely on the new safe harbor prior to that date.

### *Conclusion*

Plan sponsors are not required to comply with the final rules regarding electronic disclosure, but those electing to do so should find the new requirements much easier to administer than the prior safe harbor guidance. In addition, plan sponsors may elect to use these electronic delivery methods for some, but not all, participants and beneficiaries. Finally, while the new rules do not apply to sponsors of governmental plans, they do provide a useful roadmap for rolling out such systems with respect to disclosures required by governmental plans. If you have questions about the new final rule or to implement this new rule, contact any of Laner Muchin’s employee benefits attorneys.