
Employee Benefits Update

May 28, 2020

Department of Labor Finalizes New Retirement Plan Electronic Disclosure Rules

Executive Summary

The Department of Labor (the “DOL”) recently finalized a new voluntary safe harbor that retirement plan administrators may use to furnish retirement plan information and documents electronically by email or by posting on a website.



New Electronic Disclosure Safe Harbor for Retirement Plans

The new rule recognizes technological advancements that have been made in recent years to effectively provide and receive electronic communications, and provides additional flexibility to plan sponsors, which is especially needed during the COVID-19 pandemic. Under the [final rule](#) for the new electronic disclosure safe harbor, retirement plan administrators may disclose retirement plan “covered documents” to “covered individuals” by making the covered documents available on a website or by providing the documents via an email.

Covered Individuals & Covered Documents

A “covered individual” is a participant, beneficiary, or other individual entitled to receive covered documents who has provided a valid “electronic address” (*e.g.*, employer-assigned or personal email addresses, or mobile numbers for smartphones with text capabilities). If the covered individual is a spouse or beneficiary, the spouse or beneficiary must affirmatively provide (or the participant must provide on their behalf) an electronic address. If the covered individual is a former employee, the retirement plan administrator must obtain a new email address or smart phone number if the contact information provided was employer-assigned, or take reasonable steps to ensure that the covered individual will still have access to the email address or smart phone number.

The safe harbor applies only to retirement plan “covered documents”, which include any document or information the DOL requires retirement plan administrator to furnish to covered individuals, such as Summary Plan Descriptions, participant fee disclosures, annual funding notices, blackout notices, and Summary Annual Reports. Notably, however, covered documents do not include disclosures required by the IRS, such as safe harbor notices. In addition, any document that must be furnished *only* upon request is not considered to be a covered document.

Paper Notice of Electronic Disclosure Required First

Before a retirement plan administrator can rely on the new safe harbor to provide covered documents, the retirement plan administrator must first provide each covered individual with a notice, in paper form, stating that some or all covered documents will be furnished electronically to an electronic address. The paper notice must include certain required information, including the specific electronic address of each covered individual receiving the paper notice, instructions necessary to access covered documents (e.g., whether passwords are required, how to download a required smart phone app, or how to set up an online account), and a statement informing covered individuals of their right to request paper copies of covered documents, free of charge, and to globally opt-out of receiving electronic disclosures, as well as an explanation of the process for requesting paper copies and opting-out of electronic disclosures. This paper notice must also explain that the covered documents will be available for one year, or until they are superseded by an updated document. This paper notice may be provided with an employer's annual enrollment materials.

Electronic Delivery Methods

The safe harbor permits plan administrators to use two methods for electronic delivery:

- *Email delivery*: covered documents emailed directly to the email address of covered individuals, with the documents either in the body of the email or as an attachment to the email, using a system that will alert the retirement plan administrator if a message “bounces back” or the email address is invalid or inoperable; or
- *Website/intranet posting*: covered documents posted on a website that covered individuals have access to, so long as appropriate notification of internet availability is provided to the electronic address of all covered individuals.

In order to provide covered documents by email, the safe harbor requires the email to include specific information, including, for example:

- ✓ The statement “Disclosure About Your Retirement Plan” in the subject line of the email;
- ✓ An explanation of the right to receive a paper copy of the covered documents, free of charge, and the right to opt out of electronic disclosure entirely; and
- ✓ Identification of the covered document, or a description of the covered document if its identity is not easily discerned from its title.

In order to post covered documents on a website or intranet, the retirement plan administrator must first provide covered individuals with a Notice of Internet Availability (“NOIA”) before the covered document is posted. One annual combined NOIA can be provided with respect to posting Summary Plan Descriptions and other documents that must be furnished annually and that do not require action by a participant by a specific date. However, other covered documents, such as a Summary of Material Modifications or quarterly benefit statements, require their own NOIA before they are posted.

The NOIA must be a stand-alone document delivered to each covered individual’s electronic address, and must include specific information, including, for example:

- The statement “Disclosure About Your Retirement Plan”;
- A statement that says “Important information about your retirement plan is now available. Please review this information.”
- Identification of the document (*e.g.* “your Quarterly Benefit Statement is now available”) and a description of the document if not reasonably conveyed by the name;
- The internet address, or a hyperlink to the internet address, where the notice(s) can be accessed;
- Statements about the right to receive a paper copy of the notice(s) or to opt out of electronic disclosure entirely; and
- A telephone number that covered individuals may use to obtain additional information.

Effective Date

The final rule will be effective July 27, 2020; however, the DOL has announced a nonenforcement policy with respect to plan administrators who choose to begin relying on the new regulations sooner, which means they may be relied upon immediately. Plan administrators also can continue to rely on the existing electronic disclosure safe harbor, which was issued in 2002, but only for eighteen months after the effective date of the new safe harbor. After the expiration of the eighteen-month transition period, plan administrators will only be able to rely on the 2020 safe harbor when furnishing covered retirement plan documents electronically. Finally, although the final rule is limited to retirement plan disclosures, it reserves welfare plan disclosure rules for later rulemaking.



To discuss the DOL's new electronic disclosure safe harbor for retirement plan communications, please contact any member of our Employee Benefits and Executive Compensation Group below.

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