

Employee Benefits Update

October 2019

U.S. Department of Labor Proposes New Electronic Disclosure Rule

Executive Summary

On October 22, the Department of Labor (the “DOL”), proposed a new safe harbor that would allow retirement plan sponsors the option of distributing required pension plan notices and disclosures electronically to participants and beneficiaries. This proposed Electronic Disclosure Rule is in response to Executive Order 13847 that President Trump issued in August of 2018.



I. *Background*

The DOL’s existing electronic disclosure safe harbor, which is limited to participants with either regular access to electronic media at work or who take steps to affirmatively opt-in to electronic disclosures, has not been updated to reflect advancements in technology and expanded internet access for electronic disclosures since it was issued in 2002. In August of 2018, President Trump issued Executive Order 13847, instructing the DOL to review whether or not actions could be taken to reduce the cost and burden on employers when distributing required notices and disclosures, and to make them more understandable and useful to participants and beneficiaries. The DOL has now responded to that Executive Order by proposing a new voluntary safe harbor rule that would allow retirement plan sponsors to satisfy disclosure requirements by notifying participants and beneficiaries that notices and disclosures will be available on a website.

II. *Features of Proposed Voluntary Safe Harbor Rule*

The proposed safe harbor rule is voluntary and applies only to pension plans notices and disclosures; it does not apply to welfare plan notices and disclosures at this time. If adopted, the rule would be in addition to the existing safe harbor rule on electronic disclosures, so plan sponsors would have the option to use both safe harbors, or choose the one that best works for their plans.

Some of the key provisions of the proposed rule include:

- **Covered Individuals** – Retirement plan sponsors may use the new safe harbor to distribute notices and disclosures electronically to “covered individuals”. A “covered individual” will include a participant, beneficiary, or other individual entitled to receive covered documents who, as a condition

Important Dates

November 15:

- Confirm that 401(k) plan recordkeeper has provided 3rd quarter benefit statements to participants
- Distribute Summary of Benefits and Coverage for each group health plan option offered
- File Form 990 returns for tax-exempt trusts or VEBAAs (if Form 8868 was filed)

November 30:

- Distribute 401(k)/403(b) Plan Safe Harbor Notice and Automatic Enrollment Notices
- Distribute Notice of Qualified Default Investment Alternative (“QDIA”) for defined contribution plans

of employment, either at the beginning of plan participation or otherwise, provides the employer, plan sponsor, or administrator with an electronic address, such as an email address or number for an internet-connected mobile-computing-device, such as a smartphone or tablet. The proposed rule also provides that when a covered individual terminates employment, the retirement plan administrator must take reasonable measures to ensure the continued accuracy of the electronic address that is on file, or to obtain a new electronic address.

- **Covered Documents** – The proposed rule applies to “covered documents”, which will include any documents that the retirement plan administrator is required to furnish pursuant to Title I of ERISA (such as a Summary of Material Modification or blackout notice), except for any document that must be provided upon request.
- **Initial Notification** – Before using the new safe harbor to distribute notices or disclosures electronically, retirement plan administrators will need to provide paper notices to covered individuals stating that covered documents will be provided electronically. While a plan administrator will be permitted to have electronic delivery be the default method of furnishing documents, the initial notices will need to include information advising covered individuals that they have the right to request paper copies free of charge and the right to affirmatively opt-out of electronic distribution, as well as an explanation of how to exercise these rights.
- **Notice of Internet Availability** – Under the proposed rule, retirement plan administrators will need to furnish a notice of internet availability to covered individuals’ electronic addresses at the time a covered document is made available electronically. While the proposed rule contemplates that a separate notice would need to be provided for each covered document, it does permit a combined notice to be used in limited circumstances, for certain covered documents, as long as timing requirements are met. In addition, the notice of internet availability will have to meet specific content requirements.

III. *What to Expect*

The DOL is currently accepting comments and questions regarding the proposed rule through November 22, 2019. Employers may not rely on the proposed rule until it is finalized.



If you have any questions about the proposed rule or would like to discuss any other employee benefits issues, please feel free to contact any member of our Employee Benefits group below.



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