

DOL Finalizes New Electronic Disclosure Safe Harbor

On May 27, 2020, the United States Department of Labor (DOL) published a Final Rule that establishes an alternative “safe harbor” method by which retirement plan administrators can provide participant disclosures and notices electronically. The alternative safe harbor could significantly reduce the costs of furnishing required disclosures such as summary plan descriptions (SPDs), summaries of material modifications (SMMs), summary annual reports (SARs), notices regarding default investment funds and other disclosures required under the Employee Retirement Income Security Act (ERISA). The Final Rule sanctions a “notice and access” disclosure method, whereby the administrator notifies the participant by email or text message that an important document is available on a designated website. The Final Rule also permits administrators to send documents to participants directly via email.

The existing safe harbor for electronic disclosures under ERISA was established by the DOL in 2002. The 2002 safe harbor permits plan administrators to furnish required disclosures electronically to a limited subset of employees who use email as part of their jobs – so called “wired at work” employees – and to other participants only if they affirmatively consent to receive documents electronically. In other words, the 2002 safe harbor requires most participants to opt into the electronic notification system.

The new safe harbor expands on the 2002 rules in several ways. Most importantly, the new safe harbor:

- permits plan administrators to furnish documents by posting them on a website to which participants are directed by email or text message (“notice and access”), or directly by email;
- uses an “opt-out” rather than an “opt-in” method to determine the participants to whom disclosures can be provided electronically; and
- for the first time, authorizes the use of mobile apps to provide required disclosures.

Note that the new safe harbor only applies to retirement plan disclosures; welfare plan documents (such as COBRA notices and claims decisions) are not yet covered.

The new alternative safe harbor is available beginning on July 26, 2020, but the Final Rule states that the DOL will not take enforcement action against an employer or administrator that elects to use the safe harbor delivery method before that date.

Requirements of the New Safe Harbor

Covered Individuals. “Covered individuals,” to whom ERISA disclosures can be provided electronically under the Final Rule, include any participant, beneficiary or alternate payee who has provided the employer or administrator with an electronic address – an email address or an internet-connected mobile phone (e.g., a smartphone) number – or to whom the employer has assigned such an “e-address.” Any employee or other individual who has provided or been assigned such an e-address may receive electronic disclosures under the new safe harbor unless and until he or she opts out, as described below.

Covered Documents. “Covered documents,” that can be furnished electronically in reliance on the new safe harbor, are defined as any document that the plan administrator is required to provide to participants and beneficiaries under Title I of ERISA, except for documents that must only be furnished upon request. (Under ERISA Title I, certain documents must be provided to participants at stated times, others must be provided upon the occurrence of specified events, and still others need only be furnished upon request.)

Thus, the new safe harbor can be relied on to make electronic disclosures of:

- summary plan descriptions (SPDs) and summaries of material modifications (SMMs);
- summary annual reports (SARs);
- pension benefit statements;
- participant fee disclosures from individual account plans;
- default investment (QDIA) notices;
- “blackout notices” (alerting participants that they will not be able to direct investment of their accounts, apply for plan loans, etc. during an upcoming “blackout period”); and
- pension plan funding notices.

The new safe harbor cannot be used to provide copies of plan documents, trust agreements or Form 5500s, because those documents need only be provided to participants upon request.

Initial Paper Notice. In order to rely on the new safe harbor, the plan administrator must provide each covered individual with a paper notice alerting the individual that certain retirement plan documents and information will be provided electronically in the future. The paper notice must be provided to current participants at the time the administrator first begins to use the new safe harbor and to new employees (and their spouses and beneficiaries, if applicable) that become covered individuals thereafter. This initial paper notice must identify the e-address (email address or smartphone number) that will be used in connection with the electronic disclosures, include any instructions necessary to access the covered documents, and alert the recipient that the covered document is not required to be available on the website indefinitely. In addition, the initial notice must notify the individual of his or her rights to opt out of receiving documents electronically and to receive, free of charge, paper copies of covered documents.

Note: The initial notice must be provided in paper form even if the plan administrator is currently relying on the existing (2002) safe harbor to send electronic notices. If the administrator wants to use the new safe harbor, it *must* provide this initial notice in paper form.

“Notice of Internet Availability.” The “notice” component of the “notice and access” system is an electronic (email or text message) notice which the Final Rule calls a “Notice of Internet Availability” (NOIA). The NOIA informs the individual that an important retirement plan document is available on the administrator’s website. The plan administrator must provide a NOIA to each covered individual for each covered document the individual is entitled to receive. Generally, it must be delivered at the time a covered document is first made available on the website, but the Final Rule also permits administrators to provide a consolidated annual notice that covers multiple covered documents, subject to certain timing requirements. Specifically, a NOIA covering more than one document must be sent annually, not later than 14 months after a previously delivered annual notice.

A consolidated annual NOIA can only be used for certain types of covered documents – specifically, summary plan descriptions (SPDs) and other documents that ERISA requires to be provided annually, rather than upon the occurrence of a specific event or upon request, and that does not require action by the participant by a specific deadline. Thus, a consolidated annual NOIA could be used to notify covered individuals about summary annual reports (SARs), pension benefit statements, annual funding notices, annual participant fee disclosures and default investment (QDIA) notices – but not SMMs, quarterly fee disclosures or blackout notices. An individual NOIA must be sent for each of those disclosures.

The administrator must implement procedures to handle invalid e-addresses. For example, if a NOIA sent by email is returned as undeliverable (i.e., the administrator receives a bounce-back message), the administrator must take prompt remedial action, such as sending the notice to a backup e-address, if available, contacting the covered individual to get a new address, or mailing the document in paper form. In addition, when a participant terminates employment, the administrator must take reasonable steps to ensure that the e-address then in use will continue to be valid after termination.

Although the Final Rule does not include a model notice, the rule clearly states the required elements that a NOIA must include.

The NOIA must include the following:

- a prominent statement that reads, “Disclosure About Your Retirement Plan,” in the title or subject line;
- 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 (for example, “Your Quarterly Benefit Statement”) and, if the title alone does not convey the nature of the document, a brief description of it;
- the website address where the covered document is available, or a or hyperlink to the document (the internet address could take the covered individual to a login page first);
- an explanation of the individual’s right to request and obtain a paper version of the covered document, free of charge;
- an explanation of the individual’s right to globally opt out of electronic delivery and receive only paper versions of covered documents, free of charge;
- a cautionary statement that the covered document is not required to be kept on the website for more than one year or, if later, after it is superseded; and
- a telephone number to contact the plan administrator or other designated representative.

In the interests of clarity and simplicity, the NOIA generally cannot include information other than what is listed above, although the Final Rule does permit the NOIA to also include a statement as to whether action by the participant is required (or not required) in connection with the documents identified in the notice, and how to take any required action.

Website Standards. Plan administrators must take reasonable steps to ensure that the Notice of Internet Availability (NOIA) connects the recipient with a website leading them directly to the covered document or to a login page where the covered document is accessible with appropriate credentials. In addition, the plan administrator must take measures reasonably calculated to ensure that the covered document:

- is available on the website no later than the date on which it must be provided under the applicable provision of ERISA;
- remains available on the website for at least one year or, if later, until it is superseded by a subsequent version of the same document;
- is presented in a widely available format that can be read online, printed on paper, and saved in its electronic format; and
- can be searched electronically.

The administrator must also take reasonable measures to protect the confidentiality of the covered individuals' personal information.

Mobile Apps. Notably, the Final Rule defines “website” to include an internet website “or other internet or electronic-based information repository, such as a mobile application.” In the preamble to the Final Rule, the DOL stated that it wants the new safe harbor to be available for new technologies, including mobile apps developed for purposes of providing retirement plan documents.

Alternative Method for Email Disclosure. In addition to the “notice and access” method, the Final Rule also permits a retirement plan administrator to provide a covered document directly via email, either in the body of the email or as an attachment. Any such email must include a subject line which reads “Disclosure about Your Retirement Plan,” and the name and a brief description of the covered document. By using this component of the new safe harbor, administrators could avoid potential problems (forgotten passwords, etc.) with participant logins to the administrator's website.

Effect of the Final Rule on the 2002 Safe Harbor and Other Approved Delivery Methods

The new safe harbor does not supersede or eliminate the 2002 “opt in” safe harbor for providing ERISA disclosures electronically, and retirement plan administrators can continue to utilize that method if they wish. Note that the 2002 safe harbor applies to both retirement and welfare plan disclosures, while the new safe harbor is (for now) only available for retirement plans.

However, the Final Rule states that certain delivery methods that the DOL had previously approved for specific ERISA disclosures are no longer available, having been superseded by the new safe harbor. Specifically, retirement plan administrators will no longer be able to provide pension benefit statements or participant-level fee disclosures via a “continuous access website,” as permitted under DOL guidance issued in 2006 and 2011, respectively.¹

Note that the IRS issued regulations in 2006 which authorize the electronic delivery of certain notices required under the Internal Revenue Code. The IRS rules generally require that the participant either have the ability to effectively access the electronically provided document or provide affirmative consent. The Preamble to the Final Rule states that the DOL's new safe harbor is intended to “align” in large part with the IRS's rules, but of course the IRS has not yet stated that the DOL's new “notice and access” delivery method would satisfy Internal Revenue Code requirements.

What Retirement Plan Sponsors and Administrators Should Do

The new safe harbor allows the use of electronic delivery for a broader range of employees and through a broader range of methods than the existing (2002) safe harbor. Importantly, the new safe harbor may permit retirement plan administrators to send most or all required ERISA disclosures electronically without complying with the “opt in”

¹ Field Assistance Bulletin 2006-03 (Dec. 20, 2006); Tech. Rel. 2011-03R (Dec. 8, 2011).

requirements of the current safe harbor. In the near future, mobile smartphone apps might be available to further streamline the disclosure process, enabling administrators to save significant time and money when providing these disclosures.

On the other hand, the new safe harbor also includes significant administrative requirements, including the duties to send an initial paper notice, to follow up on “bounce-back” or undeliverable notices and to administer opt-out requests. Retirement plan sponsors and administrators should consider whether the advantages of the new safe harbor outweigh the new requirements.

For now, DOL guidance that applies during the COVID-19 emergency permits both retirement and welfare plans to deliver required notices via email, text message or continuous access websites. (See our previous information memo, [U.S. Department of Labor Issues Guidance on Employee Benefits and COVID-19 Outbreak](#).) This guidance – EBSA Disaster Relief Notice 2020-01 – also gives administrators additional time to deliver required notices, provided they make good faith efforts to deliver notices as soon as administratively practicable. In light of this broad relief, many administrators will likely choose not to rely on the new safe harbor until after the announced end of the COVID-19 emergency.

If you have any questions about this information memo, please contact [Robert Patterson](#), any [attorney](#) in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.



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