



Labor Department Proposes New Safe Harbor For Electronic Disclosure Under ERISA

Insights

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The Department of Labor (DOL) recently issued proposed regulations updating the safe harbor for the electronic delivery of employee benefit plan notifications for plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). A copy of the proposed rules can be found [here](#).

This is welcome news for employers who have long struggled to comply with the complex and antiquated rules of the current safe harbor. However, the new rules as proposed only provide relief relating to required retirement plan notifications.

Brief Background

As background, the Trump administration issued Executive Order (EO) 13847 on August 31, 2018. The EO, entitled “Strengthening Retirement Security in America,” directs the DOL to provide guidance making retirement plan disclosures under ERISA easier to read for participants and beneficiaries. It also calls for reducing the compliance burden on employers who must produce and distribute the ERISA-required notices and disclosures. In response to the EO, the DOL issued the proposed safe harbor updating the current rules for electronic disclosure.

The federal agency has requested comments on the proposed safe harbor and on ideas for improving the content requirements of ERISA disclosures, including with respect to both retirement and health and welfare plans. The DOL appears willing to include welfare plan communications under simplified electronic disclosure rules, but noted that it needs additional time to consider the impact. The proposed safe harbor for electronic disclosure will be effective 60 days after final regulations are published.

Key Provisions

Here is an overview of some of the key notice and access requirements plan administrators would be required to follow if you post retirement plan notices online:

- **Covered Individuals.** The safe harbor would apply to participants, beneficiaries, or other individuals entitled to covered documents (including appropriate designees) who have an employer-provided email address or who otherwise provide an employer, plan sponsor, or plan administrator with an electronic address, such as an email address or smartphone number.
- **Initial Notification of Default Electronic Delivery and Right to Opt Out.** Prior to providing a covered individual with electronic communications and notices described below, the plan

covered individual with electronic communications and notices described below, the plan administrator must provide a mandatory notification. It must announce that it is adopting a new procedure for providing future retirement plan information electronically, through which a notice-and-access model is adopted and recipients are aware that notices of available document will be provided to an electronic address (e.g., email). The notification must also make clear that the covered individual has the right to opt out totally or partially from the electronic delivery of all or only certain documents. This notice would need to be provided even if the employer is currently utilizing the existing safe harbor for electronic delivery with affirmative consent from employees. The paper notice must provide that certain documents will be provided electronically and describe the covered person's right to request and obtain a paper version of a covered document free of charge, the covered person's right to opt out of receiving covered documents electronically, and an explanation of how to exercise these rights.

- **Covered Documents.** The covered disclosures are currently limited to those required to be furnished by retirement plans pursuant to Title I of ERISA (e.g., summary plan descriptions, summary of material modifications, summary annual reports, plan documents, etc.). The safe harbor would not apply to welfare benefit plans, such as group health plans.
- **Notice of Internet Availability.** Prior to posting or sending a retirement plan communication, a notice that a covered document is available must be provided and include the following information:
 - A prominent statement that reads “**Disclosure About Your Retirement Plan.**”
 - A statement that: “**Important information about your retirement plan is available at the website address below. Please review this information.**”
 - A brief description of the covered document.
 - The internet website address where the covered document is available. The website should either lead directly to the covered document or to a login page (or a page immediately after the login page) that provides a prominent link to the covered document.
 - 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 this right.
 - A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise this right.
 - A telephone number to contact the plan administrator or other designated representative of the plan.
- **Timing and Delivery of Notice of Internet Availability.** The notice of internet availability must be provided to each covered individual at the time the covered document is made available on the employer's website, subject to certain exceptions. The notice would generally be furnished separately from other documents, but in certain cases the plan administrator could combine commonly provided documents into a single notice.

- **Form and Manner of Furnishing Notice of Internet Availability.** The notice would need to be written in a manner calculated to be understood by the average plan participant – including short sentences, no double negatives, everyday words rather than technical and legal terminology, an active voice, and language that results in a Flesch Reading Ease test score of at least 60.
- **Standards for Internet Website.** A plan administrator would need to take steps that are reasonably calculated to ensure that under the website used for posting the covered document is available in a timely fashion, that the covered document remains on the website until it is superseded by a subsequent version of the same document, and that the presentation of the document can be understood by the average participant. Further, the document would need to be in a widely available format that can be searched electronically and that allows the document to be permanently retained in an electronic format. The website must also be reasonably designed to protect the confidentiality of the covered person’s personal information.
- **Right to Request Paper Copies and Opt-Out Requests.** Upon request, the plan administrator would need to furnish the covered person with a paper copy of a requested document and comply with a covered person’s request to opt out of electronic delivery. Further, the plan administrator would need to establish and maintain reasonable procedures governing such requests.
- **System Requirements.** The system that is used to provide the notice of internet availability would need to alert the plan administrator of a covered person’s invalid or inoperable electronic address (e.g., email is returned as undeliverable). The plan administrator may either take reasonable steps to cure the problem or treat the individual as if they had opted out of electronic communications. For terminated employees, the plan administrator would need to take reasonable measures to ensure the electronic address used by the covered person remains viable or obtain a new electronic address.

Conclusion

The DOL requested public comments on the proposed safe harbor, which were due in late November. In addition, the DOL requested comments and input on ideas for additional measures it could take in the future to improve the effectiveness of ERISA disclosures, including with respect to both retirement and health and welfare plans. Accordingly, we can expect to see more changes coming with respect to the ERISA disclosure requirements relating to both delivery and content. We will monitor developments and provide updates as warranted.

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