



Labor Department Creates New Options For Employers To Electronically Distribute Retirement Plan Notices

Insights

9.04.20

The Department of Labor recently issued a new rule providing an additional safe harbor for electronic disclosure of pension plan notices effective July 27, 2020. Prior to the new rule, the DOL's only safe harbor for electronic disclosure dated back to 2002. The old safe harbor imposes different requirements on plan administrators depending on whether computer access is an integral part of the recipient's job duties. This often requires employers to maintain different procedures for electronically disclosing documents to different groups of participants (active employees vs retirees, office workers vs field workers, etc.).

While the old safe harbor is still available, the new rule provides additional options for employers interested in electronically disclosing the various documents and notices required under the Employee Retirement Income Security Act of 1974 (ERISA). For now, the new safe harbor only applies to retirement plans and not group health plans, but the DOL has alluded to similar options being available to group health plans in the future. In light of the new, simplified safe harbor requirements, employers utilizing paper disclosures should reevaluate whether to utilize electronic disclosure in their plan's administration.

The New Rule

The new rule creates a safe harbor for compliance with Title I of ERISA's requirement to distribute certain notices and disclosures to participants, beneficiaries, and other intended recipients. The rule applies to "covered individuals" and "covered documents." Covered individuals include participants, beneficiaries, or any other individual entitled to covered documents, but only if they have a legitimate pathway for electronic communication with the plan administrator (e.g., individuals with an employer-assigned email address and individuals who voluntarily provide a personal email address or smart phone number). Covered documents are those required to be furnished under Title I of ERISA, such as Summary Plan Descriptions (SPDs). However, they do not include documents that must be furnished only upon request.

The new safe harbor applies only to disclosures required by ERISA and not those required under the Internal Revenue Code, such as auto enrollment notices. The DOL indicated this new rule is meant to work with IRS's electronic delivery rules, but it did not obtain formal IRS confirmation that following the rule will satisfy the IRS's electronic delivery standard. Also, in conjunction with the new safe

harbor, the DOL has withdrawn prior sub-regulatory guidance that allowed certain ERISA disclosures to be furnished under the IRS electronic disclosure standards.

Two New Options For Electronic Distribution

The rule provides two new safe harbor distribution methods: a notice-and-access process and email delivery. To take advantage of the new safe harbor distribution methods, plan administrators must first notify recipients of their right to opt out of electronic disclosure. The notice must be in hard copy and include basic information such as:

- the email address that will be used for the individual;
- any instructions necessary to access the covered documents;
- disclosure of the recipient's right to request and obtain a paper copies free of charge (and an explanation of how to exercise that right);
- disclosure of the recipient's right to opt out electronic delivery for all covered documents and receive only paper versions free of charge (and an explanation of how to exercise that right); and
- if using the notice-and-access process, 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 new version).

After providing the initial notice, employers have two alternatives for electronic disclosure: (1) posting the disclosure on a website and notifying the individual of the posting ("notice-and-access" disclosure) or (2) direct email disclosure.

Notice-And-Access Disclosure

Notice-and-access disclosure allows plan administrators to post documents to a website and then notify the participants how to obtain the documents by electronic means. Plan administrators must have backup delivery procedures in place if the website fails and all personal information obtained must be kept confidential. When posting documents to the website, plan administrators must ensure the covered document:

- is available on the website no later than the date on which it must be furnished under ERISA;
- remains available on the website for at least one year (even if it is superseded by a new version);
- is presented in a manner that is easily understood by the average plan participant;
- is presented in a widely available format (or formats) that is suitable both to read online and can be printed clearly on paper;
- can be searched electronically; and
- can be permanently retained in an electronic format.

For each disclosure, plan administrators must notify recipients that the document has been posted. This notice is called the Notice of Internet Availability (NOIA). Plan administrators can deliver the

THIS NOTICE IS CALLED THE NOTICE OF INTERNET AVAILABILITY (NOIA). Plan administrators can deliver the NOIA electronically, but the method for furnishing the NOIA must alert the administrator of invalid addresses and the administrator must take prompt corrective action for any failed deliveries.

The NOIA must include the same disclosures as the initial notice regarding recipients' rights to obtain paper copies and opt out of electronic disclosure. The NOIA must also inform the participant which document has been posted, explain how to access it, and warn that the document is not required to be posted for more than one year (or, if later, after it is superseded by a new version). Finally, the NOIA must include a telephone number to contact the plan administrator (or other designated representative) and the following statements: (1) "Disclosure About Your Retirement Plan," which must be stated prominently, such as in the NOIA's title or subject; and (2) "Important information about your retirement plan is now available. Please review this information."

Administrators may also use combined NOIAs that cover multiple documents in a single annual disclosure. However, only certain documents may be included in a combined NOIA, including SPDs and other covered documents that must be furnished annually. For all other documents, a separate notice must be provided.

Email Disclosure

Alternatively, plan administrators may choose to email covered documents directly to recipients. Disclosures may be provided either in the body of the email or as attachments. Such emails must follow the same timing and plain language requirements as NOIAs. Also, like the NOIA, the email must include the name of the document and certain statements about beneficiaries' rights and contact information. The subject line must read "Disclosure About Your Retirement Plan."

Administrators using email to furnish disclosures must take reasonable measures to protect the confidentiality of personal information. Also, where the plan administrator uses an employer-assigned email address for electronic delivery and employees lose access to that email following termination, the plan must obtain a new email address to allow the participant to continue receiving covered documents electronically.

What Should Employers Do?

Employers interested in implementing one of the new safe harbor disclosure methods should assess necessary changes to internal procedures and discuss implementation with any third-party service provider that assists with distribution of notices and disclosures on behalf of the employer's retirement plan. Employers may also need to review their service contracts to ensure that any new services (or changes to existing services) being provided because of the new processes are captured. Also, any plan administrators that currently use the IRS electronic disclosure standards pursuant to the DOL's prior sub-regulatory guidance should update their disclosure process to meet DOL requirements.

Additionally, although the new rule does not require recipients to affirmatively acknowledge that they have reviewed electronically disclosed documents, plan administrators may consider including such safeguards. The Supreme Court recently held that the "actual knowledge" required to trigger

such safeguards. The Supreme Court recently held that the “actual knowledge” required to trigger ERISA’s three-year statute of limitations period does not exist where a plan participant received documents but did not read them. Thus, requiring recipients to acknowledge that they have reviewed certain disclosures may assist in limiting the plan’s legal exposure.

Finally, the new safe harbor only provides additional methods of distribution – it does not alter ERISA’s timing and content requirements otherwise applicable to covered documents. Thus, plan administrators should consult with their ERISA counsel to confirm the notice and disclosure requirements applicable to their plan and ensure that legally compliant documents are being distributed in a timely manner. Don’t forget, the DOL and IRS have extended the timeframes for employers to furnish notices and disclosures under Title I of ERISA during the COVID-19 pandemic.

For more information, [contact the author here](#).

Service Focus

Employee Benefits and Tax