

Employee Relations

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Employee Benefits

The Department of Labor's Final Rule Creates a New Electronic Disclosure Safe Harbor for Employee Retirement Plans

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The U.S. Department of Labor (“DOL”) has issued final regulations creating a new safe harbor for electronic delivery of required disclosure documents pertaining to employee retirement plans (the “Final Rule”).¹ In 2002, the DOL established its first electronic safe harbor (the “2002 Safe Harbor”) for disclosing certain plan materials as required under Employee Retirement Income Security Act of 1974, as amended (“ERISA”).² However, as internet and email use have increasingly permeated society, stakeholders have criticized the 2002 Safe Harbor for being too limited by relying on outdated assumptions and practices.

The Final Rule represents nearly two decades of fact-finding and fine-tuning, with input spanning multiple governmental departments as well as public surveys. The Final Rule allows plan administrators to deliver certain plan disclosure materials to qualifying plan participants or

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beneficiaries either by posting the documents to a website or attaching the materials to an email.

The delivery methods under the Final Rule can help plan administrators reduce costs when furnishing plan materials and can assist with tracking that such documents were furnished in a timely manner. Plan sponsors should work with their ERISA counsel to review, document and, if appropriate, implement the delivery options under the Final Rule.

Final Rule Overview: Electronic Address

The Final Rule does not supersede the 2002 Safe Harbor. Rather, it offers plan sponsors an additional safe harbor method for delivering electronic disclosures to retirement plan participants.³ The two electronic safe harbors differ in important ways. The 2002 Safe Harbor provides that all communications must be provided in paper, unless (i) the participant affirmatively agrees to receive electronic disclosures or (ii) the individual is an active employee who can effectively access documents from work and such computer access is an integral part of performing his or her job duties. On the other hand, the Final Rule provides that all participants can receive electronic disclosure. A frictionless opt-out process is a core component of the Final Rule; plan administrators are not allowed to charge an opt-out fee or construct any hindrances toward opting out.

Additionally, the Final Rule is only available for furnishing employee retirement plan documents; employee welfare benefit plans do not fall within the scope of the Final Rule and may only be furnished electronically in accordance with the 2002 Safe Harbor and related guidance.⁴

The Final Rule allows plan administrators to deliver covered documents to designated plan participants or beneficiaries either by posting the documents to a website or sending the documents to an electronic address. Covered documents include any document pertaining to an employee retirement plan that a plan administrator is required to affirmatively furnish to plan participants and beneficiaries under ERISA.⁵ All retirement plan participants or beneficiaries who are entitled to covered documents under ERISA and who provide the employer or plan administrator with an electronic address are referred to as “covered individuals” under the Final Rule.⁶ An “electronic address” includes an email address or smartphone number.⁷

However, while an electronic disclosure may be delivered to a smartphone, the disclosure must be in written form and may not be left as a voicemail.⁸

The plan administrator must ensure it has a valid electronic address on file for each plan participant in order to utilize the Final Rule’s safe harbor. To satisfy the Final Rule’s electronic address requirement, the employer, plan administrator, plan sponsor, or a valid designee of the foregoing must receive an electronic address from the covered individual.⁹

Typically, the employee would provide a personal electronic address; however, the employer (and only the employer) may furnish the covered individual with a work-related electronic address to satisfy this requirement,¹⁰ provided that this employer-assigned electronic address was not created solely for the purpose of delivering ERISA disclosures (i.e., the employer-assigned electronic address must be a multi-purpose electronic address that the employee utilizes for work-related business generally).¹¹

Furthermore, the plan administrator or sponsor (or any designee) may not assign the employee an electronic address or hire a third party to locate and furnish an employee's personal email address.¹²

While the Final Rule allows employers to assign electronic addresses to employees, employers may not assign electronic addresses to beneficiaries who may be entitled to covered documents.¹³ To satisfy the Final Rule with regard to such beneficiaries, the employer, plan administrator or sponsor, or an appropriate designee will need to solicit an electronic address from the beneficiaries.¹⁴

If a plan administrator becomes aware of a delivery error (e.g., an invalid email address bounce-back error message), then the plan administrator must furnish paper copies of covered documents until a valid electronic address is supplied.¹⁵ For terminated employees who were furnished covered documents through an employer-assigned electronic address, the plan administrator must take measures reasonably calculated to ensure the continued accuracy and availability of such electronic address or to obtain a new electronic address so that the terminated employee may continue to receive covered documents.¹⁶

Initial Notification of Default Electronic Delivery

The requirements necessary to satisfy the Final Rule vary according to whether the plan administrator utilizes the website posting or electronic address direct delivery method. However, prior to utilizing either of the electronic disclosure delivery methods available under the Final Rule, the plan administrator must send an initial paper notification to each covered individual.

This initial notification must be written in a manner calculated to be understood by the average plan participant and must:

- Inform the covered individual that some or all covered documents will be made available electronically;
- List the electronic address that the plan administrator will use to send Notices of Internet Availability ("NOIA," covered in detail below) and covered documents;

- Contain instructions as to how a covered individual may access covered documents (e.g., the need to create a login name and password for an online portal or to download a mobile app);
- Warn the covered individual that covered documents are not required to be available on the website (if that delivery method is utilized) for more than a year, unless a particular document is to be superseded, in which case that covered document is only required to be posted until the subsequent version is made available;
- Inform the covered individual that they may request, free of charge, a paper copy of any covered document; and
- Inform the covered individual that they may opt out from the electronic disclosure safe harbor.¹⁷

This initial paper notification may contain additional information beyond these six requirements and may be packaged with other documents.¹⁸

Website Delivery

One of the available delivery methods allowed under the Final Rule is posting covered documents on a website. In order to furnish covered documents through the Final Rule's website delivery method, a NOIA must be sent to each covered individual each time a covered document is posted online.¹⁹ Each NOIA must be written in clear and concise language in a manner calculated to be understood by the average plan participant²⁰ and must include only the following:

- A title or heading that reads, "Disclosure About Your Retirement Plan."²¹
- A statement that reads, "Important information about your retirement plan is now available. Please review this information."²²
- The name of the document that is being posted (e.g., "Quarterly Benefit Statement"), but if the nature of the document is not "reasonably conveyed" by the title of the document (e.g., a blackout notice²³), then the NOIA must also include a brief description of the document's contents.²⁴
- The website address or hyperlink where the covered document is posted.²⁵ The Final Rule requires that the address or hyperlink be "sufficiently specific." A sufficiently specific website

address or hyperlink is one that leads directly to the covered document. A website address or hyperlink also will satisfy the “sufficiently specific” standard if it leads to a login page that immediately precedes a page where a link to the covered document is prominently displayed. A covered individual must not be required to navigate through “an unreasonable number of web pages” after clicking on the initial hyperlink in order to find a covered document.²⁶

- A statement notifying the covered individual that they may request, free of charge, a paper copy of the covered document along with instructions on how to make such a request.²⁷
- A statement notifying the covered individual that they may opt out, free of charge, of the electronic delivery method for all future covered documents and receive paper copies instead. Instructions on how to exercise this right must be provided as well.²⁸
- A warning 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 subsequent version of the covered document.”²⁹
- A phone number by which a covered individual may contact the plan administrator or some other designated representative of the plan.³⁰

The contents of an NOIA may only include the above information and no additional information. However, the plan administrator may include pictures, logos, and other design elements that enhance readability and that do not otherwise mislead or distract from the NOIA’s purpose.³¹

In accordance with the Final Rule’s purpose of being adaptable to future technological advancements, delivery of an NOIA is not restricted to email. Text messages are an acceptable delivery format for NOIAs.³²

If a covered document is being furnished on a website, the associated NOIA cannot be included along with any other disclosures or documents, except where consolidation of multiple, specifically enumerated NOIAs is permitted.³³ The Final Rule lists four categories of covered documents for which the corresponding NOIAs may be consolidated into a single annual NOIA:³⁴

- Summary plan descriptions (“SPDs”);
- Documents that must be furnished annually, not upon the occurrence of a particular event, and that do not require

further action from a covered individual before a specified deadline (e.g., SARs, annual funding notices, Qualified Default Investment Alternative (“QDIA”) notices³⁵);

- Any covered document authorized in writing by the Secretary of Labor; and
- Covered documents required by the Internal Revenue Code that are authorized in writing by the Secretary of the Treasury.³⁶

If the plan administrator makes use of the consolidated annual NOIA option, subsequent annual NOIAs must be sent to covered individuals within 14 months of the previous annual NOIA;³⁷ provided that the covered documents are furnished by the date prescribed under applicable law.³⁸ If a covered document is of the type that is typically superseded by subsequent versions (e.g., an SPD), then such covered document must remain posted on the website for the later of a 12 month period after being posted, or a subsequent version is posted.³⁹ However, if the covered document is of a type that is typically not superseded by subsequent versions (e.g., a blackout notice), then the covered document must remain posted on the website for at least 12 months.⁴⁰

Regardless of the duration of plan document being posted on the website, a plan administrator still has its document maintenance and retention obligations as set forth in Sections 107 and 209 of ERISA with respect to the posted documents. Meaning, a covered individual may still request a covered document that is no longer available on the website, and the plan administrator may still be obligated to comply with the request.⁴¹

When posting covered documents on a website, a plan administrator must take measures reasonably calculated to protect the security and privacy of covered individuals’ information that may be included in the covered documents.⁴²

Covered documents must be posted to a website; however, in accordance with the Final Rule’s goal of promoting innovation and the adoption of emerging technologies, “website” is defined to mean “an internet website, or other internet or electronic-based information repository, such as a mobile application, to which covered individuals have been provided reasonable access.”⁴³

Direct Delivery of Covered Documents via Email

As an alternative to the website posting method, plan administrators may directly send covered documents to an electronic address (i.e., not any email address) either as an attachment or in the body of the email.⁴⁴ The initial paper notification sent out prior to sending covered documents by email contains the same information described earlier, except that the

notification does not need to include the warning regarding finite availability.⁴⁵ Multiple covered documents may be bundled in a single email, provided such documents may be furnished together in paper form.⁴⁶

Covered documents must still be furnished no later than the date required by the ERISA.⁴⁷ While an NOIA is not required if the covered document is sent via email, the email must still include the following information:

- A subject line that reads: “Disclosure About Your Retirement Plan”;
- The identity of the document and brief description of the document if the title does not adequately convey its purpose;
- A statement regarding the covered individual’s right to a paper copy;
- A statement regarding the covered individual’s right to opt out of electronic delivery; and
- A telephone number that may be used to contact the plan administrator or a designated representative.⁴⁸

The directly emailed copies must adhere to the same readability standard as covered documents posted to websites, and the emailed copies must similarly be available in a commonly used format.⁴⁹ Additionally, when emailing the covered documents to a covered individual, a plan administrator must take measures reasonably calculated to protect the personal information of the covered individual.⁵⁰

Conclusion

If followed properly, the Final Rule can afford plan sponsors potentially significant savings while making mandatory ERISA disclosures more accessible to plan participants and reducing paper waste significantly. Plan administrators should work closely with their ERISA counsel to ensure that they understand the requirements of the Final Rule’s safe harbor and when implementing one of the delivery methods available under the Final Rule.

Notes

1. 85 Fed. Reg. 31,884, 31,889 (May 27, 2020).
2. 29 C.F.R. § 2520.104b-1(c).

3. 29 C.F.R. § 2520.104b-1(f). These safe harbors are not the exclusive methods of furnish plan materials to participants.
4. 29 C.F.R. § 2520.104b-31(c)(1).
5. *Id.*
6. 29 C.F.R. § 2520.104b-31(b).
7. *Id.*
8. 85 Fed. Reg. at 31888.
9. 29 C.F.R. § 2520.104b-31(b).
10. 85 Fed. Reg. at 31889.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. 29 C.F.R. § 2520.104b-31(f)(4).
16. 29 C.F.R. § 2520.104b-31(h).
17. 29 C.F.R. § 2520.104b-31(g).
18. 85 Fed. Reg. at 31,901.
19. 29 C.F.R. § 2520.104b-31(d)(1).
20. 29 C.F.R. § 2520.104b-31(d)(4)(iv).
21. 29 C.F.R. § 2520.104b-31(d)(3)(A).
22. 29 C.F.R. § 2520.104b-31(d)(3)(B).
23. 85 Fed. Reg. at 31,892.
24. 29 C.F.R. § 2520.104b-31(d)(3)(C).
25. 29 C.F.R. § 2520.104b-31(d)(3)(D).
26. 85 Fed. Reg. at 31,897.
27. 29 C.F.R. § 2520.104b-31(d)(3)(E).
28. 29 C.F.R. § 2520.104b-31(d)(3)(F).
29. 29 C.F.R. § 2520.104b-31(d)(3)(G).
30. 29 C.F.R. § 2520.104b-31(d)(3)(H).
31. 29 C.F.R. § 2520.104b-31(d)(4)(iii).
32. 85 Fed. Reg. at 31,894.
33. 29 C.F.R. § 2520.104b-31(d)(4)(iii).
34. 29 C.F.R. § 2520.104b-31(i).
35. 85 Fed. Reg. at 31,904.
36. 29 C.F.R. § 2520.104b-31(i).

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37. 29 C.F.R. § 2520.104b-31(d)(2).
38. 29 C.F.R. § 2520.104b-31(e)(2)(i).
39. 29 C.F.R. § 2520.104b-31(e)(2)(ii).
40. *Id.*
41. 85 Fed. Reg. at 31,897.
42. 29 C.F.R. § 2520.104b-31(e)(3).
43. 29 C.F.R. § 2520.104b-31(e)(4).
44. 29 C.F.R. § 2520.104b-31(k).
45. 29 C.F.R. § 2520.104b-31(k)(4)(ii).
46. 85 Fed. Reg. at 31,906.
47. 29 C.F.R. § 2520.104b-31(k)(1).
48. 29 C.F.R. § 2520.104b-31(k)(2).
49. 29 C.F.R. § 2520.104b-31(k)(2)(iv) and (3).
50. 29 C.F.R. § 2520.104b-31(k)(4)(i).

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