

EMPLOYEE BENEFITS

THE DOL PROPOSES NEW “NOTICE AND ACCESS” ELECTRONIC DISCLOSURE RULES FOR RETIREMENT PLANS, BUT NUMEROUS QUESTIONS AND ISSUES REMAIN

by Eric W. Gregory

The Department of Labor (DOL) [has proposed](#) a new safe harbor to allow employers to furnish information to participants and beneficiaries subject to ERISA. While it is a welcome update to the DOL's woefully outdated disclosure rules [previously covered](#) on our [All Things HR Blog](#), there are numerous technical details and exceptions, which each employer should understand before expanding its electronic disclosure distribution program.

In short, the new DOL safe harbor adopts a “notice and access” model, which means that participants and beneficiaries are notified that information is made available on a plan-related website, are provided with instructions on how to access disclosures, and are provided with instructions on how to request paper copies of disclosures.

The Current Safe Harbor Is Still in Place, New Rules Will Only Apply to Retirement Plans

First, it is important for employers to know that the current 2002 safe harbor for electronic disclosures is still in place and has not been supplanted by the new proposed safe harbor. Additionally, the proposed safe harbor only applies to retirement plans and not employee welfare benefit plans (such as plans providing group health or disability benefits).

The Requirements of the Current Safe Harbor

The current safe harbor continues to be available for participants who are commonly referred to as “wired at work.” These are participants who have the ability to effectively access documents furnished in electronic form at any location where they are expected to perform their duties as an employee. Employees who are “wired at work” may be provided disclosures electronically without obtaining additional consent, provided that the employer notifies each recipient, at the time the information is distributed, of the availability and significance of the document, of their right to request a paper version of the document, and follows a [number of additional technical requirements](#).

Electronic disclosure under the 2002 safe harbor also is available for all other (i.e., not “wired at work”) participants, beneficiaries, or other individuals, but requires affirmative consent on behalf of those individuals. The affirmative consent requirements are so cumbersome for most employers, that employers typically distribute documents via paper to individuals who are not “wired at work.”

Covered Persons, Covered Documents and One-Time Paper Notice Under the Proposed Safe Harbor

Covered Persons

The proposed safe harbor has a much broader application than the current safe harbor. Instead of requiring affirmative consent from participants who are not “wired at work,” the proposed safe harbor does not require affirmative consent from employees if their employer assigns them an email address. Additionally, it does not require affirmative consent from any participant, beneficiary, or other individual who provides the employer with an email address or a smartphone number.

Covered Documents

The new safe harbor may be used by a retirement plan to furnish any document that the administrator is required to furnish to participants and beneficiaries under Title I of ERISA, except for documents that must be furnished upon request (referred to as “covered documents”). Covered documents include (but are not limited to):

- The summary plan description;
- A summary of material modification;
- The summary annual report;
- Pension benefit statements; and
- Blackout notices.

These documents may be furnished electronically when they are required to be disclosed due to the passage of time (e.g., when the summary annual report must be disclosed each year) or because of a specific triggering event (e.g., a summary of material modification due because of a plan amendment). Documents furnished because of a participant request (e.g., requested copies of the summary plan description) may not be disclosed electronically pursuant to the new safe harbor. The DOL has requested public comments as to whether this scope of documents is appropriate.

One-Time Notice

Prior to providing any covered documents to any covered persons, a one-time paper notification and right to opt-out must be provided to each covered person. This notification informs the covered person that some or all covered documents will be provided electronically, a statement of the right to request a paper version of the document free of charge, the right to opt-out of receiving documents electronically, and the explanation of how to exercise those rights.

It may be a good practice to provide this notice to newly hired employees with their new employee paperwork, and incorporate this notice into the employee intake process.

The Notice of Internet Availability, Contents, Delivery Tracking, and the 14-Month Rule

Notice of Internet Availability

In addition to the one-time notice, a notice of internet availability generally must be furnished when a new covered document is made available. The covered document must be available to the covered individual on the date when the covered document must be furnished according to the applicable section of ERISA or regulation. For example, a summary annual report must be made available no later than September 30th for calendar-year plans.

Contents of Notice of Internet Availability

The notice of internet availability must include a prominent statement such as "Disclosure About Your Retirement Plan" and a statement that "Important Information about your retirement plan is available at the website address below. Please review this information," as well as a brief description of the covered document or documents. It must also include the statement of the right to opt out of receiving electronic documents, a statement of the right to receive a paper version, and a telephone number to contact the administrator or other designated plan representative.

The notice may only contain the content described in the proposed safe harbor, save for other design elements or company logos. Specifically, it cannot be combined with other information that is required to be disclosed pursuant to other different requirements of ERISA (e.g., it cannot be included as a part of the summary plan description).

The notice must use short sentences without double negatives, "everyday words," and language that "results in a Flesch Reading Ease test score of at least 60" (a reading grade level of sixth to seventh grade).

Delivery Tracking

A plan administrator must ensure that the system for furnishing the notice of internet availability is designed to alert the administrator of an invalid or inoperable electronic address. In the event an administrator is alerted to an invalid address, the administrator must treat the individual as opting out of electronic delivery if the problem is not promptly cured.

The 14-Month Rule for Combined Disclosure

Although administrators are generally required to provide a separate notice of internet availability for each covered document, administrators may combine notices of internet availability for certain specified documents that are generally triggered by the passage of time:

- A summary plan description;
- A summary of material modification;
- The summary annual report;
- The annual funding notice;
- Investment-related disclosures under 29 CFR 2550.404a-5(d);
- The qualified default investment alternative ("QDIA") notice; and
- The pension benefit statement.

For these documents only, the plan administrator may provide a combined notice of internet availability only once each plan year. This notice must be provided at least once in every 14-month period after the prior notice was provided. The 14-month period is designed to provide flexibility to extend the date of furnishing which may vary slightly from year-to-year.

For example, if a plan administrator provided an annual notice including the above-described documents, but a blackout notice became required because of a blackout period, a separate notice of internet availability would be required for that document only.

Specific Technical Requirements: Searchability, Mobility, Direct Access, and Continued Access

The new proposed safe harbor has a number of requirements that will be familiar to plan administrators with respect to most DOL disclosures, including that the covered documents be presented in a manner calculated to be understood by the average participant. However, there are a number of more specific technical requirements that will likely require some advanced planning on behalf of plan administrators.

The Documents Must be Posted on a Website

To be clear, the proposed safe harbor does not cover email attachments, but only covers documents that are posted to a website or company intranet site. Therefore, plan administrators cannot merely attach PDFs to an email and comply with the new proposed safe harbor. The DOL assumes that some responsibilities with these websites may be assumed by plan service providers, investment providers, or other third parties, but that the plan administrator is responsible for ensuring the establishment and maintaining of the website.

The Documents Must be Searchable

The documents posted must also be searchable by numbers, letters, or words. The DOL explain that electronic searching capability will "contribute significantly to making disclosures more effective for participants, enabling them to use keywords to quickly and easily find specific information." Many employers, however, are used to simply scanning documents as PDFs that may not be searchable, so this will require some extra attention.

The Documents Must be Directly Accessible, Except for a Login Page

When links to covered documents are provided to covered persons, those links must either go directly to the covered document, a login page, or a landing page that has a “prominent link to the covered document.” This will likely require some technical work from third party administrators and other service providers who maintain plan-related websites, as many retirement plan-related websites do not provide direct links to disclosure documents.

Document Availability and Replacement

Covered documents must remain available until they are superseded by a subsequent document. This rule makes sense for documents that are updated periodically or on a regular basis like summary plan descriptions or annual reports, but the DOL requested comments on whether a final rule should address the category of covered documents that technically do not become superseded by reason of a subsequent version (e.g., blackout notices). It is possible that the final rule will provide that documents that no longer have relevance can be removed after a certain period.

Potential Additional Mobile-Friendly Requirements

The DOL notes in the proposed safe harbor that some individuals access the internet only through handheld devices such as smartphones. It requests comments on what additional actions need to be taken to ensure that electronically-disclosed documents will provide an effective and useful presentation available to handheld device-only individuals. It also requests comments on whether such requirements should be mandatory for administrators that wish to comply with the proposal.

Severance from Employment

The proposed safe harbor also provides that when an employee severs from employment, the plan administrator will be obligated to take measures reasonably calculated to ensure the continued accuracy of the former employee’s electronic address. Practically speaking, employers will likely request that terminated employees provide a new email address as a part of their termination process.

No Reliance Until Final

The proposed safe harbor does not provide employers with the ability to rely on it currently. The proposed effective date is not until 60 days after the publication of the final rule, and the proposed applicability date is January 1 following publication of the final rule. The proposed safe harbor solicits numerous comments, which are due no later than November 22, 2019.

Conclusion

Employers have largely embraced electronic communications with their employees for most purposes. The new proposed safe harbor—

when effective—will allow employers to not only reduce paper usage and expenses, but will also allow employers to modernize their practices with respect to retirement plan disclosures. However, despite these welcome changes, employers should consult carefully with their third party administrators and benefits counsel in developing a workable disclosure regime consistent with the technical requirements once the proposed safe harbors become final.

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