

Employee Benefit Plan Review

DOL Publishes Long-Awaited Final Rule for Providing Retirement Plan Disclosures Electronically

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The Department of Labor (the “DOL”) has published a highly anticipated final rule in the Federal Register (the “Final Rule”) that provides new guidance with respect to furnishing certain required retirement plan disclosures electronically in order to comply with the information disclosure requirements under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).¹

The Final Rule does this by establishing a new, voluntary “safe harbor” (the “Safe Harbor”) that allows retirement plan administrators to comply with many of ERISA’s disclosure requirements while making electronic delivery their default method of disclosing information. The Final Rule has been highly anticipated by retirement plan administrators that have sought to comply with the electronic delivery rules that the DOL published in 2002, but who found these rules to be antiquated or cumbersome.

This Safe Harbor provides additional flexibility and potential cost savings to employers and plan administrators. Many employers and plan administrators may find the Safe Harbor beneficial as they face a number of challenges due to the COVID-19 emergency, including financial, logistical and other impediments to

complying with ERISA’s disclosure requirements (although there is relief available with respect to these requirements during the duration of the COVID-19 emergency, as discussed below).

The DOL anticipates that the Safe Harbor will also enhance the effectiveness of ERISA disclosures. However, in order to utilize the Safe Harbor, employers need to comply with the complex conditions set forth by the DOL.

Employers and plan administrators should consult legal counsel when considering how to satisfy the disclosure requirements under ERISA and whether to utilize the Safe Harbor.

WHAT ARE THE GENERAL ERISA REQUIREMENTS FOR FURNISHING RETIREMENT PLAN DISCLOSURES?

ERISA provides general requirements for the disclosure and delivery of all information required to be provided to participants, beneficiaries and other individuals entitled to receive such information pursuant to Title I of ERISA. Information required to be provided under Title I of ERISA includes summary plan descriptions, participant fee disclosures, pension benefit statements and blackout notices.

ERISA requires that with respect to any reports, statements, notices and other

documents required to be furnished under Title I of ERISA, the plan administrator must use measures “reasonably calculated to ensure actual receipt of the material”² by the parties to whom the materials need to be provided, that are “likely to result in full distribution.”³ Accordingly, under ERISA, in-hand delivery to an employee is acceptable, but merely placing copies of materials in a location frequented by plan participants would be insufficient. Mailing materials is generally acceptable as well.

WHAT IS THE SAFE HARBOR FOR ELECTRONIC DELIVERY OF RETIREMENT PLAN DISCLOSURES THAT WAS ISSUED IN 2002?

In 2002, the DOL provided guidance that established a safe harbor (the “2002 Safe Harbor”) whereby electronic delivery of required materials would be deemed sufficient under ERISA, provided that certain conditions were met with respect to the content of the materials, the plan administrator had taken reasonable steps to ensure receipt, and recipients had the right to request paper versions of the materials.⁴

Notably, the relief provided under the 2002 Safe Harbor allowed for electronic delivery of required materials without obtaining the recipient’s consent, but generally only with respect to individuals who have access to documents in their electronic form at their workplace and for whom access to their employer’s electronic information system is an integral part of their duties.

For other individuals (including employees who did not meet those requirements, former employees, and beneficiaries of plan participants), a plan administrator would be required to have these individuals provide a highly technical affirmative consent in order for them to be able to receive the required materials in electronic form. Many employers and plan administrators found

that complying with the 2002 Safe Harbor resulted in a significant administrative burden.

WHAT IS THE IMPACT OF THE FINAL RULE ON THE 2002 SAFE HARBOR AND OTHER PRIOR DOL GUIDANCE?

The DOL has indicated that even after the publication of the Final Rule, plan administrators may continue to rely on the 2002 Safe Harbor with respect to satisfying their requirements to furnish documents under Title I of ERISA, or alternatively, furnish paper documents by hand delivery or mail.

The preamble to the Final Rule explains that, in an effort to create uniformity in the requirements for retirement plan disclosures, the Final Rule supersedes previous DOL interpretive guidance (other than the 2002 Safe Harbor).

Plan administrators may continue to rely on this prior interpretive guidance for 18 months following the effective date of the Final Rule.

Specifically, the Final Rule supersedes interpretive guidance that had given plan administrators the ability to provide pension benefit statement information through a “continuous access website,”⁵ that permitted relying on the Internal Revenue Service’s (“IRS”) electronic delivery rules for qualified default investment alternative notices,⁶ and that allowed plan administrators to furnish certain information required to be disclosed to participants of self-directed individual account plans (such as certain 401(k) plans) through electronic media if the participants voluntarily provided an email address and other conditions were satisfied.⁷

Plan administrators may continue to rely on this prior interpretive guidance for 18 months following the effective date of the Final Rule (i.e., 18 months following July 27, 2020). Plan administrators and sponsors should consult with legal counsel to consider whether any of their practices and procedures for electronic disclosure of documents needs to change in light of the Final Rule.

WHAT ARE THE GENERAL REQUIREMENTS OF THE SAFE HARBOR?

The Safe Harbor allows a plan administrator to provide covered plan disclosures to covered individuals, provided that, among other things:

- A paper initial notification containing specific information and explaining the right to request to receive paper versions of covered documents is provided;
- A “Notice of Internet Availability” (“NOIA”) is provided for disclosures that are provided online or through a mobile application;
- Requirements are met with respect to the website or mobile application used to furnish documents, or any emails that contain these documents;
- Requirements are met regarding the accessibility and readability of electronic documents;
- A valid electronic address (which includes an email address or smartphone number) has been provided for every individual entitled to receive the documents; and
- The plan administrator complies with various rules and requirements relating to the availability of paper copies of documents and addressing the unavailability of documents due to maintenance or unforeseen circumstances.

Each of these requirements is explained in more detail below.

Who Are the Covered Individuals That Can Receive Electronic Delivery of Retirement Plan Notices?

Under the Safe Harbor, covered individuals that can receive electronic delivery of retirement plan notices include plan participants, beneficiaries or other individuals entitled to receive “covered documents” (described below), provided that such individuals provide the employer, plan administrator or sponsor with an “electronic address” (which includes an email address or smartphone number) at which they can receive a written NOIA. If an employee is assigned an electronic address by his or her employer, the employee is deemed to have provided an electronic address to the employer.

What Plan Disclosures Are Covered by the Safe Harbor?

Any documents or information required to be furnished under Title I of ERISA (“covered documents”) can be provided to covered individuals under the Safe Harbor, other than documents that must be furnished only upon request of a covered individual.

Additionally, the Safe Harbor does not apply to employee welfare benefit plans (e.g., group health plans, disability benefit plans, etc.), although the DOL has noted that they are studying the future application of the Safe Harbor to these arrangements. Finally, the Safe Harbor does not apply to information required to be furnished under the Internal Revenue Code (“IRC”) or by the Internal Revenue Service. Practitioners are awaiting guidance from the IRS for new electronic disclosure rules.

What Is the Initial Notice of Electronic Delivery and Right to Opt Out That Must Be Provided to Rely on the Safe Harbor?

Prior to relying on the Safe Harbor, a plan administrator must provide each covered individual with a paper notice regarding the electronic delivery of covered documents

and the right to opt out of electronic delivery.

This notice must:

- Be written in a manner intended to be understood by the average plan participant;
- Identify the electronic address to which documents will be sent (notably, plan administrators should pay specific attention to this requirement since it will require sending individually tailored notices to each covered individual);
- Provide any instructions necessary to access the documents;
- State how long the documents are required to remain accessible electronically; and
- Provide information regarding how to request paper versions of documents (of which one copy of each requested document must be provided free of charge) and the ability to opt out of electronic delivery of all documents.

This notice should be sent to all covered individuals before relying on the Safe Harbor and then, on an ongoing basis, to newly hired employees.

What Is the Notice of Internet Availability That Must Be Provided Prior to Making Documents Available Online or in a Mobile Application?

The plan administrator must generally provide an NOIA for each covered document at the time such document is made available on a website or mobile application. The purpose of the NOIA is to announce that a new covered document is available.

However, the Final Rule allows for a single NOIA to be provided that announces the electronic disclosure of the following documents (a “combined NOIA”):

- A summary plan description;
- Any covered document that must be provided annually

(rather than in connection with a particular event), provided that the document does not require any action to be taken by the recipient by a particular deadline;

- Any other covered document, if authorized in writing by the Secretary of Labor; or
- Any notice required by the Internal Revenue Code, if authorized in writing by the Secretary of the Treasury.

If utilized, a combined NOIA must be provided each plan year, and, in any case, no later than 14 months following the last time a combined NOIA had been provided.

What Content Must Be Included in an NOIA?

The NOIA must contain the following:

- A prominent statement that reads, “Disclosure about your retirement plan”;
- A statement that reads, “Important information about your retirement plan is now available. Please review this information”;
- An identification of the covered document being sent (or a brief description of the document, if identification alone would not reasonably describe the nature of the document);
- The website address of, or a hyperlink to the covered document;
- A statement that a paper copy of the covered document is available free of charge, and an explanation of how to request a paper copy;
- A statement describing the right to opt out of electronic delivery, and an explanation of how to do so;
- A cautionary statement describing how long the document must remain available on the website; and

- A telephone number for contacting the plan administrator (or any other designated representative).

The NOIA must be sent to the electronic address associated with the covered individual. The Final Rule also requires that the NOIA be written in a manner that is calculated to be understood by the average plan participant and not contain any content other than what is required under the Final Rule (although company logos and letterheads are permissible).

What Are the Requirements for Internet Websites and Mobile Applications?

The plan administrator is required to make sure there is a website at which a covered individual can access covered documents. The covered documents must be made available on the website no later than the date they are required to be furnished to covered individuals under ERISA. Covered documents must remain available on the website until the later of the one-year anniversary of the document being made available on the website or the date the document is superseded by a subsequent version (if applicable).

Notably, under the Final Rule, the term “website” includes a mobile application or other internet or electronic-based information repository.

Notably, under the Final Rule, the term “website” includes a mobile application or other internet or electronic-based information repository. Accordingly, covered documents can be provided by means of a smartphone application instead of

a website, provided that the requirements described above with respect to websites are satisfied.

The Final Rule requires that plan administrators take measures that are reasonably calculated to ensure that all covered individuals’ confidential, personal information on the website or mobile application is secure.

What Are the Requirements for Covered Documents That Are Provided Electronically?

The Final Rule requires that covered documents must be:

- Presented in a manner calculated to be understood by the average plan participant;
- Provided in a format that is widely available, or a format that is suitable for reading online as well as being printed clearly on paper;
- Downloadable (or otherwise permanently retainable in an electronic format); and
- Electronically searchable.

What Are the Requirements for Email?

Instead of maintaining a website or mobile application, the Safe Harbor allows a plan administrator to email covered documents to covered individuals.

When furnishing a covered document by email, an NOIA is not required to be provided if the covered document is either in the body of the email or included as an attachment. The email must have a subject line that reads “Disclosure About Your Retirement Plan.”

When furnishing a covered document by email, the Safe Harbor requires that certain information be provided with the documents which is generally similar to the information required to be provided in an NOIA (e.g., identification or a brief description of the document, a statement of the right to paper copies

and the right to opt out of electronic delivery, a telephone number for contacting the plan administrator (or any other designated representative), etc.).

The email containing the covered document must be presented in a manner calculated to be understood by the average plan participant, and the documents attached to the email must comply with the requirements for covered documents described above (e.g., readability, downloadable or otherwise retainable, electronically searchable, etc.).

To take advantage of the Safe Harbor, covered documents must be emailed to covered individuals no later than the date that they are required to be provided under ERISA.

The Final Rule requires plan administrators to take measures that are reasonably calculated to ensure that all covered individuals’ confidential, personal information contained in the email is secure.

Can an Individual Opt to Receive Paper Copies of Documents Instead of Electronic Ones?

If a covered individual requests paper copies of a covered document, the plan administrator must promptly provide a paper copy of the document to the covered individual.

Plan administrators must also provide covered individuals with the ability to opt out of electronic delivery and instead receive paper copies of all covered documents.

What Are a Plan Administrator’s Responsibilities If Documents Become Unavailable Due to Maintenance or Unforeseen Circumstances?

A plan administrator would not be in violation of the Final Rule if covered documents are unavailable on a website due to maintenance or unforeseen circumstances beyond the control of the plan administrator,

provided that the plan administrator has reasonable procedures in place to ensure the documents are available as required, and, as soon as practicable following the time that the plan administrator knows (or reasonably should know, if earlier) that the covered documents are temporarily unavailable, the plan administrator takes prompt action to ensure that the documents will again be available as required.

What Is the Effective Date of the Final Rule?

The Final Rule became effective on July 27, 2020 (60 days after publication in the Federal Register).

Is There Additional Relief Due to the COVID-19 Emergency?

Pursuant to EBSA Disaster Relief Notice 2020-01, issued by the Employee Benefit Security Administration of the DOL on April 28, 2020 (the “EBSA Notice”), during the COVID-19 emergency, plans and plan fiduciaries will not be in violation of ERISA if they act in good faith to furnish certain notices, disclosures or documents required to be furnished under Title I of ERISA as soon as administratively practicable under the circumstances.

The EBSA Notice provides that good faith acts include the use of electronic means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to

electronic means of communication, including email, text messages and continuous access websites. This relief applies to certain notices and disclosures that must be furnished between March 1, 2020 and 60 days after the announced end of the COVID-19 national emergency.

ACTION ITEMS

The Safe Harbor may potentially provide significant cost savings and increased efficiency for employers and plan administrators. In addition, utilizing the Safe Harbor may reduce the consumption of paper and modernize disclosure practices.

However, compliance with the Safe Harbor rules could be cumbersome and complex. As discussed above, the 2002 Safe Harbor may still be utilized to comply with ERISA’s disclosure requirements. When analyzing the requirements of the Final Rule, some plan administrators may find that relying on the 2002 Safe Harbor may be more appropriate given their circumstances. However, since the Final Rule supersedes some prior DOL guidance, employers and plan administrators should carefully review their electronic disclosure procedures in light of the new requirements.

Employers and plan administrators should be cognizant of the fact that the Safe Harbor does not cover documents required to be provided upon the request of covered

individuals, documents required to be provided with respect to welfare benefit plans, or documents required to be provided by the IRS (although practitioners are awaiting further IRS guidance regarding how to properly communicate with participants and beneficiaries electronically).

Employers and plan administrators should work with legal counsel to consider whether any changes should be made to their electronic disclosure methods as a result of the Final Rule, and, if they choose to utilize the Safe Harbor, to ensure that they are compliant with all of the relevant requirements. 🌐

NOTES

1. 85 Fed. Reg 31884 (May 27, 2020).
2. 29 CFR §2520.104b-1(b).
3. *Id.*
4. 29 CFR §2520.104b-1(c).
5. Field Assistance Bulletin 2006-03.
6. Field Assistance Bulletin 2008-03, Q&A 7.
7. Technical Release 2011-03R (Dec. 8, 2011) (TR 2011-03R).

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