

DOL final regulations establish an alternative safe harbor for electronic disclosure of ERISA information



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Plan administrators of retirement plans, such as 401(k) plans, often struggle to find effective and efficient methods to communicate and distribute all the information and disclosures required under the Employee Retirement Income Security Act of 1974 (ERISA) to their employees. This problem may have become more complex as more and more employees have been working remotely in recent months and will probably continue to work remotely. ERISA was enacted and its original regulations written in a time when paper communication was the norm. Today's workplace and workforce has become more and more reliant on receiving information electronically. The Department of Labor (DOL) recognizes that fact and over time has been slowly modifying the "old" rules to permit more electronic communication.

Recently, the DOL issued final regulations, which will provide plan administrators (who are often the employer sponsoring the plan) with an alternative "safe harbor" method to provide ERISA-required information and disclosures electronically. The DOL previously issued regulations providing one safe harbor for electronic disclosure; those regulations still are operative. The new regulations provide an additional safe harbor.

The new safe harbor applies only to retirement plans at this time. Health and welfare plans are not yet covered; the electronic disclosure safe harbor under the previously issued regulations remains the only safe harbor applicable to health and welfare plans. However, we anticipate the DOL will ultimately include

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all ERISA plans under the new safe harbor.

The new safe harbor applies only to “covered individuals.” A covered individual is a participant, beneficiary, or other individual entitled to ERISA documents and disclosures, who has provided the employer, plan sponsor, or plan administrator with an electronic address or, with respect to employees, was assigned an electronic address by the employer. An electronic address includes an email address or a number for an internet-connected mobile device such as a smartphone.

Unlike the current safe harbor, no specific consent is required. However, the employer-provided electronic address must be for work purposes and not simply for plan purposes; this is a change from the regulations as initially proposed.

The plan administrator may then use the electronic address to provide “covered documents.” Covered documents relating to retirement plans include any document or information that a plan administrator is required to automatically furnish under ERISA. This includes information such as summary plan descriptions, benefit statements, summaries of material modification, summary annual reports, and blackout notices. A covered individual can still request a written copy and a written copy will need to be provided at no cost. The term “covered documents” does not include documents that must be furnished only upon request, such as plan documents or Forms 5500.

If an employee terminates employment, the plan administrator must take reasonable measures to ensure the continued accuracy and availability of the former employee’s electronic address or obtain a new electronic address in order to be able to continue to rely on this safe harbor.

When providing such ERISA information, there are, of course, certain notices that must be provided in order to be able to rely on the new electronic communication safe harbor.

Initially, the plan administrator will be required to furnish a notice of default electronic delivery and the right to opt out to all covered individuals to whom electronic disclosures will be made, even if those covered individuals are employees currently receiving covered documents under the existing safe harbor. This initial notice will need to be provided in writing rather than electronically, even if the plan is already relying on the current electronic communication safe harbor, and is to be provided before the first time a covered document (or documents) is made available online.

This initial notice of default electronic delivery must inform individuals that:

- Various documents will be furnished electronically.
- Electronic disclosure will be the default method of providing the documents, instructions for accessing the documents, and that documents are not required to be available on a website after the later of one year or the date the document is superseded.
- The individual has the right to request and receive paper copies, free of charge.
- The individual can opt-out of electronic delivery, with an explanation of how to exercise these rights. In such case, the individual must be provided future required communications by paper rather than electronically.
- The electronic address or addresses that will be used for such individual.

After providing the initial notice, each electronic disclosure of a “covered document” must be made with a “notice of internet availability” that must contain:

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- A prominent title or 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 document by name and a brief description of the document if the name is not sufficient to convey the nature of the document.
- The internet website address or a hyperlink to such address where the document or information is available. The address or hyperlink must be specific enough to lead the individual to the document or information. Either the address or the hyperlink must take the participant directly to the document or to a login where there is a prominent link to the document.
- A statement informing the individual that he or she has the right to a paper copy free of charge and how to obtain it.
- A statement explaining that the individual can opt-out of electronic delivery and an explanation of how to do so.
- A statement that the document or information is not required to be on the website for more than a year or until it is superseded by another document (if later).
- A telephone number to contact the plan administrator or other representative of the plan.

Both the notice of default electronic delivery and the notice of internet availability, as with other ERISA notices, must be written in a manner calculated to be understood by the average plan participant. It may include pictures, logos, and other designs provided they are not misleading.

The document or information must remain on the website for at least a year even if it is superseded by a subsequent version.

The document or information must be presented in a format that is suitable to be read on-line and to be printed clearly on paper and to be permanently retained in an electronic format such as a PDF.

The document or information must be searchable electronically by number, letter, or words.

The website must protect the confidentiality of any personal information related to the individual.

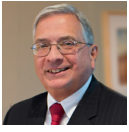
Additionally the regulations permit the plan administrator to furnish a covered document directly to covered individuals by using his or her email address. The document may be in the email or as an attachment. The email must include the information listed above for the notice of internet availability that would be required to be provided to covered individuals when the information is on a website.

The new safe harbor becomes effective on July 27, 2020 (60 days following the date the new regulations were published in the Federal Register). The preamble to the new regulations clarifies that plan administrators may rely on the new safe harbor before that date. However, with the present COVID-19 crisis and the disclosure relief presently in place, we anticipate that most plan administrators will wait until the end of the current disclosure relief period (60 days following the end of the COVID-19 declared emergency) before implementing the new safe harbor.

The finalization of this regulation gives plan administrators another option to satisfy their disclosure obligations under ERISA. A plan administrator can continue to distribute paper copies; it can follow the original electronic disclosure safe harbor; or it can utilize this new safe harbor. While far from ideal, the new safe harbor electronic disclosure rules appear to provide plan administrators with a common-sense method of providing plan participants with the required information regarding their retirement plans in

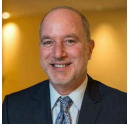
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an efficient manner. Thus, given the realities of the modern workplace, we anticipate that most plans will eventually elect to follow them.



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