

US Department of Labor Proposes New “Notice and Access” Electronic Delivery Safe Harbor

The U.S. Department of Labor (DOL) issued proposed regulations on October 23, 2019, providing for a new electronic-delivery safe harbor applicable to certain required disclosures for ERISA-governed retirement plans. Though DOL is likely to revise its final rule in response to comments to the proposed regulations, the new "notice and access" safe harbor as currently drafted would significantly expand the ability of plan administrators to deliver required disclosures in a manner that more closely aligns to modern methods for accessing information.

In particular, the proposed notice and access safe harbor would authorize plan administrators to post "covered documents" on a website for access by "covered individuals" so long as the administrator furnishes a corresponding electronic notice of internet availability to such individuals. "Covered individuals" includes: (1) participants, beneficiaries and alternate payees who provide an email or other electronic device address (i.e., smartphone number); and (2) employees for whom an employer assigns an electronic address (previously covered under DOL's "wired at work" safe harbor which will remain in effect). "Covered documents" includes any document a plan administrator is required to furnish under Title I of ERISA (e.g., summary plan descriptions, summaries of material modifications and blackout notices), but does not include documents that must be furnished only on request. It is unclear whether optional disclosures are covered by the proposed notice and access approach. The proposed regulations would not apply to voluntary disclosures, health and other welfare plan disclosures, or disclosures required by the IRS.

The notice and access safe harbor can be satisfied by meeting both "notice" and "access" requirements.

Notice

The safe harbor's "notice" requirement consists of three components:

- *Initial Notice of Internet Availability*—A physical (i.e., paper) copy of the retirement plan's "initial notice of internet availability" must be provided to all covered individuals before relying on the safe harbor. The initial notice must inform the individual that future retirement plan disclosures will be made available electronically with individuals being notified of any such new disclosures via email and the disclosures being accessible via a website. The notice of availability must also inform the recipient of their right to request paper copies of the documents to be made available electronically and their right to opt out of electronic delivery.
- *Document-Specific Notice of Internet Availability*—Each time a covered document is posted to the applicable website, a "notice of internet availability" must be furnished by the employer to each covered individual. This document-specific notice of internet availability may be sent via electronic means (e.g., via electronic mail) and must include the information/statements set forth in the proposed regulations.
- *Form and Manner of Providing Document-Specific Notice of Internet Availability*—The proposed regulations specify that the document-specific notice of internet availability must include the following:
 - Be furnished electronically

- Contain only the content specified in the regulations (though company design elements such as pictures and logos are permitted)
- Be furnished separately from any other documents and/or disclosures furnished to covered individuals
- Be written in a manner calculated to be understood by the average plan participant

Under the proposed plan, multiple notices may be consolidated in a single "notice of internet availability," provided once within a 14-month period, for the following documents:

- Summary plan descriptions
- Summaries of material modifications
- Summary annual reports
- Annual funding notices
- Annual investment-related disclosures under 29 C.F.R. § 2550.404a-5(d)
- Qualified default investment alternative notice
- Pension benefit statements

Access

In order to satisfy the safe harbor's "access" requirement, plan administrators would be required to take reasonable steps to ensure the following:

- The covered document must be available on the website no later than the date the covered document is required to be furnished under ERISA.
- The covered document must remain available on the website until it is superseded by a new or updated version of the document.
- The covered document must be presented on the website in a widely-available format that is suitable to be read both online and printed clearly on paper.
- The covered document must be searchable.
- The website on which the documents are posted must protect the confidentiality of personal information relating to any covered individual.

Additional rules apply to covered individuals who have severed employment, including taking reasonable steps to update the former employee's electronic notification address.

Plan Administrator Considerations

The notice and access safe harbor for required document delivery raises several considerations for plan administrators, including the following:

- DOL may ultimately extend the notice and access safe harbor to welfare plans, but for now many plan administrators will be faced with evaluating reliance under one safe harbor regime for retirement plans and a separate one for welfare plans, meaning the old "wired at work" safe harbor under current DOL regulations.
- Individuals retain the option under the proposed regulations to opt out of electronic delivery at any time and to receive paper copies of any or all disclosures, so plan administrators cannot entirely rely on electronic delivery methods.

- The notice and access safe harbor will only become effective 60 days after the date that DOL issues its final rule on this delivery method, with reliance beginning on the first day of the calendar year following the date of the final rule's publication.

Plan administrators should consult with experienced legal counsel as they design and implement responses to industry-standard electronic disclosure delivery systems.

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