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DOL Finalizes Notice and Access Safe Harbor for Electronic Delivery of Retirement Plan Participant Communications

The U.S. Department of Labor (DOL) has issued a [final rule](#) establishing a new "safe harbor" method for satisfying ERISA and DOL's requirements for electronic distribution of certain ERISA-governed retirement plan documents. The DOL's final rules on this "Notice and Access" safe harbor substantially mirrored the DOL's proposed rules, which we previously summarized in our [client update dated November 14, 2019](#). This update provides background and details on how retirement plan administrators can satisfy the DOL's final Notice and Access safe harbor.

Effective Date for Notice and Access Safe Harbor

The DOL's final rule providing for the Notice and Access safe harbor was published in the Federal Register on Wednesday, May 27, 2020, and will become effective 60 days following this publication date (i.e., July 26, 2020). However, in an [announcement](#) released concurrently to the final rule, DOL expressed that it would not take any enforcement action against a plan administrator that relies on the Notice and Access safe harbor before the end of this 60-day period. As a result, plan administrators can begin to rely on the Notice and Access safe harbor as of the final rule's publication date.

Plans and Documents Covered by the Notice and Access Safe Harbor

The DOL's final rule provides that the Notice and Access safe harbor is only available for disclosures that must be made by ERISA-governed retirement plans. As a result, this safe harbor is not available for health and welfare benefit plans, voluntary disclosures, or additional disclosures required by the Internal Revenue Service (IRS) or the Pension Benefit Guaranty Corporation (PBGC). Commenters to DOL's proposed regulations requested DOL's clarification as to whether the Notice and Access safe harbor would be made applicable to non-retirement plans at a later date, to which DOL indicated that it is continuing to explore the expansion of the safe harbor to health and welfare plans following careful consideration and analysis of notice requirements and issues that are unique to those plans. DOL acknowledged the significant cost savings that would be associated with expanding the rule to cover health and welfare plans and will coordinate with the U.S. Department of the Treasury and the U.S. Department of Health and Human Services to consider new electronic disclosure rules specific to health and welfare plans.

For now, it appears that plan administrators can rely on the Notice and Access safe harbor with respect to the following ERISA-governed retirement plan 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

The Notice and Access safe harbor can be satisfied by complying with both the "Notice" and "Access" requirements described below.

Notice Requirements

Initial Notice of Availability

Prior to relying on the Notice and Access safe harbor an initial Notice of Availability (initial notice) must be provided to covered individuals in paper form. The initial notice must state that the covered documents will be provided electronically. Further the initial notice must be tailored to each covered individual to include the electronic address for the individual. In addition, the initial notice must provide the following:

- **Access Instructions.** Instructions about how to access the covered documents, if necessary.
- **Right to Paper Documents.** A statement of the right to request and obtain a paper version of the covered document, free of charge, and how to exercise this right.
- **Opt-Out Rights.** A statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.
- **Cautionary Statement.** A statement that the covered document is not required to remain on the website for more than one year, or, if later, after it is superseded by a subsequent version of the covered document.

Notice of Internet Availability

With respect to those covered individuals who have not opted out of internet delivery of covered documents, the administrator must provide a "notice of internet availability" (notice) to each covered individual for each covered document.

- **Covered Individual.** A "covered individual" is defined as a participant, beneficiary, or other individual who: (1) is entitled to the covered document(s); and (2) provides the employer, plan sponsor, or administrator with an electronic address (e.g., an email address or smart phone number) at which the individual can receive the notice. An employee is treated as though he or she provided an electronic address if the employer issued the address for employment-related purposes.
- **Covered Document.** A "covered document," with respect to a pension benefit plan as defined under ERISA, is any document or information that the administrator is required to furnish to participants and beneficiaries (but not a document that must only be provided on the individual's request).

Timing Requirement

The notice must be provided to each covered individual each time a covered document is made available on the website or platform used by the plan administrator for purposes of distributing plan-related documents. Alternatively, the administrator can issue a combined notice for more than one covered document so long as the notice is issued each plan year and, if the notice was issued in the prior plan year, no more than 14 months after the date on which the prior plan year's notice was furnished.

Content Requirements

The notice must include the following components:

- **Overall Statements.** A statement reading "Disclosure About Your Retirement Plan" (e.g., this statement can be set out as the notice's title, legend, or subject line) plus a statement reading "Important information about your retirement plan is now available. Please review this information."
- **Covered Document Identification.** An identification of the covered document by name and, if identification alone would not reasonably convey the nature of the document, a brief description of the covered document.
- **Website Identification.** The internet website address, or hyperlink, where the covered document is available. The address or hyperlink should lead the covered individual directly to the covered document or to a login page that, upon entry of login credentials, leads the covered individual to a prominent link to the covered document.
- **Right to Paper Documents, Opt-Out Rights, and Cautionary Statement.** Each of these statements are the same as described above for the initial notice.
- **Administrator's Contact Information.** A telephone number to contact the plan administrator or other designated representative of the plan.
- **Optional Response Requirement.** The notice may, but is not required to, contain a statement as to whether the covered individual is invited or required to respond to the covered document and how to take such action, or that no action is required (so long as such statement is not inaccurate or misleading).

Manner of Furnishing Notice

The notice must:

- Be furnished to the address provided by each covered individual.
- Contain only the content required for the notice (as detailed above, except that the notice may also include pictures, logos, or similar design elements so long as such additions are not inaccurate or misleading with respect to the required content).
- Be furnished separately from any other documents or disclosures (except with respect to combined notices).
- Be written in a manner calculated to be understood by the average plan participant.

Access Requirements

Internet Website for Disclosures

The plan administrator may only rely on the Notice and Access safe harbor if they have established either an internet website or an electronic-based information database, such as a mobile application, to which covered individuals have been provided reasonable access to covered documents. Covered documents must generally be made available on this website no later than the date on which the covered document must be furnished under ERISA and must remain on the website until one year after it is made available, at the earliest, or, if later, the date on which it is superseded by a subsequent version of the covered document. The covered document must be presented on the website in a manner calculated to be understood by the average plan participant and must be provided in a widely available format that is suitable to be read online *and* printed clearly on paper. The covered document must also be searchable by numbers, letters, or words, and must be presented in a format that can be permanently retained by the covered individual in electronic format.

Implementing Request for Copies or to Opt-Out of Electronic Disclosures

Upon receipt of a request from a covered individual for a paper copy of a covered document or to globally opt-out of electronic delivery, the plan administrator must act promptly to comply with such request and/or election. The plan administrator must establish and maintain reasonable procedures governing such requests or elections.

Invalid or Inoperable Electronic Addresses

The plan administrator's system for furnishing the notice must alert the administrator to invalid or inoperable electronic addresses. On receipt of such an alert, the administrator must take prompt and reasonable steps to cure the problem (e.g., delivering the notice to a secondary electronic address provided by the covered individual) or treat the individual as having globally opted out of electronic delivery of plan documents (after which the administrator must, as soon as is reasonably practicable, furnish a paper version of the covered document identified in the notice).

Email Delivery Alternative

As an alternative to providing Notice and Access, the plan administrator may provide the covered document by providing the document either in the body of an email or as an attachment to the email. The covered document must also adhere to the requirements established above for documents accessible via internet website. The email must be sent to the covered individual's email address no later than the date the covered document is otherwise required to be furnished, include the subject line "Disclosure About Your Retirement Plan" and provide the covered document identification, right to paper documents, opt-out rights, and administrator's contact information as described above for the initial and annual notices. Distribution via email delivery must include measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual.

Takeaways

Plan administrators should consider the benefits and potential administrative complexities of implementing the Notice and Access safe harbor. Additionally, it is important to remember that this safe harbor currently only applies to retirement plan notices required by the DOL and is not available for health and welfare plans. The IRS has indicated that it intends to issue additional guidance on electronic disclosures, but these new rules do not change an employer's obligations as they relate to notices required by the IRS (or PBGC).

While the DOL Notice and Access safe harbor is potentially a more cost-effective method of distributing certain retirement plan notices, this patchwork of enforcement regimes complicates the implementation of the safe harbor and restricts its scope. Employers should consult with their third-party administrators and legal counsel to evaluate adopting and implementing the Notice and Access safe harbor.

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