

COVID-19 Alert

DEFAULT ELECTRONIC DISCLOSURE BY EMPLOYEE PENSION BENEFIT PLANS UNDER ERISA

JUNE 2020

On May 27, 2020, the U.S. Department of Labor (DOL) published a final rule titled “Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA,” which is similar to a proposed rule that was issued on October 23, 2019. This final rule creates a new, voluntary safe harbor for ERISA-governed retirement plans to provide specific documents to covered individuals electronically, rather than through mailed paper documents. The rule does not require retirement plans to use this newly allowed electronic safe harbor, so please remember that it is optional. The final rule is effective July 27, 2020, but the DOL has adopted a “non-enforcement” policy that allows retirement plans to rely on the new safe harbor immediately. Here are the details:

KEY DEFINITIONS

- The final rule applies to a “covered individual.” That term is generally defined as a participant, beneficiary, or other individual entitled to certain “covered documents” and who has provided the plan administrator with an “electronic address.”
- “Covered documents” means retirement plan disclosures that are under the DOL’s jurisdiction. Examples of covered documents include summary plan descriptions, summaries of material modifications, summary annual reports, annual funding notices, participant fee disclosures, and annual, or quarterly benefit statements. This new safe harbor *does not* apply to documents required by the Internal Revenue Service.
- The term “electronic address” generally includes an email address or the telephone number associated with an internet-connected mobile-computing device, such as a smartphone. Plan administrators *cannot* rely on email addresses or smart phone numbers that they obtain through search engines on the internet.

WHAT IS THE NEW VOLUNTARY SAFE HARBOR?

- Covered individuals must be provided an initial, mailed paper notification stating that the way they currently receive retirement plan documents and disclosures (e.g., paper delivery in the U.S. mail) is changing. The notice must inform them of the new electronic delivery method, the electronic address that will be used, and their right to “opt out” if they prefer to continue to receive paper disclosures in the mail. This notice must be provided to all covered

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individuals before the retirement plan may use the new, electronic-delivery safe harbor.

- The new safe harbor permits the following two optional methods for electronic delivery:
 1. Email delivery – Plan administrators may send covered documents directly to the electronic addresses of covered individuals, with the covered documents in the email or as an attachment to the email; OR
 2. Website posting – Plan administrators may post covered documents on a website if a notice of internet availability (NOIA) is furnished to the electronic addresses of covered individuals. The final regulation makes clear that:
 - Generally, an NOIA must be provided *each time* a new covered document is made available for review on the website.
 - However, to avoid “notice overload,” the final rule permits an annual NOIA to include information about multiple covered documents, instead of providing multiple NOIAs throughout the year.
 - The NOIA must briefly describe or identify the covered document that is being posted online, include an address or hyperlink to the website, and inform the covered individual of the right to request paper copies or to opt out of electronic delivery altogether.
 - The NOIA must be concise, understandable, and contain only specified information.
 - The NOIA must include a title or subject line that reads: “Disclosure About your Retirement Plan” and the following statement “Important information about your retirement plan is now available. Please review this information.” The NOIA must also identify the covered document by name and include a brief description if the name of the covered document does not reasonably convey the nature of the covered document.
 - The NOIA must provide a telephone number to contact the plan administrator or other designated representative of the plan.
 - The DOL has not provided a model NOIA at this point.

WHAT ELSE DO I NEED TO KEEP IN MIND?

- Covered individuals can request paper copies of specific documents, or opt out of electronic delivery entirely, at any time, free of charge. Also, plan administrators cannot require a participant or beneficiary to receive all disclosures electronically.
- The new safe harbor does not cover information that plan administrators must furnish only upon request, such as plan documents or all or a portion of the retirement plan’s Form 5500.
- Plan administrators must ensure that the electronic delivery system alerts them if a covered individual’s electronic address is invalid or inoperable. In that case, the plan administrator must attempt to promptly cure the problem or treat the covered individual as opting out of electronic delivery.

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- Plan administrators must carefully track the covered individuals who request paper copies and those who may later choose to opt out of electronic delivery.
- Documents made available by website posting must remain posted on the plan website for a minimum of one year or until they are superseded by newer versions.
- This new safe harbor applies only to retirement plans (pension and annuity plans), and it **does not** apply to ERISA-governed health and welfare plans.
- This new safe harbor does not supersede an earlier (2002) electronic disclosure safe harbor. The 2002 safe harbor applies to employees who have the ability to access electronic documents and whose access is an integral part of their employment duties, or who affirmatively consent to receive documents electronically and provide an address for receipt of such documents.

CONCLUSION

In the event your retirement plan(s) are interested in taking advantage of this new safe harbor, please let us know. We can work with you on the next steps to implement this change (identifying all of the covered individuals, considering how to obtain and update email/text addresses, drafting a NOIA, determining which of the two electronic delivery methods to use, etc.).

A link to the final rules can be found [here](#).

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Multiemployer Benefit Plans practice listed to the right, for more up to date information, or questions about your unique circumstances.

For information and regulatory guidance on coronavirus / COVID-19 issues, please visit our [Coronavirus \(COVID-19\) Guidance & Resources](#) website page.

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