
LEGAL UPDATE

The DOL's Final Regulations on E-Disclosure of Retirement Plan Documents Become Effective Soon—Are You Ready?

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In August 2018, President Trump issued Executive Order 13847, Strengthening Retirement Security in America, one portion of which asked government agencies to explore the potential for broader use of electronic disclosure, as a way of improving the effectiveness of disclosures and reducing the costs and burdens of paper disclosure. In response, in October 2019, the DOL issued proposed regulations, updating its 2002 regulations dealing in part with electronic disclosures, and on May 27, it issued final regulations, that become effective as of July 27, 2020. During the 60-day period from May 27 to July 27, retirement plan administrators can rely on the proposed regulations and the DOL will not take enforcement action against them for doing so, in large measure because of the difficulty in transmitting documents by traditional means during the COVID-19 pandemic.

Covered Individuals and Covered Documents

The final rule establishes a voluntary safe harbor for retirement plan administrators who want to use electronic media as a default to furnish covered documents to covered individuals. “Covered individuals” are participants, beneficiaries, and other individuals who are entitled to receive covered documents and who are assigned an electronic address for employment-related information or who provide an electronic address, which may be either an email or a smart

phone, to the employer, plan sponsor or plan administrator. “Covered documents” are any documents or information that the administrator is required to provide to plan participants and beneficiaries under Title I of ERISA, other than a document or information that needs to be furnished only upon request. Covered documents include, but are not limited to, summary plan descriptions, summaries of material modifications, summary annual reports, participant-level fee disclosures, and blackout notices.

The new safe harbor is unavailable to administrators of welfare plans, although the DOL is open to consideration of this issue in the future.

Two Options for Electronic Delivery Website Posting

The voluntary safe harbor provides two optional methods for electronic disclosure. The first method, generally referred to as “notice and access,” is website posting, whereby plan administrators post covered documents on a website, if appropriate notices of Internet availability (NOIA) have been furnished to the electronic address of the covered individual.

A NOIA must be furnished each time a new covered document is made available on the Internet website. To avoid “notice overload,” the final regulations permit an annual NOIA to include information about multiple covered documents that are provided annually, instead of issuing multiple

NOIAs throughout the year. However, with respect to a document that is not provided annually, such as a quarterly benefit statement, the document must be accompanied by a separate NOIA. The NOIA must briefly describe or identify the document that is being posted online, including an address or hyperlink to the website; indicate the length of time the document will remain on the website; inform the individual of the right to receive paper notices or opt out of electronic delivery altogether; and provide contact information for the administrator. Additionally, the NOIA must be concise, understandable, and contain only specified information.

In recognition that electronic systems occasionally go offline, the regulations provide that the conditions of the regulation will continue to be satisfied even if the covered documents are temporarily unavailable for a reasonable period of time due to technical maintenance or unforeseeable events or circumstances beyond the control of the administrator, provided (i) the administrator has reasonable procedures in place to ensure that covered documents are available as required by the regulations, and (ii) the administrator takes prompt action to ensure that covered documents are available as soon as practicable after the administrator knows or reasonably should know that the covered documents are temporarily unavailable.

Direct Email Delivery

The second option is the “email delivery method,” under which plan administrators may send covered documents directly to the electronic address of a covered individual, with the covered documents being provided either in the body of an email or as an attachment. NOIAs are not required under this method, but the email sent by the plan administrator must include a subject line that reads “Disclosure About Your Retirement Plan”; identification of the covered document; a statement of the right to receive a paper copy of the covered document; a statement of the right to opt out of electronic delivery; and a telephone number to contact the plan administrator.

Participant Protections

The final regulation is designed to provide protection to plan participants in several ways.

- Covered individuals can request paper copies of documents and can globally opt out of electronic disclosure at any time, free of charge, and plans are prohibited from implementing burdensome procedures that would make the opt-out more difficult.
- Covered individuals must be furnished with an initial notification, on paper, advising them that the manner in which they currently receive retirement plan disclosures, *e.g.*, paper delivery by U.S. mail, is changing. The notice must inform covered individuals of the new electronic delivery method; the electronic address that the

plan will be using; the right to opt out if they wish to receive paper disclosures; and the procedures for opting out. This notice must be provided before the plan uses the new safe harbor.

- The covered documents must remain on an Internet website until superseded by a subsequent version, but in no event for less than one year.
- The format of the covered document should be easily readable (both online and when printed), searchable electronically, and downloadable.
- The plan administrator must ensure that the electronic delivery system is designed to alert them if a participant’s electronic address is invalid or inoperable. In that case, the administrator must attempt promptly to cure the problem, or treat the participant as opting out of electronic delivery.
- If a participant separates from the service of an employer, the plan administrator must take steps to ensure the continued accuracy and operability of the employer-provided electronic address.
- The plan administrator must take measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual.

2002 Guidance Remains Applicable

An administrator can continue to rely on the 2002 safe harbor. The 2002 regulations provided for disclosure by hand delivery, first-class mail, or electronic disclosure if there was work-related computer access or participant consent to electronic disclosure, which some administrators found to be a burdensome process.

EBSA Disaster Relief Notice 2020-01

In March, the DOL along with the Treasury Department and Department of Health and Human Services, issued EBSA Disaster Relief Notice 2020-01 (Notice 2020-01). It grants relief for providing notices, disclosures, and documents that were due to participants and beneficiaries between March 1 and the end of the 60-day period following the close of the COVID-19 national emergency, which has yet to be declared, so long as plan administrators act in good faith and provide required information as soon as practicable. Acting in “good faith” includes sending required information electronically when the administrator believes that the intended recipient has effective access to the information.

“Actual Knowledge” Standard in *Intel* Case

In a recent Supreme Court decision, *Intel Investment Committee v. Sulyma*, a plaintiff’s “actual knowledge” of the fiduciary breach was required in order for the three-year

(rather than the six-year) statute of limitations under ERISA Section 413 to apply. “Actual knowledge” requires more than evidence that a disclosure was made to the plaintiff. “Actual knowledge” means “the plaintiff must in fact have become aware of that information.” A plaintiff does not have actual knowledge of information that s/he received but does not read or does not remember reading, and knowledge must be more than hypothetical. Utilizing electronic disclosures may help prove that the participant has actually read the disclosure, especially if there is a means to track whether participants have accessed electronic disclosures (*e.g.*, delivery and read receipts) or a tool that will prevent a reader from closing the disclosure without scrolling to the end and acknowledging that s/he has read the disclosure and understands that the disclosure pertains to the particular topic in question.

Note, however, that even if use of such tools is sufficient to establish that a participant actually read the document, that might not be sufficient in all Circuits to establish the necessary “actual knowledge” for purposes of ERISA’s breach of fiduciary duty statute of limitations.

Takeaway

Although the final regulations did not refer to Notice 2020-01, the relief described in Notice 2020-01 appears still to be available. Plan administrators may want to consider relying on the electronic disclosure relief provided under Notice 2020-01 until the end of the pandemic. Thereafter, administrators may want to evaluate whether either of the methods under the new safe harbor alleviates the administrative burdens of providing required disclosures. Some may prefer the email delivery method in order to avoid maintaining a website solely for retirement plan disclosure purposes. Regardless of whether the new safe harbor or prior 2002 guidance is relied upon for electronic disclosure, the plan administrator should consider the use of a tool(s) to evidence that the participant has actually read the disseminated plan information.

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