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DOL Attempts to Modernize its Electronic Disclosure Rules with New Proposed Safe Harbor

On October 23, 2019, the Department of Labor (DOL) published a proposed rule outlining a new safe harbor for distributing certain retirement plan documents electronically. The new safe harbor adds to the current electronic disclosure safe harbor, issued way back in 2002, which is seen by most as outdated. The new “notice and access” safe harbor, unlike the safe harbor issued in 2002, does not require affirmative consent from individuals to receive electronic disclosures and does not require an employer to determine whether individuals have work-related access to email as part of their job function.

The new safe harbor allows certain “covered documents” to be provided to “covered individuals” via posting on a website designed for the distribution of such documents, after notice of availability is given to the “covered individuals.”

Who and What Does This Apply to?

“Covered individuals” generally include any participant, beneficiary, or alternate payee, regardless of employment status, who has (i) provided the employer, sponsor, or administrator with an “electronic address” (i.e., an email address or an internet-connected cell phone number), or (ii) been assigned an email address by the employer.

“Covered documents” include any document that the plan administrator is required to furnish to participants and beneficiaries under Title I of ERISA, except for documents that must be furnished upon request. Notably, the new safe harbor only applies to pension benefit plans and not to welfare benefit plans, but the DOL has indicated that welfare benefit plan rules may be addressed separately in the future.

Notice of Internet Availability

Before the safe harbor can be satisfied, a “Notice of Internet Availability” (Notice) must be furnished to individuals for each document provided under the new rule (or for a group of regular disclosures, as described further below). The Notice must be (i) furnished to the covered individual’s electronic address, (ii) limited only to the content specified in the rule (employer logos and other design elements are generally ok), and (iii) calculated to be understood by the average plan participant. The Notice must contain the following information:

- A prominent statement or title that reads “Disclosure About Your Retirement Plan” along with the following statement – “Important information about your retirement plan is available as the website address below. Please review this information.”
- A brief description of the document.
- The website address where the document can be located.
- A statement of the right to request paper copies, free of charge, and how to obtain such copies.
- A statement of the right to opt-out of receiving electronic disclosures, and an explanation of how to opt-out.
- A telephone number to contact the administrator (or designated representative) of the plan.

As mentioned above, certain regular disclosures may be announced via a single Notice that is provided at least once within a 14-month period. These regular disclosures include:

- Summary plan descriptions
- Summaries of material modifications
- Summary annual reports
- Annual funding notices
- 404a-5 fee disclosures
- Qualified default investment alternative notices
- Pension benefit statements required by Section 105 of ERISA

In addition to the regular “Notice of Internet Availability,” the administrator is also required to provide an initial Notice in paper form that explains that some covered documents will be provided

electronically along with an explanation of the rights to request a paper version and to opt-out of electronic delivery. This paper notice must be provided before the new safe harbor can be used and to each new hire.

Website Requirements

Once the Notice has been provided, the disclosures can be made via posting on a website that meets certain minimum standards. The administrator must take measures reasonably calculated to ensure that:

- The covered document is available no later than the date it is required to be furnished,
- The document remains available until it is superseded by a subsequent version,
- The covered document is searchable,
- The document is maintained in a widely available format that allows the document to be permanently retained (such as in PDF), and
- The website protects confidential information.

Odds and Ends

- The new safe harbor does not apply to welfare benefit plans, but the DOL has suggested it is considering rules for those plans as well.
- The rule would supersede the “continuous access website” rule outlined in DOL Field Assistance Bulletin 2006-03 (a separate distribution safe harbor that applies when participants have continuous access to benefit statement information via secure website) for pension benefit statements and participant-level fee disclosures.
- The rule for QDIAs that either the DOL or IRS electronic delivery rules can be relied on has been eliminated.
- The system must be designed to alert administrator of invalid or inoperable electronic address.

- Administrators are required to act when they receive notice of an invalid or inoperable electronic address for a participant and must maintain procedures designed to resolve such issues (such as sending a Notice to a secondary address).
- Administrators must take measures calculated to ensure the continued accuracy of the electronic address following a severance from employment or to obtain a new address so an individual can continue to receive disclosures after severance.

Given that the new safe harbor is optional and not mandatory, the DOL has provided that it can be relied on as of the first day of the first calendar year after it is published as a final rule in the Federal Register. Comments on the proposed rule are due November 22, 2019.

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