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Saving the Trees: DOL Issues Final Electronic Disclosure Rule

On May 21, 2020, the Department of Labor (DOL) issued the final rule on the new electronic disclosure safe harbor, approximately seven months after it first released the proposed rule. We discussed the proposed rule in our update, [“DOL Attempts to Modernize its Electronic Disclosure Rules with New Proposed Safe Harbor.”](#) The final rule generally mirrors the proposed rule, with a few exceptions we will discuss in this update.

The final rule provides a “notice and access” safe harbor for the distribution of required disclosures by retirement plans. The rule permits documents required to be disclosed under the Employee Retirement Income Security Act (ERISA) to be provided to participants and beneficiaries by posting the documents on a website, provided that a specific notice of availability is provided with each such posting.

Before the safe harbor can be used, individuals must be given an Initial Notice that documents will be provided electronically to a specific email or cell number, instructions on how to access the electronic disclosures, and the same information included in the notice each time a document is provided electronically about how long the document will be available, how to request a free paper copy, and how to opt out of electronic disclosure.

The safe harbor can be used without an individual’s affirmative consent to electronic delivery. If an individual provides an email or cell phone to an employer as part of a job application or otherwise, that can be used to give notice as long as the employer can track whether the notice bounces back. Posting can also be used if an employer assigns a work-related email address to employees that isn’t provided solely to give electronic ERISA disclosures. The following are highlights from the final rule that are changes or updates to the proposed rule:

- **Notice Statement When Document is Posted:** Each time documents are posted, a Notice of Internet Availability (NOIA)

with the specific content stated in the rule must be provided, including a statement that the final rules modified to say “Important information about your retirement plan is now available. Please review this information.” The NOIA must also now identify a covered document by name and include a brief description of the document only if identification by name would not reasonably convey the nature of the document.

- **Optional Content of NOIA:** The DOL says that the NOIA **may** contain a statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action, or that no action is required, provided that the statement is not inaccurate or misleading. Other than this, only required content can be included.
- **Readability of NOIA and of ERISA Documents:** The DOL now says the NOIA, like the documents being disclosed as described in the NOIA, only have to be written in “a manner calculated to be understood by the average plan participant.” The DOL removed the proposed standard regarding the use of short sentences, avoidance of double negatives, and meeting a minimum Flesch Reading Ease test score of 60. The documents must be searchable and able to be read on-line, printed and saved.
- **Document Availability:** The final rule now says that the website must keep a covered document available for at least one year after the date the covered document is made available or, if later, the date it is superseded by a subsequent version of the covered document. The NOIA as well as the initial notice of use of the safe harbor must contain a cautionary statement describing this rule.
- **Mobile Apps:** The final rule clarifies that covered documents can be provided via mobile apps or another “internet-based information repository” provided that covered individuals have been provided reasonable access.
- **Terminated Employee Diligence:** The DOL modified the requirement that plan fiduciaries undertake additional diligence to update contact information for participants who

leave employment by limiting it only to employees who were given employer-provided addresses used to furnish covered documents.

- **Notice Consolidation:** The DOL modified the rule that allows consolidation of regular disclosures via a single NOIA by specifying that only covered documents that are required to be provided annually and SPDs can be provided via a single NOIA. Because of this change, quarterly statements and Summaries of Material Modifications must now be disclosed with an individual NOIA.
- **Alternative Disclosure Method:** The DOL added an alternative method for disclosure that allows a covered document to be sent directly to a covered individual's email address provided that the document (i) meets the readability standards described above, (ii) is in a format that is suitable to be read online, printed clearly, and retained permanently, and (iii) is searchable. In order to use this alternative, in lieu of furnishing the NOIA, the email must include the document in the body of the email or as an attachment, include a subject line that reads "Disclosure About Your Retirement Plan," and include other information that is required in the NOIA (such as identification and/or brief description of the document, a statement of the right to receive a free paper copy, a statement of the right to opt out, and a telephone number).

Notably, the final rule did not expand the safe harbor to welfare benefit plans but did leave open the opportunity for the Secretary of Labor to expand the rule to those plans. The final rule also says that the Secretary of the Treasury is permitted to authorize notices required by the Internal Revenue Service to be provided via the safe harbor. The final rule is effective for disclosures provided on or after July 27, 2020 (60 days following its publication date) if its conditions are met but the preamble clarifies that DOL is permitting plans to rely on the new rule immediately through a non-enforcement policy.

Please contact [Carl Lammers](#) or another attorney in Frost Brown Todd's [Employee Benefits & ERISA practice group](#) if you have

questions about the DOL's electronic disclosure safe harbor.

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