



MODERNIZING ERISA DISCLOSURE REQUIREMENTS

New Department of Labor Regulation Offers Additional Electronic Delivery Methods for Retirement Plans

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A plan administrator is required to furnish ERISA-required notices and disclosures using a delivery method that is reasonably calculated to ensure actual receipt by participants, beneficiaries, and other individuals. Under regulations issued in 2002, the Department of Labor ("DOL") established a safe harbor for satisfying this requirement through the use of electronic media (e.g., email).

On May 27, 2020, the DOL published final regulations regarding a new, voluntary safe harbor for plan administrators of retirement plans to furnish notices and disclosures required under ERISA using electronic media as the default method of delivery. These final regulations became effective on July 27, 2020. The new safe harbor is in addition to the existing safe harbor for electronic delivery. However, unlike the existing safe harbor, the new safe harbor does not apply to health and welfare plans.

This client advisory summarizes both the existing and new safe harbors:

Existing Electronic Delivery Safe Harbor (Retirement and Welfare Plan Disclosures)

The 2002 safe harbor can be utilized for providing documents to only two types of individuals: (1) employees with the ability to effectively access electronic notices and disclosures at any location where they are reasonably expected to perform their employment duties and for whom access to the employer's electronic information system is an integral part of those duties (so-called "wired at work" employees) and (2) individuals entitled to the applicable notices and disclosures under ERISA who affirmatively consent to receiving notices and disclosures electronically.

To satisfy the 2002 safe harbor for electronic delivery to such individuals, plan administrators are required to have appropriate and necessary measures in place which are reasonably calculated to ensure that the system for furnishing notices and disclosures results in actual receipt. Additionally, certain notice requirements are required at the time an electronic notice or disclosure is furnished, and an individual is required to be given the right to request and receive a paper copy of the electronic notice or disclosure free of charge.

New Electronic Delivery Safe Harbor (Retirement Plan Disclosures Only)

► Available Methods of Delivery

Under the new safe harbor, a plan administrator of a retirement plan may use one of two optional methods for furnishing certain retirement plan notices and disclosures electronically to covered individuals. A "covered individual" is defined more broadly under the new safe harbor than under the 2002 safe harbor and includes any individual entitled to the applicable notice or disclosure under ERISA who has a valid electronic address, as described below.

The delivery methods available under the new safe harbor are:

- **Website Posting ("Notice and Access")** – The plan administrator may post the notices and disclosures on a website, provided that appropriate notice (referred to as "Notice of Internet Availability" or "NOIA") is furnished to the electronic addresses of the covered individuals. Notices and disclosures must remain on the designated website for the longer of one year or until the notices and disclosures are updated. Technical requirements must be satisfied both with respect to the website and to the format of the notice or disclosure.

- **Email Delivery** – The plan administrator may send the notices and disclosures directly to the electronic addresses of covered individuals. The email must include "Disclosure About Your Retirement Plan" in the subject line, and the relevant notice or disclosure may either be attached to the email or included in the body of the email. Technical requirements must be satisfied with respect to the format of the notice or disclosure.

In either case, a covered individual must be given the right to opt out of electronic delivery and to receive a paper copy of any electronic notice or disclosure free of charge.

► **Valid Electronic Address**

The requirement discussed above for a valid electronic address is satisfied if (1) the employer provides an electronic address to employees for an employment-related purpose (other than the delivery of notices and disclosures required by ERISA) or (2) an employee or beneficiary provides a personal electronic address to the employer or plan administrator, for example as part of the job application process or on other HR documents or plan enrollment paperwork.

For transition purposes, a plan administrator may rely on electronic addresses obtained prior to the effective date of the new safe harbor for which the source of the electronic addresses may be unknown, provided that the plan administrator acts reasonably, in good faith, and otherwise complies with the requirements of the new safe harbor.

► **Notice Requirements for New Safe Harbors**

Prior to relying on either of the above new safe harbor delivery methods, a plan administrator must furnish each covered individual a paper notification that includes the following:

- A statement that covered notices and disclosures will be furnished electronically.
- The electronic address that will be used for that individual.
- Any instructions necessary to access the covered notices and disclosures.
- The following three statements:
 - If the notice and access method will be used, a statement regarding the period that the covered notice or disclosure will be available on the website;
 - How to request a free paper version of a covered notice or disclosure; and
 - How to opt out of electronic delivery and receive only paper versions of covered notices and disclosures.

Additionally, under the notice and access delivery method, a NOIA must generally be furnished to the electronic addresses of the covered individuals at the time a notice or disclosure is made available on the website which includes the following:

- A prominent statement of "Disclosure About Your Retirement Plan."
- A statement that reads: "Important information about your retirement plan is now available. Please review this information."
- The name of the notice or disclosure and, if the name alone would not reasonably convey the nature of the notice or disclosure, a brief description of the notice or disclosure.
- The internet website address (or a hyperlink) where the notice or disclosure is available.
- A statement of the right to request and obtain a paper copy of the covered notice or disclosure free of charge and an explanation of how to exercise this right.
- The three statements required to be included in the initial notice, described above.

The new safe harbor also permits a plan administrator to combine the NOIA for multiple notices and disclosures provided certain requirements are met.

► **System Checks for Electronic Addresses**

In addition to the above notice requirements, a plan administrator must ensure that its electronic delivery system is designed to alert it if a participant's electronic address is invalid or inoperable and take steps to fix any such addresses or provide paper copies.

For employer-assigned electronic addresses, the plan administrator is required to have measures in place that are reasonably calculated to ensure the continued accuracy and availability of such address following the individual's severance from employment, or have measures in place to obtain a new electronic address from terminated employees.

our Employee Benefits and Executive Compensation Practice Group.



Al Ward
al.ward@hwlaw.com
813.222.8703



Kirsten Vignec
kirsten.vignec@hwlaw.com
813.222.8731



Bret Hamlin
bret.hamlin@hwlaw.com
813.222.8717



Tim Zehnder
timothy.zehnder@hwlaw.com
813.222.3113

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