The Electronic Age

Antediluvian electronic disclosure rules need updating

Ask just about any plan sponsor, administrator or service provider what the Department of Labor (DOL) should do to make running a retirement plan easier and cheaper to administer, and the answer will frequently be: "Make electronic disclosure easier." This should not come as a surprise to anyone, least of all the decisionmakers at the DOL.

In the last 10 years, the DOL has managed to cobble together a string of rules, releases and guidance, creating an electronic disclosure framework that is both completely antiquated and ridiculously complex. As a result, many plan sponsors are left with little or no choice but to continue to send disclosures on paper, with the associated costs borne by either the employer or participants.

Depending upon the document and the person receiving it, there are five different DOL-approved approaches for sending Employee Retirement Income Security Act (ERISA) information electronically to participants. Two are found in the department's electronic disclosure safe harbor; a third is described in the preamble to the final default investment alternative regulation. A fourth approach, along with an expansion of the third, is contained in the department's Field Assistance Bulletin 2006-03. A fifth and sixth approach were described in the DOL's Technical Release 2011-03R, though one of these was only temporary and expired last May. If this sounds confusing, it is. And, sadly, it is far more confusing than it needs to be.

The general electronic disclosure rules can be found in the DOL's electronic disclosure safe harbor. The safe harbor can be used for any document required to be furnished under ERISA, and it contains two different approaches.

The first approach allows information to be sent to any participant or beneficiary who has "affirmatively consented" to receive plan information electronically. In order to "affirmatively consent" to receive plan information over the Internet, a participant must 1) be provided with information about what documents will be delivered electronically and through what means; 2) provide the plan an email address; and 3) consent or confirm his consent in a manner that reasonably demonstrates his ability to access the information. It is this last requirement that makes "affirmative consent" so difficult to implement.

The second approach in the safe harbor—electronic delivery to employees with computers on their desks—is easier to carry out but limits who may receive disclosures electronically. Under this approach, a plan sponsor may send disclosures electronically to any current employees who use a computer as an "integral" part of their employment. However, a plan sponsor must still determine and track which employees use a computer as an "integral" part of their job.

For example, if you own a lawn care company that offers a 401(k) plan, your managers, landscape architects and accountants would probably qualify for the safe harbor since they have computers on their desks. However, the bulk of your staff, the people mowing the lawns and planting the flowers, generally, would have to "affirmatively consent" to electronic disclosure. This would be true even if you knew their personal email address and gave them access to a company computer during working hours. If one of your accountants left for greener pastures, that person would no longer qualify for the safe harbor and would have to "affirmatively consent," as well.

The DOL published the safe harbor in 2002. But things are different today; the world has become much more connected since the department published its electronic disclosure regulation—a reality of which the department is aware.

However, instead of re-evaluating and updating the safe harbor to make the use of electronic disclosure more widespread and easier administratively, the department has developed document-specific electronic disclosure approaches. Some of these approaches make a lot of sense. Unfortunately, they also have disparate requirements that make them expensive to implement and, since they were established through subregulatory guidance, can be withdrawn with little or no notice.

With much pressure and a lot of outcry from the ERISA community, you would think the DOL would be expediting new regulations. Unfortunately, electronic disclosure is currently off the department's regulatory agenda and shows no immediate signs of returning.

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