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## LEGAL DEVELOPMENTS

### *New DOL Safe Harbor for E-Delivery of Retirement Plan Notices*

*The DOL published its final rule on e-delivery on May 27, 2020, making it the permissible “default” method for DOL disclosures. This column examines the DOL rules now available for e-delivery of notices for ERISA plans.*

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Plan sponsors and recordkeepers have long wished for updated electronic delivery or e-delivery rules that permit electronic delivery as the default form of distribution, and one that could be applied uniformly for all notices and participant elections made under an employer benefit arrangement. But over the years, each of the major agencies—Department of Labor (DOL), Internal Revenue Service

(IRS), and Pension Benefit Guarantee Corporation (PBGC)—have historically had their own take on electronic delivery methods that are permissible. But with the DOL publishing its final rule in this area on May 27, 2020, we have e-delivery as the “default” method for the first time, and we move ever closer to harmonizing these rules and harnessing the power of the World Wide Web. This column examines the DOL rules now available for electronic delivery of notices for Employee Retirement Income Security Act (ERISA) plans.

### DOL E-Delivery Options

The general rule is that disclosures required by ERISA must be distributed to participants in a manner “reasonably calculated to result in actual receipt.” [29 C.F.R. 2520.104b-1(b)] The question has always been to what extent does a plan administrator’s use of electronic delivery technology satisfy this standard.

With the final rule, the following options are now available for electronic delivery of DOL-required retirement plan notices to participants:

- Wired-At-Work Safe Harbor (Existing Safe Harbor)
- Continuous Access Website Rule (eliminated in early 2022)
- Covid-19 Relief (temporary)
- Notice and Access Safe Harbor (New Safe Harbor)

The following is a brief look at each of these options.

#### Wired-At-Work Safe Harbor (Existing Rule)

This safe harbor applies to all pension plan disclosures required under Title I of ERISA, including, but not limited to, summary plan descriptions, summary of material modifications, summary annual reports, claims denial notices, and individual benefit statements. To meet this safe harbor, eligible recipients must fall within one of the following two categories:

1. **Affirmative Consent.** This covers participants or other individuals who have affirmatively consented to electronic disclosure. A valid consent must meet certain requirements, including that the consent be made in a manner that reasonably demonstrates the individual’s ability to access information in the electronic form used (*e.g.*, internet), and that

the participant receive a disclosure describing the extent of the consent and how to revoke it, including a participant’s right to receive paper copies upon request.

2. **Access Through Employment.** This covers active employees who have (a) the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee, and (b) for whom access to the employer’s or plan sponsor’s electronic information system is an integral part of their job duties.

Moreover, the following conditions must also be satisfied: (a) the system for furnishing documents is “reasonably calculated” to (i) result in actual receipt of the transmitted information; and (ii) protect the confidentiality of personal information relating to the individual’s accounts and benefits; (b) that electronically delivered documents be prepared and furnished in a manner that is consistent with the style, format, and content requirements applicable to the particular document; and (c) that notice is provided to participants and beneficiaries at the time the document is provided electronically that apprises the individual of the significance of the document and the right to request a paper copy.

#### Continuous Access Website Rule

The “continuous access website” rule for pension benefit statement information under Field Assistance Bulletin 2006-03 (FAB 2006-03) will be eliminated 18 months after the July 27, 2020, effective date. (The ability to rely on the IRS electronic delivery rules in order to deliver Qualified Default Investment Alternative (QDIA) Notices under Field Assistance Bulletin 2008-03 will be simultaneously eliminated.)

Under this safe harbor, the following conditions must be met:

- The participant must be given notice that explains the availability of the required pension benefit statement information and how such information may be accessed.
- The notice must inform participants of their right to request and receive a free paper version of the pension benefit statement.
- The notice must be written in a manner calculated to be understood by the average plan participant.
- The notice must be provided in a manner that has been authorized by the DOL for the provision of a

pension benefit statement (*e.g.*, via US mail to the last known address, via electronic means pursuant to either the DOL or IRS electronic delivery rules).

- The notice must be provided in advance of the date the plan is required to provide the first benefit statement and annually thereafter.

Moreover, following DOL Tech. Release 2011-03R, the following information may also be provided with the statements:

- General plan information including a list of the plan's designated investment alternatives, procedures for providing investment directions, whether proxy voting rights are passed through to participants, and the name of any designated investment managers,
- Plan administrative fees and plan individual fees, and
- Amounts charged against participant accounts for administrative and individual expenses.

### **Covid-19 Relief (Temporary)**

EBSA Disaster Relief Notice 2020-01 provides valuable electronic delivery flexibility during the COVID-19 emergency that is broader than any of the other options available. Specifically, the DOL announced "good faith" relief from participant-level disclosure deadlines provided that the plan administrator provides the disclosure as soon as practicable, including through email, text messaging, and continuous access Websites. Importantly, this good faith relief policy specifically envisions electronic disclosure methods without substantive conditions. This good faith relief is available to plan administrators affected by COVID-19 and extends until 60 days following the announced end of the COVID-19 emergency.

### **Notice and Access Safe Harbor (New Rule)**

This new safe harbor (New Rule) will be effective on July 27, 2020, and can be relied on immediately. The New Rule permits plan administrators to provide "covered documents" to "covered individuals" electronically, provided that several additional conditions are met. The following discussion describes the key definitions and conditions of the New Rule.

1. Covered Documents
2. Covered Individuals
3. Initial Notice of Internet Availability (Paper Notice)

4. Notice of Internet Availability (for Website Delivery)

5. Website Delivery or Direct Delivery

6. Procedures for Undeliverable Addresses, Opt-Outs

1. **Covered Documents.** First, the New Rule applies only to "covered documents," which is defined as any document that the plan administrator is required to furnish participants and beneficiaries under Title I of ERISA in connection with a pension plan, except for any document that must be furnished only upon request. Importantly, this does not include any IRS or PBGC-required participant notices. Notably, welfare plan disclosures are entirely excluded.

2. **Covered Individuals.** The New Rule defines a "covered individual" as a participant, beneficiary, or other individual entitled to covered documents (discussed below) who provides the employer, plan sponsor, or plan administrator (or an appropriate designee) with an electronic address, such as an email address or internet-connected mobile-computing device (*e.g.*, smartphone) number.

Alternatively, if an employer assigns an electronic address to an employee, the employee is treated as if he or she provided the electronic address as long as certain requirements are met. However, the plan administrator must take steps to ensure the continued accuracy of the electronic address following termination of employment, or to obtain a new electronic address to allow the participant to continue to receive covered documents electronically following termination of employment.

3. **Initial Notice of Internet Availability (Paper Notice).** Once the employer obtains an electronic address for an individual, the next step is to provide a paper notice advising the person that the plan administrator will rely on the New Rule to provide disclosures electronically. This requirement applies both to existing participants and beneficiaries as well as any employees that become eligible after the plan begins using the New Rule. This initial notice must:

- Explain that covered documents will be provided electronically to an electronic address;
- Identify the specific electronic address to be used for the individual;
- Include any instructions to access the documents'
- If the documents will be posted to a Website (rather than delivered directly), include a notice that materials may not be available for more than a year or, if later, after the posted document has been superseded by a subsequent version of the document; and

- Include an explanation of the rights to request a paper version of any document and to opt out of electronic delivery globally. Notably, the plan administrator is required to provide paper versions of covered documents upon specific request, to comply with requests to opt out of electronic disclosure entirely, and to maintain procedures governing these requests.

4. **Notice of Internet Availability.** The New Rule relies on sending a Notice of Internet Availability to each covered individual at the electronic address provided by the individual (or assigned by the employer, in the case of an employee). The Notice of Internet Availability must be provided after the covered document is posted on the website and no later than the date the disclosure was required to be provided. It is intended to be a concise, freestanding notice that identifies the document that has been posted, provides the website or a hyperlink to the document, explains the participant's right to request and obtain a paper version or opt out of electronic delivery free of charge, and cautions that the document may not be available for more than one year (or after it is superseded).

Generally, a new Notice of Internet Availability is required to be distributed each time a new covered document is posted to the plan's Website. However, a special rule provides that certain disclosures may instead be covered by a single annual Notice of Internet Availability that is sent once every 14 months, alerting participants to certain documents that may be posted throughout the year. The annual notice is subject to similar content requirements as the initial "Notice of Internet Availability." Notably, only the following documents can be announced in the combined annual notice:

- a summary plan description;
- covered documents or information that must be furnished annually;
- any other covered document authorized by the Secretary of Labor; and
- any applicable notice required by the Code if authorized by the Secretary of the Treasury.

Neither the Secretary of Labor nor the Secretary of Treasury has authorized the inclusion of additional notices to date.

#### 5. **Website Delivery or Direct Delivery.**

- *Website Delivery:* The plan administrator is required to ensure the existence of the website that is being

used to post the covered documents, and to take measures reasonably calculated to ensure that the website meets certain minimum standards, including:

- The covered document is available no later than the date it is required to be furnished;
- The document remains available for at least one year, or, if later, until it is superseded by a subsequent version;
- The covered document is presented in a manner calculated to be understood by the average plan participant;
- The document is maintained in a widely-available format (or formats) suitable for viewing online and can be clearly printed on paper and allowing the document to be permanently retained in an electronic format;
- The covered document is searchable electronically; and
- The Website protects confidential information.

Notably, a plan administrator will not fail to be in compliance with the New Rule if covered documents become temporarily unavailable due to unforeseeable events or circumstances beyond the administrator's control, provided procedures are in place to ensure the documents are available and the plan administrator takes prompt action to cure any unavailability as soon as practicable on becoming aware of the problem.

- *Direct Delivery:* The New Rule permits a plan administrator to furnish a covered document in the body of the email or as an email attachment, to the email furnished or assigned by the employer in item #2 above. Any such email must include the same information as the Notice of Internet Availability, other than the website and the caution regarding how long documents will be available.

6. **Procedures for Undeliverable Addresses and Opt Outs.** The system for furnishing Notices of Internet Availability (and email direct delivery) must alert the administrator of an invalid or inoperable address. The plan administrator is required to maintain procedures designed to resolve the invalid addresses such as by sending the notice/document to a secondary address, obtaining a new address from the individual, or treating the individual as if they opted out of electronic delivery. In addition, the plan administrator is required to maintain procedures that allow

participants to opt out of electronic delivery entirely, and to request and receive paper copies free of charge.

### Interplay with IRS Notices

Unfortunately, the final rule does not adopt Treasury Regulation 1.401(a)-21, which sets forth the governing rules for providing IRS required notices (and also covers participant elections). Such notices include safe harbor notices, 204(h) notice, 402(f) roll-over notice, automatic enrollment, etc.

The IRS rules outline two methods for providing electronic notices: (1) affirmative consent, and (2) “effective ability to access.” This second rule requires (a) the electronic medium must be a medium that the recipient has effective ability to access, and (b) at the time the notice is provided, the recipient is advised that he or she may request and receive the notice in paper at no charge, and upon request, must be so provided. Although “effective ability to access” is not defined, “electronic medium” is broadly defined to include any electronic means of communication, which expressly includes Websites and emails.

Therefore, these new rules do not apply to delivery of any IRS Notices and there is no requirement

to change your existing process for these disclosures. For employers and recordkeepers that want to follow the new DOL rule for all benefit-related disclosures and move to a single process to ease administration and participant confusion, additional IRS guidance would be very welcomed. DOL’s preamble notes that the IRS intends to issue additional guidance relating to the use of electronic delivery. Pending any such guidance, any change would require a careful review of the form impacted, the current process, and a review of how the change lines up with the IRS rule. It is helpful that the preamble makes it clear that although it did not adopt the IRS “effective ability to access” rule verbatim, the Department believes that the final rule does “align” with the IRS regulation “in large part.”

### Conclusion

Plan sponsors and recordkeepers should take an inventory of the current processes and procedures for delivery of participant notices and consider the impact of these new rules, which have been viewed as facilitating movement of retirement notices into the 21st Century. ■

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