

## Employee Benefits Alert

# New DOL Safe Harbor Allows More Flexibility for the Electronic Disclosure of Retirement Plan Documents

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On May 27, 2020, the Department of Labor issued final regulations which provide a more streamlined process for allowing employers to send certain retirement plan documents and notices by email or to make them available through a website or mobile app. The new safe harbor essentially creates an “opt out” process under which plan documents can be provided electronically, by default, unless the employee or beneficiary specifically opts out and requests to receive paper copies. In contrast, the current DOL safe harbor provides for an “opt in” process under which employers cannot send plan documents electronically unless the individual affirmatively consents to electronic receipt, making paper copies the default method of providing plan documents and notices. Employers who follow the specific procedures and requirements of the new safe harbor will be deemed to have met their obligations under ERISA to disclose certain retirement plan statements, notices, and other documents to participants, beneficiaries and other specified individuals if done electronically.

The new safe harbor allows employers to choose between emailing plan documents and notices directly to individuals, as attachments, and using a website, web portal or app to provide plan documents and notices. If not provided as attachments, employers must send a separate email or text to provide a link to the document or other access information and to let individuals know that the document or notice has been made available.

The new safe harbor applies to “covered documents,” which is defined in the regulations as any document or information that the administrator is required to furnish to participants and beneficiaries pursuant to Title I of ERISA, except for any document or information that must be furnished only upon request. The new safe harbor also applies to more than just employees, as it includes beneficiaries and other individuals who are entitled to receive covered documents, all of whom are referred to in the regulations as “covered individuals.” However, the new safe harbor only applies to employee pension benefit plans, as defined in section 3(2) of ERISA, which includes most types of retirement plans but excludes health and welfare benefit plans.

Employers who want to rely on the new safe harbor will need to take the following actions in order to comply with the new regulations:

**(1) Determine who is eligible to receive covered documents electronically.** The employer must have an electronic address (i.e. an email or smartphone number that can receive texts) that the covered individual provided to the employer, plan sponsor or administrator (or any of their designees). This regulations outline the means by which electronic addressees can be obtained and include special rules for transitioning to the new safe harbor and terminated employees.

**(2) Provide a one-time, initial notification, in paper form, regarding the electronic delivery of future covered documents.** The initial notice is required to be given in paper form (but may be combined with other materials), and it must contain certain information required by the new regulations.

**(3) Provide covered documents electronically, either by attaching them directly to an email or making them available on a website or mobile app.** Covered documents may be sent directly to the individual's email address (but a text is not permissible) no later than the date on which the covered document must be furnished under ERISA. If covered documents are made available through a website, web portal or app, the employer must send an electronic "notice of internet availability" once each covered document becomes available, and no later than the date the document must be furnished under ERISA. Notifications for certain types of reoccurring documents may be combined into an annual notice. The electronic transmission must contain certain information and comply with other requirements under the new regulations.

**(4) Ensure that the website, app or email transmitting the covered document complies with certain standards, as applicable, when a document is made available.** The new regulations impose specific formatting, display, retention and confidentiality requirements, and also require that the system be designed to alert the employer of an invalid or inoperable electronic address.

**(5) Establish and maintain reasonable procedures governing requests for paper documents and elections to opt-out of electronic disclosures.** Under the new safe harbor, only one paper copy of any document is required to be provided free of charge, opt-out is on a global rather than document-by-document basis, and individuals may continue to request covered documents that are more than one year old.

Additional details about the new safe harbor requirements can be found [here in the full article](#).