

Employee Benefits Alert

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

By Christine Boronyak Bowers

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.

The final regulations provide the following framework for compliance with the new safe harbor for electronic disclosure of covered documents.

(1) Employers must determine who is eligible to receive covered documents electronically. In order for an employer to use electronic means as the default method of providing covered documents to an individual, 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 includes electronic addressees obtained –

- As a condition of employment.
- At the beginning of plan participation.

- By issuing a company email address to the employee. In this case, the email address is deemed to be voluntarily provided, but it cannot have been issued solely for the purpose of receiving electronic plan documents or notices or by the plan administrator or a service provider. It must be issued by the employer, and there must be another employment-related purpose for issuing the email address.
- By issuing a company smartphone with data plan. The electronic address is also deemed to be voluntarily provided in this case.
- By requesting it in plan enrollment paperwork or to establish a participant's online access to plan documents and account information. The employer can obtain the electronic address through a service provider in this case.
- From application materials or other human resources documents in the case of a personal email address.

There is nothing in the safe harbor that prevents an employer from requesting an electronic address specifically for this purpose or that requires an employer to confirm that the covered individual actually accesses information from the electronic address. However, see (4) below for when an electronic address is found to be invalid.

Under a special transition rule, existing email lists may be used, even if the email addresses were compiled over time and there is no documentation to support that they were provided in conjunction with one of the bullets listed above. However, the plan administrator must act in good faith, which requires that no email address be used if there is reason to know that it is invalid, inoperable, or was obtained other than under one of the means in the bullets listed above.

When an employee terminates employment, after having used an employer-assigned email to receive covered documents, the employer must request a new electronic address to continue providing covered documents electronically.

(2) Employers must 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 accomplish all of the following –

- Inform individuals that they will be receiving future plan documents electronically.
- Identify the electronic address that will be used for the individual. Note that this requirement may make it necessary to provide personalized initial notifications.
- Provide any instructions necessary to access the documents electronically.
- Provide an opportunity to opt out of electronic disclosures entirely, free of charge, and an explanation of how to exercise this right.
- Include a statement of the right to request and obtain a paper copy of any document, free of charge, and an explanation of how to exercise this right.
- Include a statement that document is not required to be available on the website for more than one year or, if later, once it is replaced by an updated version.
- Inform individuals that they will be notified by email when covered documents are available for review on the plan sponsor's (or an authorized provider's) website or when the document is emailed to them.

The initial notice must be provided to existing employees, as well as employees and other individuals who are already receiving electronic disclosures under the old safe harbor (i.e. those who had affirmatively consented or were determined to be "wired at work"), unless the old safe harbor will continue to be used for these individuals (in which case the old safe harbor requirements must continue to be met). Thereafter, an initial notice must be provided to each new employee and covered individual.

Because the safe harbor essentially allows electronic delivery to be the default means of providing covered documents, unless an individual opts out, it is important for the initial paper notice to be as clear and obvious as possible if it is included with other materials.

(3) Employers may attach covered documents directly to an email. 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. The covered document can be in the body of the email or included as an attachment, and the email must include all of the following information:

- A subject line that reads "Disclosure About Your Retirement Plan."
- The name of the document and a brief description (if nature of document is not made clear by its name).
- A statement of the right to request and obtain a paper version of the document, free of charge, and an explanation of how to exercise this right.
- A statement of the right to opt out of receiving documents electronically and receive them on paper, free of charge, and an explanation of how to exercise this right.
- A telephone number to contact the administrator or other designated representative of the plan.

If covered documents are attached to an email that contains the above information (rather than provided through a link to a website or app), there is no need to send a notice that the document is available, by separate email, as described in (4) below. The email to which the document is attached will serve the same purpose.

(4) Employers may post covered documents to a website, web portal or app. 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. However, notifications for certain types of reoccurring documents may be combined into an annual notice, as described below. The notice of internet availability should not be combined with any other content (except for logos or where consolidating the notices for certain plan documents are allowed), and it must include all of the following information –

- A prominent statement, for example, as a title, legend, or subject line, that reads "Disclosure About Your Retirement Plan."
- A statement that says, "Important information about your retirement plan is available at the website address below. Please review this information."
- The name of the document and a brief description (if the nature of document is not made clear by its name).
- The internet website address where the document is available, which can include a link to a website either displaying the covered document directly or showing a log-in page through which the document can be accessed.
- A statement of the right to request and obtain a paper version of the document, free of charge, and an explanation of how to exercise this right.
- A statement of the right to opt out of receiving documents electronically and receive them on paper, free of charge, and an explanation of how to exercise this right.
- A statement that the document is not required to be available on the website for more than one year or, if later, once it is replaced by an updated version.
- A telephone number to contact the administrator or other designated representative of the plan.

- (Optional) A statement about whether the individual may or is required to take any action in response, how to take any action, or that no action is required.

There are special rules that allow for a consolidated, annual notice of internet availability to be used to alert individuals to the posting of certain plan documents. The following documents may be combined into this annual notice: summary plan descriptions (SPDs), summary annual reports (SARs), qualified default investment alternative (QDIA) notices, annual pension benefit statements, annual investment related information (2550.404a-5(d)(2) information), and annual plan fee information (2550.404a-5(c) information). A separate notice of internet availability is required for summaries of material modifications (SMMs), quarterly pension benefit statements, any document that is furnished when a particular event occurs rather than on an annual basis, or any document that requires participant action by any particular deadline.

(5) Employers must ensure that the website, app or email transmitting the covered document complies with certain standards, as applicable, when a document is made available.

- The information on the website/app/email must be formatted so that it is understandable by the average plan participant.
- Covered documents must be displayed through the website/app/email in a commonly-available format (such as Word or PDF) that can be read online, printed, downloaded, and saved and must be electronically searchable by numbers, letters, or words.
- Covered documents must remain available on the website or app until the later of one year or when they are superseded by a later version.
- The website/app/email must protect confidentiality.
- Service providers (such as recordkeepers, investment providers, etc.) can host the website/app on which covered documents are posted, but the plan sponsor will still have fiduciary responsibility for selecting and monitoring their activities, and will ultimately be responsible for the website's/app's establishment and maintenance.

In addition, the system must be designed to alert the employer of an invalid or inoperable electronic address (e.g. an undeliverable message is received), in which case the employer must treat the individual as if he or she had elected to opt out of electronic delivery, unless it can be promptly cured by requesting a new electronic address or sending the notice to an alternate address on file that was provided by the individual.

(6) Employers must establish and maintain reasonable procedures governing requests for paper documents and elections to opt-out of electronic disclosure.

- Only one paper copy of any document is required to be provided free of charge.
- Opt-out is on a global basis; there is no requirement to allow opt-out on a document-by-document basis.
- Individuals may continue to request covered documents that are more than one year old.

Note that the new safe harbor may be used immediately. The DOL states in the preamble to the final regulations that it will not take enforcement action for reliance on the safe harbor before it becomes effective (i.e. during the 60-day period following publication in the May 27, 2020 publication date in the Federal Register). The final regulations are located at 29 CFR §2520.104b-31.