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# New Final DOL Rule Expands Electronic Disclosures for Retirement Plans

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The new rule finalized by the U.S. Department of Labor on May 27, 2020 has expanded the use of electronic delivery for retirement plan disclosures. Under the final rule, plan administrators may now use email or electronic posting to make such disclosures after an initial paper notification of default electronic delivery. The final rule does not affect the existing safe harbor rule for electronic disclosures. It applies only to retirement plan disclosures required by ERISA Title I and does not apply to notices required by the IRS or to health and welfare plan notices.

## When is the final rule effective?

The final rule is effective July 27, 2020, but the DOL will not take enforcement action against plans that rely on the rule immediately.

## Which disclosures can be delivered electronically?

The final rule covers documents required by Title I of ERISA, including summary plan descriptions (SPDs), summaries of material modifications (SMMs), pension benefit statements, summary annual reports (SARs), participant fee disclosures, annual funding notices (AFNs), qualified default investment alternative (QDIA) notices, and blackout notices. Plans may provide some, all, or none of these documents electronically.

The rule does not cover any disclosure by health and welfare plans, disclosures required by IRS rules such as 401(k) safe harbor notices and rollover notices, or documents that are required to be provided only upon request.

## Who can receive electronic disclosures?

To be eligible to receive electronic disclosures under the final rule, a participant, beneficiary, or alternate payee must:

- Provide the employer or the plan with an “electronic address” such as an email address or a smartphone number; or

- Be assigned an electronic address by the employer for employment-related purposes. The address cannot be assigned solely for the purpose of satisfying this rule.

Covered individuals may opt out of electronic disclosures at any time and free of charge. If an electronic address becomes invalid or inoperable, plans must take reasonable steps to obtain a valid and operable electronic address or treat the recipient as having opted out of electronic disclosures. If an employee is assigned an electronic address by the employer, the employer or the plan must take reasonable steps to ensure the continued accuracy of the address, or obtain a new, valid address, when the employee terminates.

### **What initial steps must be taken before electronic delivery?**

Plans must provide a paper notice informing each covered individual that some or all covered documents will be provided electronically. This notice must be written in a manner calculated to be understood by the average plan participant. The notice must also contain the following information:

- The electronic address that will be used for the individual
- Any instructions necessary to access the covered documents
- A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, until after it is superseded by a subsequent version of the covered document
- A statement of the individual's right to request and obtain a single paper version of a covered document free of charge and an explanation of how to exercise that right
- A statement of the individual's right to opt out of electronic delivery entirely and instructions on how to exercise this right

Employers may incorporate the initial paper notification into the employee onboarding process. The notification will need to be customized to state the covered individual's electronic address.

There is an open question whether the deadline to provide this initial notice is affected by recent joint DOL and IRS guidance that tolls certain plan deadlines until 60 days after the end of the national emergency declared by the President.

### **How may plans deliver documents electronically?**

After the initial paper notification, plans may deliver electronic documents in one of two methods: electronic posting or email.

#### **1. Notice and Access (Electronic Posting)**

Under the electronic posting method, plans may make a covered document available on a designated secure website and provide covered individuals with an electronic notice of internet availability. This notice must

be written in a manner calculated to be understood by the average plan participant. The notice must also contain the following information:

- A title, subject, or other prominent statement: “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 covered document and a brief description of the document if the name is insufficient to reasonably convey the nature of the document
- A link to the covered document or a login page that, after the covered individual logs in, leads to a prominent link to the document
- A statement of the right to request a paper copy of the covered document, free of charge, and an explanation of how to exercise this right
- A statement of the right to opt out of electronic delivery, free of charge, and an explanation of how to exercise this right
- A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, until after it is superseded by a subsequent version of the covered document
- A telephone number to contact the administrator or other designated plan representative
- (Optional) A statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action, or that no action is required, provided that such statement is not inaccurate or misleading

The notice of internet availability must include only the above content, although it may also include pictures, logos, or similar design elements, so long as the design is not inaccurate or misleading and the required content is clear. Posted covered documents must remain available for at least one year or, if longer, until superseded.

Although the notice of internet availability must be provided separately from other notices and documents, plans may provide a combined notice of internet availability for documents that are required to be provided annually (e.g., summary annual report, annual funding notice), as well as the summary plan description. The combined notice of internet availability must be provided annually no later than 14 months after the prior year’s notice.

## **2. Direct Delivery (Email)**

Plans may provide a covered document by email, either as an attachment or in the body of the email, without a separate notice of internet availability. The following rules apply to direct email delivery:

- The subject of the email must be “Disclosure About Your Retirement Plan”
- The email must provide the name of the covered document and a brief description of the document if the name is insufficient to reasonably convey the nature of the document
- The email must also contain the following information:
  - A statement of the right to request a paper copy of the covered document, free of charge, and an explanation of how to exercise this right

- A statement of the right to opt out of electronic delivery, free of charge, and an explanation of how to exercise this right
- A telephone number to contact the administrator or other designated plan representative

### **Who must maintain the website if a plan opts for electronic posting?**

Either the company or a third-party vendor, such as a recordkeeper. The key is that the website must be accessible to all plan participants, including participants who have terminated employment. If it's a company website, that means former employees would still need access. If it's a vendor website, that might raise issues about posting materials that the recordkeeper did not produce.

### **What transition issues might arise when using a third-party vendor website for electronic posting?**

Care should be taken when coordinating with a recordkeeper or other vendor to implement electronic disclosure or when transitioning from one vendor to another vendor. When replacing a vendor, plans should discuss with potential new vendors whether they will be able to accommodate existing documents, including those created by competing vendors, to the extent necessary to comply with the requirement that documents remain available for at least one year until superseded. Some vendors may introduce new fee structures or other changes to the service agreement. These changes should be carefully reviewed, keeping in mind that participants cannot be charged any amount for opting out of electronic disclosure.

### **How does the final rule affect existing rules and guidance?**

Plans may continue to use the existing 2002 DOL safe harbor, which is unaffected by the final rule. Under the 2002 DOL safe harbor, electronic disclosure is permitted to two types of employees: (1) employees who affirmatively consent to receive electronic delivery and (2) employees who are able to effectively access electronic 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. The rule is also known as the "wired at work" rule.

The final rule does supersede certain DOL interpretive guidance addressing electronic delivery for certain disclosures, but the DOL will permit plans to continue relying on such guidance for 18 months following the effective date of the final rule. The superseded guidance includes:

- Field Assistance Bulletin 2006-01, which discusses providing pension benefit statements through a secure website
- Field Assistance Bulletin 2008-01, which discusses providing QDIA notices electronically
- Technical Release No. 2011-03R, which discusses providing certain plan- and investment-related information electronically

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