DOL Final Rule Will Shift 401(k) Participant Disclosures Online

Electronic notices are expected to ease compliance and reduce costs

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May 27, 2020

On May 27, the U.S. Department of Labor (DOL) published in the *Federal Register* a final rule (https://urldefense.proofpoint.com/v2/url?u=https-3A__www.federalregister.gov_documents_2020_05_27_2020-2D10951_default-2Delectronic-2Ddisclosure-2Dby-2Demployee-2Dpension-2Dbenefit-2Dplans-2Dunder-2Derisa&d=DwMFAg&c=nQOnw6HHAeKBNxj23OXhOw&r=BO0HZIQJ7bjQ58Ey6XwV6w&m=e84PlVq2DfZqGG4ZhZyaej4kN-XR0-wWweoXo6j9jEM&s=X-3Zgz21FU8jESXn07g0X0s4dQcj_kNj-H-qhgJso-E&e=) that expands employers' ability to deliver retirement plan information by e-mail with an attached document or to send either an e-mail or a text message with links to documents posted online. The rule takes effect July 27.

The DOL also posted a fact sheet (https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/electronic-disclosure-safe-harbor-for-retirement-plans) outlining how the final rule applies to participant disclosures required by the Employee Retirement Income Security Act (ERISA) for 401(k) and similar defined contribution retirement plans, and for defined benefit pension plans.

The rule allows employers to deliver disclosure documents to plan participants primarily electronically, which will reduce printing, mailing and related plan costs by an estimated $3.2 billion over the next decade, the DOL said, while preserving participants' right to request paper disclosures.

A Welcome Development

"The final regulation represents a significant improvement over current rules and will permit many sponsors to upgrade, and in some cases transform, the way they communicate with their participants (http://www.octoberthree.com/dol-finalizes-electronic-participant-communications-safe-harbor/)," wrote Mike Barry, a senior consultant at retirement plan advisory firm October Three.

"This is a welcome development for several reasons, not the least of which are the potential cost savings and the ability to deliver important information on a more timely basis," said Kim Buckey, vice president of client services at DirectPath, a benefits education, enrollment and health care transparency firm.

Although the final rule is technically not effective until 60 days after it is published in the *Federal Register*, the DOL "has indicated that it will not take enforcement action against a plan administrator that relies on the new safe harbor before that date (https://www.spencerfane.com/publication/dol-finalizes-electronic-disclosure-safe-harbor-for-retirement-plans/)," wrote Rob Browning, a partner in the Kansas City, Mo., office of law firm Spencer Fane. "Therefore, the electronic delivery safe harbor is essentially available immediately. This is good news, particularly given the number of employees who are currently working remotely due to the COVID-19 pandemic," he noted.

New Safe Harbor

Prior to the new rule, plan sponsors that wanted to send plan information electronically were required to solicit consent from participants who didn't routinely work online. Participants could indicate consent by sending a verifiable e-mail to the plan sponsor, for instance.

The final rule creates a new safe harbor for delivering ERISA-required documents electronically as long as recipients have a valid e-mail address or smartphone number.

Plan administrators must ensure that the electronic delivery system alerts them if a participant's electronic address is invalid or inoperable. In that case, the administrator must promptly fix the problem or regard the participant as having opted out of electronic delivery.

The rule allows two methods for delivering retirement plan disclosures electronically:

- **Website posting**. Administrators may post participant disclosures on a website if an appropriate notification of Internet availability (NOIA) is sent to the electronic addresses of plan participants, either by e-mail or text message. These documents must remain on a website until superseded by a subsequent version, but never for less than one year.

  The NOIA must include the web address of, or a hyperlink to, the document; a statement of the right to receive a paper version free of charge; and a statement of the right to opt out of electronic communications and how to do so, along with the administrator's or a designated representative's phone number.

- **E-mail delivery.** Alternatively, administrators may send required disclosures directly to the e-mail addresses of plan participants, with the documents in the body of the e-mail or as an attachment. "Because disclosure is being provided directly, no NOIA is required," October Three's Barry wrote. Required documents must be sent to participants' e-mail addresses no later than the date by which the document must be furnished under ERISA.

When employment ends, administrators must "take measures reasonably calculated to ensure the continued accuracy and availability" of electronic addresses used to deliver required documents, or take steps to obtain new, valid electronic addresses from plan participants, the rule states.

The new safe harbor does not invalidate the 2002 safe harbor procedures, under which employers solicit participants' consent to receive plan disclosures electronically, for instance if they do not routinely work online. Plan sponsors may continue to use the 2002 safe harbor practices.

E-Delivery and the Pandemic

This final rule may help some employers and service providers recover from the economic disruption caused by the coronavirus pandemic, the DOL said. "Many retirement plan representatives and their service providers, for example, have indicated that they are experiencing increased difficulties and, in some cases, a present inability to furnish [ERISA] disclosures in paper form. Enhanced electronic delivery offers an immediate solution to some of these problems."

Martha King, managing director and head of the institutional investor group at Vanguard Investments, observed that "participants, particularly in this current environment, are increasingly relying on online resources to access account information and track their retirement goals."

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Deeper Engagement

"Default electronic delivery works, and the Labor Department's action benefits millions of retirement savers by lowering costs and providing greater access to and deeper engagement with information about their retirement savings," said Tim Rouse, executive director of the SPARK Institute, which represents retirement plan service providers and investment managers.

A 2019 SPARK Institute study on default electronic delivery (https://www.sparkinstitute.org/wp-content/uploads/2019/12/SPARK-Institute-Default-Electronic-Delivery-Works.pdf) found that 99 percent of retirement plan participants have Internet access, and 88 percent use the Internet daily. The research showed that e-delivery of required notices could yield benefits such as:

- Increasing participants' engagement with online tools and educational resources, driving modest increases in savings rates.
- Providing a better guarantee of actual receipt of information, helping address missing participants and strengthening cybersecurity to prevent online account fraud.

Eased regulations for electronic disclosures, Buckey said, "enables employers and plan administrators to explore technologies that measure open rates, time spent on pages, etc. These analytics can help identify issues about which participants may need additional information."

However, while the new regulations are helpful, "just because employers and plan administrators can now send disclosures electronically doesn't mean the participants will necessarily open and read them," she noted. "We have a responsibility to craft these materials in a way that is engaging, readable and understandable. And, frankly, those same standards should apply regardless of the method of distribution."

The final rule requires only that the NOIA be "written in a manner calculated to be understood by the average plan participant" and says plan administrators may look to the department's summary plan description regulations (https://www.federalregister.gov/documents/2015/03/19/2015-06211/fiduciary-requirements-for-disclosure-in-participant-directed-individual-account-plans-timing-of) for guidance on readability.

Other Plans

Although the new rule affects only retirement plan disclosures under the DOL's jurisdiction, Buckey observed that it "left the door open to extending similar safe harbors to health and welfare plans."

Doing so, she added, would "extend this safe harbor to the majority of ERISA-required materials," including Health Insurance Portability and Accountability Act and COBRA notices.

Buckey would like to see regulators "focus on this sooner rather than later," a view shared by other plan administrators and service providers.

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