# New Electronic Disclosure Rules from the DOL

The Department of Labor (DOL) released a final rule on electronic disclosure of retirement plan notices to plan participants on May 21, 2020. This new rule will allow disclosures to be delivered to certain employees via email or posted on a web site, as a default, rather than by election.

## *Background*

Plans covered by ERISA must provide multiple notices to participants and beneficiaries each year. In the past, the notices had to be hand-delivered or mailed to participants, unless the participant provided consent to receive the notice electronically or the plan was able to meet a stringent safe harbor requirement for electronic delivery. As a result, many employers chose to mail notices, despite the cost of doing so, to ensure they were meeting their fiduciary requirements.

## *New Safe Harbor*

Although the old rules have not gone away, the new rule adds availability for electronic disclosure for many businesses that could not easily satisfy the requirements in the past. The new rule adds a safe harbor option that can be followed (at the employer's option) to provide disclosures through electronic means without consent, unless the participant requests a paper copy of the disclosure. The new safe harbor will permit the employer to post the disclosure to a website or furnish it through email delivery.

## *Covered Individuals and Covered Documents*

The new safe harbor is available only for "covered individuals." A covered individual is any person entitled to receive a "covered document" who has a valid email address or smartphone number. This can be an email address or phone number that the employee provides to the employer, or one that the employer assigns to the employee for employment-related purposes (but not solely for purposes of receiving these communications). Therefore, if the employee has an email address assigned to them for business purposes, this email address can be used to deliver covered documents as required under ERISA. A covered document is any document required to be provided to a participant, beneficiary, or another party under ERISA, except for one that is only required to be provided upon request.

***Initial Notice***

Before any disclosures can be provided under the new rule, an initial notification must be provided, on paper, to inform participants they will be receiving notifications electronically, and must include:

- how the disclosures will be delivered (email, website, etc.) along with any instructions needed to access the disclosures, and
- that this is a change for existing participants (when this method of delivery is first used), and
- that they have a right to opt out of electronic delivery if they prefer to receive the notice on paper, at no charge.

***Notice of Internet Availability***

Once an initial notice has been provided, a Notice of Internet Availability (NOIA) must be provided whenever a new notice is posted to a website to let the participants know it is available. Alternatively, the disclosure can be attached to the email, or just included in the body of the email.

The NOIA is intended to be short and concise. It must identify or describe the covered document, how to access it, and the participant's right to receive a paper copy and opt out of electronic delivery. To avoid "notice overload," the DOL allows one NOIA to be used to announce multiple disclosures that are posted at the same time. Documents that can be combined under one notice include the SPD, any covered document that must be provided annually (as opposed to upon the occurrence of an event) like participant-level fee disclosure, and any other documents not specifically included but otherwise authorized by the DOL or IRS. However, note that the new rule does not change the deadline for providing any specific notice or disclosure.

If posted online, the covered documents must be available until replaced by a newer version, but at a minimum for at least one year. If a newer version is posted sooner than the one-year period has expired, both documents will be accessible at once.

***Invalid Addresses***

The plan administrator must ensure that they will receive notifications of invalid addresses so that they can review and correct the problem. If they cannot obtain a valid electronic address, they must treat the participant as having opted out. Also, the plan administrator must take steps upon an employee's termination to ensure the continued accuracy of the participant's electronic address.

### *Effective Date of the New Rule*

The final rule becomes effective on July 27, 2020, 60 days after published in the Federal Register. However, the DOL has indicated they will not take any enforcement action against a plan administrator that relies on this safe harbor before that date. Their decision to provide this non-enforcement policy supports the government's broader effort to respond to the COVID-19 pandemic.