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DOL Finalizes Rule Updating Electronic Disclosure Safe Harbor for Retirement Plans

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The Department of Labor (DOL) has issued final regulations providing a new "notice and access" safe harbor (the "NOA Safe Harbor") for retirement plans to furnish required disclosures by email or other electronic means to participants and beneficiaries. Generally, under the "notice and access" process, the plan administrator may send participants and beneficiaries electronic messages notifying them of the availability of documents and required disclosures posted on the plan's website.

The NOA Safe Harbor should reduce costs for many retirement plans because it expands the availability of electronic disclosures beyond what was permitted under the DOL's prior safe harbor issued in 2002 (the "2002 Safe Harbor"), which generally allows electronic disclosures to participants who are "wired at work" or who have opted into receiving electronic disclosures. Plan administrators may still rely on the 2002 Safe Harbor instead of the NOA Safe Harbor.

The final rule includes some modifications to the proposed rule that was issued in October. Our prior posts on the proposed regulations are available at: Deeper Dive into the new Proposed Electronic Disclosure Safe Harbor and DOL Proposes New Electronic Disclosure Safe Harbor for Retirement Plans.

What Documents May be Provided with the NOA Safe Harbor?

As with the proposed rule, the final rule applies the NOA Safe Harbor only to retirement plan disclosures under the DOL's jurisdiction. This includes a broad array of documents, like summary plan descriptions (SPDs), participant fee disclosures, pension benefit statements and blackout notices. The final rule does not extend the NOA Safe Harbor to disclosures for health and welfare plans, but the DOL continues to consider whether it should be extended to these plans and under what circumstances.

The NOA Safe Harbor does not apply to documents that are within the IRS's jurisdiction, such as safe harbor notices. However, the DOL coordinated the development of the rule with the IRS at the direction of the President and Treasury/IRS intend to issue their own guidance updating their electronic disclosure rules.

Who May Receive Disclosures under the NOA Safe Harbor?

The NOA Safe Harbor generally can apply to any participants or beneficiaries for whom the plan administrator has a valid email address or other internet address (e.g., for a smartphone mobile number). This can include active employees who have been assigned a work email address or who have provided a personal email address, for example, as part of their application process or in connection with enrolling in the plan.

Plan Administrators can rely on the NOA Safe Harbor for spouses and beneficiaries only if they have affirmatively provided an electronic address.

What Steps Must the Plan Administrator Take to Ensure an Electronic Address is Valid?
The system must be designed to alert the plan administrator if a message "bounces back" or is otherwise invalid or inoperable. In this case, the plan administrator can either send a message to a secondary address on file for the participant or beneficiary, obtain a new address or send a paper notice as soon as reasonably practicable.

Additionally, when a participant terminates employment, the plan administrator must take reasonable steps to verify that the address is still accurate and available or to obtain a new address.

How Does the Plan Administrator Adopt the New Safe Harbor for Electronic Delivery?
To rely upon the NOA Safe Harbor, the plan administrator must first provide a paper notice to participants and beneficiaries informing them that documents will be furnished electronically to an electronic address. This could be provided with plan enrollment materials. This notice must also identify the electronic address that will be used, provide instructions on how to access the documents and inform participants and beneficiaries of the right to request a paper document free of charge or to opt out of electronic disclosures. This notice must also inform participants that documents will be maintained on the website for a minimum of one year or until the document is superseded by an updated version of the document.

What Is a Notice of Internet Availability (NOIA)?
The NOIA is the electronic message that informs participants of the availability of documents posted on the website. The NOIA is subject to formal content requirements similar to that described in the proposed regulations. The NOIA must include:

A prominent statement that says: "Disclosure About Your Retirement Plan."

A statement that says: "Important information about your retirement plan is now available. Please review this information."

Identification of the document by name (e.g., "Your Quarterly Benefit Statement is now available.") and a description of the document if not reasonably conveyed by the name. For example, a Quarterly Benefit Statement would be self-explanatory, but a blackout notice would need a brief explanation.

The website address or hyperlink for the document.

A statement of the right to request a paper version of the document free of charge.

A statement of the right to opt out of electronic disclosures and how to exercise this right.

A cautionary statement of how long the document will be maintained on the internet site.

The NOIA must be separate from other disclosures and not include any other content, except that it can include pictures, logos or other design elements that are not misleading or confusing.

Can a Combined NOIA Be Provided for Multiple Documents?

A combined NOIA can be used for an SPD and for any documents that must be furnished annually and that do not require action by a participant by a specific date. Documents that relate to a specific event, such as a blackout notice, or that must be provided on a different schedule, such as a quarterly benefit statement, cannot be provided under the combined NOIA.

When Must the NOIA Be Sent to Participants and Beneficiaries?

Generally, a NOIA must be provided at the time that a document is posted on the website. However, a combined NOIA as described immediately above must be furnished once each plan year, and no more than 14 months from the time of the prior year's NOIA. The 14-month period is intended to accommodate some flexibility in timing from year to year.

How Long Must Documents Remain Posted on the Website?

Documents must remain posted on the website for a minimum of one year or until they are superseded by newer versions. For example, an SPD would be maintained on the website until a new SPD is issued. A blackout notice, which relates to a specific event and so will not be updated, must remain posted for one year.

What Standards Apply to the Website?

Documents posted on a website must be posted by their legal due dates for being provided to participants. They must be presented in a way that is calculated to be understood by the average participant and posted in a widely available format or form that is suitable to reading online or printing on paper. Further, the documents must be searchable by numbers, letters or words. The website on which documents are posted must be reasonably designed to ensure the confidentiality of personal information.

Can Documents Be Attached to Emails Rather than Posted on a Website?

Unlike the proposed regulations, the final regulations specifically allow for disclosure documents to be attached to an email instead of posted on a website.

Must Paper Copies of Documents Be Available upon Request?

Although the DOL recognizes that internet access has become "nearly universal" since the 2002 Safe Harbor was issued, it believes there are legitimate reasons that participants may prefer paper notices. Accordingly, the DOL has retained a requirement that participants be able to request a paper copy of notices free of charge, or be able to opt out of electronic disclosures altogether in favor of receiving paper copies.

Will the NOA Safe Harbor Adapt to Changing Technologies?

The DOL has anticipated that technologies will continue to change. For example, apps may replace websites and new forms of communication may supplant emails. The NOA Safe Harbor is intended to adapt to these technologies. Accordingly, a website may include mobile applications or other internet-based technologies. Similarly, an electronic address can include text addresses or electronic addresses other than email.

When is the NOA Safe Harbor Effective?

The NOA Safe Harbor becomes effective 60 days after its publication in the Federal Register. However, as an enforcement measure, the DOL will not take any enforcement action against a plan administrator that relies on the safe harbor sooner.