

DOL Announces Publication of Final E-Disclosure Rule

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On May 21, 2020, the Department of Labor (DOL) announced its final rule on electronic disclosures, which is scheduled to be published on May 27th. The final rule allows employers to deliver participant disclosures primarily electronically. The DOL anticipates this will reduce plan costs by an estimated \$3.2 billion over the next decade, while making disclosures more readily accessible and useful to plan participants. The final rule also preserves the right of participants to receive disclosures in paper form, if they choose.

The final rule is fundamentally similar to the proposed rule published in October of 2019, which we discussed in detail in our [October 2019 newsletter](#). These regulations create a new, voluntary fiduciary safe harbor for electronically providing participant disclosures required under ERISA (referred to in the final rule as “covered documents”), which are within the jurisdiction of the DOL. (IRS regulations will continue to apply to retirement plan notices within IRS jurisdiction.) The safe harbor only applies to *retirement* plan disclosures (not health and welfare plans), and it does not apply in circumstances where a document is only required to be provided upon request (such as a copy of the plan document).

The safe harbor permits a so-called “notice and access” approach, where participants and beneficiaries (referred to in the final rule as “covered individuals”) must first receive a paper notice



explaining that some or all covered documents will be furnished electronically, and that they have a right to opt-out of electronic delivery and, instead, receive the documents in paper form, free of charge. As a general rule, whenever a covered document is made available, the individual must electronically receive a Notice of Internet Availability (NOIA) that explains what the document is and where it is available, and again provides the right to opt out of electronic delivery and receive a paper copy of the document.

The system for furnishing the NOIA must be designed to notify the plan administrator of a covered individual's invalid or inoperable electronic address. And, if so notified, the plan administrator must either take prompt steps to fix the problem or treat the individual as having opted out of electronic delivery, in which case the disclosure must be provided in paper form as soon as reasonably practicable.

The final rule departs from or clarifies the proposed rule in a number of areas, the most significant of which are described below:

- The final rule provides that covered documents can be sent directly via email (in which case an NOIA is not required, but the email must include certain required information)
- Unlike under the proposed rule, the final rule provides that the employer cannot assign an employee an electronic address to be used solely for the purpose of complying with the safe harbor — the electronic address must have another employment-related purpose (such as the employee's general work email address).
- The final rule provides that only an employer, and not a plan administrator or service provider, has the authority to assign an electronic address to an employee to be used to comply with the safe harbor.
- The final rule provides that employers cannot assign electronic addresses for non-employee spouses or other beneficiaries; rather, the safe harbor can apply only if these individuals have affirmatively provided an electronic address.
- The final rule clarifies that covered individuals include multiemployer plan participants.
- The final rule clarifies that participant-level fee disclosures are covered by the rule.
- The final rule made minor changes to the content requirements of an NOIA, such as clarifying that a brief description of the document is required only when identifying a covered document by name would not reasonably convey the nature of the document (because, for example, that document is not typically furnished on a recurring basis and would not, therefore, be familiar to the participant).
- The final rule clarifies that hyperlinks may be included on an NOIA, and, in fact, they are encouraged.
- The final rule contains a new provision requiring that a covered document remain available on a website until it is superseded by a subsequent version of the covered document, but in no event less than one year after the date the covered document was published to

the website. The final rule also requires the initial paper notice, as well as any NOIAs, to include a cautionary statement that describes this timeframe.

- The final rule provides that an NOIA may (but is not required to) contain 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 a statement that no action is required, provided that such statement is not inaccurate or misleading.
- With regard to the readability standard for an NOIA, the final rule does not contain the language from the proposed rule that referenced short sentences, everyday words, active voice, and language that results in a Flesch Reading Ease test score of at least 60.
- The final rule clarifies that the term “website” for purposes of the safe harbor means an internet website or other internet or electronic-based information repository (such as a mobile app) to which covered individuals have been provided reasonable access.
- The final rule clarifies that plan administrators are not required to offer a right to opt-out of electronic disclosure on a document-by-document basis and that the ability to globally opt-out is the only requirement, although plan administrators may choose to offer additional opt-out election options.
- The final rule eliminates the requirement to take special steps to verify electronic contact information after an employee has a severance of employment, when the electronic address being used was not assigned by the employer.
- The final rule modifies the groups of documents for which a single annual combined NOIA is permitted and, notably, no longer permits an annual NOIA to cover quarterly benefit statements.

The final rule will become effective 60 days following the date it is published in the Federal Register; however, the DOL states that, as an enforcement policy, it will not take any enforcement action against a plan administrator that relies on this safe harbor before that date. The DOL explains that its non-enforcement policy supports the government’s broader effort to respond to the far-reaching effects of COVID-19, and its desire is to reduce administrative burdens on employers and plan service providers during this difficult and unprecedented time.

Trucker Huss will be presenting a webinar on the final e-disclosure rule on Thursday, June 4th at 9:30 a.m. PDT. You can register for the webinar using the following link:

<https://attendee.gotowebinar.com/register/4494305862753280782>

We look forward to meeting with you on June 4th. In the meantime, if you have questions regarding the new electronic disclosure safe harbor, please contact us.

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