

Electronic Delivery of Required ERISA Notices for 401(k) Plans Made Easier Under New DOL Rules

WRITTEN BY

[Evelyn Small Traub](#) | [James E. Earle](#)

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Authors:

Evelyn Small Traub, Partner, Troutman Sanders

[James E. Earle](#), Partner, Troutman Sanders

Jessica Hajjar

On May 27, 2020, the DOL published final rules that provide a new safe harbor method for the electronic delivery of ERISA-required notices (the “Final Rules”).

The Final Rules apply to any participant, beneficiary, or alternate payee who provides the plan sponsor or administrator with an email address or smartphone number. Plan sponsors and administrators may deliver required ERISA notices by a combination of (i) providing the covered individuals with an electronic “notice of internet availability” that identifies a website where the ERISA notice is posted, and (ii) posting the notice on the website (i.e., “notice and access”). For many regular annual required notices, the “notice of internet availability” must be furnished only once per year. Alternatively, covered documents may be delivered directly to the covered individual’s email address. The rules apply only to required notices for 401(k) and other tax-qualified retirement plans, and do not apply to group medical or other health and welfare plans.

The new safe harbor is a small but welcomed step forward in reducing some of the administrative burdens related to tax-qualified retirement plans while also recognizing the wired world in which we live. Before using the new safe harbor, the plan administrator must notify participants of the new delivery method.

Background

Plan sponsors and administrators of 401(k) and other tax-qualified retirement plans must comply with numerous notice requirements under the Employee Retirement Income Security Act of 1974 (“ERISA”). Participants and beneficiaries must receive copies of summary plan descriptions, summaries of material modifications, summary annual reports, various investment disclosures, plan statements, and numerous other required notices.

In 2002, the Department of Labor (“DOL”) approved two “safe-harbor” methods to electronically deliver these notices. One easy-to-use safe harbor applies to employees who are “wired at work.” The other safe harbor

applies to anyone else in the plan – i.e., employees who are not “wired at work,” former employees with accounts, beneficiaries, and alternate payees. These individuals must provide affirmative consent to electronic delivery.

These safe harbors have proved helpful and remain in effect. However, with the rapid changes in electronic options, they may have become a cumbersome way for employers to deliver notices. In October 2019, the DOL proposed a new, additional safe harbor that follows a “notice and access” electronic delivery model intended to provide a more convenient and efficient method for furnishing required ERISA notices, especially for individuals who do not qualify for the 2002 “wired at work” safe harbor. The finalized rules are substantially similar to the proposed rules, but some changes have been incorporated in response to concerns raised by commenters, as further described below.

New Electronic Delivery Safe Harbor

The Final Rules create a new safe harbor allowing ERISA plans to provide plan participants, beneficiaries and other individuals with a notice stating that the required plan disclosures will be made available on a website or to provide required disclosures directly by email (the “safe harbor”). However, a plan administrator who wishes to continue to rely on the existing 2002 safe harbor rules for e-delivery or continue to deliver by hand or first-class mail may continue to do so.

The Final Rules utilize a “notice and access” structure for furnishing ERISA required disclosures electronically. Under this structure, a plan administrator notifies the “covered individuals” of the availability of the documents with an electronic “notice of internet availability” (the “notice”) and then posts the required disclosures on a website. The requirement and parameters of this process are discussed below. The direct disclosure by email is also discussed below.

Effective Date

The Final Rules are effective on July 27, 2020. The DOL has stated that it will not take any enforcement action against a plan administrator that relies on the new safe harbor before the effective date in connection with the Federal government’s broader effort to respond to COVID-19.

Getting Started:

Initial Paper Notification of Default Electronic Delivery and Right to Opt Out

A plan administrator that decides to utilize the new safe harbor must send an initial notification on paper that some or all of the covered documents will be e-delivered to the participant’s electronic address on file. Additionally, the initial notification must alert the covered individual of his or her right to receive the covered documents in paper and that he or she may opt out of e-delivery, including the procedures for exercising such rights.

If the plan is currently using the 2002 safe harbor and wishes to adopt the new safe harbor, the plan administrator must send a one-time notification to each existing employee (including those who provided their affirmative consent under the 2002 safe harbor) notifying them of the plan’s intent to rely on the new safe harbor. Thereafter, the administrator must send this notification to each new employee who would be covered by the safe harbor.

Details of the New Safe Harbor

Covered Individuals

Under the Final Rules a “covered individual” is a participant, beneficiary or alternate payee for whom the employer, sponsor or plan administrator has an electronic address (e.g. email address, smartphone number, etc.). The Final Rules require, a condition to use the safe harbor, that the administrator receive an electronic address or number with which to communicate with the covered individual. This may include a personal or work email address. Because technology changes so often, the Final Rules do not limit the type of device a participant or beneficiary must have to be covered by the safe harbor.

Employers may use a work email address that it assigns to an employee for employment related purposes other than solely the delivery of covered documents under the new safe harbor.

Covered Documents

A plan administrator may use the safe harbor only for pension benefit plans, which includes 401(k) and other tax-qualified retirement plans. The safe harbor covers documents that are required to be provided to participants and beneficiaries under Title I of ERISA (“covered documents”). The definition of covered documents includes documents that must be sent as a result of the passage time – such as a summary annual report – and documents required as a result of a specific triggering event – such as a summary of material modification (SMM), blackout notice or claim denial. The plan administrator has discretion to only apply the safe harbor to certain covered documents.

The Final Rules do not apply to employee welfare plans. However, the DOL has reserved the right to expand the safe harbor in the future.

Timing of Notice of Internet Availability

The Final Rules require the plan administrator to send the notice to the covered individuals for a covered document at the time it becomes available. For example, if a plan is required to send six different covered documents, such as four quarterly benefit statements, a black out notice and a new Summary of Material Modifications (SMM) to its covered individuals over the course of the plan year, the plan administrator would have to send six notices in order to comply with the safe harbor.

However, a plan administrator may send a single combined annual notice for all or some of the following documents:

- Summary plan descriptions (SPDs);
- SMMs (after initial notice of availability);
- Any covered document that must be furnished at least annually, as opposed to at the time of a specific event, such as:

- Summary annual reports;
 - Annual funding notices;
 - Investment-related disclosures (identifying information, performance data, benchmarks, fee information, etc.);
 - Qualified default investment alternative notices;
 - Pension benefit statements; and
- Any IRS required notices if authorized by the IRS to be delivered electronically by means of a combined notice.

If the plan administrator uses a combined notice, the timing requirement is satisfied if the combined notice is furnished each plan year. If the combined notice was furnished in the prior plan year, then the combined notice must be sent no later than 14 months following the date the prior plan year's notice was sent.

Additionally, the Final Rules require the plan administrator to make the covered document available on the website by the covered document's ERISA deadline.

Content of Notice of Internet Availability

The notice of internet availability must contain the following information:

- A prominent statement (such as a title, legend or subject line) that reads, "Disclosure About Your Retirement Plan;"
- A statement that reads, "Important information about your retirement plan is available at the website address below. Please review this information;"
- An identification of the covered document by name, a brief description of the covered document and why it is important (if not evident from the name);
- A specific website address that provides ready access to the covered document or in a combined notice covered documents (e.g., a direct link to the document or a log-in page that provides a link to the document);
- A statement of the right to request and obtain a paper version of the covered document, 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 a year or, if later, after it is superseded by a subsequent version;
- A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to

exercise this right; and

- A telephone number to contact the administrator or other designated representative of the plan.

Form and Manner of Providing the Notice of Internet Availability

Like most participant disclosures under ERISA, the DOL expects the notice to be clear and concise in explaining its content and importance. In order to satisfy the safe harbor, the notice must:

- Be sent electronically to the covered individual's electronic address;
- Contain only the required content, though pictures, logos or similar design elements may be included, so long as the design is not inaccurate or misleading and the required content is clear;
- Be furnished separately from any other documents or disclosures, including those required by ERISA, sent to the covered individual (unless the exception for combined notices applies); and
- Be written in a manner calculated to be understood by the average plan participant.
 - For this purpose, the DOL removed the requirement included in the proposed rules that the notices meet an objective general readability standard. The DOL will, however, continue to study ways to improve readability of the required notices.

Website

The plan administrator is also required to establish and maintain a website (or other electronic-based repository for information such as a mobile app) where covered individuals can easily access the covered documents. The administrator may delegate some responsibilities associated with the website to third party service providers. But, the administrator, as a plan fiduciary, must prudently select and monitor those service providers. Additionally, the administrator must take measures reasonably calculated to ensure the website meets certain requirements. For example, covered documents posted on the website must:

- Be available on the website by the applicable ERISA deadline for furnishing the covered document;
- Remain available on the website at least a year or if later, until it is superseded by a later version;
- Be presented in a manner calculated to be understood by the average plan participant;
- Be available in a widely-used format suitable for reading online and printing clearly on paper;
- Be searchable electronically by numbers, letters or words so participants can quickly find information about

specific issues; and

- Be available in a widely used format that allows the document to be permanently retained electronically (e.g., PDF).

A plan administrator must also take reasonably calculated measures to ensure the website protects the covered individual's personal information and confidentiality.

Right to Request Paper Copies and Opt Out

The Final Rules require the plan administrator to maintain reasonable procedures to allow a covered individual to request a paper copy of the document free of charge. The Final Rules also require the plan administrator to establish reasonable procedures to give covered individuals the ability to opt out of e-delivery and receive only paper copies of some or all of the covered documents. If a participant decides to opt out, then all future covered documents must be delivered in paper, unless the covered individual decides to opt back into e-delivery.

Severance from Employment with Plan Sponsor

Covered individuals may continue to receive their covered documents by e-delivery even after they separate from employment with the plan sponsor. In such case, the plan administrator must take measures reasonably calculated to ensure the continued accuracy of the covered individual's electronic address or obtain the covered individual's new electronic address to ensure the covered individual's continued access to the covered documents.

Alert About Invalid Electronic Addresses

The Final Rules require the system for furnishing the notice to provide an alert to the administrator in case a covered individual's electronic address appears to be invalid or otherwise inoperable. The administrator then must take steps to obtain a new, valid electronic address. If the administrator cannot obtain a new valid address, then it must deem the covered individual to have opted out of e-delivery. As a best practice, plan administrators should keep a secondary electronic address for the covered individual on file and send the notice to the secondary address if they are alerted to an invalid or inoperable primary electronic address. The DOL has stated that this requirement is intended to help reduce the number of post-employment "lost participants."

Temporary Unavailability

The Final Rules require plan administrators to have reasonable procedures in place to ensure that the covered documents are available. However, the Final Rules recognize that technological errors do occur and that they may render the covered documents temporarily unavailable. If the documents do become temporarily unavailable, the plan administrator must take prompt action to get the covered documents back online and available as soon as practicable following the time when the administrator knew or reasonably should have known the documents were unavailable.

Alternative to “Notice and Access” Method

As an alternative to the safe harbor described above, the administrator can send a covered document directly to a covered individual's email address no later than the date the document must otherwise be furnished. The email must use a subject line that reads: “Disclosure About Your Retirement Plan” and include much of the same content as the notice of internet availability described above, such as the name of the document (including a brief description, if needed), a statement of the right to receive a paper copy and/or opt out of electronic delivery, and a contact phone number. The document can be delivered in the body of the email or as an attachment. The document must meet the same standards of readability and other requirements for documents that are posted on the website described above.

If you have questions about the new electronic distribution rules, or if you would like to implement the new delivery methods, please contact an attorney in the Troutman Sanders Employee Benefits and Executive Compensation Practice.

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