

Locke Lord QuickStudy: New ERISA Safe Harbor Expands Opportunities for Electronic Disclosure of Retirement Plan Information

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On May 21, 2020, the U.S. Department of Labor (“DOL”) announced a new safe harbor rule that will allow plan sponsors, by default, to post retirement plan disclosures online or deliver them to participants by email in satisfaction of their duties under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). To deliver disclosures electronically, until now, plans could use a regulatory safe harbor established by the DOL in 2002.

In addition to predicting savings to employers of over \$3 billion over the next ten years, the DOL asserts that the new rule will provide immediate relief to employers as they rapidly respond to changes necessitated by the COVID-19 national emergency. Visit our [COVID-19 Resource Center](#) for up-to-date information to help you stay informed of the legal issues related to COVID-19.

This article will present a practical summary and guide in Q&A format for plan sponsors and administrators relating to this new electronic disclosure safe harbor. In addition to addressing the requirements of the safe harbor, we will also provide insight regarding transitioning to the new rule and best practices for tackling challenges that disclosure under the new rule may present.

Q: Is the new electronic disclosure rule mandatory?

A: No. The new rule provides a voluntary safe harbor that plan sponsors may utilize to satisfy certain disclosure requirements under ERISA. The regulatory safe harbor that was issued in 2002 is still effective, and plan communications may also still be provided in paper form. The general ERISA standard requires that any delivery method must be reasonably calculated to ensure that workers actually receive the disclosure.

Q: Does the new safe harbor apply to all plan participants?

A: The safe harbor applies only to “covered individuals.” A “covered individual” is a participant, beneficiary, or other individual who provides the employer, plan sponsor, or administrator with an electronic address when he or she begins participating in the plan, as a condition of employment, or otherwise.

Q: What is an “electronic address” for purposes of this safe harbor?

A: The DOL stated that the safe harbor requires an email address or internet-connected mobile computing device, such as a smartphone number. The rule, however, is meant to be broad enough to apply to new and changing technology.

Q: Does the rule permit a participant to provide a personal email address for receiving plan communications? May employer-issued addresses be used?

A: Plans have a variety of ways to obtain an electronic address for each covered individual. An electronic address issued by an employer to an employee in connection with his or her employment or a personal electronic address that is provided by the individual to the plan sponsor as part of the job application process will both suffice. Although employers may assign electronic addresses to their employees in connection with employment, employers cannot assign such addresses to non-employee spouses or other beneficiaries of plan participants. While an employer may issue electronic addresses, the safe harbor does not allow a third-party plan service provider, such as a record-keeper, to assign them.

Q: May an employer issue a special-purpose email address to an employee to be used solely for plan communications?

A: No. Employer-assigned addresses must have an employment-related purpose other than to comply with the safe harbor. Because of the risk that disclosure could go unnoticed or an employee might ignore the email address, the safe harbor does not permit an employer to issue an email address for the sole purpose of electronic disclosure.

Q: Does a plan sponsor or administrator have a duty to ensure that an electronic address is valid and that disclosure is actually received?

A: The system for furnishing a notice of internet availability (see below) must alert the plan if an electronic address is invalid or inoperable. If an electronic address has become invalid or inoperable, the plan must promptly take reasonable steps to cure the problem. Additionally, plans that use smartphone device numbers, as opposed to email addresses, must take steps to distinguish landline numbers from mobile or similar numbers that enable the receipt and inspection of written messages. Audio transcriptions of written disclosures will not satisfy the safe harbor.

Q: Does the new safe harbor cover all ERISA disclosure?

A: The safe harbor does not apply to any employee welfare benefit plans, such as plans providing disability benefits or group health plans. For purposes of the safe harbor, a “covered document” is any document or information that must be furnished to participants and beneficiaries pursuant to Title I of ERISA with respect to a retirement plan, except for any document or information that must be furnished only upon a participant’s request.

Q: What are the prerequisites to providing covered documents electronically?

A: Prior to relying on the safe harbor, plan administrators must provide each covered individual with a paper notification that the covered document will be sent to an electronic address (Initial Notice). Thereafter, plan administrators must provide participants with a Notice of Internet Availability (NOIA) at the time the covered documents are posted to a website.

Q: What information must be included in the Initial Notice?

A: Before a plan may rely on this new safe harbor, plan administrators must provide each covered individual with a paper Initial Notice. This Initial Notice must include the following information:

- Identification of the specific internet address (email address or smartphone number) that will be used for the individual and any instructions necessary to access the covered documents (for example, whether the individual will have to use passwords, download a mobile application or set up an online account).
- A cautionary statement that documents are not required to be available on the website for more than one year, or if later, after it was superseded by a subsequent version.
- 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 statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.

A plan must provide this Initial Notice to existing participants, including those who are receiving electronic disclosure under existing ERISA safe harbor electronic disclosure rules and newly hired employees. Further, this Initial Notice is not required to be furnished alone, and may be distributed with enrollment or other onboarding materials.

Q: What Information must be included in the NOIA?

A: If a covered document will be made available on a website or app used to distribute plan-related documents, the plan must provide covered individuals a Notice of Internet Availability. The NOIA must be written in a manner reasonably calculated to be understood by the average plan participant and include the following information:

- A prominent statement – for example, a title, legend or subject line – that reads “Disclosure About Your Retirement Plan.”
- A statement that reads “Important information about your retirement plan is now available. Please review this information.”
- The name of the document (for example, a statement that reads “Your Quarterly Benefit Statement is now available”) or a brief description of the document if identification by name would not reasonably convey the nature of the document.
- The internet website address, or a hyperlink to such address, where the document is available. The website or hyperlink must either lead the covered individual directly to the covered document or to a login page that provides, after the individual logs in, a prominent link to the covered document.
- A statement of the right to request and receive a paper version of the document free of charge, and an explanation of how to exercise this right.
- A statement of the right to opt out of electronic delivery and receive only paper versions of documents, 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 one year or, if later, after it is superseded by a subsequent version of the covered document.
- A telephone number to contact the plan administrator or other designated plan representative.

The NOIA may also include an optional statement as to whether action by the covered individual is invited or required in response to a plan document and how to take such action, or that no action is required, but this statement cannot be inaccurate or misleading.

Q: *Can NOIAs be combined?*

A: A NOIA must be provided to each covered individual each time a covered document is made available on the website or app. For certain documents, including the summary plan description (SPD) and other documents that must be furnished annually and not as a result of a particular event, the plan administrator can issue a combined NOIA once each plan year and no later than 14 months after the prior year's notice.

Q: *Can covered documents be delivered by email?*

A: Yes. Covered documents may be delivered by email rather than (or in addition to) posting to a website, with the covered document attached as a PDF or similar version or fully set forth in the body of the email. Plan administrators must first provide the Initial Notice and cannot send the covered document directly by text.

- To email the covered document directly, the plan administrator does not need to send an NOIA. Rather, the email must:
- Include the covered document in the body of the email or as an attachment.
- Include a subject line that reads: "Disclosure About Your Retirement Plan".
- Identify or briefly describe the covered document.
- Include a statement of the right to paper copy of the covered document and the right to opt out of electronic delivery.
- Be written in a manner calculated to be understood by the average plan participant.
- Include the plan administrator's telephone number.

The plan administrator must take measures reasonably calculated to protect the confidentiality of personal information, and comply with the requirements relating to the right to request paper documents or the right to opt out discussed below.

Q: *What are the standards for the website?*

A: Plan administrators must ensure the website that is being used to access covered documents exists and is properly maintained. Further, plan administrators must take measures reasonably calculated to ensure that:

- The website protects the confidentiality of personal information relating to any covered individual.
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The covered documents are presented on the website in widely-available formats that are suitable to be both read online and clearly printed on paper and allow for the documents to be permanently retained in an electronic format.

- The covered documents are searchable electronically by numbers, letters or words.
- The covered documents are available on the website no later than the date it is required to be furnished and remains available for at least one year, or, if later, until it is superseded by a subsequent version.

If the covered documents are temporarily unavailable for a reasonable period of time due to maintenance or unforeseeable events or circumstances beyond the plan administrator's control, the safe harbor requirements will be satisfied if the plan administrator has reasonable procedures in place to ensure that the documents are available in the manner required by the safe harbor. The plan administrator must take prompt action to ensure that the documents are available as soon as practicable after the administrator knows or reasonably should know that such documents are temporarily unavailable.

Q: Can participants request paper copies or globally opt out of electronic delivery?

A: Yes. Plan participants can request paper copies of any covered document, free of charge. Participants also have the option to “globally” opt out of all electronic disclosures and plan administrators may, but are not required, to offer additional opt-out elections, such as a document-by-document opt out or one based on categories or classifications of covered documents.

Q: Can the safe harbor be used for terminated employees?

A: Yes, provided the plan administrator has a valid electronic address for the terminated employee. Plan administrators must ensure that a former employee for whom an electronic address was assigned by the employer has continued availability to such electronic address or must obtain a new electronic address that enables receipt of covered documents following termination of employment. As an example, as part of the off-boarding process, the employer may request that the employee provide an updated personal email address for future notifications.

Q. When are the safe harbor rules effective?

A: The safe harbor rules apply beginning on July 27, 2020. However, the preamble to the final regulations provides that the DOL will not take any enforcement action against a plan administrator that relies on the safe harbor before that date.

If you have any questions on how to implement these new electronic disclosure rules, please contact the authors or any member of our Employee Benefits and Executive Compensation Practice Group.

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