

Client Action Bulletin

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EBSA final rules on default electronic disclosure for pension plans

SUMMARY

The Employee Benefit Security Administration (EBSA) of the Department of Labor (DOL) published a final rule on the use of electronic media as a default to provide information to pension plans' "covered individuals." The rule is an additional safe harbor for use by these pension plans' administrators to comply with ERISA plans' disclosure rules. Covered individuals can be notified that certain "covered documents" will be made available on either a website or via email, subject to several specific conditions discussed below.

The use of this optional form of plan disclosure was effective July 27, 2020. The final rule was developed after consideration of comments received by DOL regarding the 2019 proposed rule and eventually replaces several Field Assistance Bulletins (FABs) and Technical Releases (TR) published since the safe harbor rule published by DOL in 2002. There is a transition period, ending January 27, 2022, that phases out reliance on these FABs and TRs.

The final rule does not apply to employee welfare benefit plans, such as group health plans subject to ERISA. DOL reserved the right to follow up with the Treasury Department and Health and Human Services Department over which DOL shares joint interpretive jurisdiction on disclosures for such plans.

BACKGROUND

DOL's stated objective is to update ERISA's electronic delivery rules (from the 2002 safe harbor rule) for required disclosures to better leverage ongoing improvements in online and mobile-based technology and communications and to provide a structure that will be appealing to the workforce. DOL states that this final rule strikes an appropriate balance between competing policy goals—taking advantage of the innovations and reduced costs that may be achieved through enhanced use of electronic communication, and ensuring suitable safeguards for covered individuals who may be less ready to move to electronic communication (or who simply prefer paper).

DOL received and analyzed 257 responses to the October 2019 proposed rule before issuing the final rule. DOL also relied on survey information from several credible sources (such as Pew Research) regarding U.S. households' accessibility to electronic communication and internet-based information. The final rule adds to the existing DOL rule, new §2520.104b-31, "Alternative method for disclosure through electronic media."

As part of regulatory Orders for Regulatory Impact Analyses, the Congressional Review Act deems this a major rule that will have a cost impact for all users in excess of \$100 million.

DISCUSSION

There are two optional voluntary methods for electronic delivery of retirement plan disclosures described in the final rule. As with all requirements by DOL for communication with covered individuals, all content must be written in a manner reasonably calculated to be understood by the average plan participant.

The first option is website posting, on which plan administrators may post covered documents on a website if appropriate notification of internet availability is provided to the electronic addresses of covered individuals.

The second option is email delivery, permitting plan administrators an option to send covered documents directly to the electronic addresses of covered individuals, with the covered documents either in the body of the email or as an attachment.

- “Covered documents” are documents or information that are mandated by DOL rules to be given to participants and qualified beneficiaries about the pension plan covered by ERISA. Examples of covered documents include Qualified Default Investment Alternatives, Summary Annual Reports, Annual Participant Fee Disclosure, and Annual Funding Notice.
- Covered individuals are any plan participant, qualified beneficiary, or alternate payee entitled to receive a covered document and who must have a valid electronic address (cellphone or email).

Before any electronic notices can be sent, the plan administrator sends initial notification to covered individuals via paper, explaining the new electronic delivery method for retirement plan disclosures.

Once the initial notification has been sent, the plan administrator can either send a Notice of Internet Availability (NOIA) to covered individuals, while concurrently posting any new disclosure item(s) on its website, or the plan administrator can send an email or text to covered individuals with the new disclosure item attached. There is an ongoing obligation to monitor and ensure electronic addresses are valid.

The final rule lists electronic addresses as an email address, or an internet-connected mobile-computing-device (e.g., “smartphone”) number, at which the covered individual may receive a written notice of internet availability.

For a plan’s annual notices, if a plan administrator wants to provide more than one covered document, it can do so if the combined NOIA was furnished in the prior plan year, but no more than 14 months following the date the prior plan year’s notice was furnished. Note that combining notices for purposes of the NOIA is only available for annual notices. Other non-annual notices cannot be combined in the same notification.

Among the items in the NOIA are:

- A prominent statement for the subject line: Disclosure About Your Retirement Plan
- A statement: “Important information about your retirement plan is now available. Please review this information.”
- The name and brief description of the covered document.
- The internet website address including specific direction on how to access, or a hyperlink to such address, to the covered document.
- A statement of the right to request and obtain a paper version of the covered document.
- A statement of the right to opt out of electronic delivery and receive only paper versions of covered documents.
- A telephone number to contact the administrator or other designated representative of the plan sponsor.

The final rule sets minimum standards for the website to which the covered documents are posted. Some of these minimum standards are assurance of:

- The existence of a website (an internet website or smart-phone app)
- The version of the posted covered document is the most recent available and remains for at least one year
- The covered document can be understood by the average plan participant
- The covered document website format is suitable to be both read online and printed clearly on paper
- The covered document can be searched electronically by numbers, letters, or words
- Reasonable measures were taken to assure the website protects the confidentiality of personal information relating to any covered individual
- The right to copies of paper documents or to opt out of electronic delivery

DOL inserted a special item regarding ensuring access for covered individuals who sever from employment subsequent to the plan administrator adopting one of the new safe harbors. The administrator must take measures reasonably calculated to ensure the continued accuracy and availability of an electronic address or to obtain a new electronic address that enables receipt of covered documents following the individual’s severance from employment.

ACTION

Plan sponsors should review with their pension plan administrators and consultants regarding the choice to implement the changes permitted in these rules for all ERISA-covered pension plans. In order to avoid any complications that could occur if the plan sponsor is audited by a federal agency to perform missing participants compliance, plan sponsors may wish to consider a review of the current administration of locating employees, or their named qualified beneficiaries, who have yet to claim their pension benefits, as they are part of the covered individuals under the final rule. Plan sponsors may also wish to update their procedures for when a participant terminates employment to include obtaining a personal email so that electronic communications can continue.

Please contact your Milliman consultant to discuss critical steps to take now for an evaluation of how it may affect your compliance with DOL plan disclosure rules.



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