

DOL Issues Proposed Regulations Providing Alternate Method of Electronic Delivery of Retirement Plan Notices

In response to both President Trump's 2018 executive order addressing workplace retirement plans and the continuously evolving changes in technology, the Department of Labor (DOL) recently announced proposed regulations addressing the electronic delivery of retirement plan notices. Under the proposed regulations, retirement plan sponsors would be permitted to distribute notices alerting participants and beneficiaries of electronic posting of required plan notices. The proposed regulations significantly expand the circumstances under which plan sponsors may electronically deliver information. However, as further explained below, there will likely be some complications in administering this alternate delivery method.

Overview of Electronic Disclosure Safe Harbor. In 2002, in response to developing internet and e-mail technology, the DOL released regulations establishing a safe harbor method of electronic delivery which permitted electronic disclosures of required benefit plan notices under certain circumstances. Under the safe harbor, plan administrators were permitted to electronically deliver notices to participants and beneficiaries reasonably expected to perform their duties using the employer's electronic information system or participants and beneficiaries who affirmatively elected to receive notices electronically. The regulations required the electronic delivery to be reasonably calculated to ensure the actual receipt of the information and the protection of confidential information. The regulations were specific to 2002 technology, and did not evolve with subsequent technological developments.

The DOL's Proposed Regulations. Rather than update the current safe harbor, the proposed regulations provide an alternate, "notice and access" method of electronic delivery for retirement plan sponsors, designed to evolve and keep pace with future technological developments.

While the proposed regulations may not be relied upon, plan sponsors should review their current notice delivery methods and carefully consider whether the "notice and access" method would be beneficial to plan participants and beneficiaries.

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Participants Eligible to Receive Notices. After sending a "notice of internet availability" to participants and beneficiaries that the plan sponsor will adopt a new method of notice delivery, the plan sponsor may send *notices* of internet availability rather than distributing the actual notice. The proposed regulations permit plan sponsors to provide participants and beneficiaries electronic notice of the availability of any required retirement plan notice, provided the plan sponsor has e-mail addresses or mobile telephone numbers for participants and beneficiaries. The preamble to the proposed regulations clarifies that a plan sponsor may use company-issued e-mail addresses or mobile telephone numbers, or extract such information from participants' and beneficiaries' records. Terminated participants and beneficiaries may receive electronic notices, provided the plan sponsor is able to maintain updated records of their e-mail addresses or mobile telephone numbers.

Required Content for Notice of Internet Availability. A notice of internet availability must include a brief description of the document, the web address where the document is located, a statement of the participants and beneficiaries' right to request and obtain a paper version of the document as well as the right to opt out of receiving electronic documents, and the plan administrator's contact information. Plan sponsors may send one annual notice of internet availability for all required, recurring disclosures that must be distributed based on the passage of a specific amount of time. This annual notice does not apply to documents delivered irregularly or based on a specific event, such as blackout notices, claim denials, qualified domestic relations order determinations, or notices required under ERISA section 204(h). A separate notice will need to be distributed by U.S. Mail.

However, there are elements of the proposed regulations that could create administrative difficulties for plan sponsors, administrators and service providers.

The Proposed Regulations Are Not Universally Applicable. The preamble to the proposed regulations explicitly states the regulations do not apply to health and welfare plans, noting that welfare plan disclosures raise different considerations which must be addressed by both the Treasury Department and the Department of Health and Human Services. Additionally, the preamble notes the Trump Administration did not explicitly direct the DOL to address the electronic delivery of health and welfare plan notices. Do not expect the final regulations to address health and welfare plans. Accordingly, the DOL is expected to address health and welfare plan disclosures in separate regulations.

Required Elements of Website-Hosting Plan Documents. Plan sponsors must ensure the intended recipients have access to the website whereat the required notices are posted. Accordingly, plan sponsors that use their intranet or other internal server to post required notices would not reach terminated participants and beneficiaries, and another means of notice would need to be used.

The preamble to the proposed regulations also clarifies that, while plan sponsors are ultimately responsible for establishing and maintaining the website, such duties may be delegated to a service provider, such as a third-party administrator or recordkeeper. ***Plan sponsors should review such agreements to ensure the viability of their service providers.***

Additionally, acknowledging that circumstances occur wherein documents are temporarily unavailable due to scheduled website maintenance or unforeseeable circumstances, the proposed regulations deem a plan sponsor to be in compliance if it has established reasonable procedures to ensure the documents are available as required under the proposed regulations and become available again as soon as practicable. ***Accordingly, prior to implementation, plan sponsors should work with their service providers to develop such procedures.***

Exceptions to Notice of Internet Availability. Plan sponsors may not send a notice of internet availability:

1. If a participant or beneficiary specifically requests a paper version of a required document;
2. If a participant or beneficiary opts out of electronic delivery and requests to receive only paper versions of some or all documents; or
3. Upon receipt of a notice of an undeliverable message.

If a participant or beneficiary opts out of electronic delivery, all notices must be distributed by U.S. Mail or hand delivery until the participant or beneficiary affirmatively elects electronic delivery.

Participants and beneficiaries who do not provide a valid e-mail address or mobile telephone number, or do not update this contact information as necessary, should be deemed to have opted out of electronic delivery. ***Plan sponsors should work with their service providers to verify they are capable of monitoring electronic delivery and identifying invalid e-mail addresses.***



If you have any questions about the proposed regulations, please contact your Reinhart attorney for additional information.

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