

DOL Releases Final Rule Expanding Use of Electronic Delivery of ERISA Documents

The U.S. Department of Labor (DOL) on May 27, 2020, published its final rule addressing a new safe harbor form of electronic disclosure available for employee benefit plan sponsors. The final rule, while generally similar to [the proposed rule released last fall](#), incorporates several changes, which are discussed in more detail in this alert. The final regulations are effective July 27, 2020.

The final rule creates a "notice of availability" alternative safe harbor method of electronic delivery for retirement plan sponsors. This method is designed to evolve and keep pace with future technological updates. The preamble to the regulations provides that while the regulations refer to email addresses, mobile telephone numbers and internet websites, plan sponsors could also utilize web-based applications and modes of delivery and document hosting not yet developed.

Individuals Eligible to Receive Notices Electronically

The regulations provide that all participants, alternate payees and beneficiaries are considered "covered individuals" and eligible for electronic delivery, provided the plan sponsor has a valid email address or mobile telephone number for each individual.

The preamble to the regulations provides significantly more clarity than the proposed regulations regarding how a plan sponsor may collect email addresses. For example, plan sponsors may use employer provided email addresses, provided the email address has an employment purpose independent from the provision of electronic disclosures. Plan sponsors may obtain email addresses or mobile telephone numbers from a service provider, like a recordkeeper or plan administrator, if the covered individual provided the contact information in relation to the plan. The preamble prohibits plan sponsors from using commercial locators to identify participant email addresses.

Terminated participants and beneficiaries may receive electronic notices, provided the plan sponsor is able to maintain updated records of their email addresses or mobile telephone numbers. If the plan sponsor is using employer provided email addresses to provide documents electronically, then the plan sponsor must request a new email address that will allow the individual

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to continue to receive notices following termination of employment.

If a covered individual requests a document or opts out of receiving documents electronically, the plan sponsor must provide the covered individual with a paper copy of the document. Participants, alternate payees and beneficiaries that have not provided a valid email address or mobile telephone number should be deemed to have opted out of electronic delivery.

Upon notification of failure to deliver a document electronically, a plan sponsor must take action to deliver the notice or disclosure to the participant within a reasonable amount of time.

Covered Documents

All documents that a plan sponsor is required to provide to retirement plan participants under Title I of ERISA may be distributed through the notice of availability method of distribution. This includes summary plan descriptions, annual funding notices, summary annual reports, participant statements, blackout notices and claim and appeal denial notices. Documents requested by a participant are not considered a covered document.

As expected, application of the final regulations do not extend to health and welfare plans.

The covered document must remain on the plan sponsor's website for one year or, if later, the date the document is superseded. As an example, a quarterly participant statement published on January 15, 2021, must remain on the website until January 15, 2022. However, a summary plan description, which is required to be restated every five years, posted on January 1, 2021, must remain on the website until the summary plan description is restated and posted on January 1, 2026. Plan sponsors may elect to retain documents for a longer period.

Initial Notice of Electronic Delivery

The regulations require plan sponsors intending to implement the notice of availability method of delivery to provide covered individuals with an initial notice describing the new method of delivery. This initial notice is also required of plan sponsors shifting delivery methods from electronic disclosure to notice of availability.

The plan sponsor must mail the initial notice to all covered individuals and provide notification that documents will be provided electronically, the email address or mobile telephone number to which plan sponsors will send future



notices, the website participants may use to access the documents, instructions for accessing the documents, the deadline by which documents will be removed and notification of the right to request a document or opt out of electronic delivery. This notice must be written in a manner calculated to be understood by the average plan participant.

The plan sponsor must also provide the initial notice to all newly eligible covered individuals and can include it with plan enrollment materials.

Required Content for Notice of Internet Availability

The plan sponsor must send a Notice of Internet Availability (NOIA) electronically to all covered individuals receiving the notice or disclosure electronically. The preamble clarifies that the NOIA is intended to be clear and concise for participants. As a result, the regulation provides that the NOIA should not include any unnecessary or additional information and should be written in a manner calculated to be understood by the average plan participant.

The final regulations detail the content the plan sponsor must include in the NOIA, including a list of covered documents posted and a brief description if necessary, the address or a hyperlink to the website hosting the documents, the date the document may be removed and contact information for the plan administrator. The NOIA must also notify participants of their right to request paper copies of the document or opt out of electronic delivery. The NOIA could advise individuals whether any action is necessary. However, both the preamble and regulations warn that such statement cannot be deemed to be inaccurate or misleading.

Regardless of the timing of the NOIA, the plan sponsor must post the document to the website by the deadline for providing the notice to the covered individual.

Plan sponsors are permitted to provide a combined annual NOIA to alert participants to the availability of the plan's summary plan description, any document that is provided annually and any document authorized to be included by the Secretary of Labor or Secretary of the Treasury. Participants must be provided with a NOIA when any other document becomes available electronically.

Required Elements of Website Hosting Plan Documents

The plan sponsor is ultimately responsible for providing and monitoring the website to host the plan documents or disclosures to participants. However, the plan sponsor could delegate the duty to provide the website to a service provider.



The website must allow participants to save any posted document and take reasonable measures to protect participant confidentiality.

Plan sponsors could elect to make the website and covered documents available to all participants, regardless of whether they have opted out of electronic disclosures.

If you have any questions regarding these final regulations, please contact your Reinhart benefits attorney.

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