

Publications

Final Electronic Disclosure Rules for Retirement Plans

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The DOL expanded the option for electronic delivery of retirement plan notices and documents. There are now two safe harbors for electronic delivery of notices and documents, the 2002 safe harbor (available for both retirement and welfare plan notices and documents) and the 2020 safe harbor (available for just retirement plan notices and documents).

Plan administrators who wish to continue to rely on the 2002 safe harbor for electronic delivery, or to furnish paper documents by hand-delivery or by mail, can continue doing so.

The 2020 safe harbor applies to retirement plan notices and documents provided to (1) employees to whom the employer has assigned an email address for employment-related purposes that include but are not limited to the delivery of notices; and (2) individuals who give the employer an email address.

2020 Safe Harbor for Posting Documents to the Internet or Intranet

If an employer wants to provide retirement plan notices and documents by posting them on the internet or an intranet, the first step is to send an initial paper notice, an Initial Notice of Default Electronic Delivery. (Consistent with the other COVID relief provided by the DOL, the DOL will consider plans in compliance if this Initial Notice of Default Electronic Delivery is provided by email so long as a paper notice is provided as soon as practicable after the end of the COVID national emergency.) Click [here](#) to see a chart for a list of the items that must be included in an Initial Notice of Default Electronic Delivery.

Then, when the employer posts a notice to the internet or intranet, it must send a Notice of Internet Availability (NOIA). A NOIA may be sent by paper or email. An employer can do a combined NOIA (at least once every 14 months) for:

- Summary plan descriptions (SPDs) and summaries of material modifications (SMMs);

- Documents that are furnished annually rather than upon the occurrence of a specific event; and
- Other documents if and when specifically authorized in writing by the Secretary of Labor or the Internal Revenue Service (none have been authorized to date).

Notice of the availability of a quarterly pension benefit statement cannot be furnished in a combined NOIA. The employer would need to send a separate NOIA each quarter that it used the 2020 safe harbor to electronically deliver the quarterly benefit statement.

Click [here](#) for a list of the items that must be included in a NOIA.

2020 Safe Harbor for Furnishing Documents Attached to an Email

As an alternative to posting on the internet or intranet, the 2020 safe harbor allows an employer to furnish covered notices and documents directly to individuals via email. The covered notice or document must be sent no later than the date on which the document must be furnished under ERISA, and the plan administrator does not need to send an NOIA about the notice or document that is sent via email. The email must include:

- A subject line that reads “Disclosure About Your Retirement Plan”;
- Identification or brief description of the covered document;
- A statement of right to receive a paper copy of the covered document;
- Information about opting out of electronic delivery; and
- A telephone number to call to receive additional information.

Administrators who use this method are not required to maintain a website that would retain the covered document for a year and so are not required to include a statement related to this requirement.

Employers Can Use Both Safe Harbors

The new 2020 safe harbor is an addition to the existing 2002 safe harbor. Click [here](#) to see a chart that compares the 2020 safe harbor with the 2002 safe harbor. An employer could use the 2002 safe harbor for some employees and the 2020 safe harbor for others. For example, if an employer has groups of employees who do not use an employer provided email address as an integral part of their employment duties so the employer is currently providing paper copies of covered documents to those covered individuals, the employer could use this new 2020 safe harbor to provide electronic notices for those employees (and save the costs and hassles of paper delivery).

Future Regulatory Developments

The DOL indicated that it needed tri-agency consultation to extend the new 2020 safe harbor to health and welfare plans. The DOL stated that it is continuing to work toward a rule for health and welfare plan disclosures. Until then, health and welfare plans will not be able to benefit from the 2020 safe harbor. Further, according to the preamble of the 2020 safe rule, the Treasury Department and the IRS expect to issue additional guidance relating to the use of electronic delivery for participant notices.

Vorys Comments

The 2020 safe harbor provides a useful alternative for delivering notices to employees who fell outside of the 2002 safe harbor. Contact your Vorys attorney for assistance in adapting your communication strategy.

