

# Insights

## **DOL Finalizes Rule Providing Alternative Safe Harbor Method for Electronic Disclosure by ERISA Retirement Plans**

May 28, 2020

By: and Fenton D. Strickland

On May 21, 2020, the Department of Labor (DOL) published its final rule establishing an alternative safe harbor method of delivery of electronic disclosures by retirement plan administrators. The Alternative Safe Harbor allows employers to post retirement plan disclosures online or deliver them to workers via email, which is expected to significantly reduce administrative costs and provide participants ready access to plan information required to be disclosed under the Employee Retirement Income Security Act (ERISA).

### **Key Takeaways**

- The final rule provides a voluntary alternative to (but does not replace) the 2002 Electronic Notice Safe Harbor.
- The Alternative Safe Harbor utilizes a "notice and access" structure for default electronic disclosure, which entails posting a "covered document" on a website in conjunction with a properly-timed notice of availability electronically delivered to "covered individuals."
- Plan Administrators alternatively may also use direct email to covered individuals.
- The Alternative Safe Harbor does not apply to employee welfare benefit plans.
- The Alternative Safe Harbor does not alter ERISA-required substance or timing of notices.

### **Background**

The general disclosure standard of ERISA requires delivery methods "reasonably calculated" to ensure participants and beneficiaries will actually receive the required plan documents. Plan administrators have traditionally accomplished this by in-hand delivery to an employee at his or her place of employment. However, in recognition of developments in communications technology, the DOL amended ERISA's general standard with the 2002 Electronic Notice Safe Harbor (as set forth in 29 CFR 2520.104b-1(c)) (the "2002 Safe Harbor"), which provides for electronic disclosure to a narrow band of employees or to individuals who affirmatively opt in to receive them.

The 2002 Safe Harbor does not dictate the exclusive method for compliant electronic disclosure; rather, it provides assurance to plan sponsors that adherence to its requirements will satisfy ERISA's general standard. In practice, however, the 2002 Safe Harbor has proven to be an inflexible and unreliable tool, due primarily to its narrow application to "wired at work" individuals.

### **The Alternative Safe Harbor's Application**

The new Alternative Safe Harbor, on the other hand, applies broadly to any "covered individual," meaning any participant, beneficiary or other individual entitled to "covered documents" and who provides an electronic address. And the Alternative Safe Harbor imposes an opt-out rather than an opt-in provision, so without having to elect to receive electronic disclosures, individuals will receive information electronically unless they provide notice that they do not want to.

"Covered documents" refer to documents or information a plan administrator is required to furnish automatically under Title I of ERISA. These include pension benefit statements, summary annual reports (SARs), summary material modifications (SMMs), and blackout notices. Any documents that must be furnished only upon request, however, are not considered "covered documents" under the final rule.

### **Not Applicable to Welfare Benefit Plans**

Notably, the Alternative Safe Harbor does not apply to employee welfare benefit plans, such as group health and disability benefit plans. The DOL acknowledges its need to consult with the Treasury Department and Department of Health and Human Services regarding group health plan disclosures before any rulemaking.

### **Initial Paper Notice**

Before availing itself of the Alternative Safe Harbor, a plan administrator must provide each covered individual with an initial *paper* notice, disclosing that certain future retirement plan information will be provided electronically. This notice must include a statement of the individual's right to opt out of receiving documents electronically and to receive, free of charge, a paper copy of the covered document. Further, the initial paper notice must (i) identify the individual's electronic address the plan administrator will use for disclosure, (ii) include any instructions necessary to access the covered documents, and (iii) include a cautionary statement that the covered document is not required to be available on the website indefinitely.

### **Notice of Internet Availability**

In general, under the new Alternative Safe Harbor, plan administrators must provide covered individuals with a separate notice of internet availability ("NOIA") for each covered document they are entitled to receive. The NOIA must be furnished at the time the covered document is made available on the website. Nevertheless, an administrator may consolidate multiple NOIA into one NOIA with respect to certain covered documents, as long as certain timing requirements are followed.

The final rule emphasizes that the Alternative Safe Harbor is not intended to alter the substance or timing of any ERISA-required disclosure. Therefore, regardless of whether a combined NOIA is used, covered documents must be available on the website no later than the date they otherwise must be furnished by law.

While the final rule does not provide a model NOIA, it does prescribe standards for content, form, and manner of furnishing the notice, as summarized in the chart below:

Content:
<p>The NOIA <u>must</u> contain the following:</p> <ul style="list-style-type: none"><li>• statement that reads, "Disclosure About Your Retirement Plan," in the title, subject line or placement of similar prominence;</li><li>• statement that reads, "Important information about your retirement plan is now available. Please review this information";</li><li>• identification of the covered document by name and, in some cases, a brief description;</li><li>• website address or hyperlink where the covered document is available;</li><li>• statement of the right to request and obtain a paper version of the covered document, free of charge, and explanation of how to exercise that right;</li><li>• statement of the right to opt out of electronic delivery and receive only paper versions of covered documents, free of charge, and an explanation of how to exercise that right;</li><li>• cautionary statement that the covered document is not required to be available on the website for more than one year after it is superseded; and</li><li>• telephone number to contact the plan administrator or other designated representative.</li></ul> <p>The NOIA <u>may</u> contain the following:</p> <ul style="list-style-type: none"><li>• statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action; and</li><li>• other design elements that do not mislead or obscure the required content.</li></ul>

## Form & Manner of Furnishing:

The NOIA must be:

- furnished electronically to the electronic address provided by the covered individual;
- furnished separately from any other documents or disclosures except as permitted; and
- written in a manner calculated to be understood by the average participant.

### **Website Standards**

Plan administrators must ensure the NOIA connects covered individuals with a website leading them directly to a covered document or to a login page where the covered document is accessible with credentials. Further, a plan administrator must take measures reasonably calculated to ensure that the covered document:

- is available on the website no later than the date it must be furnished under ERISA;
- remains available on the website for at least one year or, if later, until it is superseded by a subsequent version of the covered document;
- is presented in a manner calculated to be understood by the average plan participant;
- is presented in a widely-available format or formats suitable to be read online, printed clearly on paper, and permanently retained in its electronic format; and
- can be searched electronically by numbers, letters, or words.

Measures must reasonably be taken as well to ensure the website protects the confidentiality of personal information relating to any covered individual.

### **An Email Alternative**

Plan administrators may alternatively choose to furnish covered documents to covered individuals by direct email, instead of the NOIA followed by access to the covered document. The email method would not require an NOIA, but many of the elements required to be included in an NOIA would have to be in the email delivery. And measures must still be reasonably calculated to protect the confidentiality of personal information, and initial paper notice and opt-out requirements still apply. If direct email is used, the covered document may be included in the body of the message or as an attachment and must be delivered no later than otherwise required by ERISA.

### **Effective Date**

The final rules provide that the Alternative Safe Harbor becomes effective July 27, 2020, though plan sponsors may comply sooner if they choose.

### **Conclusion**

The Alternative Safe Harbor allows plan sponsors and administrators to make electronic delivery their routine method of disclosing information, providing some relief from the administrative burden of first having participants opt in under the 2002 Safe Harbor. This alternative disclosure method may be even more valuable as the COVID-19 pandemic has made remote work and work-from-home a new normal for many Americans. For more information about the Alternative Safe Harbor or assistance in administering it for your retirement plan, please contact Bryan Gross, Fenton Strickland, or another member of the Krieg DeVault Employee Benefits & Executive Compensation Practice Group. Also, please look to Krieg DeVault's Coronavirus Resource Center for posts and links addressing a number of legal and other issues related to COVID-19, including the CARES Act.