

Department of Labor Proposes a New Electronic Disclosure Safe Harbor

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The Department of Labor (DOL) recently proposed a new safe harbor for the electronic delivery of employee benefit plan information for plans subject to the [Employee Retirement Income Security Act of 1974](#) (ERISA). The proposal would provide welcome relief for employers who have long struggled with antiquated rules restricting their ability to provide important plan information through electronic means.

If ultimately adopted, the proposal would allow plan administrators who satisfy certain conditions to provide participants and beneficiaries with a notice that certain disclosures will be made available on a website. The proposed safe harbor includes the following conditions and requirements:

- **Persons Covered by the Safe Harbor.** The safe harbor would apply to information furnished to participants, beneficiaries, or other individuals entitled to covered documents (including appropriate designees), who are assigned an employer-provided email address or who otherwise provide an employer, plan sponsor, or plan administrator with an electronic address, such as an email address or smartphone number.
- **Communications Covered by the Safe Harbor.** At present, the safe harbor would apply only to statements that are required to be furnished by retirement plans pursuant to Title I of ERISA (e.g., summary plan descriptions, summary of material modifications, summary annual reports, plan documents, etc.). The safe harbor would not apply to welfare benefit plans, such as plans providing disability benefits or group health plans. The DOL indicates that it needs additional time to study the future application of the safe harbor to documents required to be furnished by such plans, as those disclosures raise different considerations.
- **Initial Notification of Right to Opt-Out.** Before a plan administrator could rely on the safe harbor, the plan administrator would need to provide each covered person, a paper notice indicating that some or all covered documents will be furnished electronically. The notice would also need to include a statement describing the covered person's right to request and obtain a paper version of a covered document, free of charge, the covered person's right to opt-out of receiving covered documents electronically, and an explanation of how to exercise these rights.
- **Notice that a Covered Document is Available.** A notice that a covered document is available would need to include the following information:
 - A prominent statement that reads "**Disclosure About Your Retirement Plan.**"

- A statement that: “**Important information about your retirement plan is available at the website address below. Please review this information.**”
- A brief description of the covered document.
- The internet website address where the covered document is available. The website must provide ready access to the covered document. This means that the website should either lead directly to the covered document or to a login page (or a page immediately after the login page) that provides a prominent link to the covered document.
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right.
- A statement of the right to opt-out of receiving covered documents electronically, and an explanation of how to exercise this right.
- A telephone number to contact the plan administrator or other designated representative of the plan.
- **Timing and Method of Delivery of Availability Notice.** The plan administrator would need to send to each covered individual’s electronic address a notice that a covered document is available at the time the covered document is made available on the employer’s website, subject to certain exceptions. The notice would include only the information described in the above “*Notice that a Covered Document is Available*” section (pictures, logos, or similar design elements could be added so long as they are not misleading and the required content is clear). The notice would generally be furnished separately from other documents. However, certain commonly-provided documents could be combined into a single notice.
- **Readability Requirements.** The notice would need to be written in a manner calculated to be understood by the average plan participant. The safe harbor explains that this means the notice should use short sentences, no double negatives, everyday words rather than technical and legal terminology, an active voice, and language that results in a Flesch Reading Ease test score of at least 60. The Flesch Reading Ease test measures the average sentence length in words and the average word length in syllables. For purposes of illustrating the DOL’s expectation, Rudolf Flesch, author of the formula, rates the *New York Daily News* at a 60 of 100. More information about the test can be found [here](#).
- **Standards for Internet Website.** A plan administrator would need to ensure the existence of an internet website where a covered individual is able to access covered documents. This includes taking steps that are reasonably calculated to ensure that the covered document is available in a timely fashion, that the covered document remains on the website until it is superseded by a subsequent version of the same document, and that the presentation of the document be calculated to be understood by the average participant. Further, the document would need to be in a widely-available format that can be searched electronically and that allows the document to be permanently retained in an electronic format. The plan administrator would also need to take measures that are reasonably calculated to ensure that the website protects the confidentiality of the covered person’s personal information.
- **Right to Opt-Out and Request Paper Copies.** As with other electronic communication safe harbors, upon request, the plan administrator would need to furnish the covered person with a paper copy of a requested document and promptly comply with a covered person’s request to opt-out of electronic delivery. Further, the plan administrator would need to establish and maintain reasonable procedures governing such requests.
- **System Requirements.** The system that is used to provide the notice of internet availability would need to alert the plan administrator of a covered person’s invalid or inoperable electronic address (e.g., email is returned as undeliverable). In such an event, the plan administrator would either take reasonable steps to cure the problem or treat the individual as if he or she had opted out of electronic communications. At the time of a severance from employment, the plan administrator would need to take reasonable measures to ensure the electronic address used by the covered person remains viable or obtain a new electronic address.

The proposed safe harbor will become effective 60 days following the publication of final rules. While the proposed safe harbor is a welcome update to the DOL’s electronic delivery rules, there is yet significant room for improvement; in particular, through the inclusion of welfare plan disclosures.

The DOL has requested comments on the proposed safe harbor and on ideas for additional measures the DOL could take in the future to improve the effectiveness of ERISA disclosures, including with respect to both retirement and health and welfare plans. Comments must be submitted on or before November 22, 2019. Given the potential to improve the participant experience and the significant cost savings that can be achieved through electronic delivery, we expect significant input from the plan sponsor and plan service-provider community. A copy of the proposed rules can be found [here](#).

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