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E-Delivery Rule Brings Cost-Relief to Retirement Plan Administration

By Sheila Ninneman

On May 27, 2020, the Federal Register published the Department of Labor's *final rule* that permits employers to use electronic means to fulfill their retirement plan disclosure obligations. (Disclosures required by the Department of Labor as to health and welfare plans are not covered by this safe harbor rule.) The final rule is effective July 27, 2020, but the Department announced it will not take enforcement actions against plan administrators who rely on the safe harbor prior to that date, in light of the government's broader response to the Covid-19 emergency.

The final rule is substantially similar to the proposed rule issued in October 2019, and briefly discussed in our article *here*. Long overdue, this rule should go a long way to reduce the costs and hassles of ERISA-required disclosures.

Voluntary Safe Harbor

The voluntary safe harbor provided by the final rule allows employers to use either website posting or email delivery for the distribution of required communications or "covered documents" to "covered individuals" via electronic addresses. A covered individual is a participant, beneficiary or other individual entitled to covered documents who provides an electronic address. Covered documents include any disclosure required by Title I of ERISA, and include a summary plan description (SPD), a summary of material modifications (SMM) and summary annual report (SAR).

The electronic address can be an email address or an internet-connected mobile device such as a smartphone. The final rule specifies that only an employer (not a service provider or plan administrator) can assign an electronic address has employment-related purposes other than receipt of electronic disclosures under this safe harbor. In addition, employers cannot assign electronic addresses to non-employees. Those individuals must voluntarily provide electronic addresses.

E-delivery Safe Harbor Requirements

Initial notification

Prior to relying on this safe harbor for electronic disclosure of covered documents, the plan administrator must issue a notification, on paper, to covered individuals that the way they normally receive the required disclosures is changing. The notice must include the electronic address that will be used, and notice of the right to opt-out of electronic disclosure of covered documents in favor of paper documents. The opt-out right can be global or the plan administrator may provide the opt-out right on a per-disclosure basis.

Notifications of availability on a website

This notice can generally be provided electronically unless a covered individual has opted to receive paper notifications. The electronic notification must be provided each time a new covered document is being posted on the website, or an annual notice of multiple covered documents made available throughout the year can be provided instead. This notice must describe the covered document, describe the right to receive a paper copy, provide an address or hyperlink to the covered document, and inform the covered individual of opt-out rights.

Retention of covered documents on a website

The ERISA-required disclosure must remain on the website for no less than one year, or until superseded by a subsequent version of the covered document.

Email delivery of covered documents

A plan administrator may also deliver covered documents via email. The covered document can be in the body of the email or provided as an attachment. In this case there is no requirement for a "notification of availability" as discussed above. The email must contain the phrase "Disclosure About Your Retirement Plan" in the subject line.

Email content requirements

The email delivering the covered document must briefly describe the document, describe the right to receive a paper copy and notify the covered individual of the right to opt-out of electronic delivery,

Addressing invalid electronic addresses

Plan administrators must ensure that the electronic delivery system alerts them if an electronic address is invalid or does not work. The administrator must attempt to fix the problem, or treat the covered individual as having opted out of electronic delivery.

Termination of employment

Plan administrators must take action to ensure that a covered individual's electronic address continues to be accurate and operable.

Paperless Communications

This voluntary safe harbor gives plan administrators the opportunity to save the cost of providing all-paper SPDs, SMMs and other ERISA-required covered documents by eliminating the cost of printing and mailing these documents. Many employees, who conduct so much of their lives through electronic media, will welcome paperless communications.

If you would like to know more about this safe harbor for electronic delivery, and need assistance in implementing it, please contact your Findley consultant or Sheila Ninneman at *Sheila.Ninneman@findley.com*, or *216.875.1927*