May 28, 2020

Cord-Cutting: DOL Embraces Technology with New Retirement Plan Disclosure Safe Harbor

The U.S. Department of Labor (DOL) recently adopted a new optional safe harbor for plan administrators to harness online and mobile-based technology to furnish information to participants and beneficiaries of retirement plans subject to the U.S. Employee Retirement Income Security Act of 1974, as amended (ERISA). The safe harbor permits plan administrators to (i) provide participants and beneficiaries a notice that certain disclosures will be made available on a website or mobile app (a notice of internet availability or NOIA) or (ii) furnish disclosures via email, subject to various conditions. While the DOL has long evaluated ways to modernize disclosure, a critical nudge came in the form of the President's Executive Order 13847, *Strengthening Retirement Security in America*, on Aug. 31, 2018, which called for an "exploration of the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens." The DOL released a proposal of the safe harbor last October in response to the Executive Order.

Here are the key takeaways:

- The safe harbor only applies to retirement plans (*i.e.*, employee welfare benefit plans are not covered).

- The safe harbor's scope is limited to *covered individuals and covered documents*.

  - A *covered individual* is a participant, beneficiary or other person entitled to the covered documents. This individual must provide the plan sponsor or administrator an email address or smartphone number at which the covered individual may receive a NOIA or an email with the attachments. This information could be obtained from the job application, for example. A company-provided email address is generally sufficient; however, the plan administrator must take steps to ascertain a different email address (or smartphone number) should the individual no longer be employed by the plan sponsor. If the administrator is alerted that the email address or cell number is inoperable (e.g., a bounce-back), then the administrator must promptly take reasonable steps to cure the problem. The DOL indicates that the plan administrator may ultimately have to utilize cell phone carriers' validator services to distinguish landline numbers from cell numbers.

  - A *covered document* is any document or information that the plan administrator must provide participants and beneficiaries under Title I of ERISA, such as QDIA notices, summary plan descriptions (SPDs) and summary annual reports. Notably, this does not include documents that have to be provided by the plan upon request.

- Covered documents must be stored on a website or mobile app. Covered individuals must be provided reasonable access to the website or app. This includes such requirements as:

  - The document is made available no later than the date on which the covered document must otherwise be furnished under ERISA and remain available online for the later of at least one year from the date they were first posted or the date the document is superseded by a subsequent version of the covered document. An SPD, for example, must remain digitally available on the website or the app until superseded by a subsequent version, even if longer than a year from when it was originally made available.

  - The covered document is in a widely-available format that is suitable to be read online and printed clearly on paper. The requirement that the documents be printable may present challenges for certain apps.

  - The covered document is searchable by numbers, letters or words.

  - The administrator takes measures reasonably calculated to ensure that the website or app

For more information, please contact:

George Michael Gerstein
Co-Chair, Fiduciary Governance
202.507.5157
ggerstein@stradley.com

protects the confidentiality of personal information relating to a covered individual. The safe harbor does not create liability for security breaches.

- The safe harbor is not lost merely because the covered documents become temporarily unavailable for a reasonable period of time due to technical maintenance or unforeseeable events or circumstances beyond the control of the administrator, provided, among other things, the documents become available again as soon as reasonably practicable.

- The administrator must furnish to each such individual an *initial* notification of electronic delivery on *paper*. This initial notification must include, among other things, the email address or cell number that will be used for the individual, instructions to access the covered documents, and a statement of the right to opt out of electronic delivery and receive a paper version of the document free of charge.

- A NOIA must be sent by the administrator to the covered individual's designated email address or cell phone number (*i.e.*, a text message) each time a covered document becomes available digitally on the website or app. The regulation imposes a number of content-specific requirements for a NOIA, such as a prominent statement (*e.g.*, a subject line) that reads, "Disclosure About Your Retirement Plan," as well as a statement that reads, "Important information about your retirement plan is now available. Please review this information."

  - The NOIA must also provide the website address or a hyperlink to the website. The address or hyperlink needs to lead the individual directly to the document (before or after a login page).

  - As with the initial disclosure, the NOIA must include a statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents.

  - The regulation permits an administrator to furnish each plan year one aggregate NOIA with respect to certain documents, such as an SPD and QDIA notice. Quarterly benefit statements are not includible in a combined NOIA.

- An administrator may alternatively *email* the actual covered documents as attachments or in the body of the email to the covered individual. The subject line would have to read, "Disclosure About Your Retirement Plan." The regulation imposes content-specific requirements on the email, such as identification or brief description of the covered documents. The document must also be in a widely-available format that is suitable for reading online, as well as printed on paper, as otherwise be searchable. These documents must be furnished no later than the date on which the covered document must be provided under ERISA.

- Upon request from a covered individual, the administrator must promptly furnish, free of charge, a single paper copy of the covered document. Multiple copies may be furnished for a fee.

- Covered individuals must also have the right to globally opt-out of electronic delivery of documents.

- This new safe harbor does not replace the existing 2002 electronic disclosure safe harbor, 29 C.F.R. § 2520.104b-1, which remains available for plan administrators. This means that plan administrators who wish to rely on the 2002 safe harbor (or furnish paper documents by hand or mail) may continue to do so.

- The safe harbor supersedes the DOL's prior guidance relating to electronic disclosure, other than the 2002 safe harbor. For example, the DOL issued Field Assistance Bulletins 2006-03 and 2008-03 on this topic. The DOL has provided an 18-month transition period following the new safe harbor's effective date to allow plan administrators to continue to rely on such prior guidance.

- The DOL intends for the new safe harbor to align with the Treasury Department's electronic media regulation, 26 C.F.R. § 1.401(a)-21. The Treasury Department and Internal Revenue Service have indicated that they intend to issue additional guidance relating to the use of electronic delivery for participant notices.

- The safe harbor becomes effective and applicable on July 27, 2020. The DOL will not, however, take any enforcement action against a plan administrator that relies on the safe harbor before that date.

  The new safe harbor contains numerous other conditions. We encourage plan sponsors and administrators to review the regulation carefully.