Wealth Management

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Your Challenge, Our Solutions™

Electronic disclosure safe harbor for retirement plans

The U.S. Department of Labor (Department) announced a final rule on May 21, 2020 that will allow employers to post retirement plan disclosures online or deliver them to workers by email, as a default. Enhancing the ability of employers to furnish retirement plan disclosures electronically will reduce administrative expenses for job creators and make the disclosures more readily accessible and useful for America's workers.

Economic and other benefits

Over the next decade, the rule will save approximately $3.2 billion in net costs for retirement plans covered by the Employee Retirement Income Security Act of 1974 (ERISA)—plans that rely on the rule will be able to eliminate significant materials, printing and mailing costs associated with furnishing printed disclosures.

Furthermore, in the short term, this rule will immediately assist employers and the retirement plan industry as they face a number of economic challenges due to the 2019 coronavirus (COVID-19) national emergency, as well as logistical and other impediments to compliance with ERISA's disclosure requirements.

Employers who sponsor retirement plans now have additional ways to disclose information, which will benefit workers and retirees by enhancing the availability and effectiveness of communications about their retirement savings.

Workers will be able to decide how they would like to receive their retirement plan information, and they can change their mind at any time.

Background information

There are approximately 700,000 retirement plans covered by ERISA. These plans cover approximately 137 million participants.

ERISA-covered retirement plans must furnish multiple disclosures each year to participants and beneficiaries. The exact number of disclosures per year depends on the specific type of retirement plan, its features and, in some cases, the plan's funding status.

Delivery methods for ERISA disclosures must be reasonably calculated to ensure that workers actually receive the disclosures. To deliver disclosures electronically, plan administrators, until now, could use a regulatory safe harbor established by the Department in 2002. See 29 CFR 2520.104b-1(c).

As technology has evolved and improved, stakeholders have criticized the effectiveness of the 2002 safe harbor, characterizing some of its conditions as sometimes difficult to satisfy, hindering broader use of electronic delivery.

Internet availability

- A 2019 survey found that 90% of U.S. adults use the internet, representing a substantial increase from 2000 when 52% of U.S. adults reported using the internet.[1]
- A 2018 study concluded that 93% of households owning defined contribution accounts had access to, and used, the internet in 2016.[2]

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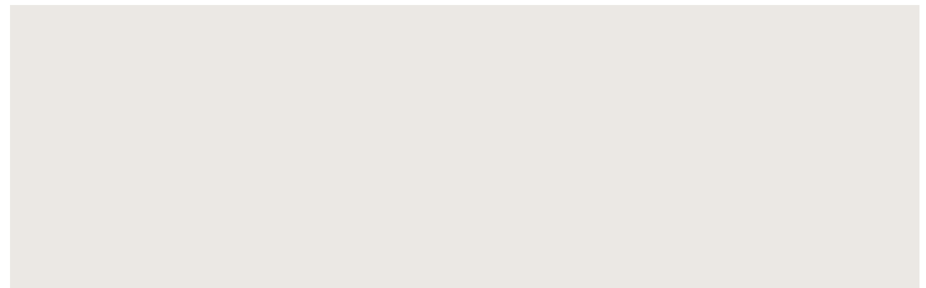

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- A 2017 survey by the U.S. Census Bureau found that 87% of the United States population lives in a home with a broadband internet subscription.[3]

Proposed rule

In October 2019, the Department published a proposed regulation with a solicitation for public comment. The preamble to the proposal also contained a request for information to explore whether and how any additional changes to ERISA's general disclosure framework, focusing on design, delivery and content, may be made to further improve the effectiveness of ERISA disclosures. In response, the Department received 467 written responses from a variety of parties, including plan sponsors and fiduciaries, plan service and investment providers and employee benefit plan and participant representatives.

New voluntary safe harbor

The final rule establishes a new, voluntary safe harbor for retirement plan administrators who want to use electronic media, as a default, to furnish covered documents to covered individuals, rather than sending potentially large volumes of paper documents through the mail.

The new safe harbor permits the following two optional methods for electronic delivery:

- Website posting. Plan administrators may post covered documents on a website if appropriate notification of internet availability is furnished to the electronic addresses (e.g., email address or smart phone number) of covered individuals.
- Email delivery. Alternatively, plan administrators may send covered documents directly to the electronic addresses of covered individuals, with the covered documents either in the body of the email or as an attachment to the email.

Retirement plan administrators who comply with the safe harbor will satisfy their statutory duty under ERISA to furnish covered documents to covered individuals.

Scope

- The safe harbor is limited to retirement plan disclosures.
- A plan administrator may use this safe harbor only for "covered individuals." To be a covered person, the individual must be entitled under ERISA to receive covered documents and must have a valid electronic address.
- The safe harbor announced in May 2020 does not supersede the 2002 safe harbor; the 2002 safe harbor remains in place as another option for plan administrators.

Protections for plan participants

The new safe harbor includes a variety of protections for covered individuals, including:

- Right to paper. Covered individuals can request paper copies of specific documents, or globally opt out of electronic delivery entirely, at any time, free of charge.
- Initial notification. Covered individuals must be furnished an initial notification, on paper, that the way they currently receive retirement plan disclosures (e.g., paper delivery in the U.S. mail) is changing. The notice must inform them of the new electronic delivery method, the electronic address that will be used, and the right to opt out if they prefer paper disclosures, among other things. The notice must be given to them before the plan may use the new safe harbor.
- Notifications of internet availability. Covered individuals generally must be furnished a notice of internet availability (NOIA) each time a new covered document is made available for review on the website.
  - To avoid "notice overload," the final rule permits an annual NOIA to include information about multiple covered documents, instead of multiple NOIAs throughout the year.
  - The NOIA must briefly describe or identify the covered document that is being posted online, include an address or hyperlink to the website, and inform the covered individual of the right to request paper copies or to opt out of electronic delivery altogether.

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- — The NOIA must be concise, understandable, and contain only specified information.
- Website retention. Covered documents must remain on website until superseded by a subsequent version, but in no event for less than one year.
- System check for invalid electronic addresses. Plan administrators must ensure that the electronic delivery system is designed to alert them if a participant's electronic address is invalid or inoperable. In that case, the administrator must attempt to promptly cure the problem, or treat the participant as opting out of electronic delivery.
- System check at termination of employment. When someone leaves their job, the plan administrator must take steps to ensure the continued accuracy and operability of the person's employer-provided electronic address.

Effective date and immediate availability

The new safe harbor is effective 60 days after its publication in the Federal Register. However, the Department, as an enforcement policy, will not take any enforcement action against a plan administrator that relies on this safe harbor before that date. The Department's decision to provide this non-enforcement policy supports the Federal government's broader effort to respond to COVID-19. The Department understands the far-reaching effects of COVID-19, and the non-enforcement policy provides flexibility and may reduce administrative burden on employers and pension plan service providers during this unprecedented time.

[1] Pew Research Center, "10% of Americans don't use the internet. Who are they?" (Apr. 22, 2019).

[2] Peter Swire and DeBrae Kennedy-May, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time has Come to Prefer Electronic Delivery – 2018 Update," (April 2018).

[3] "Types of Internet Subscriptions by Selected Characteristics," U.S. Census Bureau American Community Survey 1-Year Estimates (Table S2802) (2017).

FAQs about low balance accounts

The cashout rules may allow plans to remove low balance accounts of former employees.

Workforce reductions over the past couple of years have left some employers with a lot of low-balance plan accounts owned by former employees. These accounts can be expensive to maintain and burdensome to administer. Below, you will find answers to commonly asked questions about handling these small accounts.

Can we just distribute small accounts to the former employees?

Check your plan's provisions. Under federal law, plans can provide that, if a former employee has not made an affirmative election to receive a distribution of his or her account assets or to roll those assets over to an IRA or another employer's plan, the plan can distribute the account—as long as its balance does not exceed $5,000. For accounts valued at $1,000 or less, the plan can simply send the former employee a check for his or her balance. Distributions of more than $1,000 must be directly transferred to an IRA set up for the former employee. Accounts valued at $1,000 or less may also be rolled over for administrative convenience.

Should non-vested assets be included when determining whether a mandatory distribution can be made?

You only have to include the value of the former employee's non-forfeitable accrued benefit. If the employee was not fully vested in any portion of the account when he or she left your employ, you do not have to count the non-vested portion.

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What about rollovers?

A plan may provide that any amounts that a former employee rolled over from another employer's plan (and any earnings on those rollover assets) are to be disregarded in determining the employee's non-forfeitable accrued benefit. Thus, you may be able to cash out and roll over accounts greater than $5,000. Note that rolled over amounts are included in determining whether a former employee's accrued benefit is greater than $1,000 for purposes of the automatic rollover requirement.

What requirements do we have to meet when rolling over a small account?

To fulfill your fiduciary duties as a plan sponsor, the following requirements must be met:

- The rollover must be a direct transfer to an IRA set up in the former employee's name.
- The IRA provider must be a state or federally regulated financial institution, such as an FDIC-insured bank or savings association or an FCUA-insured credit union; an insurance company whose products are protected by a state guaranty association; or a mutual fund company.
- You must have a written agreement with the IRA provider that addresses appropriate account investments and fees.
- The IRA provider cannot charge higher fees than would be charged for a comparable rollover IRA.

(Other fiduciary responsibilities apply.)

Are there rules for investing the rollover IRA?

The investments chosen for the IRA must be designed to preserve principal and provide a reasonable rate of return and liquidity. Examples include money market mutual funds, interest-bearing savings accounts, certificates of deposit and stable value products.

Do we have to provide disclosures?

Yes. Before you cash out an account, you must notify the former employee in writing, either separately or as part of a rollover notice, that, unless the employee makes an affirmative election to receive a distribution of his or her account assets or rolls them over to another account, the distribution will be paid to an IRA. As long as you send the notice to the former employee's last known mailing address, the notice requirement generally will be considered satisfied. In addition, you must include a description of the plan's automatic rollover provisions for mandatory distributions in the plan's summary plan description (SPD) or summary of material modifications (SMM).

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