Department of Labor Proposed Rule Aims to Modernize Electronic Disclosure

On October 23, 2019, nearly 20 years after it issued its first guidance regarding electronic disclosure, the Department of Labor (the “Department”) issued its highly anticipated proposed rule (“Proposed Rule”) to modernize the electronic disclosure rules for retirement plans.¹

In issuing the Proposed Rule, the Department recognized the important technological and consumer behavioral changes that have taken place since the issuance of its 2002 safe harbor rule. In this regard, the Department observed that “[t]echnology has changed substantially since the establishment of the 2002 safe harbor, including through the expansion of broadband and wireless networks and use of email, improvements to servers and personal computers, as well as the expanded use of smartphones, tablets, and other mobile devices.”²

The Department further noted that “[a]s the internet, smartphones, and other electronic devices have become an integral part of everyday American life, consumers use them in a wide range of activities, including shopping online and conducting financial transactions,” and that “[a]ccording to an online survey conducted by the Federal Reserve Board in 2015, 82 percent of smartphone owners with a bank account used online banking and 53 percent used mobile banking to check their balances or recent transactions in the prior 12 months.”³

The following summary highlights notable aspects of the Proposed Rule.

A. Application Limited to Retirement Plans – Welfare Plans Excluded

• Significantly, the Proposed Rule only applies to retirement plan documents. In the preamble, the Department expressly states that the Proposed Rule “does not apply to employee welfare benefit plans, as defined in section 3(1) of ERISA, such as plans providing disability benefits or group health plans.”⁴

• That said, the Department suggested that separate related guidance for welfare plans may be issued in the future. The Department indicated that it intends to “study the future application of the new safe harbor to documents that must be furnished to participants and beneficiaries of employee welfare benefit plans,” and that it would consult with the Treasury Department and the Department of Health and Human Services “[i]n considering any possible new electronic delivery safe harbor for group health plan disclosures in the future.”⁵

B. Notice and Access Approach

² Id. at 56,911.
³ Id.
⁴ Id. at 56,902.
⁵ Id.
The Proposed Rule provides a safe harbor based on a “notice and access” approach that requires (i) providing required disclosures to a website and (ii) providing a notice of electronic availability for such disclosures. In approving this approach, the Department indicated its view “that a website posting, in conjunction with a properly-timed notice of internet availability, constitutes ‘furnishing’ for purposes of ERISA pension plan disclosures.”

Significantly, the Proposed Rule does not include the “wired at work” and “affirmative consent” requirements of the existing safe harbor rules issued in 2002.

Instead, the Proposed Rule provides broader safe harbor relief that is based on providing “covered documents” to “covered individuals.”

- “Covered documents” generally include any documents that a plan administrator is required to furnish to participants and beneficiaries under Title I of ERISA.
- “Covered individuals” include any participant, beneficiary or alternate payee, regardless of employment status, who has provided an electronic address (e.g., email address) to the employer, sponsor or administrator. The definition includes an individual who has not provided an address for electronic disclosure but for whom the employer has assigned an electronic address, even if done solely to satisfy the safe harbor.

C. Right to Request a Paper Version or Opt Out

- The Proposed Rule provides covered individuals with a right to receive paper versions of documents or opt out of electronic disclosure altogether.

- In this regard, the preamble notes that “[o]ne of the Department’s goals in establishing the proposed framework was to be certain that, regardless of the delivery method chosen by a plan administrator, covered individuals who wish to receive paper copies of covered documents would be able to do so without undue burden.”

- Accordingly, the Proposed Rule requires that “any time a participant prefers to receive a paper copy of any of the covered documents, he has the right to request and receive a paper copy, free of charge.”

- The Proposed Rule also includes a “global opt out provision” that “enables a participant who wants to have all of her disclosures in paper . . . unless and until she later consents to receive covered documents electronically.”

---

6 Id. at 56,902.
7 Id. at 56,906.
8 Id. at 56,901-56,902.
9 Id. at 56,903.
10 Id.
11 Id.
D. Initial Notice of Internet Availability

- Prior to relying on the safe harbor, an initial paper notice is required that must explain that some covered documents will be provided electronically to an electronic address and explain the individual’s rights to request a paper version of any document or opt out of electronic delivery.\(^\text{12}\)

- The Department explained that “a paper copy is required because of the importance of advising participants at the outset how covered documents will be furnished and their rights described in the notification.”\(^\text{13}\)

E. Notice of Internet Availability

- The Proposed Rule generally requires furnishing a Notice of Internet Availability for each covered document provided using the new safe harbor.

- Notices must generally be provided at the time the document is posted on the website and must include\(^\text{14}\) –
  
  - A prominent statement (e.g., title, legend, subject line) that reads, “Disclosure About Your Retirement Plan.”
  
  - A statement advising 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.
  
  - 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.

F. Website Standards

- The website that is being used to post the covered documents must meet certain minimum standards.

- Specifically, the plan administrator must take measures reasonably calculated to ensure that\(^\text{15}\) –

\(^{12}\) Id. at 56,906.

\(^{13}\) Id.

\(^{14}\) Id. at 56,902-56,903.
The covered document is available no later than the date it is required to be furnished.

The covered document remains available until it is superseded by a subsequent version.

The covered document is searchable.

The covered document is maintained in a widely-available format that allows the document to be permanently retained (e.g., PDF), and

The website protects confidential information.

- Notably, the Proposed Rule specifically references “website” but does not explain whether other electronic mechanisms, such as mobile applications or portals, are included within the definition.

G. Severance from Employment

- The Proposed Rule includes a special rule regarding severance from employment. Specifically, the Proposed Rule provides that “[a]t the time a covered individual who is an employee severs from employment, the administrator must take measures reasonably calculated to ensure the continued accuracy of the covered individual’s electronic address or number . . . or to obtain a new electronic address that enables receipt of covered documents following the individual’s severance from employment.”\(^{16}\)

- The provision reflects the Department’s observation that “covered individuals may continue to receive and need access to certain ERISA disclosures even after they sever their employment with the employer sponsoring the plan.”\(^{17}\)

H. Request for Information

- In the preamble, the Department included a Request for Information with a series of questions seeking “information, data, and ideas on additional measures (beyond the electronic delivery safe harbor proposed in 29 CFR 2520.104b-31) the Department could take in the future (either as part of finalizing the proposal in this document, or a separate regulatory or appropriate guidance initiative) to improve the effectiveness of ERISA disclosures, especially with respect to design and content of ERISA disclosures.”\(^{18}\)

- In this regard, among other things, the Department requested comments from the regulated community regarding the following\(^{19}\) –

  - The best way to measure the effectiveness of a disclosure.

\(^{15}\) Id. at 56,904-56,905.

\(^{16}\) Id. at 56,906.

\(^{17}\) Id.

\(^{18}\) Id. at 56,908-56,909.

\(^{19}\) Id.
o How plan sponsors “assess the use, effectiveness, and impact of disclosures,” the findings and responses to such assessments, and whether assessments and responses should be required by regulation.

o Whether there are any “currently mandated routine retirement plan disclosures for which effectiveness and efficiency could be improved.”

o Whether “more personalized disclosure” would enhance participant engagement.

o The “need to strike a balance between providing too little information for participants to gain an adequate understanding of what the disclosure is trying to convey and providing too much information, which can become overwhelming and confusing,” and “whether the Department should encourage or require, as an alternative to furnishing the entire document, that the plan administrator furnish a brief, clear, and accurate summary of key information from the document.”

o Whether under the current rules, “redundant or inconsistent information” is disclosed to participants.

o Whether “the problem [is] that there are too many disclosures, or that there is too much information that is disclosed, or both,” and whether it would “be feasible, and advisable, to condense and streamline information into fewer disclosures or less voluminous disclosures, rather than eliminating disclosure of certain information.”

o Design and other aspects to improve the readability of disclosures (e.g., question and answer format, font sizes, colors/visuals, etc.).

o Cybersecurity concerns.

****