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DOL finalizes electronic delivery rule for retirement plan notices

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Final Department of Labor (DOL) [e-delivery regulations](#) will make it significantly easier for retirement plan administrators to deliver certain notices to participants and beneficiaries via internet websites, mobile apps and email. After receiving initial notice about how to access the documents, participants and beneficiaries can opt out of electronic delivery altogether, but even those who don't opt out can request paper versions of specific documents. The rule takes effect July 27, but plan administrators may rely on it earlier. The new rule applies only to retirement plans (but DOL may address e-delivery rules for health and welfare plans in the future).

Final regulation reflects comments

The "notice-and-access" safe harbor method for e-delivery remains largely intact in the final rule. However, in response to comments on the proposal, DOL made a number of revisions in the final rule, including:

- The final rule allows direct delivery of documents by email as an alternative method of e-delivery.
- Administrators using the notice-and-access framework now can choose to post covered documents to websites or use other platforms, such as mobile apps, to house available notices.
- Posted notices must be available for at least one year, even if superseded earlier.

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- Participants have the right to opt out of e-delivery entirely, but unlike the proposal, the final rule doesn't require plans to let participants opt out on a document-by-document basis.
- The list of documents for which a plan administrator can provide a combined notice of internet availability (NOIA) has changed from seven specific documents identified in the proposal to certain categories of documents, including summary plan descriptions (SPDs) and required annual disclosures that don't have a particular deadline for participant action. Notably, unlike the proposal, the final rule does not allow including quarterly benefit statements in a combined NOIA.

No model NOIA. The final rule does not provide a model NOIA. Commenters on the proposed rule overwhelmingly said that the safe harbor requirements were sufficiently specific, and any model would likely be too rigid to accommodate each employer's circumstances.

Two safe harbor methods of e-delivery

The final regulation allows two safe harbor methods of electronic delivery:

- A notice-and-access framework, with plan administrators notifying participants and beneficiaries that documents are available on a website or other platform
- Direct email delivery of documents

Employers can choose which (if any) disclosures to provide using either safe harbor method and can continue distributing paper documents for any or all disclosures. Participants can opt out of electronic delivery altogether or request a paper version of a particular disclosure.

2002 safe harbor still available

DOL first made an e-delivery safe harbor for ERISA retirement plan disclosures available in [2002 regulations](#). The 2002 safe harbor applies only for participants who can effectively access electronic documents at work, as well as participants and beneficiaries who have affirmatively consented to receive disclosures electronically. The new rule doesn't change any aspect of the 2002 safe harbor, which remains available going forward.

Details applicable to both safe harbor methods

Certain details of the new safe harbor apply to both the notice-and-access and email delivery methods.

Covered documents

The safe harbor is available for the delivery of "covered documents." A covered document is any retirement plan disclosure required by Title I of ERISA, except documents that must be furnished only on

request, which administrators must continue to provide on paper. For details on notices and documents covered by ERISA Title I, see DOL's [*Reporting and Disclosure Guide for Employee Benefit Plans*](#).

Covered individuals

The safe harbor can be used only for “covered individuals” — participants, beneficiaries and others entitled to covered documents for whom the employer, sponsor or plan administrator has an electronic address, such as a personal or work email address. Smartphone numbers also may be used, but only for the notice-and-access method, and the plan administrator must confirm a number is capable of receiving text messages.

The rule allows flexibility in obtaining an electronic address. For example, plan administrators can use an address the employee provided on a new-hire application, in plan enrollment paperwork or when registering to access plan information online. Administrators also can use an electronic address that the employer assigned to an employee, but only if that address will be used for other employment-related purposes beyond delivering covered documents. However, employers cannot assign electronic addresses to spouses and other beneficiaries, who must affirmatively provide an electronic address. Administrators and third-party service providers may not assign an address to any participant or beneficiary — for example, by using a commercial locator service to obtain an individual's personal email address or setting up a Gmail account for that person.

Transition. DOL will permit plan administrators to rely in good faith on lists of electronic addresses that already exist as of the rule's effective date.

Severance from employment. The rule allows plan administrators to continue using the safe harbor after employees leave employment with the plan sponsor. However, if a former employee had been receiving covered documents at an employer-assigned electronic address rather than a personal one, the administrator must “take measures reasonably calculated to ensure the continued accuracy and availability” of the terminated employee's electronic address or obtain a new electronic address when the termination occurs.

Invalid electronic addresses. The e-delivery system must alert the plan administrator to an invalid electronic address. Once aware of a bad electronic address (for example, when an email is returned as undeliverable), the administrator must promptly fix the problem or take action as if the covered individual had opted out of e-delivery. The regulation suggests that the administrator could fix the problem by using a secondary electronic address on file or obtaining a new electronic address. However, other corrective actions may be acceptable, depending on the particular facts and circumstances of a failed delivery. If e-delivery isn't possible, the plan administrator must furnish a paper version of the document as soon as reasonably practicable. Paper delivery will remain in effect until the administrator obtains a valid electronic address to resume sending electronic documents.

Paper copies and opting out

Plan administrators need to have reasonable procedures for participants and beneficiaries to obtain paper copies of covered disclosures and to opt out of electronic delivery for all covered documents. The administrator will have to supply paper copies of all future documents to participants who opt out, unless and until they elect e-delivery. The administrator must provide only one paper copy of a disclosure free of charge, unless plan terms or other ERISA rules require otherwise. The administrator cannot charge a fee for participants to opt out.

Initial notification of default e-delivery

Before relying on the new safe harbor, a plan administrator must send all participants and beneficiaries an initial paper notice explaining the new e-delivery method. The initial notice is required before using either the notice-and-access method or email to e-deliver documents. Plan administrators cannot send the initial notice electronically, even to participants already receiving electronic disclosures under the 2002 safe harbor. (However, administrators who can't send the notice on paper during the pandemic may rely on earlier DOL [relief](#) to send the notice electronically, provided they make a good-faith effort to send the paper notice as soon as administratively practicable.)

The initial notice must be written in a manner calculated to be understood by the average plan participant and must contain:

- An explanation that covered documents will be furnished electronically to an electronic address
- The electronic address to which the covered documents will be sent
- Any necessary instructions on how to access the covered documents electronically (e.g., if participants will need to create an account, set up a password or download a mobile app)
- If the administrator is using the notice-and-access method, a cautionary statement that the covered document may be available on the website for only one year or until superseded in later years
- A statement informing individuals about their right to request a paper copy of a covered document for free, and how to do so
- An explanation that individuals may opt out of electronic delivery for all covered documents without charge, and how to do so

Administrators may include the initial notice in new-hire packets or other standard enrollment materials.

Additional requirements for notice-and-access method

Plan administrators using the notice-and-access method must meet additional requirements for providing NOIAs and maintaining websites.

Notice of internet availability

A plan administrator must furnish an NOIA to each covered individual when a disclosure is newly available on the administrator's website or other platform.

Timing. The NOIA is due at the same time the disclosure is due. For example, a plan administrator must provide a summary of material modifications (SMM) to participants within 210 days after the close of the plan year in which a plan's terms were significantly changed. Plan administrators that want to post the SMM on a website have to provide the NOIA — and make the SMM available on the website — by that deadline. However, a special timing rule applies if the administrator provides a combined NOIA (see [Combining notices of internet availability](#) below).

Content. The NOIA must include the following information:

- A prominent statement (such as a title, legend or subject line) that reads "Disclosure About Your Retirement Plan"
- A statement that reads "Important information about your retirement plan is now available. Please review this information."
- The name of the covered document (for example, "your Quarterly Benefit Statement is now available") and, if the document's name doesn't reasonably convey its nature, a brief description of the document
- A website address — or a hyperlink to the website address — that's sufficiently specific to provide ready access to the document (e.g., a direct link to the document or to a login page for a site that immediately provides a prominent link to the document once users log in)
- A statement of individuals' right to request and obtain a paper version of the covered document for free, and an explanation of how to do so
- A statement of the right to opt out of receiving covered documents electronically, free of charge, and an explanation of how to do so
- A cautionary statement that the covered document may only be maintained on the website for one year or until superseded in later years

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- A telephone number to contact the plan administrator or other designated plan representative

The NOIA also can include an optional statement about any action that individuals are invited or required to take in response to the document and instructions on how to take such action. Alternatively, the notice may state that no action is required, if such statement is not inaccurate or misleading.

Form and manner of providing notice. The NOIA must:

- Be sent to the individual's electronic address — paper delivery is not permitted
- Contain only the required content, though pictures, logos or similar design elements may be included, as long as the design is not inaccurate or misleading and the required content is clear
- Be furnished separately from any other ERISA documents or disclosures provided to the individual, unless the exception for combined notices (discussed below) applies
- Be written in a manner calculated to be understood by the average plan participant

Combining notices of internet availability

A plan administrator generally must provide a separate NOIA for each required disclosure. But plan administrators can furnish a single combined notice for all or some of the following types of documents:

- SPDs
- Any covered document or information that must be furnished annually — rather than on the occurrence of a particular event — and doesn't require individuals to take any action by a particular deadline (for example, summary annual reports, annual funding notices, investment-related disclosures under 29 CFR [§ 2550.404a-5\(d\)](#), qualified default investment alternative (QDIA) notices and annual benefit statements)
- Any other covered document, if authorized by the secretary of Labor
- Any applicable notice required by the Internal Revenue Code, if authorized by the Treasury secretary

Employers may not give a combined NOIA for any disclosures besides the ones listed above.

Timing of combined notice. Covered individuals must receive a combined NOIA once per plan year. The plan administrator has 14 months after the date of the prior plan year's combined notice to provide a new one. However, providing a combined notice doesn't change the deadline for making a disclosure available on the website. That deadline remains the due date for furnishing the document by law.

Website standards

Plan administrators are responsible for establishing and maintaining the website used for document delivery. The rule takes an expansive view of the term website, including internet websites and other electronic information repositories like mobile apps. The administrator can retain third-party service providers to establish and maintain the website, but still has fiduciary responsibility for selecting and monitoring the service providers. The administrator must ensure each document is:

- Available by the ERISA deadline for furnishing the document
- Available for at least one year or until superseded by a revised version in later years
- Presented in a manner calculated to be understood by the average plan participant
- Available in a widely used format suitable for reading online and printing clearly on paper
- Searchable electronically by numbers, letters or words so participants can quickly find information about specific issues
- Available in a widely used format that allows the document to be permanently retained electronically

Protecting participant data. The administrator must take measures to ensure that the website protects the confidentiality of personal information about any covered individual. The rule does not prescribe specific, technical requirements for satisfying this requirement. The preamble to the final rule explains that this was intentional, given the variety of technologies, software and data used by retirement plans.

Technology mishaps. If the website or other platform becomes temporarily unavailable due to technical maintenance or other unforeseeable events or circumstances beyond a plan administrator's control, the plan administrator will not violate its disclosure obligations if it meets both of these conditions:

- Has reasonable procedures in place to comply with the safe harbor
- Takes prompt action to make the documents available as soon as practicable after the administrator knows (or reasonably should know) that the documents are temporarily unavailable

Additional requirements for email delivery

Plan administrators may choose to send some or all covered documents directly via email. Sending documents by text message to a smartphone number is not allowed. Plan administrators may send some documents by email and use the notice-and-access method for others. (For instance, a plan sponsor may prefer to send benefit statements by email, while posting other documents like SPDs on a website.) The

plan administrator must also take measures to protect the confidentiality of the covered individual's personal information.

Timing. Documents delivered by email must be sent by the date the disclosure is due.

Content of email. The email delivering the document must be written in a manner reasonably calculated to be understood by the average plan participant and must include the following information:

- A subject line that reads "Disclosure About Your Retirement Plan"
- The name of the covered document (for example, "your Quarterly Benefit Statement is now available") and, if the document's name doesn't reasonably convey its nature, a brief description of the document
- A statement of individuals' right to request and obtain a paper version of the covered document at no cost, and an explanation of how to do so
- A statement of the right to opt out of receiving covered documents electronically without charge, and an explanation of how to do so
- A telephone number to contact the plan administrator or other designated plan representative

Standards for covered document. The covered document may be contained in an attachment to the email or included within the text of the email itself. The document must also be:

- Written in a manner reasonably calculated to be understood by the average plan participant
- Available in a widely used format suitable for reading online and printing clearly on paper
- Searchable electronically by numbers, letters or words so participants can quickly find information about specific issues
- Available in a widely used format that allows the document to be permanently retained electronically

Combining covered documents. Although the regulation doesn't address whether a single email can deliver multiple disclosures, the preamble confirms that the plan administrator may apply the same standards that would apply to paper disclosures. That is, if separate delivery is not required and the timing requirements align, plan administrators may send multiple documents via a single "envelope" email.

Effective date

The final rule takes effect July 27. The proposal distinguished the effective date from the applicability date, which would have been the first day of the calendar year after the effective date. The final rule eliminates this distinction and is both effective and applicable on July 27.

Earlier reliance during COVID-19 pandemic. Although the rule is not effective until July 27, DOL will not take any enforcement action against a plan administrator that relies on the new safe harbor before that date. DOL's nonenforcement policy aims to provide flexibility to administrators struggling to satisfy their disclosure obligations during the COVID-19 pandemic. Before relying on the safe harbor, however, plan administrators still have to send an initial notice — on paper — explaining the plan's e-delivery system. Although the rule requires the initial notice be sent on paper, earlier [relief](#) permits e-delivery of required notices due during the pandemic, provided administrators make a good-faith effort to deliver paper copies as soon as administratively practicable.

Phaseout of existing subregulatory guidance. For 18 months after the final rule's effective date, plan administrators can continue to rely on the following pieces of subregulatory guidance:

- Field Assistance Bulletin (FAB) [2006-03](#), which allows administrators to provide pension benefit statements on secure websites
- FAB [2008-03](#), which lets administrators that provide QDIA notices electronically rely on either DOL's 2002 e-delivery safe harbor or the Treasury Department's [rules](#) for using electronic media.
- Technical Release (TR) [2011-03R](#), which allows plan administrators to use electronic media for participant-level disclosures under 29 CFR [§ 2550.404a-5](#).

Related resources

Non-Mercer resources

- [Final regulation](#) (Federal Register, May 27, 2020)
- [Fact sheet](#) (DOL, May 27, 2020)
- [News release](#) (DOL, May 27, 2020)
- [Disaster relief notice 2020-01](#) (DOL, April 29, 2020)
- [TR 2011-03R](#), (DOL, Dec. 8, 2011)
- [FAB 2008-03](#), (DOL, April 29, 2008)

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- [FAB 2006-03](#) (DOL, Dec. 20, 2006)
- [Final IRS rule: Use of electronic media for employee benefit notices](#) (Federal Register, Oct. 20, 2006)

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- [DOL gives retirement plans and participants pandemic relief](#) (April 30, 2020)
- [DOL proposes new electronic delivery rule for retirement plan notices](#) (Nov. 1, 2019)
- [DOL urged to speed electronic delivery rule for retirement plans](#) (June 18, 2019)

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