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New Rules on Electronic Delivery of Retirement Plan Disclosures

The Department of Labor (“DOL”) recently announced a Final Rule (the “Rule”) providing additional flexibility for employers who wish to deliver retirement plan disclosures to participants electronically (including via a website).

The Rule – Electronic media as default method for disclosure

Since 2002, plan administrators have used email to disclose employee benefits notices and documents for participants who regularly use email to perform work, or for those who affirmatively consented to electronic disclosure. The new Rule is more expansive and allows for electronic disclosure of certain retirement plan documents and notices to *all* individuals with an email address or smartphone number. Further, if the employer assigns all of its employees an email address, this address can be used (provided the email is used for other employment purposes). As always, the DOL requires that individuals be allowed to request paper copies or opt out of electronic disclosures entirely.

Plan administrators can use this Rule to furnish retirement plan notices required under ERISA, including Summary Plan Descriptions, Summary of Material Modifications and fee disclosure notices. Administrators should wait for guidance from the Internal Revenue Service before using the Rule to provide any notices required by the Internal Revenue Code (e.g., automatic contribution arrangement notices). Note that this new Rule does not apply to notices required by the Pension Benefit Guaranty Corporation or other regulatory agencies. While the official effective date of the Rule is July 26, 2020, plan administrators may use the Rule immediately.

Paper notice required to use electronic disclosure as default method

Before utilizing the Rule, plan administrators *must* provide an initial *paper* notice to covered individuals that electronic disclosure will be the default method of disclosure. The notice must also identify the email address or smartphone number that will be used for future disclosure and contain certain phrases, instructions, and cautionary statements.

Electronic disclosure – form and method

Disclosing via website

After sending the initial paper notice, plan administrators may publish ERISA disclosure documents to a website. In order to properly disclose those ERISA disclosure documents, plan administrators must notify covered individuals of their publication by sending the individual a notice of internet availability (“NOIA”). The NOIA must be sent to the email address or smartphone number provided by the covered individual and may not be sent with any other document. A NOIA must also contain certain phrases and information and provide a link directly to the ERISA disclosure document. The NOIA system should be designed to alert administrators to delivery failures (e.g., disclosures to landlines or invalid email addresses).

Generally, a NOIA must be provided *every* time a new ERISA disclosure document is made available on the website. For certain types of ERISA disclosure documents, a special combined NOIA is allowed and provides for one annual notification for multiple documents. When publishing an ERISA disclosure document via website, plan administrators should take care to protect the confidentiality of any personal information.

Disclosing via email

A plan administrator may send an ERISA disclosure document directly to a covered individual's email address. Disclosure via email requires the attachment of the ERISA document to the email, certain phrases and information, and the plan administrator's telephone number. A NOIA is not required for email disclosure, as the document is being sent directly to the individual.

Action Items

- Evaluate your current approach to paper/electronic disclosure and whether the new Rule is a better fit.
- Reach out to your recordkeepers to find out how and if they intend to implement the new guidance and review the proposed method for compliance with the Rule.
- Begin to consider how your organization might implement the requirements of the Rule. For example, the Rule requires the NOIA system to be designed to detect delivery failures. Consider how you will meet this requirement, including whether you can demonstrate to auditors that your system detected such failures.

If you have any questions about this guidance, or how it impacts your retirement plans, please contact a member of the [Kutak Rock Employee Benefits Practice Group](#).

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