

EMPLOYEE BENEFITS ADVISORY

DOL Issues Final Regulation on Electronic Delivery for Retirement Plan Disclosures



Retirement plan sponsors and recordkeepers surely will welcome the issuance by the Department of Labor (DOL) of final regulations that provide a “notice and access” safe harbor (the Safe Harbor), allowing retirement plans to furnish required participant disclosures by email or other electronic means. Under the Safe Harbor, the plan administrator may send participants and beneficiaries electronic messages (including via email, text, or IM) notifying them that documents and required disclosures are posted on the retirement plan’s website.

The Safe Harbor expands the DOL’s 2002 guidance on electronic disclosures, which applied only to participants with work-related access to the electronic documents or those who affirmatively opted in to receiving electronic disclosures. Plan administrators may still rely on the 2002 guidance if they so choose.

ONLY RETIREMENT PLANS ARE SUBJECT TO THE SAFE HARBOR

Note that the Safe Harbor only applies to retirement plans and not to health and welfare plans, although the DOL has indicated that it is considering expanding the Safe Harbor to health and welfare plans in the future.

DOCUMENTS AND DISCLOSURES COVERED BY THE SAFE HARBOR

The Safe Harbor applies only to retirement plan disclosures required by ERISA and governed by the DOL, including the following:

- Summary plan descriptions (SPDs)
- Participant fee disclosures
- Benefit/account statements
- Summary annual reports
- Blackout notices



Kathy Odle
Member
Denver, CO
303.299.8116
[Email](#)



Kirsten Stewart
Member
Denver, CO
303.299.8272
[Email](#)



George Tsai
Member
Denver, CO
303.299.8426
[Email](#)

Not covered by the Safe Harbor are documents required by the IRS, such as 401(k) plan safe harbor notices and 402(f) rollover notices. We anticipate that the IRS will issue its own guidance on electronic disclosures for documents under its authority in the near future.

REQUIREMENTS FOR RECIPIENTS OF THE DISCLOSURES UNDER THE SAFE HARBOR

The Safe Harbor applies to participants (and beneficiaries) for whom the plan administrator has a valid email address or other electronic address (such as a smartphone mobile number), including active employees who have an employer-assigned email address or who have provided a personal email address (for example, when enrolling in the plan or even when applying for the job). However, note that for spouses and beneficiaries, the Safe Harbor applies only if they have affirmatively provided the plan administrator with an electronic address.

PLAN ADMINISTRATOR MUST CONFIRM THAT ELECTRONIC ADDRESS IS VALID

The plan's operating system must be designed to alert the plan administrator if a message "bounces back" or is invalid for some reason. If this occurs, the plan administrator must either send a message to a secondary address on file for the individual or send a paper notice as soon as reasonably practicable. Also, when a participant terminates employment, the plan administrator must take reasonable steps to verify that the electronic address remains operational or to obtain a new address.

PAPER NOTICE REQUIRED TO INFORM PARTICIPANTS/BENEFICIARIES OF THE ELECTRONIC DELIVERY OF DOCUMENTS

To take advantage of the Safe Harbor, the plan administrator first must provide a paper notice to the participants (and any beneficiaries) that states: (a) that the documents will be furnished electronically to an electronic address; (b) the electronic address that will be used; (c) instructions about how to access the documents; (d) that the participant has the right to request a paper document free of charge; (e) how to opt out of the electronic disclosures; and (f) that the documents available electronically will be maintained on the website for a minimum of one year or until the documents are superseded by an updated version of the documents.

This notice could be provided in a new-hire kit or could be provided with the plan's enrollment materials.

REQUIREMENTS FOR NOTICE OF INTERNET AVAILABILITY

The Notice of Internet Availability is the electronic message that informs participants of the availability of documents posted on the plan's website. The DOL has set forth formal requirements for this Notice of Internet Availability, which must include:

- A statement that reads: "Disclosure about your retirement plan."
- A statement that reads: "Important information about your retirement plan is now available. Please review this information."
- Identification of the document by name (for example, "Quarterly Account Statement is now available") and a description of the document if not reasonably ascertained by the document title.
- The website address or hyperlink for the document.

- A statement of the right to request a paper version of the document free of charge.
- A statement of the right to opt out of electronic disclosures and how to opt out.
- A “cautionary” statement of how long the document will be maintained on the internet site.
- Telephone number to contact the administrator or other representative.

The Notice of Internet Availability must be separate from other disclosures and must not include any other content, except that it can include pictures, logos, or other design elements that are not misleading or confusing. Plan administrators can provide a combined Notice for an SPD and any documents that must be furnished annually and that do not require action by a participant by a specific date. Documents that relate to a specific event, such as a blackout notice, or that must be provided on a different schedule, such as a quarterly benefit statement, cannot be provided under a combined Notice of Internet Availability.

Generally, a Notice of Internet Availability must be provided at the time that a covered document is posted on the website. A combined Notice of Internet Availability must be furnished once each plan year and no more than 14 months from the time of the prior year’s Notice of Internet Availability.

WEBSITE REQUIREMENTS

Documents posted on a plan’s website must be posted by the due date applicable to those documents. The documents must be presented in a way that is calculated to be understood by the average participant and posted in a widely available format or form that is suitable for reading online or printing on paper. The document must be in a format that is searchable by numbers, letters, or words. The plan’s website must be reasonably designed to ensure the confidentiality of participants’ and beneficiaries’ personal information. Documents must remain on the website until superseded by an updated version but in no event less than one year.

OTHER MISCELLANEOUS PROVISIONS OF THE SAFE HARBOR

- The DOL guidance expressly permits disclosure documents to be attached to an email instead of posted on a website.
- The DOL has retained the requirement that participants be able to request a paper copy of notices free of charge or be able to opt out of electronic disclosures completely and to receive paper copies.
- The DOL recognizes that technological advances will continue, and the Safe Harbor is intended to adapt to new technologies. Accordingly, a website that is referred to in the DOL guidance may include mobile applications or other internet-based technologies, apps may replace websites, and new forms of communication may replace emails.

EFFECTIVE DATE

The Safe Harbor officially becomes effective 60 days after its publication in the Federal Register (which is anticipated in late May), but plan administrators may rely on the Safe Harbor immediately.

QUESTIONS

If you have any questions about your retirement plan's electronic disclosures or any other employee benefit matter, contact a member of our [Employee Benefits Group](#).