

DOL CREATES NEW E-DELIVERY SAFE HARBOR FOR RETIREMENT PLAN DISCLOSURES

Date: 2 September 2020

U.S. ERISA and Benefits and ESOPS Alert

By: Briana M. Swift, Ruth E. Delaney, Kristina M. Zanoliti

EXECUTIVE SUMMARY

The Department of Labor (DOL) published final regulations that make significant strides in reducing barriers to the electronic delivery of a wide array of retirement plan disclosures. Specifically, the final regulations create a new safe harbor (the 2020 DOL Safe Harbor) for the electronic delivery of retirement plan disclosures to participants and beneficiaries required under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA).¹ The 2020 DOL Safe Harbor applies to disclosures provided on or after 27 July 2020.²

The 2020 DOL Safe Harbor permits retirement plan fiduciaries to electronically deliver plan disclosures, either by website publication with appropriate “notice and access” or by email distribution, to a wider group of individuals than the DOL previously permitted. The 2020 DOL Safe Harbor does not eliminate or supersede the prior DOL safe harbor for electronic delivery of participant disclosures under regulations issued in 2002 (the 2002 DOL Safe Harbor).³ Rather, the 2020 DOL Safe Harbor represents an alternative to the 2002 DOL Safe Harbor. Notably, and unlike the 2002 DOL Safe Harbor, plan fiduciaries can satisfy the 2020 DOL Safe Harbor without having to analyze whether the recipient interacts with an electronic system as a function of his or her job or affirmatively consents to electronic delivery.

As discussed further below, while the 2020 DOL Safe Harbor did not supersede the 2002 DOL Safe Harbor, it did eliminate other prior DOL guidance regarding the use of certain electronic delivery methods for specific retirement plan disclosures “in the interest of creating uniformity in the delivery of ERISA disclosures electronically.”⁴ To allow plan administrators time to adapt to the elimination of prior electronic delivery guidance for these specific retirement plan disclosures, DOL will not pursue enforcement actions, through 27 January 2022, against plan administrators that comply with superseded guidance.

Moreover, the DOL's electronic disclosure rules are separate from those applicable to employee benefit plans (e.g., tax-qualified retirement plans) under the Internal Revenue Code (the Code), which fall within the interpretive jurisdiction of the U.S. Department of the Treasury (the Treasury Department) and the Internal Revenue Service (IRS). The Treasury Department has its own regulations on the use of electronic media to send required employee benefit plan notices and elections.⁵ Unfortunately for plan administrators, DOL and the Treasury Department have not officially coordinated their electronic delivery requirements. Although the 2020 DOL Safe Harbor is “intended to align” with IRS's electronic delivery rules, DOL did not receive the Treasury Department's formal blessing that satisfying the 2020 DOL Safe Harbor would also satisfy the Treasury Department's electronic delivery standards. Instead, the Treasury Department and IRS indicated that they “intend to issue additional guidance relating to the use of electronic delivery for participant notices.”⁶

2020 DOL SAFE HARBOR

Covered Documents and Covered Individuals

The 2020 DOL Safe Harbor may be used by plan administrators of a pension benefit plan, as defined in ERISA Section 3(2) (e.g., 401(k) plan), to furnish any document required to be furnished to participants and beneficiaries pursuant to Title I of ERISA, except for any document that must be furnished only upon request (e.g., documents required to be furnished under ERISA Section 104, including plan documents, trust agreements, Form 5500s, collective bargaining agreements, and other instruments under which the plan is established or operated).⁷ Documents that must be furnished only upon request may be provided in hard copy or may be delivered electronically in accordance with the 2002 DOL Safe Harbor.

Examples of *covered documents* that the 2020 DOL Safe Harbor will apply to include pension benefit statements; qualified default investment alternative (QDIA) notices, summary plan descriptions, summary of material modifications, summary annual reports, annual funding notices, participant-level fee disclosures, and blackout notices.

The 2020 DOL Safe Harbor is only available for the distribution of a covered document required to be disclosed to *covered individuals*, defined as participants, beneficiaries, alternate payees, or other individuals entitled to covered documents and who have provided an electronic address (such as an email address or smartphone number) to the employer, plan sponsor, plan administrator, or a designee.⁸

Employees (but not any nonemployee spouse or other beneficiary) with work-related electronic addresses assigned *by the employer* (not the plan administrator or a service provider) are treated as having supplied a valid electronic address, provided the employer-assigned electronic address is used for other employment-related purposes beyond providing delivery of covered documents.⁹ Once a covered individual who has been assigned a work-related email address has severed employment, the plan administrator must take measures that are *reasonably calculated* to ensure continued accuracy of the electronic address following a severance or obtain a new electronic address.¹⁰ A plan administrator may not use an electronic address gathered by commercial locator services or similar people-finder tools to acquire electronic addresses of plan participants and beneficiaries.¹¹

Method 1 – Notice and Access on a Website

The “notice and access on a website” method permits plan administrators to use websites to disseminate covered documents.

1. Website Definition

The term “website” is defined broadly to include an Internet website or other Internet or electronic-based information repository that gives covered individuals reasonable access to covered documents (e.g., a mobile application).¹²

2. Initial Paper Notification of Electronic Delivery and Right to Opt Out

To rely on the 2020 DOL Safe Harbor, the plan administrator must provide, *on paper, an initial notification of electronic delivery and the right to opt out* to existing participants and individuals who later become eligible to participate in the plan.¹³ This initial notice must be provided in paper form, regardless of whether the plan is currently relying on the 2002 DOL Safe Harbor.¹⁴

The initial notification must:

- Explain that covered documents will be provided electronically to an electronic address;
- Identify the specific electronic address to be used for the covered individual;
- Include any instructions needed to access the covered documents on the website (e.g., whether a password is required, a mobile application must be downloaded, or an online account must be established);
- Include a cautionary statement that covered documents are not required to be available on a website for more than a year or, if later, after the covered document has been superseded by a subsequent version of the covered document; and
- Explain the right to opt out of electronic delivery globally and receive only paper versions of any document (free of charge), and instructions for exercising that right.¹⁵

The initial notification must be written in a manner calculated to be understood by the average plan participant.¹⁶ The initial notification can include additional content, provided the content is relevant and not inaccurate or misleading.¹⁷ The initial notification need not be provided in a standalone document—it can be included with plan's standard enrollment materials.¹⁸

3. Notice of Internet Availability

In addition to providing an initial notification, plan administrators must alert covered individuals that a covered document has been posted to the website through a *notice of Internet availability* (NOIA).¹⁹

The NOIA must:

- Prominently state (e.g., in the title, legend, or subject line) "Disclosure About Your Retirement Plan";
- Include the statement: "Important information about your retirement plan is now available. Please review this information";
- Identify the available covered document by name (e.g., "Your Quarterly Benefit Statement is now available"), and if the name would not reasonably convey the covered document's nature, provide a brief description of the covered document;
- Include the Internet website address or hyperlink to the website where the covered document is located that is sufficiently specific to provide *ready access*²⁰ to the covered document;
- Include 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;
- Include a statement of the right, free of charge, to opt out of electronic delivery entirely and receive only paper versions of covered documents and an explanation of how to exercise this right;
- Include a cautionary statement that covered documents are not required to be available on the website for more than one year if superseded by new version; and
- Provide a telephone number to contact the plan administrator or other designated representative of the plan.²¹

Unlike the initial notification, the ability to modify a NOIA by including additional content is strictly limited. Apart from the required content described above, a NOIA is only permitted to include a statement of whether action is invited or required in response to a covered document and how to take that action or a statement that no action is required.²²

Each covered individual must be provided a separate NOIA for each covered document, with a few exceptions.²³ A NOIA can only combine information on the following covered documents:

- Summary Plan Description;
- Covered documents or information that must be furnished annually (not in response to a particular event, e.g., Summary of Material Modification or quarterly benefit statement) and do not require action by the covered individual by a particular deadline;
- Other covered documents authorized by the Secretary of Labor by regulation or otherwise; and
- Any notice required by the Code authorized by Secretary of the Treasury.²⁴

NOIAs must be furnished at the time the covered document is made available on the website.²⁵ If a combined NOIA was issued in a prior plan year and is furnished each plan year, the next combined NOIA will be treated as timely if it is provided no more than 14 months after the date the prior year's combined notice was furnished.²⁶

Plan administrators must be mindful of the systems used to furnish NOIAs. The system used must be *designed to alert* the plan administrator of invalid or inoperable electronic addresses (e.g., returned as undeliverable), and the plan administrator must *promptly take reasonable steps* to cure the issue of invalid or inoperable electronic addresses.²⁷

4. Website Standards

The plan administrator must not only ensure the existence of a website where covered individuals can access covered documents but also take measures reasonable calculated to ensure the following:

- *Timeliness* – Covered documents are available on the website no later than the date it is required to be furnished under ERISA.
- *Understandability* – Covered documents are presented in a manner calculated to be understood by the average plan participant.
- *Access*
 - Covered documents are maintained in a widely available format that can be viewed online and printed clearly on paper and are capable of being permanently retained in a manner that can be viewed online or printed clearly on paper.
 - Covered documents are electronically searchable by words, letters, and numbers.
 - If covered documents become temporarily unavailable due to technical maintenance or unforeseeable events or circumstances beyond the plan administrator's control, the plan administrator must (1) have reasonable procedures in place to ensure the covered documents are available in the manner required and (2) take prompt action to cure any unavailability as soon as practicable following

the earlier of the time the plan administrator learns of the unavailability or reasonable should learn of it.²⁸

- *Retention* – Covered documents remain available on the website for at least one year (or until superseded by a subsequent version, if later).
- *Data Security* – The website protects the confidentiality of personal information relating to any covered individual.²⁹

Method 2 – Direct Delivery by Email

The “direct delivery by email” method, like the “notice and access on a website” method, requires that the covered documents are sent to the email addresses of covered individuals.³⁰

1. Initial Paper Notification of Electronic Delivery and Right to Opt Out

Plan administrators must satisfy the same initial notification requirement applicable to the “notice and access on a website” method, except for the condition that the notification include a cautionary statement about the retention of covered documents on the website.³¹

2. Email Instead of NOIA

Under the direct delivery by email method, in lieu of furnishing a NOIA, the plan administrator sends the covered document in an email directly to the covered individual's email address. The email must include:

- The covered document in the body of the email or as an attachment;
- A subject line that reads: “Disclosure About Your Retirement Plan”;
- The name of or brief description of the covered document if the covered document is an attachment;
- A statement about the covered individual's right to: (1) receive a paper copy of the covered document free of charge and an explanation of how to do so, and (2) opt out of electronic delivery and an explanation of how to do so; and
- The telephone number to contact the plan administrator or other designated representative of the plan.³²

The email must be written in a manner designed to be understood by the average plan participant.³³

3. Email Standards

The plan administrator must ensure:

- *Timeliness* – Covered documents are sent to covered individuals no later than the date the covered document is required to be furnished under ERISA;
- *Understandability* – Covered documents are written in a manner reasonably calculated to be understood by the average plan participant;
- *Access* – Covered documents are (1) presented in a widely available format that can be read online or printed clearly on paper and are capable of being permanently retained in an electronic format that can be read online or printed clearly on paper, and (2) searchable electronically by words, letters, and numbers; and

- **Data Security** – Measures are taken that are *reasonably calculated* to protect the confidentiality of personal information relating to the covered individual.³⁴

Covered Individual's Right to Request Paper Version or Opt Out

Under both methods of electronic delivery under the 2020 DOL Safe Harbor, the plan administrator must ensure the covered individual's right to request a paper copy of covered documents or opt out of electronic delivery.³⁵ The plan administrator must: (1) provide paper versions of covered documents upon a covered individual's request (one copy must be provided free of charge), (2) comply with requests to opt out of electronic disclosure globally and receive only paper versions of covered documents, and (3) maintain procedures governing these requests that are reasonable.³⁶

Specific ERISA Disclosures – Eliminating Prior Guidance and Transition Period

In addition to creating a new safe harbor for the electronic delivery of certain retirement plan disclosures, the 2020 DOL Safe Harbor regulations also supersede, and thus prevent retirement plans from relying on, prior DOL guidance on the electronic disclosure of certain covered documents.³⁷ The 2020 DOL Safe Harbor regulations supersede prior DOL guidance permitting:

- Use of a continuous-access website to disclose pension benefits statements³⁸;
- Reliance on IRS's electronic delivery rules for the delivery of QDIA notices³⁹; and
- Use of electronic media (including a continuous-access website) to deliver participant-level fee disclosures required under 29 C.F.R. § 2550.404a-5.⁴⁰

The rules permit a transition period of up to 18 months following the effective date of the final rule (*i.e.*, until 27 January 2022).⁴¹ During the transition period, DOL will not take enforcement actions against plan administrators that comply with the superseded guidance.⁴² Following the transition period, plan administrators cannot rely on the electronic delivery methods described in the superseded DOL guidance for these retirement plan disclosures and must ensure that the electronic delivery methods used satisfy either the 2002 DOL Safe Harbor or the 2020 DOL Safe Harbor.

The K&L Gates team is ready to discuss with clients the implications of the final rule and how plan administrators seeking to rely on the electronic delivery of ERISA retirement plan disclosures can ensure they maintain legal compliance.

FOOTNOTES

¹ Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, 85 Fed. Reg. 31,884–924 (May 27, 2020) (to be codified at 29 C.F.R. § 2520.104b-31).

² 29 C.F.R. § 2520.104b-31(l).

³ Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans (2002 Electronic Disclosure Regulations), 67 Fed. Reg. 17,264 (Apr. 9, 2002).

⁴ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,908.

⁵ See 26 C.F.R. § 1.401(a)-21.

⁶ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,886.

⁷ *Id.* at 31,884; 29 C.F.R. § 2520.104b-31(c)(1).

⁸ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,888; 29 C.F.R. § 2520.104b-31(e)(4). Plan administrators may distribute covered documents to individuals who are not covered individuals either in hard copy or by electronic delivery. Electronically delivery of covered documents to non-covered individuals must satisfy the 2002 DOL Safe Harbor, which requires that the individual be notified of the right to request and obtain a paper version of the document and either have work-related computer access or affirmatively consent to the disclosure. See 29 C.F.R. § 2520.104b-1(c). It can be a complicated and ever-changing endeavor to track the electronic delivery options available to different individuals. However, failure to adhere to ERISA's electronic delivery requirements can lead to fiduciary exposure.

⁹ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,888–89; 29 C.F.R. § 2520.104b-31(b).

¹⁰ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,902–03; 29 C.F.R. §§ 2520.104b-31(h), 104b-31(k)(4)(ii).

¹¹ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,889.

¹² *Id.* at 31,898; 29 C.F.R. § 2520.104b-31(b).

¹³ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,900; 29 C.F.R. § 2520.104b-31(g).

¹⁴ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,901.

¹⁵ 29 C.F.R. § 2520.104b-31(g).

¹⁶ *Id.* This condition does not impose a Flesch Reading Ease score requirement (as the proposed rules required). Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,895.

¹⁷ Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,901.

¹⁸ *Id.* at 31,902.

¹⁹ *Id.* at 31,890; 29 C.F.R. § 2520.104b-31(g).

²⁰ The “ready access” requirement is satisfied if the individual is either taken directly to the covered document or to a login page that provides (or immediately after a covered individual logs on provides) a prominent link to the covered document. 29 C.F.R. § 2520.104b-31(d)(3)(i)(D).

²¹ *Id.* § 2520.104b-31(d)(3)(i).

²² *Id.* § 2520.104b-31(d)(3)(ii).

²³ *Id.* § 2520.104b-31(d)(4)(iii).

²⁴ *Id.* § 2520.104b-31(i).

²⁵ *Id.* § 2520.104b-31(d)(2).

²⁶ *Id.*

²⁷ *Id.* § 2520.104b-31(f)(4).

²⁸ *Id.* § 2520.104b-31(j).

²⁹ *Id.* § 2520.104b-31(e).

³⁰ *Id.* § 2520.104b-31(k)(1).

³¹ *Id.* § 2520.104b-31(k)(4)(ii).

³² *Id.* § 2520.104b-31(k)(2).

³³ *Id.* § 2520.104b-31(k)(2)(iv).

³⁴ *Id.* § 2520.104b-31(k).

³⁵ *Id.* § 2520.104b-31(f).

³⁶ *Id.*; Preamble to 2020 DOL Safe Harbor, 85 Fed. Reg. 31,899.

³⁷ Preamble to Safe Harbor, 85 Fed. Reg. 31,907.

³⁸ See DOL, FIELD ASSISTANCE BULLETIN (FAB) 2006-03 (Dec. 20, 2006).

³⁹ See DOL, FAB 2008-03 (Q/A-7) (Apr. 29, 2008).

⁴⁰ See DOL, TECHNICAL RELEASE 2011-03R (Dec. 8, 2011).

⁴¹ Preamble to Safe Harbor, 85 Fed. Reg. 31,908.

⁴² *Id.*

KEY CONTACTS



BRIANA M. SWIFT
ASSOCIATE

SEATTLE
+1.206.370.7820
BRIANA.SWIFT@KLGATES.COM



ROBERT L. SICHEL
PARTNER

NEW YORK
+1.212.536.3913
ROB.SICHEL@KLGATES.COM



MICHAEL A. HART
PARTNER

PITTSBURGH
+1.412.355.6211
MICHAEL.HART@KLGATES.COM



RIKKI A. SAPOLICH-KROL
PARTNER

SAN FRANCISCO
+1.415.882.8027
RIKKI.SAPOLICH@KLGATES.COM



RUTH E. DELANEY
PARTNER

LOS ANGELES
+1.310.552.5068
RUTH.DELANEY@KLGATES.COM



WILLIAM P. WADE
OF COUNSEL

LOS ANGELES
+1.310.552.5071
WILLIAM.WADE@KLGATES.COM



KARRIE JOHNSON DIAZ
PARTNER

SEATTLE
+1.206.370.6649
KARRIE.DIAZ@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.