



SLEVIN & HART, P.C.

Benefits Update

Final Rule On Electronic Disclosures

May 29, 2020

On May 27, 2020, the Department of Labor published a final rule that creates an additional safe harbor to allow retirement plans to electronically distribute disclosures required under Title I of ERISA (the “Safe Harbor”). Slevin & Hart first reported on the proposed regulation in November 2019. (“DOL Proposes Expanding E-Disclosure Safe Harbor for Retirement Plans,” Nov. 13, 2019.)

The Safe Harbor expands existing regulations on the permissible uses of electronic distribution of ERISA plan disclosures. Under the final rule, retirement plans may make required disclosures to participants and beneficiaries available online or through direct email delivery, provided certain notice requirements and other safeguards are met. However, individuals may opt out of electronic delivery if they prefer to receive a paper copy.

As explained in our previous publication concerning the proposed regulation, the Safe Harbor applies to any document that a plan administrator of a retirement plan, either a defined benefit or defined contribution plan, is required to provide to participants and beneficiaries under the reporting and disclosure rules of ERISA (“Covered Documents”) and to any individual entitled to receive Covered Documents who provides the plan administrator with an electronic address, including an email address or mobile device number (“Covered Individuals”).

The final version of the Safe Harbor includes some of the following notable provisions that differ from the proposed rule:

- The electronic notice to Covered Individuals must include a designated website address or a hyperlink to the designated website where the Covered Document is available.
- Covered Documents must remain available on the plan’s website until superseded by a subsequent version if applicable, but, if not superseded, for at least one year. The electronic notice also must include a cautionary statement informing the Covered Individual of the same.
- The electronic notice may, but is not required to, include a statement as to whether action is required or invited by the Covered Individual in response to a Covered Document.

In addition, the Safe Harbor includes a new provision that allows for the direct delivery of Covered Documents to Covered Individuals by email. Previously, the proposed regulation allowed Covered Documents to be made available only on a designated website, with the plan

administrator notifying the Covered Individuals of availability by electronic means. Now, plans may utilize the direct delivery method to send Covered Documents to Covered Individuals by email rather than posting to a website, provided certain content requirements are met. These requirements include the following: (1) the email subject line must contain specific information; (2) the Covered Document must be contained in the body of the email or included as an attachment to the email; (3) the email must identify or provide a brief description of the Covered Document; and (4) the email must state that the Covered Individual has the right to a paper copy of the Covered Document and the right to opt out of electronic delivery.

The Safe Harbor also addresses a concern that arose from the proposed rule regarding multiemployer plans' ability to comply with the special rule for employees who separate from employment. The proposed rule would have required a plan administrator to ensure the continued accuracy of a terminated participant's email address or obtain a new email address that enables electronic receipt, which is often difficult for an administrator of a multiemployer plan. The final rule does not impose an affirmative obligation on multiemployer plans to obtain new email addresses, but rather requires only that the plan take curative actions if it learns of an invalid or inoperable email address.

The Safe Harbor applies only to retirement plans, although the Department of Labor plans to study whether a similar provision can be created for use by welfare plans.

Please contact Slevin & Hart for more information about how this regulation may affect your plan.

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