



DWC News Update:

New eDisclosure Rules: Maybe This Whole Internet Thing is Going to Stick

Just before Memorial Day weekend, the Department of Labor published rules allowing plan sponsors to set electronic media as the default method to provide plan information to participants. At more than 150 pages, there are a lot of details in the new rule. We will provide a summary here and follow up with additional posts that explore some of the nuances in greater depth.

Here's the TL;DR - Plan sponsors can now distribute most plan-related notices electronically as long as they provide participants with an initial written notice (which cannot be electronic) outlining the change, which electronic address will be used, and offering the participant the opportunity to opt-out of electronic disclosures.

To the DOL's credit, they took a very common-sense approach in writing the rule. As you'll see below, the DOL intentionally defines terms quite broadly to cover as many scenarios as possible and to make them easily adaptable to any future technological innovations. In response to comments asking for more distinct or definitive definitions, the preamble to the regulations often respond with a simple "no thanks" - paraphrasing of course.

How Did We Get Here?

After much encouragement from the industry, the DOL first issued regulations on electronic plan-related disclosures in 2002...that's five years before the first-generation iPhone. Without getting too far into the weeds, those rules still required paper to be the default method of disclosure but provided a "safe harbor" to allow distribution of notices via email under two circumstances:

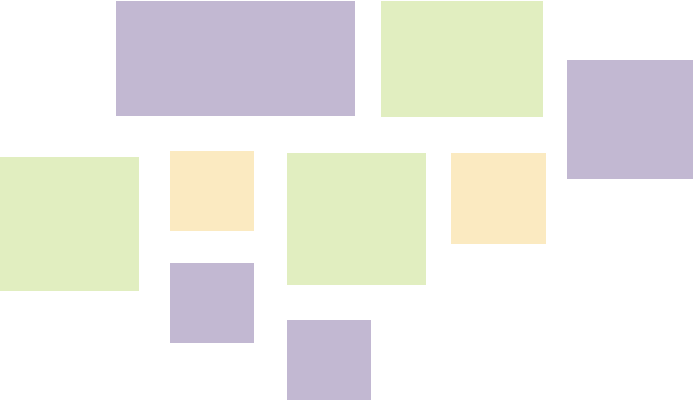
- Notices are sent to an email address provided by the sponsor and which the participant is required to access as part of his/her job; or
- The sponsor worked through a series of complex steps to document each participant's consent to receive electronic disclosures.

The industry was hopeful this was the start that would lead to more expansive guidance and continued to provide input along those lines to the DOL. It took almost 20 years, but they finally got there. We should note that this new rule does not replace the old one; instead, it provides an additional (and optional) means for plan fiduciaries to satisfy their disclosure requirements.

In support of this new rule, the preamble cites several surveys that indicate 90% of U.S. adults use the internet and that of those who don't have access at home, nearly half cite use of their smartphones as the reason for not having a separate subscription at home. Surprisingly enough, it took a survey...

Covered Individuals

This is one of the simpler definitions in the new rules. A "covered individual" is any person who is a participant, beneficiary, or "other individual entitled to covered documents" who provides an electronic address that is capable of receiving the information being disclosed. Pretty simple and, like we mentioned, pretty broad. You



may have noticed a couple of new terms in that simple definition – “covered documents” and “electronic address.” That is where simple becomes a little more complex. More on those to come.

Covered Documents

Again, DOL uses a broad definition. A “covered document” is any document *or information* required to be distributed under ERISA (emphasis mine). They added the word “information” to ensure coverage of items such as participant-level fee disclosure that might not be in a formal document, per se. The new rule does make it clear that we are only talking about retirement-plan-related disclosures and not those that might apply to welfare benefit plans.

There are two important exclusions from this ruling:

- Disclosures required by the IRS, e.g. [safe harbor notice](#), and
- Documents and information that **MUST** be furnished **ONLY** upon request.

This is a DOL rule, so it makes sense that it would only apply to DOL disclosures; however, it is left open to eventually include other disclosures, as may be allowed by the Treasury Department.

As for the second bullet, the word “only” makes it clear that all documentation that sponsors have an obligation to initially furnish to all participants but potentially again if requested are included under the new rule. An example of this is the Summary Plan Description.

Electronic Addresses

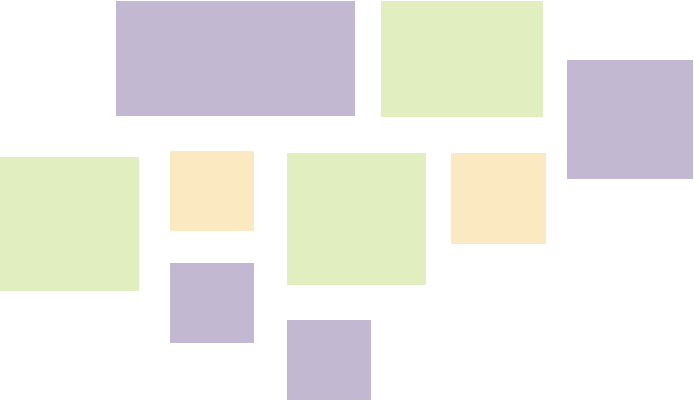
The electronic address is more or less the lynchpin of the new rule, because it is the mechanism through which disclosures are provided. No electronic address = no electronic disclosure.

Although most people’s minds will automatically jump to email, DOL’s use of the more generic term is meant to encompass other current (e.g. smartphone apps or texting) and future communication methods. Noticing a trend?

In response to concerns that language in the proposed version of these rules limited availability to employment-related electronic addresses, DOL clarified their intention was not to exclude any individual or plan that was otherwise covered under ERISA, and updated the language in the final ruling to state that providing an electronic address as a condition of employment was only one available option, not the only option.

Here are some additional requirements:

- An employer-provided address is acceptable as long as it is also for other employment-related purposes. In other words, plan disclosures cannot be the only “official” use.
- This precludes the employer from assigning an address to a non-employee such as an ex-spouse who is an [alternate payee](#).
- When a participant terminates, the employer must obtain a non-employment-based address.

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- Addresses cannot be assigned by plan service providers such as recordkeepers, though addresses that a participant provides to such a service-provider can be used.
 - Plan sponsors can rely on personal addresses already on file, e.g. from a job application or other HR documentation, and does not need to obtain additional confirmation from the individual.
 - On receipt of any notification that an address has become inoperable, e.g. a bounce message, the participant is deemed to have opted out of electronic delivery until the situation is remedied. Obtaining a new address is the most obvious option.

Internet Website

It may sound like a term out of the late 90s, but the DOL's intent...wait for it...is to broadly cover a wide array of available "electronic-based information repositories," including but not limited to mobile applications.

For an "internet website" to be acceptable, the plan sponsor must ensure the following:

- Covered documents are available no later than the date those documents are normally required to be distributed.
- The information must remain available for at least one year, or if later, the date it is replaced by an updated version of the covered document. For example, the SPD would remain on the website until it is superseded by a later version, but a [blackout notice](#) would only have to remain for one year.
- The content must be calculated to be understood by the average plan participant.
- The format must be widely available and facilitate reading online, printing it, and saving it locally (e.g. downloading a copy).
- Participants must be able to search electronically by either numbers, letters, or words.
- If the website goes down (e.g. maintenance, connectivity issues, etc.), all reasonable steps must be taken to bring it back online as soon as possible.

Initial Notice

The new rule requires two broad types of notifications to participants. One is the Notice of Internet Availability (or NOIA) as described below. Before that, however, sponsors must provide participants with an initial paper notification to let them know that some or all plan disclosures will be provided electronically. The initial notice must also include the following:

- The specific electronic address to be used (yep, that means these must be customized and not generic),
- Right to request a hard copy or opt out altogether (and instructions for doing so),
- Any special instructions for accessing covered information (e.g. creating an account or downloading an app),
- Caution about one-year availability (as described above).



Notice of Internet Availability

The purpose of the NOIA (who else is excited about another acronym?) is to inform covered individuals that plan-related information is available for their review. It must include the following information:

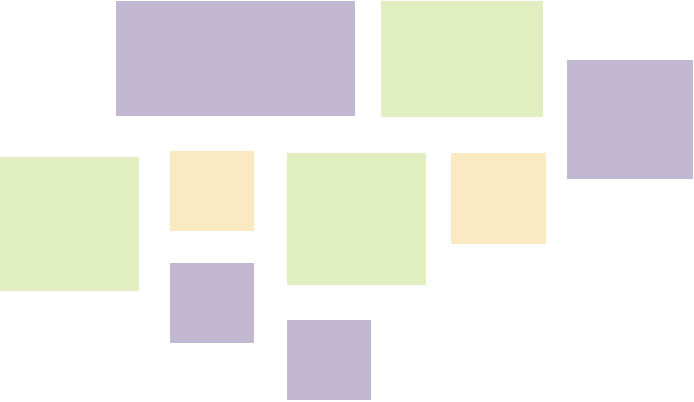
- Subject line that reads specifically “Disclosure About your Retirement Plan”
- Additional statement that reads specifically “Important information about your retirement plan is now available. Please review this information”
- Identification of the covered document(s) by name and, if not obvious based on the name, a brief description of the content.
- The URL of or hyperlink to the information. This link must lead the covered individual either directly to the covered document or to a login page that, once logged in, will provide the covered document
- A statement that explains the participant’s right to request a paper version of the covered document free of charge, and an explanation of how to make the request
- A statement outlining the participants right to opt-out of the electronic delivery, and an explanation of how to make the request
- Caution that the covered document is not required to be available for more than a year, or if later, the document is superseded by another version
- A phone number to contact the administrator or representative of the plan

Although not required, the NOIA can identify whether or not participant action is required (or invited); however, DOL is clear to point out that any such language must be clear, accurate, and not misleading.

The NOIA must be provided on its own and not combined with other documents or notices. Though it can contain design elements such as logos or graphics, it should not include marketing-type information that could be distracting. The bottom line is the NOIA must be clear, concise, and easily understood by the average participant. Though not part of the regulation itself, the DOL mentions, as examples, in the preamble things like not using highly technical, legal jargon, lengthy sentences, or double negatives.

Generally, a separate NOIA must be provided for each separate disclosure item. However, in recognition of potential “notice fatigue,” the new rule allows a single annual NOIA to combine some or all of the following items:

- Summary plan description,
- Any covered document required to be provided annually and does not require participant action (e.g. QDIA notice, summary annual report, participant fee disclosure, etc.),
- Additional covered documents as may be authorized by the Secretary of Labor, and
- Additional covered documents as may be authorized by the Secretary of the Treasury (hopefully automatic enrollment and safe harbor notices).



If the plan provides a combined NOIA in one year, it must provide the next NOIA no more than 14 months later. The extra two months are to ensure annual disclosures are provided timely without requiring sponsors to back up the notice date each year in order to meet a strict 12-month deadline.

The DOL did specifically exclude certain required disclosures from being combined. These include:

- Items that invite specific and timely action from the participant (e.g. blackout notices),
- Irregular or transaction-based disclosures,
- Qualified domestic relations order determinations, and
- Quarterly benefit statements.

Direct Delivery

Most of the new rule focuses on posting covered information to a website, but DOL also makes it clear that it is acceptable to directly deliver the covered items as attachments (think PDF). However, this option is restricted to email only and does not include other types of electronic addresses. Although a separate NOIA is not required, the “cover email” should include much of the same information minus the URL/hyperlink.

Effective Date

This new rule officially goes into effect at the end of July; however, given the disruption that COVID-19 has had on many businesses, DOL will not take action against sponsors that rely on this ruling ahead of time. Additionally, there is an 18-month transition period during which plan sponsors may continue to rely on prior guidance as they make system updates and gather electronic addresses.

Conclusion and Next Steps

There are quite a few details in this new rule that will take some time to digest and get up and running. Fortunately for most plan sponsors, it is anticipated that recordkeepers will lead the charge here. Most of them already have secure web portals in place, and they generally already have similar processes for delivering quarterly benefit statements under a special 2006 DOL rule.

As mentioned at the beginning, we will follow up with additional posts that delve into the details and nuances of certain aspects of the regulations. In the meantime, please get in touch with the [DWC Team](#) if you have questions about how this new rule might impact you.



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