DWC News Update:

eDisclosures: A Deep Dive into Electronic Addresses & Internet Websites

Although the Department of Labor's new ruling on electronic disclosures doesn't officially go live until the end of next month, it is already breathing new life into some fairly antiquated-sounding terms. In this episode of eDisclosures, we will dive into exactly what constitutes an acceptable e-address and internet website.

Quick Review

In a country in which more than 90% of adults have access to and use the internet on a daily basis, the ability for plan sponsors to electronically deliver required disclosures is long overdue. Nearly two decades in the making, the regulations DOL issued at the end of May are finally making that a reality even if some of the terms used – electronic address and internet website – sound like they are still stuck in the 1990s. However, the DOL used these seemingly outdated terms for a reason – to ensure the new rules can be applied broadly to as many plan sponsors as possible based on current technology as well as future innovations.

Electronic Addresses | The Tie That Binds

As we mentioned in our summary post on the new rules, electronic addresses are what really drive things. If a participant does not have an electronic address, s/he cannot receive an electronic disclosure. That begs the question…what constitutes an electronic address?

The obvious answer is an email address – either personal or employment related. However, the DOL made sure to mention that a smartphone with texting capabilities can be an acceptable electronic address. That means, if a participant has a cell phone that can receive text messages, that cell phone number can be used as an acceptable electronic address. Both of these carry some limitations that we will touch on later.

Gathering the Address

This is an area in which DOL provides plan sponsors quite a bit of leeway. If the employer already has an electronic address on file, whether personal or employment related, the employer may use that address to provide plan disclosures under this new rule. Additionally, if the employee provides an electronic address on any HR related form at any time, the plan sponsor may use that address. This includes personal e-mail addresses or cell phone numbers provided on a job application.

While the electronic address can be pulled from any employee provided materials, DOL was quick to put the kibosh on several other possibilities:

- **Single Purpose Address:** Although employment-related addresses can be used, employers are not permitted to provide addresses that are used solely for the purpose of plan disclosures. The reasoning is that if this is the only purpose for the address to exist, the likelihood that participants would monitor/access it would be much lower. So, in order for an employer-provided electronic address to be valid, it must be used for other employment-related purposes beyond just plan disclosures.

- **Non-Employee Address:** Since an employer provided electronic address cannot be for the sole use of providing electronic disclosures, it follows that someone who is not an employee of the plan sponsor (beneficiaries, alternate payees, and former employees) cannot receive disclosures using an address provided by the plan sponsor. Instead, for those individuals to be covered under this ruling, they must provide the employer with a personal electronic address.

- **Service Provider Addresses:** The new rules do not allow service providers (such as TPAs or recordkeepers) to provide participants with the electronic address. Conversely, however, if a participant provides his or her electronic address to a service provider, that address can be used to provide electronic disclosures.

So, it is certainly an easy endeavor to gather the required electronic address; but what happens if the information on file is incorrect, and the attempted electronic delivery comes back us undeliverable?

Inoperable Addresses

First and foremost, plan sponsors do not have an obligation to monitor participants' electronic engagement to determine whether eDisclosures are being read. However, it is the plan sponsor's responsibility to ensure that the electronic delivery method is reasonably designed to ensure actual delivery. That includes some sort of mechanism to notify the sponsor if a participant's electronic address is no longer valid or is inoperable. This could be as simple as the bounce notifications that many email systems already send.

When a plan sponsor does receive a bounce back message, it must take action to correct the issue. This may include steps such as re-sending the notification, asking the participant to provide an updated electronic address, and/or sending to secondary electronic address for the participant. If the sponsor is unable to obtain a new address and does not have a secondary address to use, the participant is treated as if he/she opted out of electronic delivery.

Participant Termination of Employment

When an employee has been provided with an employment-related electronic address, it will almost certainly cease to work upon that employee's termination. In the off chance the address remains valid following employment termination, it would no longer meet the requirement of being used for other employment-related purposes. As a result, DOL requires the plan sponsor to take measures to obtain a new address to use for electronic disclosures subsequent to termination. If the plan sponsor is already using a personal electronic address, no additional steps need to be taken.

Internet Website | The New & Improved Information Repository

Welcome back to the 90s Marty McFly!

These new rules do make it easier to provide plan disclosures to participants by emailing them as attachments; however, it is anticipated that most who take advantage of eDisclosure will do so by posting the covered documents online for participants to access. Although DOL refers to this as posting to an internet website, they point out that this includes any "internet or electronic-based information repository…to which covered individuals have been provided reasonable access." That includes, for example, a smartphone app, which could revolutionize the manner in which disclosures are provided.

Like the vast majority of plan compliance, it is ultimately the plan sponsor's responsibility to establish and maintain the website; however, DOL understands that this responsibility will likely be delegated to service-providers, such as recordkeepers, in most situations. Even then, the sponsor must still monitor those third parties to make sure they are playing by these new rules. Though fairly intuitive, DOL listed several additional requirements the internet website must satisfy:

- The content must be calculated to be understood by the average participant
- The format must be widely available and facilitate reading online, printing, and saving locally (e.g. downloading a copy)
- Participants must be able to search electronically by either numbers, letters, or words

The websites many recordkeepers make available to plan participants generally meet these requirements already, so there should be little to no transition with regard to these particular standards.

Importantly, DOL has provided relief for circumstances in which reasonable events such as internet connectivity problems, routine maintenance, or network disturbances interrupt the availability of covered documents on the website - as long as prompt action is taken to resolve the issue. Otherwise, paper disclosure would have to be distributed. The bottom line is that if the plan sponsor is going to make disclosures available online, it is their responsibility (themselves or via their service provider) to make sure the repository is up-to-date and functioning properly.

Disclosure Timing

The ruling did not change the usual deadlines for providing various disclosures; it merely added a new delivery method. That is to say, covered documents must continue to be made available no later than the date they are currently required to be distributed. For example, the Summary Annual Report for the 2019 plan year is normally due to participants by October 15, 2020. That is still the deadline; the difference is that, as long as all of the other eDisclosure requirements are met, the SAR can now be delivered electronically by that date rather than being mailed.

That said, the new regulations do introduce a new timeframe to consider. Disclosures must remain on the website for at least one year, or if later, the date they are replaced by new versions. The DOL provided a few examples:

- **Summary Plan Description:** If a plan's SPD is provided on the website on January 1, 2021, it must remain on the website until a new SPD is furnished. When the plan is amended in 2022 and a summary of material modification is furnished, a new SPD is not yet required, and the 2021 version must remain. However, if/when the SPD is completely updated any time after 2021, the old version can be removed from the website and replaced with the new one.

- **Blackout Notice:** In conjunction with a change in recordkeepers, the plan provides a blackout notice to participants on November 1, 2020. Since the blackout occurs over a set period of time and is generally non-recurring, there is no expectation that the notice will be regularly updated. As such, the notice must remain on the website until at least November 1, 2021 (one year following initial posting).

There are two additional items to note. One is that this one-year requirement is a minimum requirement. In other words, it is not a problem to keep documents on the website for longer than that. Second is that this requirement only addresses how long disclosures are required to remain on the website; it does not change the general record retention requirements that normally apply.

Conclusion

These are two incredibly broad terms that are intended to cover the unknown technologies of tomorrow, today. Join us in next week's installment of eDisclosures as we dive further into the types of disclosures that can be provided under these new rules.