May 27, 2020

Alternative Electronic Disclosure Rules Ease Requirements for ERISA-Covered Retirement Plans

On May 27, the U.S. Department of Labor (DOL) published its final alternative rule for electronic disclosure, making electronic delivery of required disclosures for ERISA pension benefit plans—such as 401(k) plans, cash-balance plans and many 403(b) plans—easier to achieve.

Key Takeaways

- Plan Administrators many now choose to make electronic delivery under the alternative rule the plan's default method for ERISA-required retirement plan disclosures and either post the disclosures online or deliver them to participants and beneficiaries by email.
- Plan Administrators must satisfy specific notice and procedural requirements in order to rely on the alternative rule.
- The alternative rule is effective as of July 26, although Plan Administrators may use the alternative rule immediately without facing enforcement action from the DOL.
- The alternative rule does not apply to welfare benefit plans (e.g., medical plans).

Background

Under ERISA, plan administrators are required to disclose to participants and beneficiaries certain plan-related documents, such as the summary plan description (SPD), summaries of material modifications (SMMs), pension benefit statements, summary annual reports and blackout notices. Disclosure must be made in a way designed to ensure that the information is received. Prior to finalizing the alternative rule, Plan Administrators could rely on the existing safe harbor rule that permits electronic disclosure, but only if the participant has access to the plan sponsor's electronic information system in the normal course of his/her duties (known as being "wired at work") or, if he/she does not have access, the participant provides affirmative consent to receive the documents electronically. Beneficiaries also could provide affirmative consent to receive the documents electronically. Because the standards for obtaining affirmative consent from participants who are not wired at work as well as from beneficiaries can be burdensome, many Plan Administrators have continued to provide ERISA-required disclosures in hard copy, resulting in increased cost. Recognizing the significant advances in access to and use of technology, the DOL issued the alternative rule, which allows electronic delivery to become the default method for furnishing ERISA-required disclosures.

What Is the Alternative Electronic Disclosure Rule?

The alternative rule allows for the electronic delivery of ERISA-required disclosures either through a "notice and access" structure or by email to participants and beneficiaries who have provided an electronic address. Under the notice and access structure, the participants and beneficiaries must be notified that the ERISA-required disclosures have been posted online, while the email method permits employers to send the ERISA-required disclosures directly in the body of the email or as an attachment. For this purpose, an electronic address is an email address or a smartphone number. If an electronic address is assigned to an employee by his/her employer for a purpose other than receiving ERISA-required disclosures, the employee is considered to have provided an electronic address. As with the existing electronic disclosure rules, a participant or

beneficiary can request paper copies of specific documents or globally opt-out of electronic delivery entirely at any time, free of charge.

What Do Plan Administrators Need to Know?

The alternative rule does not replace or supersede the existing options for making electronic disclosure. Rather, it is an additional safe harbor for furnishing ERISA-required disclosures for retirement plans that more easily allows electronic disclosure to be made to individuals who are not wired at work. Since the alternative rule is subject to several conditions, including notification and procedural requirements, Plan Administrators will want to understand the conditions for using the alternative rule and determine the extent to which they want to use it for furnishing the ERISA-required disclosures for retirement plans.

Please contact any of the attorneys in our Employee Benefits and Executive Compensation practice group to discuss the alternative rule or any other employee benefits question you have.

Authors



David P. Doyle
Partner

Parsippany, NJ | (973) 966-8136

ddoyle@daypitney.com



Thomas F. J. O'Mullane
Partner

Parsippany, NJ | (973) 966-8413

tomullane@daypitney.com