
New Electronic Disclosure Rules Complement Deadline Delays Due to COVID-19

A new safe harbor for electronic disclosures released by the Employee Benefits Security Administration (“EBSA”) complements earlier guidance released by EBSA, the Internal Revenue Service (“IRS”), and the Department of Treasury (“Treasury”). Together, these regulatory releases provide welcome relief for plan administrators as they continue to deal with the COVID-19 health crisis. The new safe harbor is in 29 C.F.R. §2520.104b-31, “Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA” (the “2020 Electronic Media Rule” or the “2020 safe harbor”), with new cross-references in 29 C.F.R. §2520.101-3(b)(3) (for blackout notices); 29 C.F.R. §2520.104b-1(c)(1) (the 2002 electronic media safe harbor); 29 C.F.R. §2560.503-1(g)(1) (for adverse claim determinations); and 29 C.F.R. §2560.503-1(j)(1) (for claims appeals).

Electronic Media May Be Used as the Default Method of Delivery

The 2020 Electronic Media Rule allows retirement plan administrators to use a website or email as the default means of furnishing retirement plan notices, disclosures, and other required documents (“covered documents”) to participants and beneficiaries who are entitled to receive the documents (“recipients”), other than documents that are available to the recipient only upon request. While the effective date is not until 60 days after publication (on or about July 26, 2020), employers may rely on the guidance in the interim to satisfy notice and disclosure obligations. Documents may be:

- posted on an internet website (including a mobile application) (“website”) with notice to the recipients that the documents are available on the website (the “website posting method”);
- sent directly by email with the documents in the body of the email or in attachments (the “email method”); or,
- provided to recipients using a combination of the two methods.

In order to rely on the 2020 safe harbor delivery methods, the following conditions apply:

- Recipients must be able to request paper copies of specific covered documents, at any time, free of charge (only one copy must be provided free of charge).
- Recipients must be able to opt out of electronic delivery entirely, on a global basis, at any time, so that all covered documents are sent by paper, free of charge (only one copy must be provided free of charge).

- The covered document must be provided in a “widely-available format” that is searchable, and can be read online, printed on paper, and saved in a permanent electronic format (such as a pdf);
- Before using either safe harbor delivery method, recipients must be notified via paper communication written in a way the average plan participant could be expected to understand:
 - That the way they receive notices is changing to a new electronic delivery method;
 - The electronic address that will be used to send covered documents;
 - Any instructions necessary to access covered documents (e.g., use of a password, download a mobile app, or set up an online account);
 - If using the website posting method, a cautionary statement that the covered document(s) will be available for a limited time (not more than one year, or if later, until it is replaced by a subsequent version); and,
 - The right to opt out (for specific covered documents or for all covered documents) if they prefer paper copies.

The 2020 Electronic Media Rule anticipates that a plan administrator may rely on: an employer-assigned email address (as long as it is not assigned solely for the purpose of delivering covered documents); an electronic address obtained by the employer in the employment application or plan enrollment process. Non-employee recipients must affirmatively provide an electronic address. If relying on a telephone number, the administrator must be able to confirm that the number is a mobile phone number and not a landline.

It is the plan administrator’s responsibility to ensure its electronic delivery system will notify the administrator if a recipient’s electronic address is invalid or inoperable. Following such notice, the administrator must either update the recipient’s electronic address or treat the recipient as opting out of electronic delivery. Additionally, when a participant ceases employment, the administrator must either ensure the electronic address is still accurate and operational or obtain an updated electronic address.

Website posting method. If using the website posting method, the covered document must be presented on a website that is reasonably accessible to recipients. Every covered document must remain on the website for at least one year; after the passage of a year, the document must still remain on the website until it is replaced with a subsequent version of the document.

With the website posting method, recipients must receive an electronic notice of internet availability (“**NOIA**”) each time a covered document is delivered using the website posting method, or, for SPDs, annual notices or disclosures which do not require action within a particular deadline, and other documents as authorized by the Secretary of either Labor or Treasury, an annual NOIA can be sent identifying multiple covered documents. The NOIA must be concise, understandable, and contain the following information:

- A prominent title or subject line that reads: “Disclosure About Your Retirement Plan,” and a statement that important information about the plan is now available on the website;
- The name of the document being posted, and a brief description if the name does not sufficiently convey the nature of the document;
- An internet address or hyperlink that leads to the document or to a webpage with sufficiently specific information to locate and identify the document on the website;

- A statement that the recipient may obtain a paper copy or opt out of electronic delivery altogether, including how to exercise these rights;
- A cautionary statement regarding how long the document must be available on the website;
- A telephone number for the plan administrator or its designated representative; and,
- Optionally, a statement regarding any action that may or must be taken in response to the document, and how to take the action, or that no action is required, if the statement is not inaccurate or misleading.

Email method. The email method is limited to email addresses (not a mobile phone number or other electronic access) and the subject line must read “Disclosure About Your Retirement Plan.” If the specific requirements for any given covered document would allow that document to be delivered with other disclosures (*e.g.*, delivered in the same envelope), then the same document(s) could be sent in the same email. No NOIA is required if the email method is used; instead, most of the required NOIA information is included in the body of the email: the name of the covered document and a brief description if needed to understand the nature of the document; a statement of the right to opt out of electronic delivery on a global basis and receive paper copies, free of charge, and the right to request a paper copy of the specific document(s) included in the email, free of charge; and a telephone number for the plan administrator or its designated representative.

Effect on prior guidance. While the COVID-19 outbreak may have spurred the release of the 2020 Electronic Media Rule, the 2020 safe harbor is a permanent delivery method rather than a temporary solution to the current difficulties in communicating with remote or absent workers. The 2020 safe harbor is an alternative to, and does not replace, the existing safe harbor established in 2002 for electronic disclosures (29 C.F.R. §2520.104b-1(c)) (the “**2002 safe harbor**”). Plan administrators that prefer to continue to utilize the 2002 safe harbor for some or all participants or beneficiaries may continue doing so (including using the 2002 safe harbor for some employees and the 2020 safe harbor for others), and they continue to have the option not to use electronic communications to satisfy their fiduciary obligations (although it is worth noting that in order to rely on some of the extended deadlines set forth below, a fiduciary should use available electronic means to provide required notices, disclosures and documents to participants and beneficiaries if the fiduciary is not able to utilize traditional communication methods). The 2020 Electronic Media Rule does render obsolete relevant portions of other prior guidance in FAB 2006-03, FAB 2008-03 (Q&A 7), and Technical Release 2011-03R (“**Transitioned Prior Guidance**”), subject to an 18-month transitional period during which a plan administrator may continue to rely on the Transitioned Prior Guidance.

What about welfare plans? The 2020 Electronic Media Rule only applies to retirement plans. EBSA is still considering whether and how to expand the use of electronic media for health and other welfare plan communications, including the need for coordination and consultation with other agencies.

Employer Deadlines for Notices, Disclosures, and Other Documents

Earlier guidance provided relief from missed deadlines for plans and plan participants and beneficiaries in EBSA’s April 28, 2020 Disaster Relief Notice 2020-01, “Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak,” (the “**Disaster Relief Notice**”); and a final regulation, “Extension of Certain Timeframes for Employee Benefit

Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak”, released by EBSA, the IRS, and Treasury (the “**Extension**”).

As background, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) amended Section 518 of the Employee Retirement Income Security Act (as amended, “**ERISA**”) to allow certain deadlines to be extended for up to one year in connection with a public health emergency declared by the Secretary of Health and Human Services. Pursuant to this amendment, the Disaster Relief Notice and the Extension stopped the clock from running on many deadlines until 60 days following the end of the COVID-19 National Emergency (such 60th following day referred to as the “**End Date**”).

The Disaster Relief Notice provides that private sector plans and their responsible fiduciaries will not be in violation of ERISA for failure to timely furnish a notice, disclosure, or document required by ERISA (“**Document**”) if the due date for furnishing the Document is between March 1, 2020 and the End Date (the “**Disregarded Period**”) as long as the plan and the responsible plan fiduciary act in good faith and furnish the Document as soon as administratively practicable under the circumstances. Examples of Documents for which this relief could be available are blackout notices, SPDs, SMMs, SARs, SBCs, claim determinations, health plan notices, pension benefit statements, 404(c) and 404a-5 disclosures, QDIA and automatic contribution arrangement notices, to name a few.

Acting in good faith includes a showing that the plan fiduciary used available electronic means of communication such as email, text, or plan sponsor websites to either provide the Document or otherwise communicate with participants and beneficiaries in order to manage expectations. Following the guidance set out in the 2020 Electronic Media Rule regarding content and participant safeguards, where practicable, should constitute a means of demonstrating good faith.

Additionally, plan sponsors and fiduciaries have the following relief:

- The time to provide a COBRA election notice is determined without taking into account the Disregarded Period (provided in the Extension).
- Plan contributions and loan repayments that should have been forwarded to a plan during the Disregarded Period may be paid to the plan later than the normal transmittal date as long as (1) the delay is solely due to the COVID-19 outbreak, and (2) the payments are forwarded as soon as administratively practicable under the circumstances.
- A plan’s failure to follow procedural rules for plan loan documentation and plan distributions will not be the subject of enforcement action by EBSA, as long as (1) the failure is solely attributable to the COVID-19 outbreak, (2) the plan administrator makes a good-faith diligent effort under the circumstances to follow the procedural requirements (obtain loan documentation or provide amortization schedules, for instance); and (3) a reasonable attempt is made by the plan administrator to correct the procedural deficiencies as soon as administratively practicable. This relief is not available for a failure to obtain spousal consent or for Treasury or IRS requirements.
- The COVID-19 pandemic is deemed to be an event beyond the control of the plan fiduciary in the case of a failure to provide the required advance notice of a plan blackout period due to COVID-19, and the fiduciary is not required to make a written determination to that effect.

Extension of Participant Deadlines

The Extension provided participants and beneficiaries their own relief with respect to deadlines by disregarding days in the Disregarded Period in calculating the following:

- The 30-day (or 60-day, in the case of loss of coverage under Medicaid or a State child health plan) HIPAA special enrollment periods allowing enrollment in the group health plan for a new dependent following birth, adoption or placement for adoption, or marriage, or for loss of coverage under another plan (including Medicaid and a State child health plan);
- The 60-day period to make a COBRA election;
- The normal 30-day deadline for paying COBRA premiums and the 45-day period to pay initial COBRA premiums following the COBRA election;
- The 60-day period for an individual to report a COBRA qualifying event (divorce or dependent aging out of definition of dependent) or a determination of disability;
- The deadline to report claims under an employee benefit plan;
- The deadline to appeal an adverse claim decision; and,
- The 4-month period to request external review of an adverse decision on appeal for non-grandfathered group health plans.

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