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ADVOCATE NEWSLETTER

June: Department of Labor Takes a Modern-Day Approach to Electronic Disclosures

The Department of Labor's new electronic disclosure regulation is likely to be of great help for employers and plan administrators that are seeking a modern-day approach to communicating with employees. It is easy to focus on the cost advantages of electronic disclosure. And yes, an electronic disclosure structure should eventually cut down on plan administrative costs. But just as importantly, such a structure is more likely to provide information in the format that an increasing number of Americans prefer to receive information. This article will provide you more direction to work down the path toward electronic disclosure.

Background on Electronic Disclosure. ERISA was in place well before employers would have considered the use of email, mobile apps, or text messages to provide retirement plan information to employees. The Department of Labor (DOL) attempted to acknowledge the changing times in 2002 with an electronic disclosure regulation that permitted electronic disclosure to two broad groups of people: (1) those who are "wired at work"; and (2) those who affirmatively consent to receive documents electronically. Over time, the DOL loosened restrictions in specific contexts, such as pension benefit statement flexibility in 2006 or QDIA flexibility in 2008. But in large part, we have lacked access to a comprehensive and cohesive set of rules that would easily accommodate electronic disclosures for all ERISA/DOL-required disclosures in the modern electronic-communication-dominated society. This commonly leads to questions like "Can we email this to all of our employees?", "Can we just post it on the web?", and "Who is going to pay for postage if we have to mail these?"

New Regulation. The new safe harbor avoids the limitations presented by the 2002 safe harbor. Employees need not "opt in" to the electronic disclosure structure; an employer may include all employees with a valid email address unless they opt out. This structure is not limited to those who are "wired at work"; an employer may use it for employees without regard to whether they sit in front of a computer all day, work on the manufacturing floor, drive a hammer on a job site, drill for oil offshore, or undertake thousands of other job responsibilities. As an important note, the new regulation applies to all participant communications and disclosures required under Title I of ERISA, which includes common disclosures like SPDs, SMMs, QDIA notices, 404a-5 fee disclosures, and fund change and mapping explanations. The DOL confirmed that the new safe harbor does not apply to communications within the IRS's jurisdiction (such as automatic enrollment and safe harbor notices) and explained that the IRS and Treasury are working toward some upcoming guidance.

Permissible Approaches. The new rule will permit participants and beneficiaries to receive retirement plan communications in three primary ways:

1. An email including a link to a website that hosts the communication;
2. an email with the communication attached (likely in a PDF format); or
3. an email with the communication included in the body of the email.

The regulation also permits the use of smartphone numbers and opens the door to host the communications on a mobile app instead of a traditional website.

But First... Prior to relying on the new safe harbor, covered individuals must receive a paper notice that includes specific content regarding the forthcoming reliance on electronic disclosures. For example, it must explain the rights to request paper copies of any communications and/or to opt out of electronic disclosures, and the processes for exercising those rights. It also must include the specific email address that will be used for the specific individual. This is a critical point: employers need to gather employee email addresses before sending the paper notice, and then must send the paper notice before relying on the new rule.

Action Steps. The regulation's framework triggers the following action items for employers and plan administrators:

- Build an email list. An individual's email address may be employer-assigned or employee-provided. If you have already established an employer-assigned email address for your employees, you're ahead of the game. If not, and if you plan to use some employee-provided email addresses, rest assured that the regulation provides a lot of flexibility around the time at which you receive that address. An employee may provide it as a part of the job application and hiring process, as a part of becoming a plan participant, "or otherwise" (as the regulation broadly provides).
- Distribute the paper notice. As noted above, the regulation requires that this paper notice include specific information, including the email address for the specific individual.
- Begin to use the electronic disclosure structure. As a technical matter, the regulation does not become effective until later this Summer. As a practical matter, however, the regulation confirms that plan administrators may rely on it now. Given the work involved in the two steps described above, we anticipate it will take most employers some time before they are able to put this into practice.
- Build out a process to maintain the email list. This process should reflect the need to track: (i) email addresses for future hires; (ii) individuals who have opted out of electronic disclosures; and (iii) the email address to be used for a terminated employee in the case of one whose email address on file was employer-assigned.

Closing Thoughts. The regulation sets forth various details that will impact the content of future disclosures. The above steps - particularly the construction of an email list and the distribution of a paper notice - must come first.

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