The Labor Department’s Notice-and-Access Disclosure Rule: The Basics

The Labor Department has issued a new rule for electronic delivery of plan disclosures to retirement plan participants, called “notice-and-access." The rule is effective July 27, 2020. The new rule replaces prior guidance on electronic delivery of disclosures to participants, with the exception of a 2002 electronic disclosure rule. The 2002 electronic disclosure rule remains in effect and permits electronic disclosure to employees who work with the employer’s computer system as part of their daily duties and to those participants and beneficiaries who choose to receive disclosures electronically.

Although the notice-and-access rule is effective July 27, 2020, the Labor Department included an 18-month transition period for plans to adjust their procedures to comply with the new rule.

Employers still may send disclosures by paper or follow the 2002 electronic disclosure rule. However, it is expected that many employers will choose this new method for furnishing disclosures to participants.

How Notice-and-Access Works

In brief

Plan participants are notified by electronic means, either email or smartphone text, that a document is available for viewing on a website. Participants must then go to that website and find the named document to view the disclosure. Thus, rather than automatically being sent paper copies of disclosures in the mail, workers and retirees will now receive an electronic communication that they must go and find the disclosure on a website. The email or text must tell them that they can request a free paper copy, which should be provided “promptly.”

In more detail

Covered individuals and covered documents

- Individual participants must have an electronic address, either an e-mail address or a smartphone number. Participants can voluntarily provide an electronic address to their employer or an address can be assigned by an employer for an employee only for employment-related purposes. Commercial locator services cannot be used to obtain an
electronic address for an individual. For this notice-and-access rule, all communication must be in writing; voice calls, voice messaging, and robocalls cannot be used. *Spouses and other beneficiaries are included in this delivery method only if they have voluntarily provided an electronic address.*

- **All ERISA Title 1 disclosures that are required to be furnished to participants can be sent using this disclosure method with the exception of documents available only by request.**[5] Summary plan descriptions (SPDs), individual benefit statements, investment information and choices, fee disclosures, and notices about black-out periods and suspension of benefits are just some of the disclosures that can be sent using notice-and-access.[6]

### Notices

**Initial Notice**[7]

- **Participants included in the notice-and-access delivery method will receive an initial notice on paper of the right to opt-out of all electronic delivery and how to exercise that right.** The notice must include the right to request free paper copies of individual documents and how to exercise that right. However, there is no requirement that the initial paper notice be distributed in a conspicuous way; for instance, it could be part of a larger, new-employee package provided at the beginning of employment and could be overlooked.

The initial paper notice must also include a statement of the specific electronic address that the plan will use to send the notices to the participant, plus any instructions for steps that will be necessary to access documents, such as creating passwords, downloading a mobile application or setting up an online account. A contact phone number is not required in the initial notice.

**Notice of Internet Availability (NOIA)**[8]

- **When a document is posted on a website, participants will be sent a “notice of internet availability”** (NOIA) to their electronic addresses advising them that the disclosure has been posted. A hyperlink to the document is not required. The NOIA must describe how to access the website to search for the document that is posted. The NOIA must also include a statement that says “Important information about your retirement plan is available,” the title of the document posted or a brief description of the document, the right to request and obtain a free paper copy and how to do it, the right to opt out of electronic delivery and how to do it, and a telephone number for contacting the plan administrator or other plan representative. A toll-free telephone number is not required. Additionally, the NOIA must include a statement that the document posted on the website may be available for only a year, or until the document is replaced by a newer version of the same document, whichever is later. (See website requirements discussed below.)
The NOIA may, but is not required to, include a statement saying whether any action is needed by the participant in response to the information provided in the posted document.

The plan administrator is not required to monitor delivery of the NOIA to ensure that the notice is opened and read, nor to ensure that a participant actually accessed the disclosure on the website. The only requirement is that the system be designed to alert the plan administrator when an email or text message has bounced back as undeliverable. If an electronic address is inoperable, the administrator must take reasonable steps to get a working electronic address. If the administrator cannot obtain a valid electronic address for a participant, the administrator must send paper copies of documents as if the individual had chosen to opt out of electronic delivery.

**Notices that can be combined**[9]

- **Several disclosures can be combined in one notice of internet availability.** The disclosures remain separate, but the notice can alert the recipient to more than one disclosure.

Four categories of documents can be combined in one NOIA. These are:

1. The Summary Plan Description (SPD).
2. Required annual notices that do not require action, including the Summary Annual Report (SAR), annual funding notices, Qualified Default Investment Alternative (QDIA) notice, annual pension benefit statement (but not the 401(k) quarterly statements), annual investment-related information such as the investment chart, general plan information and descriptions of fees. (**Note:** Quarterly benefit statements for 401(k) plans cannot be combined with other documents. Each quarterly pension benefit statement must have a separate notice of internet availability.)
3. Any other “covered document” if authorized in writing by the Secretary of Labor.
4. IRS notices if authorized in writing by the Treasury Secretary.

The notice of internet availability must include a statement of the right to free paper copies. **When disclosures are combined, individuals may choose which of the disclosures they want on paper.**

**Rights to Paper**[10]

- Plan administrators must furnish to individuals joining the plan an initial notice on paper of the right to opt-out of electronic delivery and the right to request paper copies of documents posted on the website. The initial notice must include how to exercise those rights, but the notice does not have to include a phone number and can be furnished along with other documents. (See above discussion of the initial paper notice.)

Following the initial paper notice of the rights to paper, all other mentions of rights to paper will be delivered electronically as part of the notice of internet availability (NOIA). Plan administrators must have “reasonable procedures” for individuals choosing paper...
that do not “unduly inhibit” processing a request for paper. The NOIA must include a phone number for contacting the plan administrator or plan representative.

*Only one paper copy of a document must be furnished free of charge.* It is up to the plan whether to charge for additional copies. Additionally, individuals requesting to opt out of electronic delivery cannot be charged a fee. *Plans are not required to let individuals who opt out of electronic delivery pick and choose which documents they want on paper and which will be delivered electronically. A global opt-out is total.* After a participant opts out, a plan *may permit* individuals to choose some paper and some electronic. It is up to the plan whether an individual can choose which disclosures to receive by paper. Also, plans may choose to give access to the website to individuals who opt out, but this is not required. [11]

**Website Standard**[12]

- The website can be an internet website or a “mobile application.” There are no specific security requirements (e.g., against hacking or fraud) beyond “reasonable” measures to ensure the website protects the confidentiality of personal information. Documents must be presented on the website in a manner that can be understood by an average participant. *Documents on the website must be presented in a format suitable for reading, saving to an electronic folder and for printing. Documents must remain on the website for one year or when replaced by a newer version of the same document, whichever is later.* Thus, a quarterly benefit statement, which is replaced each quarter, must remain on the website for a year. An SPD could remain on the website for several years until a newer SPD is issued. *The plan administrator is responsible for establishing and maintaining the website and for having “reasonable procedures” for compliance by service providers.*

**Direct Delivery**[13]

- As an alternative to using notice and website access, a plan administrator may use a method of delivery that more closely resembles the more common understanding of “electronic disclosure.” Participants are sent an e-mail that includes the document disclosed as part of the e-mail or as an attachment. The e-mail message must include all of the information required for a notice of availability, including the right to paper. Also, the document must be in a format that can be easily read, printed on paper, and retained electronically. *Importantly, direct delivery can only be sent to an e-mail address and not to a smartphone number. This delivery method can only be used for participants with e-mail addresses.*

**Leaving Employment**[14]

- Plan administrators must take measures calculated to ensure the continued accuracy of the electronic address or obtain a new electronic address for participants leaving employment who received employer-assigned electronic addresses while at work. However, there is no requirement to verify electronic addresses for departing
employees who voluntarily provided an electronic address to the employer. Plan administrators can continue to send plan information to former employees using the notice-and-access delivery system. Former employees will have the same rights to opt out of electronic delivery and rights to paper copies as they had when employed.

The Pension Rights Center submitted comments to the Labor Department on the proposed notice-and-access rule. In the comments we expressed our concerns that the rule will harm many participants who may fail to receive important plan information and who may not be able to retain the information they need to understand their rights to plan benefits and to later apply for those benefits.

See also The Pension Rights Center’s


AARP.org: New rule for retirement plans hinders access to paper statements

MarketWatch: This one change could undermine the retirement security of millions of Americans

[4] See paragraph (b) of the rule for a definition of covered individuals.
[5] See paragraph (c) of the rule for a definition of covered documents. Documents available only by request include the complete plan document, collective bargaining agreement, and Form 5500 annual financial report.
[7] See paragraph (g) of the rule for initial notice requirements.
[8] See paragraph (d) of the rule for information on the notice of internet availability.
[9] See paragraph (i) of the rule for information on combining notices.
[10] See paragraph (f) of the rule for a description of the right to paper copies.
[11] In the preamble to the rule, the Labor Department states “plan administrators may offer additional opt-out election options, such as a document-by-document opt-out or one based on categories or classifications of covered documents. For example, some participants might be comfortable knowing that certain documents, such as the SPD, are available on the website, but prefer to receive paper versions of other documents, such as their quarterly pension benefit statements.” Also, “O”nce a plan respects the individual’s election (to opt out) and satisfies its obligation to furnish paper documents, the plan may continue to provide online access to covered documents that are available as well. The safe harbor has no effect on optional action in this context by plan administrators.” 85 Fed. Reg. 31899, May 27, 2020.
[12] See paragraph (e) of the rule for a discussion of the website standard.
[14] See paragraph (h) for a discussion of severance from employment.