

The Future Is Coming to the DOL! And It's Electronic!

S. Derrin Watson and Ilene H. Ferenczy

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The Future Is Coming to the DOL! And It's Electronic!

- Co-hosts:
Chuck Gouge



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During the Webinar

- All attendees' lines are muted
- Question board available and monitored - look for Q&A icon on webcast toolbar
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ERISApedia.com/webcasts
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- ERPA/ASPPA/NIPA
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 - Please check spam folder
- Any questions, email: support@erisapedia.com
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Your Presenters Today

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What We Will Cover

- What are the general IRS rules for electronic disclosure?
 - What about participant elections/consents
- What are the current DOL rules for electronic disclosure?
 - When can you use IRS rules for DOL items?
- Introduction to proposed regulation
- Notice of availability
- Website posting
- Closing notes

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Question 1: IRS Notices

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**General IRS
Rules**



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IRS Electronic Notice Rules

- Final regulations in 2006
 - Treas. Reg. §1.401(a)-21
- Includes rules for
 - Electronic notice to satisfy Code requirements for written notice
 - Participant election using electronic medium to satisfy Code requirements for written consent
- If electronic notice does not follow the regulations, then it isn't "written"
- Regs are safe harbor if law doesn't require written form

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IRS Regs Apply To

Retirement plans

- Qualified
- 403(b)
- 457(b)
- SEP
- SIMPLE IRA
- Other IRAs

Welfare plans

- Accident and health
- Cafeteria
- Educational assistance
- Qualified transportation fringe
- HSA
- Archer MSA

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System Requirements

- System must be reasonably designed to provide the information at least as understandably as a paper document
- When notice given, system must
 - alert receipt to significance of information in notice (including subject matter) and
 - understandably provide necessary access instructions

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Two IRS E-delivery Systems

Effective Ability: Broad application

- Recipient has effective ability to access electronic medium
- Plan administrator must advise recipient he or she can get **free** paper copy

Consumer Consent (E-SIGN)

- Recipient must affirmatively consent to electronic notice, either:
 - By electronic consent showing ability to access notice, or
 - By paper consent, but only if the recipient confirms electronically showing ability to access notice
- Recipient can withdraw consent any time

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Participant Election Rules

- Participant is effectively able to access system
- System must be reasonably designed to preclude others from making the election
- The participant has a reasonable opportunity to review, confirm, modify, or rescind election before it takes effect
- The participant must, within a reasonable time a confirmation of the effect of the election through
 - by a paper document, or
 - by an electronic medium satisfying IRS rules
- Participant's SA consents are witnessed by plan official or notary, as required

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Current DOL Rules



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General Standard

- Use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals.
 - Material which is required to be furnished to all participants covered under the plan and beneficiaries receiving benefits under the plan . . . must be sent by a method or methods of delivery likely to result in full distribution
- No certainty

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Two DOL Safe Harbors

Wired-at-Work: Limited Application

- Participants who are **active EEs**
- EE can **effectively access** the information at any location where EE likely performs EE duties
- Access to ER's computer system is an **integral** part of EE's duties

Consent (E-SIGN): Opt-in System

- For participants, former participants, beneficiaries, alternate payees
- EE must give **notice** to recipient
- Recipient must **consent** to e-delivery (in a manner that shows ability to access information)
- EE must **not** have withdrawn consent

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DOL E-delivery Notice

- Notice prior to consent must state:
 - Type of disclosures to be made
 - General statement OK (e.g., all DOL-required disclosures)
 - Consent can be withdrawn at any time
 - Can request paper version any time, and specify fees, if any
 - Procedures for withdrawal and updating contact info
 - Hardware and software requirements for accessing and retaining disclosures
 - Consent must be reaffirmed if changes in hardware or software requirements create material risk of inability to access or retain

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Re-consent!

- If change in hardware or software requirements to access electronic information, then:
 - The plan must provide each individual opting in with statement of revised requirements
 - Individual can withdraw consent without charge or imposition of new conditions
 - Individual must consent again showing ability to access new requirements

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Examples: Two Safe Harbors

- Jim is a participant in a 401(k) plan
- **Example 1:** Jim is a CPA that works at a desk with a computer
 - Wired-at-work safe harbor would apply to Jim and his co-workers
 - May use consent safe harbor for former employees
- **Example 2:** Jim is a truck driver. Assume he is working on a Ph.D., via a distance learning program, in computer sciences and has ten fully-functioning computers at home
 - Won't qualify for electronic access safe harbor
 - May use consent safe harbor



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Examples: Two Safe Harbors (cont.)



- **Example 3:** Now assume Jim is a steelworker with access to a shared computer while at the plant
 - Won't qualify for wired-at-work safe harbor
 - May qualify for consent safe harbor

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DOL Sometimes Permits Using IRS Rules

- Plan can use IRS e-disclosure rules for:
 - Quarterly participant benefit statements
 - Participant fee disclosures included with participant benefit statements
 - Qualified Default Investment Alternative (QDIA) annual notices

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Question 2: DOL Notices Today

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Introduction to Proposed Regulation



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August 2018 Executive Order

- (c) Improving the Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures. Within 1 year of the date of this order, the Secretary of Labor shall, in consultation with the Secretary of the Treasury, complete a review of actions that could be taken through regulation or guidance, or both, to make retirement plan disclosures required under ERISA and the Internal Revenue Code of 1986 more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution.

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Executive Order

- ... This review shall include an exploration of the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens. If the Secretary of Labor finds that action should be taken, the Secretary shall, in consultation with the Secretary of the Treasury, consider proposing appropriate regulations or guidance, consistent with applicable law and the policy set forth in section 1 of this order.

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Proposed Regulation

- Published October 23, 2019
- Comment period ends November 22, 2019
- Only proposed: No reliance at present
- Effective: first day of first plan year beginning at least 60 days after final regulation published

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Broad Outline

- Establishes new e-disclosure safe harbor
 - Wired-at-work and e-Sign unchanged
 - Expect permission to use IRS rules to be revoked:
 - Benefit statement
 - QDIA
 - Fee disclosure
- Notice/Website access approach
- Technology neutral
- Limited to pension benefit plans (not welfare plans)

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Covered Individual

- Employee, participant, beneficiary, alternate payee
- Provides employer/sponsor/administrator/designee with electronic address
 - Email
 - Smartphone number
 - Other
- Could include address furnished by employer
- Could be condition of employment
- Doesn't have to be everyone in the plan
 - Combine wired-at-work and new safe harbor

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Covered Document

- Any document ERISA Title I requires the plan administrator to furnish to participants/beneficiaries
 - Not including documents available on request



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Opt-out System

- Individual can demand free paper copy of any covered document
- Individual can opt out of all e-disclosures
- Administrator must have reasonable procedures for opt-out



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Invalid Address

- System to furnish notice of availability must notify administrator of invalid/inoperable address
- Choices:
 - Use backup address
 - Get new address
 - Treat individual as opting out of all e-notices

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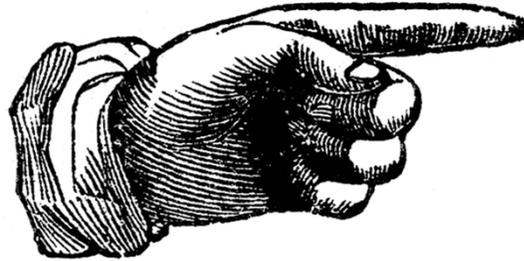
Relation to IRS rules

- IRS allows electronic disclosure if recipient has effective ability to access and can demand free copy
- DOL system complies with IRS rules
- So you can use the same system for both

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**Notice of
internet
Availability/
Other Notices**

Please Notice This



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Furnish Notice of Internet Availability for Covered Document

- Provide notice when document is made available on the web
- Content:
 - Title: Subject: Disclosure about your retirement plan
- “Important information about your retirement plan is available at the website address below. Please review this information”
- Brief description of covered document

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Notice of Availability (con't)

- Internet website address
 - Leads directly to document
 - Leads to login screen followed by prominent link to document
- Right to receive free paper document/how to exercise
- Right to opt out of e-notices
- Contact phone number

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Form of Notice

- Furnish electronically to individual's address
- Contain ONLY information above
 - Can include logo; picture; design elements
- Be furnished separately from other documents/information
- Calculated to be understood
 - A notice that uses short sentences without double negatives, everyday words rather than technical and legal terminology, active voice, and language that results in a Flesch Reading Ease test score of at least 60 satisfies the understandability standard in the preceding sentence.

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Example

A notice that uses short sentences without double negatives, everyday words rather than technical and legal terminology, active voice, and language that results in a Flesch Reading Ease test score of at least 60 satisfies the understandability standard in the preceding sentence.



Readability Statistics	
Counts	
Words	42
Characters	238
Paragraphs	1
Sentences	1
Averages	
Sentences per Paragraph	1.0
Words per Sentence	42.0
Characters per Word	5.5
Readability	
Flesch Reading Ease	9.1
Flesch-Kincaid Grade Level	22.4
Passive Sentences	0.0%

When correcting spelling and grammar in Word

- Check spelling as you type
- Mark grammar errors as you type
- Frequently confused words
- Check grammar and refinements in the Editor Pane
- Show readability statistics



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<http://www.readabilityformulas.com/free-readability-formula-tests.php/>

Your Results:

Your text: Use short sentences. Use active voices. Don't us ...[\(show all text\)](#)

Flesch Reading Ease score: 85.7 (text scale)
Flesch Reading Ease scored your text: easy to read.

Gunning Fog: 5.5 (text scale)
Gunning Fog scored your text: fairly easy.

Flesch-Kincaid Grade Level: 2.3
Grade level: Second Grade.

- Use short sentences.
- Use active voice.
- Don't use double negatives.
- Use everyday words.
- Go for Flesch Reading Ease score of 60.

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Can Combine Availability Notices

- You can combine the following into one notice:
 - Summary plan description
 - Summary of material modifications
 - Summary annual report/annual funding notice
 - Comparative chart of investments (404(a))
 - QDIA notice
 - Participant benefit statement
- Provide annually, no more than 14 months apart

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What Must Be Sent Separately

- Blackout notice
- Adverse benefit claim
- QDRO determinations
- Divestment notice
- Failure to meet minimum funding
- Reduction in future benefit accruals

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Initial Notice

Must be provided on paper

- Even to wired-at-work employees
- Even to recipients who opted into electronic communication

Provide before reliance on safe harbor

Content

- some or all covered documents will be furnished electronically to an electronic address,
- right to request and obtain a free paper version of a document,
- right to opt out of receiving covered documents electronically,
- how to exercise these rights

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Website Standards

- Take Measures Reasonably Calculated to Ensure:
 - Document is available on the website no later than the date on which the law requires plan to furnish it
 - Document remains available on the website until it is superseded by a subsequent version of the covered document
 - Document is presented on the website in a manner calculated to be understood by the average participant;

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Website Standards (con't)

- Document is presented on the website in a widely-available format or formats that are suitable to be
 - Read online
 - Printed clearly on paper
 - Permanently saved electronically
- Document can be searched electronically by numbers, letters, or words

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Confidentiality

- The administrator must take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual.
- Notes:
 - DOL figures we probably have got this
 - Obviously, SPD doesn't need to be confidential
 - Participant benefit statement does

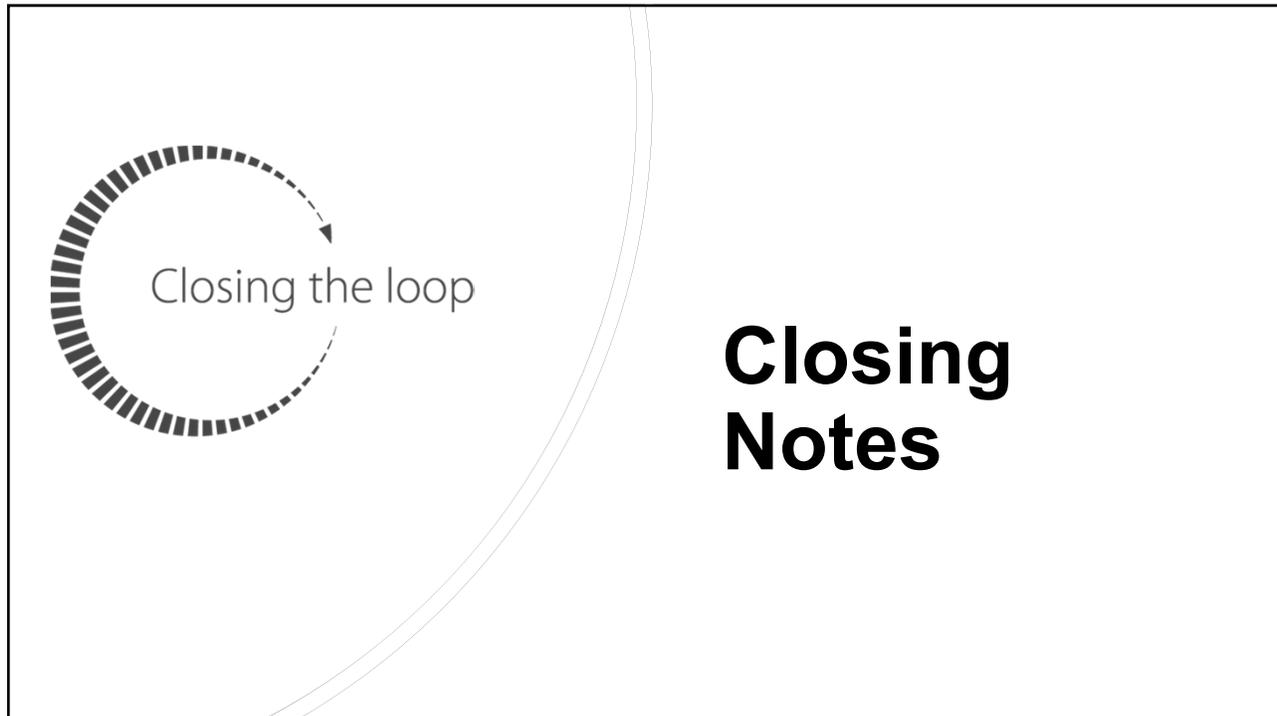
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Glitches

-
- What happens if the website temporarily goes down?
 - No problem if:
 - Administrator has reasonable procedures to have documents available on website
 - Administrator promptly acts to ensure access is restored once administrator knows or should know of problem



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Employment Termination

- On severance, “the administrator must take measures reasonably calculated to ensure the continued accuracy of the electronic address . . . or to obtain a new electronic address that enables receipt of covered documents following the individual’s severance from employment”
 - Not a bad idea to help avoid lost participants
 - One bounce notice without an alternate address converts the individual to paper notices

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Summary

- Proposed Regs: Nothing to do now
 - Maybe starting 2021 plan year
- Opt Out System
 - Opt out completely or ask for specific doc
- Three Steps
 - Get electronic address
 - Give short, simple notice of availability
 - Post information on website
 - Leave it there until replaced

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Question 3: DOL Notices Future

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