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The DOL e-Disclosure Rules: Save the Paper!


Ilene H. Ferenczy, Esq., APA, CPC
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Your Co-Hosts

- Joanne Pecina 
- Maureen Pesek 
- Tim McCutcheon 




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- At the end you will be presented with a short Google Forms survey. Please let us know how we are doing.



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Your Presenters Today

Ilene H. Ferenczy, Esq., APA, CPC



Alison J. Cohen, Esq., APA, APR



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Agenda



- Current 2002 Regs
- Initial Notification
- Notice of Internet Availability
- Covered Documents
- Address Unknown
- Impact of the Intel Case





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Let's Review Where Things Are Today

- 2002 DOL Regulations working well currently
- Employees may receive e-Notices if:
 - Agree to the electronic communications; or
 - Wired @ work:
 - Access to e-communications at all work locations; and
 - E-mail is an "integral part" of work
- Electronic communication must include:
 - The importance of the document
 - Right to receive document in paper form






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- Non-active former employee or beneficiary can still provide consent to electronic communications
- Permission may be withdrawn at any time
- Employers with "non-wired" employees were stuck with paper distributions



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Welcome to 2020 – We're Wired!

- Initial proposed regulations released 2019
- DOL recognized common use of internet and e-devices in 2020
- Presidential initiative to make communications easier
- Reduction of cost for plan sponsors





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Who Is a Covered Individual?

- Any participant, beneficiary, or alternate payee entitled to a Covered Document
- Voluntarily provides authorization for electronic delivery
 - Can be e-mail or smart phone
- For active employees, just like 2002 Regs, employer can provide e-mail address as part of job function
 - Can't just set up employee e-mails just for the purpose of receiving notices



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What Is a Covered Document?

- * "Any document or information that the Plan Administrator is required to furnish to participants and beneficiaries pursuant to Title I of the Act, except for any document or information that must be furnished only upon request."
 - "Okay" Examples: QDIA, Auto Enroll, Summary Annual Report.
 - Not "Okay" Examples: Plan documents, latest Form 5500 (see ERISA §104(b)(4)).
 - o These can be distributed electronically under the 2002 Regs



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How e-Disclosure Works Under New Regs

- Plan Administrator sends Initial Notification
- Thereafter, Plan Administrator either:
 - Sends Notice of Internet Availability to participants and posts disclosure item on website, or
 - Sends e-mail or text with disclosure item attached.
- Note: NOIA or e-mail with disclosure must be sent by due date of the document (deadlines not changed)





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Initial Notification Contents




- Statement that Plan Administrator will send information electronically (and the e-mail address to be used)
- Instructions regarding how to access information being sent, as applicable
- Statement that information will be available on the website for a year or, if later, after it is replaced by a newer document
- Statement that recipient can get the specific information via paper and instructions on how to exercise that right
- Statement that recipient can elect to get ALL information via paper and instructions on how to exercise that right

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Ongoing Communications




- As new online documents are made available, the employer needs to send a Notice of Internet Availability (NOIA)
 - Online documents could be housed on employer or service provider website
- OR, employer can attach the document to the e-mail
 - E-mail contents must be the same as NOIA
- NOIA or e-mail can contain logos or artwork as long as it doesn't distract or mislead

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Contents of NOIA



- Prominent statement, such as a title or subject line, that reads: "Disclosure About Your Retirement Plan."
- Statement: "Important information about your retirement plan is now available. Please review this information."
- Identification of the Covered Document by name and, if not self-evident by the name, a brief description of the document.
- If document is posted,
 - Website address and sufficient instructions as to how to locate the Covered Document on the web page to provide ready access, or
 - Direct hyperlink to the Covered Document

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Contents of NOIA (cont.)




- Statement of right to request and obtain paper version of Covered Document at no charge, and an explanation of how to exercise this right.
- Clear statement of right, free of charge, to opt out of the electronic delivery method and an explanation of how to exercise this right. 
- Caution: Covered Document is not required to be available on the website for more than one year or, if later after it is superseded by a subsequent version of the Covered Document.
- Telephone number to contact the Plan Administrator or other designated representative of the plan.

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Combined Annual Notice Is Permitted

- Single NOIA provided for:
 - SPD;
 - Any Covered Document that must be furnished annually, rather than because an event has occurred, and that does not require the Covered Individual to take action;
 - Any Covered Document not specifically included above that is authorized in writing by the DOL; and
 - Any notice required by the Internal Revenue Code, if authorized by the IRS.
 - Does not appear that any other document combos in one NOIA are permitted.







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Annual Notices






- Examples of Annual Notices include:
 - Summary Annual Reports
 - QDIA Notices
 - Annual (not quarterly) Participant Statements
 - Annual Participant Fee Disclosure
- May also include Automatic Enrollment Disclosure

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Timing of Annual Notices




- Must be distributed annually, but no more than 14 months from last distribution
- Flexible timing requirement should make it easier to comply
- Doesn't change any deadline for notices in current Regs
- Must be posted in a format easily accessible

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Timing of Posting/Removing




- Examples of timing rules:
 - Summary Plan Description
 - Posted January 1, 2025
 - SMM posted January 1, 2026
 - New SPD posted January 1, 2030, may remove old SPD/SMM
 - Quarterly Participant Statements
 - Quarterly Statements January, April, July, October stay for 12 months
 - Can remove old January statement when new January statement available

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Address Unknown

- Disclosure system must identify when address doesn't work
- Plan Administrator must:
 - have procedure to identify an alternate e-mail address; or
 - deliver future notices on paper to Covered Individual
- As part of employee termination process, a new e-mail address needs to be obtained from "wired at work" employee

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Programming Involved

- Notices on website pages behind login must be prominently available after participant gets past security
- Covered Individuals should not have to go searching for the notice
- Still must include security for notices and participant statements
- Employees not participating in the plan will still need login information for service provider website if that's the notice hub



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New Best Practices

- Collect both work and personal e-mail addresses
- Collection of cellphone numbers as alternative
- Termination process needs to include gathering of contact data
- Revision of website to make notices obvious



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Background on Intel v. Sulyma

- Intel tried to get dismissal of fiduciary breach lawsuit because statute of limitations expired
- Supreme Court ruled on interpretation of Statute of Limitations for accusation of fiduciary breach
- ERISA §413: Statute of Limitations is earlier of:
 - Six years after last act of breach or when breach by omission could have been cured
 - Three years after the earliest date that the participant had actual knowledge of the breach or violation



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Intel v. Sulyma

- Sulyma accused Intel of improperly investing plan funds in high-risk investments
- Intel claimed it made information on investments available in disclosures
- Intel claimed:
 - Sulyma regularly visited the company website where plan notices posted
 - Sulyma said he couldn't remember reading the requisite disclosures
- So, what constitutes "actual knowledge" for three-year statute?



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It's All in the Words

- "Known, or should have known" used throughout ERISA
- Supreme Court deferred to Congressional intent (i.e., Congress said what it meant)
- DOL submitted an amicus brief in support of strict interpretation
- Even if the plan sponsor adheres to all notification rules, without proof that the participant had actual knowledge, the three-year statute will never apply
 - DOL Reg even cites Intel case



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How Do You Prove Actual Knowledge?


- Participant signature to confirm receipt AND understanding
 - Would that be truly probative?
 - Defeats the whole purpose of the e-Disclosure
- Online tracking system to determine when, how many times, and how long spent on each document
- Supreme Court acknowledged that District Court can consider such supporting evidence in determining actual knowledge
- Of course – Congress can simply act and change the language




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Concluding Thoughts



"I keep my core beliefs written on my palm for easy reference."



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Questions?

When after your presentation someone asks a question you don't know the answer to but you gotta look credible so you answer anyway




Sometimes I'll start a sentence and I don't even know where it's going. I just hope I find it along the way.

Usually it works



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Contact Us!

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For Further Study

Joanne Pecina will demonstrate how to find more information on today's topic from the ERISApedia.com resources.



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