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# The DOL e-Disclosure Rules: Save the Paper!

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1

## Your Co-Hosts

- Joanne Pecina



- Maureen Pesek



- Tim McCutcheon



2

2

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3

3

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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.



4

4

## Your Presenters Today

Ilene H. Ferenczy, Esq., APA, CPC



Alison J. Cohen, Esq., APA, APR



5

5

## Agenda



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



6

6

# 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



7

7

# LET'S REVIEW

- 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- Permission may be withdrawn at any time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



8

8

## 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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9

9

## 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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10

10

## 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



11

11

## 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)



12

12



## 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



13

13

## 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



14

14

## 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




**make a  
statement**



15

15

## 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.



16

16



## 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.



17

17

## 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



18

18

## 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



19

19

## 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



20

20



## New Best Practices

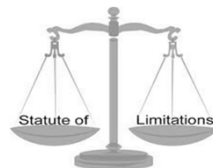
- Collect both work and personal e-mail addresses
- Collection of cellphone numbers as alternative
- Termination process needs to include gathering of contact data
- Revision of website to make notices obvious



23

## 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



24

## 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?



25

## 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



26

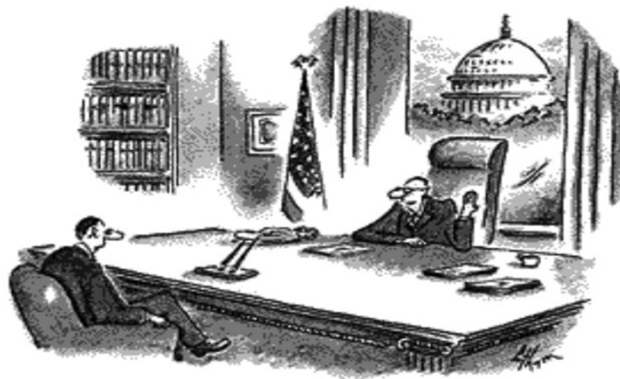
## How Do You Prove Actual Knowledge?

- 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



27

## Concluding Thoughts

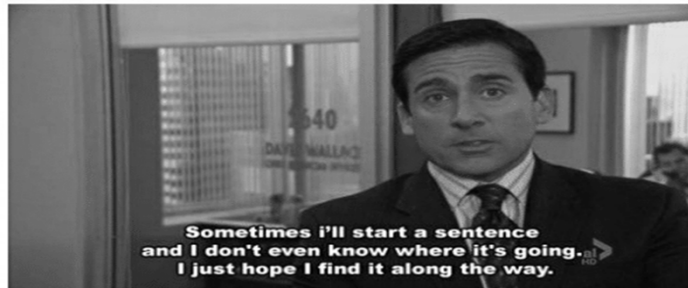


*"I keep my core beliefs written on my palm for easy reference."*

28

# 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



Usually it works



29

29



## Contact Us!

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26

30

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31

31

## For Further Study

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



32

32