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Labor and Employment Alert: New Proposed Electronic Disclosure Rule Would Permit Information to be Posted on a Website ... But Only for Retirement Plans

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On October 23, 2019, the U.S. Department of Labor (DOL) published proposed regulations on a new safe harbor for electronic disclosures for retirement plans governed by ERISA.

The new "Notice and Access" safe harbor formally blesses the longstanding practice of many plan administrators to furnish notices to participants and beneficiaries on a website, provided certain requirements are met. These requirements are described in more detail in the chart below. This is just a safe harbor; it is possible that a court (or the DOL) would find other methods of furnishing notices to be compliant.

Although certain notice requirements still must be met, the new safe harbor makes it easier for employers to provide documents electronically to all employees, whether by email or by posting on a website, because employers no longer have to get affirmative consent from those employees who do not regularly use a computer as an integral part of their jobs. However, complications may still arise if an employee's email is marked as "undeliverable" or if an employee loses access to an employer provided email address upon termination of employment. These complications are described in the chart.

The new safe harbor, as proposed, is an addition to the existing 2002 safe harbor. The DOL proposes that the new safe harbor be available as of the first calendar year starting after the publication of the final regulations.

The preamble to the proposed regulations and the 21 questions posed in the accompanying Request for Information (RFI) suggest that the proposed rules may be modified prior to the issuance of the final rule. While the proposed rule is good news for retirement plan administrators, health and welfare plan administrators must wait to receive the same good news. The new safe harbor does not apply to welfare benefit plans. However, the DOL has indicated that it may consider the application of the safe harbor to welfare benefit plans in the future.

Plan administrators are not protected by the new safe harbor for electronic disclosures until the final regulations are published. While it is likely that the final rules may change from the proposed rules based on comments the DOL receives in response to the RFI, the proposed new safe harbor represents a meaningful way to reduce the administrative expenses and burdens associated with ERISA disclosures for retirement plans.