



November 22, 2019

VIA Electronic Mail

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, RIN 1210-AB90

To Whom It May Concern:

The National Employment Lawyers Association (NELA) respectfully submits the following comments concerning the U.S. Department of Labor (DOL) Advance Notice of Proposed Rulemaking (ANPRM) concerning default electronic disclosure under ERISA.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. Our mission is to empower workers' rights attorneys through legal training, promoting a fair judiciary, and advocating for laws and policies that level the playing field for workers. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. Many of our members represent individual employees in cases involving employment discrimination, wrongful termination, employee benefits, and other employment-related matters. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts as well as comments on relevant Notices of Proposed Rulemaking (NPRMs) regarding the rights of workers and their beneficiaries under ERISA. NELA therefore has an interest in any regulation that will affect how NELA members represent ERISA plan beneficiaries.

We have deep concerns about the proposed regulation concerning default electronic disclosure under ERISA, which would undermine the retirement security of millions of workers and retirees who depend on their paper retirement disclosures to enable them to enforce their rights. While the world is changing, and more and more people use the internet, access to the internet is not uniform or equitable. In fact, studies show that access to the internet and broadband still varies substantially by education, age, income, and geography. Moreover, many individuals may only have access to internet via a smartphone. These devices preclude individuals from being able to print disclosures or store them for future reference. Making electronic delivery the default means

of delivering retirement information would effectively weaken consumer protections for participants and beneficiaries, the very people whom the disclosures are intended to protect.

ERISA requires administrators of retirement plans to furnish several understandable, important disclosures to workers, retirees and spouses so that they know their rights, know what benefits they're entitled to, are aware of the fees they're being charged, and can ensure that the plan is being managed to protect their interests. These disclosures are critical to helping workers plan for and achieve retirement security. Currently, longstanding regulations require plans to furnish disclosures and take steps to ensure actual receipt of the disclosure by participants and beneficiaries. Plans must send paper disclosures by mail as the default means of delivery, but employers can send electronic disclosures to their employees who work with computers, or they can offer consumers the choice to opt in to electronic delivery. This system of delivery has worked well to ensure that consumers automatically receive paper—the more reliable method of delivery—and those who prefer to receive information electronically may do so.

However, DOL's new proposed regulation would institute a new disclosure delivery system called "notice and access" that creates a new default system of electronic hide and seek. Under this new system, plans would not even need to send an electronic version of the disclosure to the consumer. They would need only electronically notify (by email, text, phone, etc.) the participant that a disclosure document is available on a website, then the burden would entirely fall on the participant or beneficiary to take the many steps involved in finding it.

Furthermore, the proposed regulation for "Notice and Access" is flawed for the following reasons:

- ***The proposed regulation allows notice by any technology:*** There is no requirement to use email. Plans would be allowed to notify consumers of the availability of a disclosure with a text message, or a phone call/robocall, which are not verifiable or easily preserved.
- ***Email addresses can be made up:*** The proposed rule would allow plan administrators to assign or even make up email addresses for participants and beneficiaries. Moreover, even if a consumer uses a corporate email address, if they leave the company there is no requirement that the email address be updated. The use of unreliable, unused, or outdated email addresses would mean that many consumers would likely be unable to view the disclosures or access them later.
- ***No actual receipt required:*** There is no requirement whatsoever that the administrator confirm that an email notice was actually opened by the recipient. Thus, if the email goes to a spam folder, or gets buried or misfiled, the recipient never actually receives the notice or the disclosure. Nor is there any requirement that the recipient actually have accessed the document. This is despite the fact that both actions could be easily determined by the plan administrator with this technology.

- ***Spousal rights not adequately protected:*** The proposed rule makes no exception for important action documents that are currently required to be in writing, such as notices to spouses of their right to a survivor annuity and that their consent is required to waive that right.
- ***Protections to ensure document preservation are ignored:*** An absolutely critical role that retirement plan disclosures play is that they provide written proof of the rules that applied at the time a worker was participating in the plan, and evidence of the benefits earned. Participants and beneficiaries often need access to documents decades after they have vested and terminated employment, or decades after retirement, to make claims to benefits and ensure benefits are correct. The NPRM not only fails to require that documents are electronically preserved, it permits administrators to delete the prior documents on the website as soon as they are superseded. Moreover, a consumer may not be able to access the previous document if, for instance, their hard drive fails or their smart phone lacks storage capacity.
- ***Opt-Out provisions are also inadequate:*** There are no requirements for what the opt-out process should look like. Consumers could be required to write a letter, or uncheck a pre-checked box, or locate well-hidden “preferences” in order to receive paper disclosures. Moreover, people need to understand the significance of the choice they have. In the initial notice especially, participants should be apprised of all the advantages and disadvantages—such as those discussed in these comments—of giving up their rights to paper disclosure.

Finally, this new proposed regulation is of great benefit to the financial services industry and no benefit to consumers. In fact, it shifts costs on to consumers, at a time when they are trying to save and plan for retirement. According to the regulatory analysis, this new framework will save plan administrators \$2.4 billion over 10 years. Plan sponsors and administrators have a fiduciary duty to make decisions for the benefit of the participants and beneficiaries. Yet, this NPRM imposes absolutely no requirement for plans to pass on those savings, e.g., by adding to the pension fund corpus, or by reducing 401(k) fees. It simply allows them to pocket the windfall and then shifts costs to retirees by requiring them to have purchased and maintain internet access and the hardware, software, supplies needed to access disclosures.

One of the advantages of electronic documentation is the ability to easily store and maintain lengthy documents without taking up physical space. However, while this rule requires consumers to be at best inconvenienced and at worst unable to access important information, it imposes no requirement on the plan administrator to maintain a library of previous documents. Access to documents that are often decades old is critical to making claims to benefits and ensuring benefits are correct.

This proposal is being promulgated in response to a decades-long lobbying effort of the financial services industry, without any serious attempt to grapple with the new framework’s admitted adverse impact, and without any evidentiary support or reasonable explanation of how participants and beneficiaries will be at least as well-protected as the current, well-balanced framework. The proposed rule’s framework and the specifics of the proposal impose all of the disadvantages of technology, but confer none of its advantages, for the benefit of participants and

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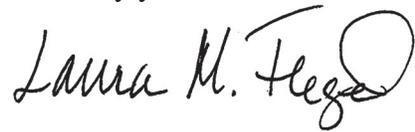
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beneficiaries. Instead, it shifts all of the risks, burdens, and costs of ensuring adequate disclosure away from plan administrators and on to participants and beneficiaries. This proposal should be withdrawn, or at least extensively overhauled to ensure actual receipt of disclosures and adequate consumer protections.

Working people work hard for years to save for a modest retirement income. This proposed regulation would make it more difficult for workers to collect their retirement income and take full advantage of their retirement plan. To deprive workers of the hard-earned fruits of their labor is deeply unfair. At a minimum, workers should be able to access important information to enable them to receive the benefits they worked so hard to earn.

Thank you for your review and consideration of these comments on these important issues. We would be happy to discuss any aspect of these comments further if you have questions or wish to discuss these matters. I can be reached at lflegel@nelahq.org or (202) 898-2880 ext. 115.

Sincerely yours,

A handwritten signature in black ink that reads "Laura M. Flegel". The signature is written in a cursive style with a large, looped initial "L".

Laura M. Flegel
National Employment Lawyers Association
Director of Legislative & Public Policy