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Submitted via regulations.gov

November 22, 2019

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

Attention: Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, RIN 1210–AB90
Attention:

This letter provides the comments of the National Association of Professional Employer Organizations in connection with the proposed regulation issued by the Department of Labor (the “Department”) regarding electronic disclosure by employee pension benefit plans under ERISA (the “Proposed Rule”). At the outset, NAPEO and its members wish to convey their appreciation for the efforts by the Department to expand the ability of plan administrators to distribute required pension plan disclosures to participants electronically. NAPEO believes that the Proposed Rule would both improve the effectiveness of important plan disclosures and reduce the costs and burdens associated with furnishing ERISA plan disclosures.

About NAPEO and Professional Employer Organizations

NAPEO is the voice of the professional employer organization (“PEO”) industry. PEOs provide comprehensive HR solutions such as payroll, employee benefits, human resources, tax administration, and regulatory compliance assistance for small and mid-sized businesses. By taking care of paperwork and providing regulatory compliance assistance, PEOs help businesses improve productivity, increase profitability, and focus on their core mission. Through a PEO, the employees of their small and mid-sized business clients gain access to employee benefits such as 401(k) plans; health, dental, life, and other insurance; dependent care; and other benefits they might not typically receive as employees of a small company.

There are approximately 907 PEOs in the United States providing services to 175,000 small and mid-sized businesses, employing 3.7 million people. The PEO industry’s 175,000 clients represent 15 percent of all employers with 10 to 99 employees.¹ The total employment represented by the PEO industry is roughly the same as the combined number of employees for Walmart (U.S. only), Amazon, IBM, FedEx, Starbucks, AT&T, Wells Fargo, Apple, and Google. Between 2008 and 2017, the number of PEO client worksite employees grew at a compounded annual rate of 8.3 percent, which is 14 times higher than the compounded annual growth rate of employment in the economy overall during the same period.

PEO-Sponsored Retirement Plans

One of the most important benefits that PEOs offer to their clients is increased access to employer-sponsored retirement plans, such as 401(k) plans. Such plans are far more likely to be available to a company that uses a PEO than to a comparable small company that handles all HR functions in-house. As

¹ PEO industry data from “*An Economic Analysis: The PEO Industry in 2018*,” Laurie Bassie and Dan McMurrer, September 2018

shown in a 2013 NAPEO white paper, 98 percent of all PEOs offer some type of retirement plan as part of their service offerings.² Comparably, based on the 2013 data, only 16 percent of employees at companies with fewer than 10 workers, and 30 percent at companies with 10 to 49 employees, are offered any type of retirement solution. Employee retirement-plan participation among those working for small business PEO clients is at least twice as high as it is among employees of similarly sized companies that do not use a PEO.

NAPEO Comments on the Proposed Rule

In most respects, the Proposed Rule is thoughtful in its consideration of the issues that electronic disclosure creates for both participants and plan sponsors, and we commend you for your efforts. This letter, however, focuses exclusively on the issues and questions that NAPEO and its members have identified as needing further clarification or correction. Where appropriate, we have respectfully provided recommended solutions or suggested clarifications.

- Many plan administrators distribute pension benefit statements by offering a secure website with continuously updated benefit information. It appears that the Proposed Rule would supersede the guidance in FAB 2006-03 allowing plan administrators to comply with ERISA section 105 by providing participants with continuous access to benefit statements through a secure website. ***We therefore request that the Department, in finalizing the Proposed Rule, reaffirm that plan administrators may comply with ERISA section 105 by providing continuous access to benefit statement information through a secure website.***
- While the costs and administrative burdens associated with pension plan notices/disclosures are significant, these burdens can be even greater for welfare plans. Thus, ***we urge the Department to utilize its authority to apply the Proposed Rule to welfare plans, either as part of finalizing the Proposed Rule or as part of separate follow-on rulemaking.***
- The Proposed Rule does not expressly permit plan administrators to distribute the notice of internet availability in paper form. Many plan administrators, however, find that certain participants prefer a regular paper notice that documents are available on the plan's secure website. Indeed, FAB 2006-03 allows this kind of paper "notice and access" with respect to pension benefit statements, which many plan administrators employ successfully when distributing those statements. ***We therefore request that the Department allow plan administrators to distribute the Proposed Rule's notice of internet availability in paper form with respect to all covered documents.***
- The Proposed Rule does not allow plans to make covered documents available on any electronic medium other than an internet website. Because many plan administrators use other electronic methods such as email to deliver required information, ***we encourage the Department to provide in the final regulation that plans may provide covered documents electronically using any electronic means that is reasonably calculated to ensure actual receipt,*** not just an internet website.
- Because the Proposed Rule does not endorse specific technologies, it is unclear whether plan administrators may satisfy the new safe harbor by using certain modern electronic methods, such as text messaging or smartphone applications. ***Accordingly, we ask the Department to consider broadening the language in the safe harbor to allow documents to be delivered through "other electronic means reasonably calculated to ensure actual receipt."***
- The Proposed Rule provides that a notice of internet availability satisfies the readability standard if it "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."

² "Professional Employer Organizations: Fueling Small Business Growth;" Laurie Bassie and Dan McMurrer, September 2013.

While we support efforts to make plan notices more comprehensible to participants, ***we suggest that the Department simply require that the notice of internet availability be written in a manner calculated to be understood by the average plan participant***, which is the conventional ERISA standard that plan administrators have followed for decades.

- ***“Brief Description” of Covered Documents:*** The Proposed Rule would require notices of internet availability to contain a “brief description” of the covered document. Although we recognize that descriptions would vary across plans, ***we ask that the Department provide additional guidance regarding what such a “brief description” would look like.***
- ***We recommend that the Department clarify how the Proposed Rule would apply to covered individuals who terminate employment but are subsequently rehired*** (e.g., whether the plan administrator must again obtain the rehired employee’s electronic address and elections, and must again send an initial notification of electronic availability).
- The Proposed Rule appears to allow covered individuals to opt out of electronic disclosure on a document-by-document basis. While we believe it is important to give participants the right to opt out of electronic disclosure entirely, we are concerned that a document-by-document opt out right will add complexity and impose additional costs on plan sponsors (and may even generate participant confusion). ***Thus, we ask that the Department allow plans to provide that a participant’s right to opt out will apply to all documents provided under the safe harbor.***
- We believe the Proposed Rule, by imposing no affirmative obligation on plan administrators to monitor actual access to covered documents, appropriately treats electronic disclosure in a manner comparable to paper delivery. ***We therefore do not believe that the Department should impose unique requirements on plan administrators that use electronic disclosure, such as monitoring access by participants to electronically disclosed documents.***
- In order to reduce costs and make disclosures more effective, many plan sponsors combine plan disclosures required by the IRS and the Department. ***To that end, we ask the Department to allow plan administrators to include IRS notices with the consolidated notice of internet availability. We also ask that the Treasury Department and IRS confirm that the Department’s new safe harbor would satisfy the Treasury regulations regarding participants’ ability to access materials furnished electronically.***

NAPEO appreciates the opportunity to comment on this Proposed Rule. If you have any questions, feel free to contact [Thom Stohler](#), Vice President of Federal Government Affairs, (703) 739-8167.

Sincerely,



Pat Cleary
President and CEO